

South Carolina Supreme Court Holds “Fetal Heartbeat Law” is Unconstitutional: Abortion Laws Remain the Same as Before the United States Supreme Court’s Decision in *Dobbs*

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On Thursday, January 5, 2023, the South Carolina Supreme Court held that the Fetal Heartbeat Act is unconstitutional.^[i] As a result, South Carolina’s abortion laws codified in 1974 continue to be the legal standards governing abortions in South Carolina.

As background, on June 24, 2022, the United States Supreme Court published a decision overturning *Roe v. Wade*. In *Dobbs v. Jackson Women’s Health Organization* (19-1392), the Supreme Court held that the “the authority to regulate abortion is returned to the people and their elected representatives.”^[ii] Regulating the right to an abortion therefore became an issue of state law.

After the *Dobbs* decision was rendered, a South Carolina law titled the “Fetal Heartbeat and Protection from Abortion” Law (“Fetal Heartbeat Law”) went into effect. However, this Law was only enforceable from June 27, 2022 to August 17, 2022, when the South Carolina Supreme Court enjoined its enforcement.^[vi] Subsequently, on Thursday, January 5, 2023, the South Carolina Supreme Court held that the Fetal Heartbeat Law is unconstitutional.

The Narrow Scope of the South Carolina Supreme Court’s January 5, 2023 Decision. The South Carolina Supreme Court held that the Fetal Heartbeat Law violates a woman’s constitutional right to privacy, as guaranteed by the South Carolina Constitution. In coming to this conclusion, the Court first recognized that the South Carolina constitutional right to privacy extends to a woman’s decision to have an abortion. The Court also stated that the State in turn “unquestionably has the authority to limit the right of privacy that protects women from state interference with her decision,” but that any limitation imposed by the State must be reasonable and must be meaningful related to the time frames imposed.

The Fetal Heartbeat law would have prohibited an abortion after around six weeks gestation and the South Carolina Supreme Court found this time frame was not a reasonable period of time for a woman to determine she is pregnant and take reasonable steps to terminate the pregnancy. The Court did not rule on any other features of the law or set out other tests or parameters for testing reasonableness of State restrictions.

Current Status of South Carolina Abortion Law in January 2023. As a result of the South Carolina Supreme Court's January 5, 2023 decision, South Carolina's abortion law reverts back to the law as it stood prior to *Dobbs*. South Carolina's abortion laws were codified in 1974 in response to the 1973 United States Supreme Court decision in *Roe v. Wade*, wherein the Court recognized a women's right to an abortion as a matter of privacy under the United States Constitution (the "1974 Abortion Laws").^[i] The 1974 Abortion Laws allow for abortions in all three trimesters of pregnancy under specified circumstances.^[iii]

Where is South Carolina Abortion Law Likely to Go from Here? The South Carolina Supreme Court's January 5, 2023 decision held that the Fetal Heartbeat Law is unconstitutional because the hallmark feature of the law was to prohibit abortions post six weeks, and that this time limitation unreasonably restricted the right to an abortion. Whether the South Carolina State Legislature will take up legislative proposals to change the current status quo under the 1974 Abortion Laws remains to be seen, but it is likely given that South Carolina Governor Henry McMaster tweeted on January 5, 2023 that he felt the South Carolina Supreme Court "exceeded its authority" and that he looked forward "to working with the General Assembly to correct this error."^[ii]

In contrast, on the same day, House Democrats Leader Todd Rutherford cheered the South Carolina Supreme Court's decision to overturn the Fetal Heartbeat law and stated that "[i]f Republicans choose to continue this war on women – knowing the court's position – they are deliberately wasting taxpayer dollars and time, because there are pressing issues facing our state that cannot afford to be sidelined."^[iii]

What Steps Can a Healthcare Provider Take Now?

For now, the main action a healthcare provider can take now is to monitor the news closely and/or monitor state provider association news for updates regarding State legislative action related to abortion laws. Providers will want to quickly modify practices if needed to comply with possible new restrictions if and when new abortion laws are passed or become enforceable.

Nexsen Pruet will be tracking changes in State law as a result of *Dobbs* that will impact health care providers. We will publish updates as the law evolves, and please let us know if Nexsen Pruet can assist you in navigating this changing regulatory landscape.

[i] Opinion at *28127.pdf (sccourts.org).

[i] Opinion at https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.

[vi] SC Judicial Branch (sccourts.org)

[ii] South Carolina Supreme Court opinion 2022-08-17-01; S.C. Code Ann. §§ 44-41-10 to -80.

[iii] See S.C. Code Ann. §§ 44-41-20.

[ii] <https://twitter.com/henrymcmaster>

[iii] <https://twitter.com/reprutherford?lang=en>