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Supreme Court Overruling of Roe v. Wade Poses Danger for LGBT Rights

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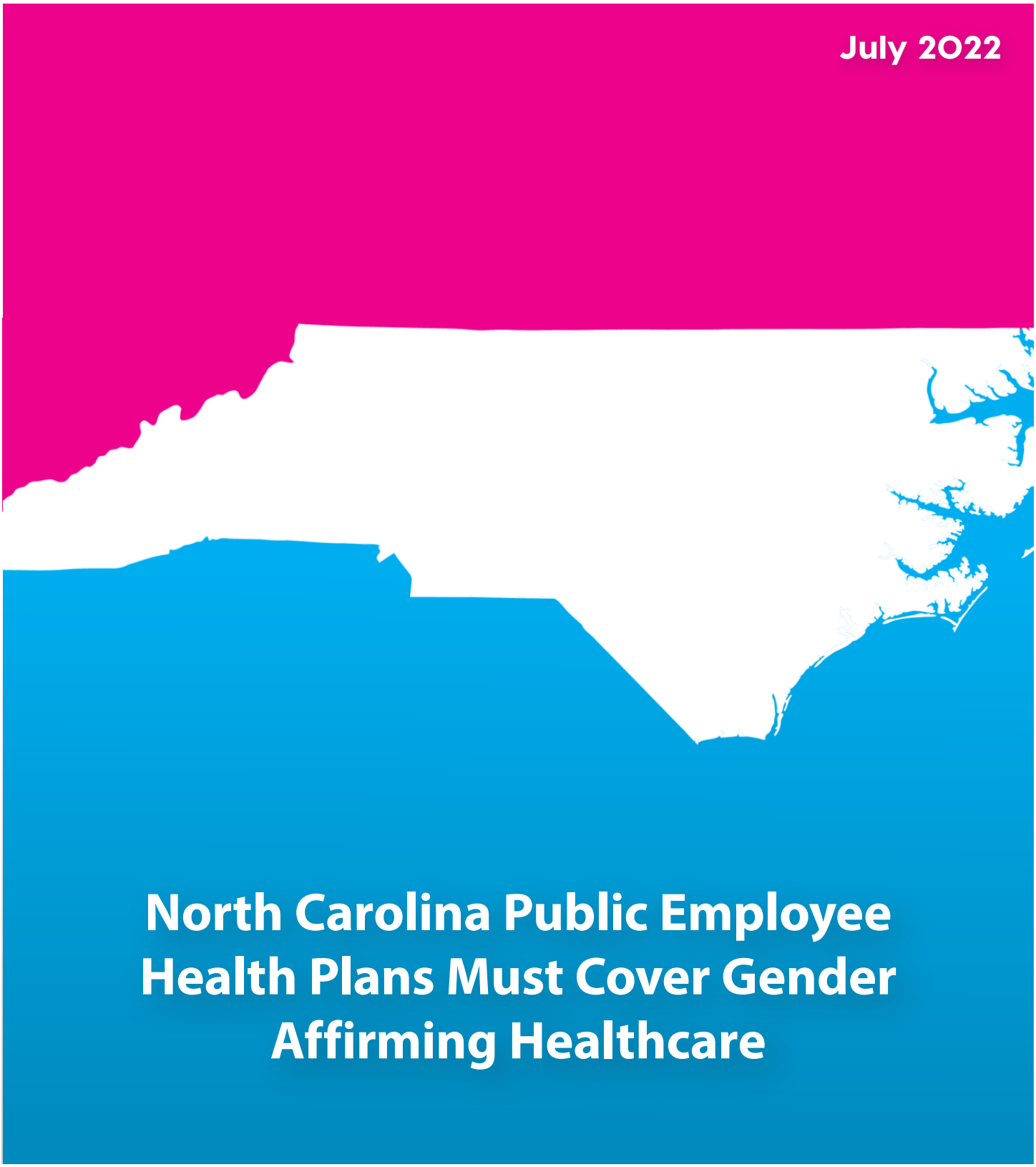

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"general applicability". FCA similarly contends that the District's policy allows for unfettered discretionary exceptions, even though the District's policy does not on its face allow for exceptions and explicitly states that it applies to all ASB student groups. As a result, Judge Gilliam concludes that FCA has failed to clearly prove their argument.

In their last argument, FCA believes the District's policy has been selectively enforced in violation and cites examples of clubs which have been "allowed" regardless of their restrictions on membership and leadership. The FCA plays a game of pointing fingers, listing clubs that appear based on their names to have restrictive requirements, such as the Girls Who Code club, the Big Sister/Little Sister club, the Girls Circle club, and the Simone club, contending that all have been allowed to select members and leaders on the basis of sex. The District quickly and briefly explains the situation, stating that some of these clubs, while hinting at a restrictive membership, are quite open and have male members in leadership, regardless of the name of the club. Others, such as the Simone Club and the Girls Circle club, are not ASB-recognized groups. The District also contends that even if FCA were to show past selective enforcement, it has implemented new policies to ensure compliance. As a result, FCA has failed to back their claim of selective enforcement.

To complete his analysis, Judge Gilliam reviews the remaining two *Winter* factors – irreparable harm and the balance of equities/public interest. Following Supreme Court precedent, when the government is a party to a case, the balance of equities and public interest factors are to be combined. As for irreparable injuries, the judge states that any violation of a First Amendment right, no matter how minute, constitutes irreparable harm. Should the District be found to be in violation of FCA's constitutional rights and the EAA, they will subsequently be deemed to have caused irreparable harm. For balance of equities and public interest, the court rules the balance does not tip in FCA's favor after weighing the First Amendment complaints as well as the costs to exclusion faced by students subject to FCA's exclusionary behavior.

Judge Gilliam's opinion is thorough and detailed. He concludes that FCA has not met its burden of proof for requesting a preliminary injunction. FCA has filed an appeal with the Ninth Circuit. It will be very interesting to see how the Ninth Circuit handles this appeal, as several of the cases cited within this opinion are Ninth Circuit cases with incredibly similar facts and results. But, as shown by recent Supreme Court rulings, precedent is not always binding, and facts may be distinguished between cases. The Ninth Circuit, once a liberal stronghold, has shifted in a more conservative direction thanks to Donald Trump, who appointed ten judges to the circuit in four years (compared to only seven by President Obama in eight years).

The extensive list of counsel representing the parties and amici spans nearly two pages of the opinion in the LEXIS version. Most notably, the Becket Fund for Religious Liberty and affiliated counsel represent the FCA student groups from the three high schools, and amicus briefs were filed on behalf of groups advocating separation of church and as well as religious freedom groups. Judge Gilliam was appointed by President Barack Obama. ■

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Supreme Court Overruling of *Roe v. Wade* Poses Danger for LGBT Rights

By Arthur S. Leonard

On June 24, the Supreme Court ruled 5-4 in *Dobbs v. Jackson Women's Health Organization*, 2022 WL 2276808, 2022 U.S. LEXIS 3057, that "the Constitution does not confer a right to abortion." Justice Samuel Alito's opinion for a five-member majority of the Court, which did not change in any material way from the draft leaked earlier this year, embraces the "originalist" contention that the 14th Amendment, adopted in 1868, means what the generation that adopted it thought that it meant, as evidenced by the legal status of abortion at that time. Chief Justice Roberts did not sign the majority opinion, writing separately to concur in the judgment that the Mississippi law at issue was unconstitutional, but not agreeing to overrule *Roe v. Wade*, 410 U.S. 113 (1973) or *Planned Parenthood v. Casey*, 505 U.S. 833 (1993), outright.

The case concerns a Mississippi law that prohibits abortions where the "probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks," except in a "medical emergency" or in the case of a "severe fetal abnormality." The district court (379 F.3d 549) and the 5th Circuit (945 F.3d 265) correctly construed existing precedents to make this law unconstitutional because it prohibited abortions prior to the viability of the fetus (i.e., developed to the point where it could survive independently), so the state was enjoined from enforcing it while the case proceeded. The Supreme Court granted certiorari in an interlocutory appeal from the preliminary injunction to determine whether it is unconstitutional to prohibit abortions at any time before the point of viability.

Although the cert petition contended that the case could be decided without overruling existing precedents, it also suggested that this would be an appropriate case in which to "revisit" the Court's abortion precedents. Once the case got to the merits briefing stage and oral argument, the state was arguing that resolving this case *required* determining whether a pregnant woman's right to have an abortion is constitutionally protected, the Solicitor General, representing the federal government, agreed with that contention, and Justice Alito's opinion does not address whether the case could be decided without determining whether *Roe v. Wade* should be overruled.

Under the Court's reasoning, because the Constitution does not explicitly mention abortion, the question whether it can be interpreted as protecting a woman's right to terminate her pregnancy depends on the language of the 14th Amendment (text) and how it would be understood in 1868. As of then, Alito contended, abortion was either criminalized or considered unlawful in most of the states, so a right to have an abortion could not be considered part of the "liberty" protected by the Due Process Clause of the 14th Amendment, under which the test he discerned from caselaw was "whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as 'ordered liberty.'"

Alito's approach to applying this test follows the brand of originalism promoted by the late Justice Antonin Scalia, who responded to the progressive view that the Constitution needs to be reinterpreted for modern times – called the "Living Constitution" doctrine – by stating that the Constitution was "dead, dead, dead" in the sense that its meaning was fixed at the time it was adopted. Although elements of originalism of this brand have shown up from time to time in opinions by the justices, Alito's opinion in Dobbs (and Thomas's opinion a day before in *Bruen*, discussed below) mark its strongest acceptance in an opinion endorsed by a majority of the Supreme Court.

Responding to the government's argument that the Court should apply "stare decisis," Alito's opinion contended that it does not apply in this case because *Roe v. Wade*, the 1973 decision that first recognized this right, was "egregiously" wrong, poorly reasoned, created an unworkable approach to the issue, and did not generate any significant reliance interest that would be upset by overruling it. Alito quoted several "liberal" or "progressive" legal scholars who wrote articles criticizing the reasoning of *Roe v. Wade*, argued that in *Planned Parenthood v. Casey*, decided two decades later, the Court provided no more reasoning to support a "viability" test for determining whether the state could prohibit an abortion from being performed, merely asserting it.

Much of Alito's opinion, and a lengthy appendix, were devoted to disputing the historical account in the *Roe* decision, which asserted that prohibitions of abortion were not established until a wave of 19th century legislation resulted in statutory bans through the U.S. by the 20th century. Alito documented the existence of numerous state laws banning abortions in effect in 1868 when the 14th Amendment was adopted, and he noted that some of them did not even provide exceptions to save the life of the pregnant woman.

A joint dissenting opinion by Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan forcefully repudiated all of Alito's points at length, noting that this is the first time in its history that the Supreme Court has rescinded an individual right that it had previously recognized, and that access to abortion plays a central role in the lives of women, such that making it unavailable would render women second-class citizens. The dissent rejected the tight tie to history as a determinative factor in deciding whether there is a fundamental right, in a way reminiscent of Justice Anthony Kennedy's opinions for the Court in cases like *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Obergefell v. Hodges*, 576 U.S. 644 (2015).

Chief Justice John Roberts wrote separately, not signing Alito's opinion and concurring only in the judgement that the Mississippi law could survive judicial review, arguing that the law could be upheld without overruling *Roe v. Wade* and *Casey*, by modifying those holdings to abandon the "viability" line (about 24 weeks). In Roberts' view, the Court should not overrule a precedent outright if it is not necessary to do so to reach the result the Court deems appropriate in a particular case. In this case, it was in his view possible to find that a 15-week line, based on what is now known about the development of a fetus in pregnancy, is a reasonable one.

The federal government, speaking through the Solicitor General, had argued to the Court that overruling *Roe v. Wade* would endanger such precedents as *Lawrence v. Texas*, which recognized the right of gay people to have sex, and *Obergefell v. Hodges*, which recognized the right of same-sex couples to marry. Both of those cases relied on the concept of "liberty" protected by the Due Process Clause of the 14th Amendment, as developed in a series of cases over the course of the 20th century, and both had prominently cited *Roe v. Wade* and *Casey* as precedents for the right to individual autonomy in making important life decisions, such as whether to have a child. Other precedents that could be endangered by the Court's approach in this case include *Loving v. Virginia*, which struck down a state law against interracial marriage, and *Griswold v. Connecticut*, which struck down a state law prohibiting distribution and use of contraceptives for preventing pregnancy. Both *Loving* and *Griswold* relied, at least in part, on an "unenumerated" fundamental right identified by the Court. *Griswold*'s Due Process component was a particularly important precedent for *Lawrence v. Texas*, and *Loving* was particularly important for *Obergefell v. Hodges*.

Justice Thomas signed Alito's opinion, but in a separate concurring opinion he called for the Court to "revisit" *Lawrence v. Texas* and *Obergefell v. Hodges* in appropriate cases. He has repeatedly described those decisions as being wrong, as he rejects the doctrine of substantive due process completely, arguing that the language of the Due Process Clause on its face only requires procedural fairness and

regularity in cases where the state is abridging life, liberty, or property rights. This is not the first time he has called on the Court to reconsider those cases, and significantly no other justice signed on to his opinion.

As in his leaked draft, Alito asserted that the Court was only deciding about abortion, which he said was a unique subject, and stated: "Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion." He expanded on this point in the final version of the opinion, responding to the dissenters' assertion that this new ruling endangers those key LGBT rights precedents. In addition to reasserting the uniqueness of abortion because it involves "potential life," he said that there might be other constitutional theories that could be used to support those other decisions, without specify what they might be. We observe that in both *Lawrence* and *Obergefell*, the Petitioners had made Equal Protection arguments in addition to Due Process arguments. In *Lawrence*, Justice Sandra Day O'Connor concurred in the result – striking down the Texas "Homosexual Sodomy Law – but on equal protection rather than due process grounds, and Justice Kennedy's opinion acknowledges that petitioners in that case could mount a plausible equal protection challenge, but that deciding the case on Due Process grounds was preferable. In *Loving v. Virginia*, the Court principally relied on equal protection to hold the law against interracial marriages unconstitutional, secondarily speaking in terms of due process, so that the *Loving* case would probably not be subject to serious challenge based on *Dobbs*.

Those who fear that the Court might immediately launch on a course of overruling all significant past substantive due process decisions should note that the Supreme Court does not spontaneously reopen cases long ago decided in order to overrule them. A new case has to come up to the Court through the litigation process. In the case of *Lawrence* or *Obergefell*, a new case would require a state to enact a new sodomy law or prosecute somebody for consensual private gay sex involving adults under an existing law not repealed in response to *Lawrence* (of which there remain several) to generate a new case on that subject, and a state would have to defy the *Obergefell* ruling and refuse to grant licenses, or otherwise to discriminate against existing same-sex marriages, to generate a new case to get that issue before the Court. This might take several years to unfold, and assuming lower courts would apply *Lawrence* and *Obergefell* in the relevant cases, might never reach the Court if it sticks to this observation and refuses to grant certiorari.

Justice Kavanaugh wrote a concurring opinion, while also signing Alito's opinion, emphasizing his view that the Court's holding is that the Constitution is "neutral" on the subject of abortion, but the dissenters criticized this assertion as failing to recognize the impact that overruling *Roe* and *Casey* will have, in light of the recent trend in conservative states to enact new restrictions and bans on abortion in anticipation of the Court's ruling. Some states have long since passed "trigger" laws outlawing abortion intended to spring into effect upon an overruling of *Roe* and *Casey* by the Supreme Court. It is hardly "neutral" to suddenly withdraw a right that has been recognized for almost 50 years.

Alito's originalism approach in this case contradicts a century of Supreme Court decision-making, the dissenters observed, and is directly inconsistent with a series of Supreme Court opinions starting with *Roe v. Wade* and extending through half a dozen or more decisions dealing with challenges to various state restrictions and regulations affecting abortion, all of which had accepted *Roe* and *Casey* (from 1993) as settled precedents.

Just a day earlier, Justice Clarence Thomas took a similar "originalism" approach in writing for a 6-3 majority in *New York State Rifle & Pistol Association v. Bruen*, 2022 U.S. LEXIS 305, a case challenging a New York law that required a person who sought a license to carry arms outside their home to show that they had some individualized need to do so, a standard that could not be met by a general assertion of fearfulness from regularly being in a high crime neighbor. Thomas wrote for the Court that because it had determined several years ago in *Heller* that the 2nd Amendment clearly protects an individual's right to bear arms, a state must apply the same license requirements to everybody, regardless of whether they just want to keep a handgun in their home for self defense or want to carry one about in public for the same reason. Since New York did not require people seeking a limited license to possess a gun in their home for purposes of self defense to show any particularized need, wrote Thomas, it could not impose such a requirement on people seeking an unrestricted license, given at the discretion of law enforcement authorities.

The 2nd Amendment is part of the Bill of Rights adopted in 1791. Thomas said that it was widely recognized in 1791 for that people could be armed in public, so that is what the 2nd Amendment protects. And since the right is protected based on the 1791 meaning of the language, the state may not infringe that right for any individual without a substantial justification on the state's part. Putting the burden on the individual to show that they need the gun is, in the Court's view, unconstitutional.

This will require New York and several other states to rethink their gun control laws and will affect the ability of the federal government and the states to undertake new initiatives to protect the public from the plague of guns.

These two cases well illustrate the agenda of the super-charged activist conservative majority bolstered by Trump's three appointments to the Court, imposing, in a way inconsistent with the Court's major civil rights precedents of the 20th century, their backwards-looking approach to the interpretation of a Constitution frozen in time. ■