

Critical Questions Remain After High Court's Abortion Rulings, *Law360*

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The U.S. Supreme Court's 2023-2024 term ended with a flurry of groundbreaking decisions that will have a long-lasting impact on American democracy.

Abortion advocates had long awaited the court's rulings in two cases heard this term: *U.S. Food and Drug Administration v. Alliance for Hippocratic Medicine*, a case involving the FDA's regulation of mifepristone, one of two drugs used in most medication abortions; and *Moyle v. U.S.*, a case concerning whether the Emergency Medical Treatment and Labor Act conflicted with Idaho's criminal abortion ban, which applies to all abortions except those "necessary to prevent the death of the pregnant woman" or that follow rape or incest.[1]

Instead of addressing the merits of either case and taking the opportunity to affirm pregnant people's access to FDA-approved medication and lifesaving care as determined by a physician, the court decided both cases on procedural grounds — dismissing the mifepristone cases on Article III standing grounds, and the EMTALA case as improvidently granted.

Justice Ketanji Brown Jackson's separate writing in the EMTALA case emphasized the real-life costs of the court's decision to punt on the merits. Even as Idaho faces a maternal health crisis, it is still ultimately unclear whether its abortion ban will be allowed to go into effect, leaving pregnant people and their doctors "in the dark about what the law requires."

Similarly, the mifepristone case will now return to the U.S. District Court for the Northern District of Texas, where the state intervenors will be allowed to present their claims on the merits.

And the states will do so now with the benefit of the court's rulings in two other blockbuster cases this term.

The first is *Loper-Bright Enterprises v. Raimondo*, which overturned Chevron deference granted to agencies' interpretations of ambiguities in the statutes they administer.

The other is *Corner Post Inc. v. Board of Governors of the Federal Reserve System*, which found that the statute of limitations for challenging older agency actions under the Administrative Procedure Act accrues when a party is injured rather than when the regulation takes effect, which effectively extends the time for bringing suit.

Both decisions will affect how federal courts view the FDA's actions on expanding access to mifepristone moving forward.

So where do the court's decisions this term leave us? Two years later, *Dobbs v. Jackson Women's Health Organization* is still the law of the land. Abortion access continues to be a state-by-state issue. And as Justice Jackson rightly points out, the important questions left unanswered this term have huge implications for abortion access moving forward.

These following key issues remain in limbo.

Federal or State Law

With the court declining to definitively resolve the EMTALA issue on the merits, whether federal law preempts state abortion bans remains unclear — as does the federal government's ability to regulate state action under EMTALA.

The federal government recently petitioned for certiorari in another case on a similar issue, *Becerra v. Texas*, from the U.S. Court of Appeal for the Fifth Circuit.

This case involves whether U.S. Department of Health and Human Services guidance expanding EMTALA protections post-*Dobbs* preempted Texas abortion laws, meaning that the court will consider whether to revisit the issue of EMTALA preemption in the fall, at which time it would be expected to reach the merits.

Relatedly, the question of whether the FDA's authority and federal regulations concerning medication abortion should preempt those imposed by the state is winding its way through the courts in North Carolina (*Bryant v. Stein*) and West Virginia (*GenBioPro v. Sorsaia*) and could wind up before the court next term as well. The resolution of these cases will help clarify the reach of federal law on state regulation of reproductive rights.

Comstock Act

Had the court reached the merits in the mifepristone case, it may well have opined on the Comstock Act, an 1873 federal law that some have argued bans the mailing of medication abortion. A ruling to that effect would seriously impede access to medication abortion, as telehealth abortions now

account for nearly 1 in 5 abortions in the U.S., with a large number occurring in states where abortion is banned, with the patient receiving that medication via mail.

In Vitro Fertilization and Contraception

After a ruling from the Alabama Supreme Court in *LePage v. Center for Reproductive Medicine* in February, the once-fringe fetal personhood movement has gained a foothold.

The Alabama Supreme Court held^[2] that under the Alabama Constitution, a frozen embryo is considered a child such that destruction of that embryo would amount to murder.

This is consistent with Justice Samuel Alito's framing in his dissenting opinion in the EMTALA case, in which he used the language of "unborn child" when referring to a fetus, suggesting that the Alabama court's rationale may have the support of at least one justice. And at least 11 states have broad definitions of personhood akin to Alabama's, making this issue likely to resurface in the coming months.

Conclusion

As a practical matter, the U.S. District Court for the District of Idaho's injunction preventing Idaho's abortion ban from taking effect in health emergencies remains in place, and access to mifepristone remains undisturbed for now. By maintaining the status quo, the Supreme Court has at least temporarily preserved critical access to medication abortion nationwide, and lifesaving medical care in Idaho.

However, the challenges to mifepristone and to federal protections for access to life-saving medical care continue, and the next round of cases to affect the national post-Dobbs legal landscape will be at the court again very soon.

In the meantime, another big shift in abortion policy will play out at the ballot box in November. Colorado, Florida, Maryland, Nevada and South Dakota all have abortion questions set for referendum this year.

And of course, the specter of a national abortion ban looms over the 2024 presidential election, though former President Donald Trump recently stated that he would not sign one should he be elected.

What remains clear after this Supreme Court term is that the post-Dobbs landscape is far from settled, and the legal challenges governing access to abortion care nationwide are far from over.

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[1] Idaho Code § 18-622.

[2] Within weeks of the Alabama Supreme Court's decision, the state legislature enshrined civil and criminal immunity for IVF to service providers and receivers into law.

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