



SCOTUSblog

Follow @SCOTUSblog

505K followers

2h, 52 tweets, 8 min read



Bookmark

Save as PDF

+ My Authors

Starting momentarily: Oral argument in *Dobbs v. Jackson Women's Health Organization*, a case involving Mississippi's attempt to ban nearly all abortions after 15 weeks. The state has asked the court to overturn *Roe v. Wade*. We'll be live-tweeting the argument here in this thread.

The court's marshal has gaveled in today's session, and the chief justice has called the case.

Arguing first: Scott Stewart, the solicitor general of Mississippi.

Stewart begins by saying that *Roe* (which established a constitutional right to abortion in 1973) and *Casey* (which re-affirmed *Roe*'s core holding in 1992) "damaged the democratic process" and "poisoned the law."

Clarence Thomas asks the first question. He notes that the court's abortion cases have generally focused on "privacy and autonomy" rather than abortion specifically. "Does it make a difference that we focus on privacy and autonomy, or more specifically on abortion?"

Now Thomas asks Stewart: "If we don't overrule *Casey* or *Roe*, do you have a standard that you propose other than the undue burden standard?" The undue burden standard is the standard created by *Casey* to evaluate abortion regulations prior to viability.

Stewart responds that, if the court does not overturn *Roe* and *Casey*, it should at least discard the rule from those cases that states cannot prohibit abortions prior to viability (the point, around 24 weeks of pregnancy, when the fetus can survive outside the rule).

Stewart suggests a "clarified undue burden standard untethered from any bright-line viability rule."

Stephen Breyer asks a lengthy and emphatic question about the importance of *stare decisis* -- the concept that courts generally adhere to prior precedents. He quotes language in *Casey* stating that the court should be extremely reluctant to overrule *Roe*.

"To reexamine a watershed" like *Roe*, Breyer says, "would subvert the court's legitimacy."

Now Sonia Sotomayor picks up the same point about the danger to the Supreme Court's legitimacy. She notes that 15 justices over 30 years "of varying political backgrounds" have reaffirmed the viability line from *Roe* and *Casey*.

Sotomayor suggests that the architects of Mississippi's 15-week abortion ban (as well as Texas' six-week ban, which is also currently pending before the court) believe they can succeed at the Supreme Court merely because the membership of the court has changed.

Sotomayor is not pulling any punches: "Will this institution survive the stench that this creates in the public perception -- that the Constitution and its reading are just political acts? I don't see how it is possible."

John Roberts, who almost certainly will be a pivotal vote in this case, makes his first remarks of the day. He says fetal viability was not initially an issue in *Roe v. Wade*, and he says that Justice Blackmun (*Roe*'s author) later suggested that *Roe*'s viability line was dicta

Follow Us on Twitter!

Tweet

Share

Amy Coney Barrett, another key vote, asks Stewart whether a ruling in favor of Mississippi would endanger other constitutional rulings on issues like the right to use birth control and the right to same-sex marriage.

Stewart says no, abortion is different.

Sotomayor responds that Stewart's answer doesn't make sense. She notes that other cases on birth control, same-sex marriage, and other constitutional rights "all rely on substantive due process," just like Roe and Casey. "They're all wrong, according to your theater."

Elena Kagan says a major goal of stare decisis is "to prevent people from thinking that this court is a political institution that will go back and forth" depending on the court's changing membership or who "yells the loudest."

Kagan: For the court to overturn a prior precedent, "usually there has to be a justification, a strong justification," beyond the fact that some people think the precedent is wrong.

Roberts asks Stewart about Mississippi's evolving strategy in this case. When the state petitioned the court for review, it said the case wouldn't require the court to overturn Roe & Casey. But after the court granted cert, the state turned to a full assault on Roe & Casey.

Stewart, not in a colloquy with Kagan, says the best path is to overturn Roe and Casey wholesale because the undue-burden standard is extremely difficult for lower courts to apply.

\*now in a colloquy

Brett Kavanaugh makes his first comments of the day. He confirms with Stewart that Mississippi is NOT arguing that the Supreme Court has the authority to ban all abortion or to order the states to ban abortion. Stewart readily agrees.

Kavanaugh: "Your argument is that the Constitution is neutral on the question of abortion but leaves the issue for the people of the states, or perhaps Congress, to resolve in the democratic process?" Stewart says yes.

What Kavanaugh is tacitly alluding to here is the argument by some abortion opponents that fetal life is protected under the 14th Amendment -- a view that, if adopted, would essentially make abortion unconstitutional.

Kavanaugh suggests he is not receptive to that view.

No more questions for Scott Stewart. Next up is Julie Rikelman of [@ReproRights](#), representing Jackson Women's Health Organization, the only abortion clinic in Mississippi.

Rikelman begins by saying that stare decisis presents "an especially high bar here" because Casey rejected "every possible reason" for overturning Roe.

Roberts asks what the effects would be of moving the Roe/Casey viability line back earlier in pregnancy. (As a reminder, viability is at around 24 weeks. Mississippi's law would nearly all abortions after 15 weeks.)

Roberts: "If you think that the issue is one of choice ... viability, it seems to me, doesn't have anything to do with choice. If it really is an issue about choice, why is 15 weeks not enough time?"

This is a very significant line of questioning from Roberts that suggests he is at least mulling the possibility of a ruling that would not formally overturn Roe & Casey but would discard the viability line -- opening the door to prohibitions on abortion earlier in pregnancy.

Neil Gorsuch asks his first question of the day. He suggests that the Casey undue-burden test is "unworkable" and difficult for courts to administer -- and he says that should be relevant in the stare decisis analysis.

Rikelman says the undue-burden test is not actually at issue in this case, because that test applies to abortion regulations, whereas the Mississippi law is a full-blown prohibition on abortions after 15 weeks.

Samuel Alito now questions Rikelman on the viability line from Roe and Casey. Alito suggests the line is "arbitrary" and "doesn't make any sense."

Alito: "If a woman wants to be free of the burdens of pregnancy, that interest does not disappear the moment the viability line is crossed."

"The fetus has an interest in having a life, and that doesn't change from the point before viability and after viability."

Rikelman responds that viability is "a principled line," because the court in Roe and Casey had to balance competing interests, and it logically looked at the fetus' ability to survive outside the womb. It's an objective scientific line, not a religious or philosophical one.

Roberts & Breyer return to the topic of stare decisis. Roberts mentions that he found Breyer's statements about Casey, and the importance of precedent, "quite compelling." But he questions some of Casey's discussion re precedent and asks if Casey represents "super stare decisis."

Thomas asks Rikelman to identify the constitutional right that protects abortion. "Is it privacy? Autonomy? What would it be?"

"It's liberty," she says. "It's the textual protection in the 14th Amendment that the state can't deny someone liberty without the due process of law."

Rikelman, in response to questions from Alito: "Allowing a state to take control of a woman's body" and force her to bear the burdens of pregnancy "is a fundamental violation of her liberty."

Kavanaugh now returns to a concept that he raised earlier in the argument: the idea that the Supreme Court should be "scrupulously neutral on the question of abortion, neither pro-choice nor pro-life."

Rikelman responds that the court rejected that same argument in Casey.

Kavanaugh lists numerous landmark cases from the court's history, including Brown v. Board of Education, in which the court overturned prior precedents. If the court had simply followed stare decisis in those cases, Kavanaugh says, "the country would be a much different place."

Big question from Kavanaugh here. "If we think that the prior precedents [Roe & Casey] are seriously wrong -- if that -- why then doesn't the history of this court's practice [suggest] that the right answer is to return to the position of neutrality?"

Rikelman's response to Kavanaugh: "The view that a precedent is wrong has never been enough to overrule that precedent." It requires a "special justification," and Mississippi, she says, hasn't come forward with any special justifications here.

Rikelman: "There is no less need today ... for women to be able to make this fundamental decision for themselves about their bodies, their lives, and their health."

Rikelman's time is up. Now at the lectern: U.S. Solicitor General Elizabeth Prelogar, arguing on behalf of the Biden administration, which is supporting the clinic.

Prelogar begins by saying "the real-world effects of overruling Roe and Casey would be severe and swift." She says

Sotomayor and Breyer both try to respond to Kavanaugh's question about when it's acceptable for the court to overturn precedent. Breyer emphasizes a detailed passage in Casey that walks through the stare decisis analysis. He says he wants everyone to read that passage carefully.

Alito asks Prelogar if it's ever acceptable for the court to overturn precedent simply because that precedent is "egregiously wrong." Prelogar says no -- the court has never considered that enough of a reason to depart from stare decisis.

Gorsuch: "If this court were to reject the viability line, do you see any other intelligible principle that the court could choose?"

Prelogar: There's no line more principled than viability, but no matter what, the court should reaffirm the fundamental liberty interest at stake.

Kavanaugh presses Prelogar about the argument that the Roe/Casey framework accommodates both the interests of pregnant people and the interests in protecting fetal life. Kavanaugh is openly skeptical that it's possible to balance both interests.

Kavanaugh: "You can't accommodate both interests. You have to pick. That's the fundamental problem. And one interest has to prevail over the other at any given point in time. And that's why this is so challenging."

Prelogar's time is up and Scott Stewart is back at the lectern for a rebuttal on behalf of Mississippi.

Stewart invokes Kavanaugh's line about the court remaining "scrupulously neutral" on the question of abortion.

"That is exactly right. ... There are interests here on both sides ... This is unique for the woman. This is unique for the unborn child too, whose life is at stake."

Stewart closes by comparing Roe v. Wade to the "egregiously wrong" decision in Plessy v. Ferguson, the 1896 ruling that upheld race-based segregation and wasn't overturned until Brown v. Board of Education in 1954.

Stewart concludes his rebuttal and the chief gavel the argument to a close, just under two hours after it began.

Stay tuned for in-depth analysis of the argument on [scotusblog.com](http://scotusblog.com).

**SCOTUSblog – Independent News & Analysis on the U.S. Supreme Court**  
Devoted to covering the US Supreme Court comprehensively, without bias according to the highest journalistic standards as a public service  
<http://scotusblog.com>

...

Missing some Tweet in this thread? You can try to [force a refresh](#)

[Tweet](#) [Share](#) [Email](#)

**⚡ Keep Current with [SCOTUSblog](#)**



Stay in touch and get notified when new unrolls are available from this author!

[Follow Us on Twitter!](#)

**⊘ This Thread may be Removed Anytime!**



Twitter may remove this content at anytime! Save it as PDF for later use!

[Tweet](#) [Share](#)