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How New Jersey Protects Access to Abortion in the Aftermath of *Dobbs*

By Linda J. Wharton

In its controversial and widely criticized ruling in *Dobbs v. Jackson Women's Health Organization*¹ the United States Supreme Court withdrew federal constitutional protection for the right to abortion that had been in place for nearly five decades. The Court did so by overruling its prior landmark decisions in both *Roe v. Wade*² and *Planned Parenthood v. Casey*.³ State constitutions and statutes are now the primary sources of protection for abortion rights in the United States. Fortunately, New Jersey is among a minority of states⁴ that has a long and distinctive history of protecting access to abortion more strongly than the protections afforded under the federal constitution, exceeding the scope of protections that were in place under federal law even prior to *Dobbs*. Consequently, in the

aftermath of *Dobbs*, the right to terminate a pregnancy remains well-protected in New Jersey via both long-standing interpretations of the New Jersey Constitution by our state Supreme Court as well as the newly enacted Freedom of Reproductive Choice Act and other recent measures. Still, policymakers can do more to expand access to abortion and enhance protections for reproductive health care providers and those seeking abortion in New Jersey.

Protection under the New Jersey Constitution

In its ground-breaking 1982 decision in *Right to Choose v. Byrne*,⁵ the New Jersey Supreme Court invalidated a state statute that restricted state Medicaid funds to abortions needed to preserve the life, but not the health, of the pregnant person. The Court held that New Jersey's Medicaid statute violated the right of pregnant persons to equal protection under the New Jersey Constitution. Two years earlier, in *Harris v. McRae*,⁶ the United States Supreme Court considered a similar restriction on use of federal Medicaid funds for abortion in the Hyde Amendment and found no violation of the federal Constitution.

The New Jersey Supreme Court began its opinion by noting the unique role of it and other state high courts in the federalist system as independent interpreters of state constitutions, which are “separate sources of individual freedoms” and may provide more expansive protection of individual liberties than the United States Constitution.⁷ The Court emphasized that “in more expansive language” than that of the federal Constitution, the New Jersey Constitution “by declaring the right to life, liberty and the pursuit of safety and happiness,...protects the right of privacy....”⁸ Moreover, in a long line of cases, the Court had found that the right of privacy extended to a variety of areas, including “an individual's personal right to control her own body.”⁹ The Court

explicitly recognized that “[t]he right to choose whether to have an abortion ...is a fundamental right of all pregnant women.”¹⁰

Employing a traditional two-tiered equal protection analysis developed by the United States Supreme Court in cases under the federal Constitution, the Court reasoned that the state's asserted interest in protecting potential life was not sufficiently compelling to justify New Jersey's interference with the fundamental right to choose whether to have an abortion under strict scrutiny review.¹¹ The Court further reasoned that under a balancing test employed in analyzing equal protections claims under the state Constitution, the government had not sufficiently justified its interference with the right to choose abortion by demonstrating a “greater ‘public need’ than is traditionally required in construing the federal constitution,” given that the statute put the health of the pregnant person at risk.¹² On this basis, the Court held that the state was required to fund “those abortions medically necessary to preserve the life or health of the woman.”¹³

Nearly two decades later in *Planned Parenthood of Central New Jersey v. Farmer*,¹⁴ the New Jersey Supreme Court relied heavily upon its expansive analysis of state equality guarantees in *Right to Choose* when it held that the state's Parental Notification for Abortion Act (Act) violated the right to equal protection under the state constitution. As in *Right to Choose*, the Court emphasized that although the United States Supreme Court had upheld both parental consent and parental notice requirements for minors seeking abortion under the federal Constitution,¹⁵ the language of Article I, paragraph 1 of the New Jersey Constitution offers more expansive protection than the federal Constitution, incorporating within its protection “the right of privacy and its concomitant rights, including the right to make certain fun-

damental choices.”¹⁶ The Court applied the *Right to Choose* balancing test to determine if the Act's differential treatment of young people who seek abortion and those who carry a pregnancy to term unfairly burdened young people seeking abortion in violation of the state Constitution's guarantee of equal protection.¹⁷ The Court catalogued the considerable burdens imposed on a minor seeking abortion by that the Act's requirement that they either tell a parent of her decision to have an abortion or, alternatively, obtain a judicial waiver that allows them to bypass the parental notification requirement.¹⁸ Both the notice requirement and the bypass mechanism significantly burdened young people seeking abortion by threatening their health and potentially “operat[ing] as a functional bar to a minor's exercise of her constitutional right to make her own reproductive decisions.”¹⁹ In contrast, the Court found that the state had “failed utterly” to show that it had any significant interest to justify these burdens.²⁰ Indeed, the law was “difficult to justify,” given that New Jersey permitted minors to make health care decisions during pregnancy, including whether to undergo a caesarean section, a more difficult procedure than abortion.²¹ Moreover, “the state has recognized a minor's maturity in matters related to her sexuality, reproductive decisions, substance-abuse treatment and placing her children for adoption.”²²

The Freedom of Reproductive Choice Act and related measures

New Jersey's strong constitutional protection for abortion has provided a solid foundation for statutory reform. In the months before the United States Supreme Court's decision in *Dobbs*, with an increasingly conservative United States Supreme Court poised to overturn longstanding federal abortion precedent, the New Jersey Legislature solidified the protections set forth in *Right to Choose* and *Planned Parenthood of Central New Jersey*

by passing a state law that codified them. The Freedom of Reproductive Choice Act,²³ signed by Gov. Phil Murphy on Jan. 13, 2022, and effective on that same date, broadly protects abortion and other reproductive health care:

Every individual present in the State, including, but not limited to, an individual who is under State control or supervision, shall have the fundamental right to: choose or refuse contraception or sterilization; and choose whether to carry a pregnancy, to give birth, or to terminate a pregnancy.... Any law, rule, regulation, ordinance, or order, in effect on or adopted after the effective date of this act, that is determined to have the effect of limiting the constitutional right to freedom of reproductive choice and that does not conform with the provisions and the express or implied purposes of this act, shall be deemed invalid and shall have no force or effect.²⁴

The Act relies explicitly on the constitutional protection for abortion recognized in *Right to Choose* and *Planned Parenthood of Central New Jersey*. On that same day, Murphy also signed legislation expanding the contraception coverage required under private insurance and Medicaid from a six-month supply to a 12-month supply.²⁵

Other recent measures focus on expanding the pool of reproductive health care providers, eliminating unnecessary targeted regulation of abortion providers and protecting providers and their patients from harm. In 2019, Murphy signed legislation expanding the state's Address Confidentiality Program to include reproductive health care providers and patients so as to protect them from harassment and violence by allowing their addresses to remain confidential.²⁶ In October 2021, the state Board of Medical Examiners unanimously voted to eliminate outdated and unnecessary regulations on abortion

and to allow certain health care providers other than physicians to perform abortions.²⁷ The changes, adopted in December 2021, repeal a rule that "singles out abortion care for targeted regulation by, among other things, requiring terminations of pregnancy be performed only by a physician and barring office-based terminations beyond 14 weeks gestations."²⁸ The revisions also clear the path for advanced practice nurses, physician assistants, certified nurse midwives and certified midwives, "to perform early aspiration terminations of pregnancy."²⁹ Regulations will be updated "to integrate reproductive health care within the generally applicable rules designed to ensure the safety of patients who undergo surgery or special procedures in an office setting."³⁰

Additional Protection for Abortion Access Post-Dobbs

In recent months, several states have enacted or proposed additional legislation that proactively strengthens and safeguards access to abortion.³¹ With the anticipated influx of individuals seeking abortion from nearby states that ban or severely restrict the right to abortion³² and some states poised to retaliate against those who help their residents get abortions elsewhere, proactive states are going further than simply "keep[ing] abortion legal within their state lines."³³ Following the lead of these states, on July 1, 2022, Murphy signed two bills into law that establish protections for abortions performed in New Jersey on out-of-state individuals.³⁴

The first bill generally forbids disclosure of a patient's medical records relating to reproductive health care without their consent in "any civil, probate, legislative or administrative proceeding."³⁵ Public entities and employees are barred from cooperating with interstate investigations aimed at holding someone liable "for seeking, receiving, facilitating, or providing reproductive health

care services that are legal in New Jersey."³⁶ Additionally, New Jersey licensing boards are prohibited from "suspending, revoking, or refusing to renew a license or registration of a professional based solely on their involvement in the provision of reproductive health care services."³⁷

The second measure prevents the extradition of an individual in New Jersey to another state for "receiving, providing, or facilitating reproductive health services that are legal in New Jersey."³⁸ The passage of this legislation was followed on July 11, 2022, by Acting Attorney General Matthew Platkin's formation of a "Reproductive Rights Strike Force" to protect access to abortion care by both New Jersey and out-of-state residents.³⁹

Earlier, in May 2022, in anticipation of the *Dobbs* decision Murphy proposed additional legislation to expand protections in New Jersey. Two reintroduced proposals⁴⁰ would mandate that insurers fully cover the costs of abortions without cost-sharing to patients and codify the state Board of Medical Examiners' expansion of the pool of abortion providers to include advanced practice nurses, midwives and physician assistants.⁴¹ The proposal would also create a "Reproductive Health Access Fund" to support uninsured and underinsured patients needing reproductive health care and to provide training for reproductive health care providers and funding to cover enhanced security measures needed by at-risk reproductive health care sites.⁴² Finally, the proposed measures would proactively protect abortion providers and patients by allowing "a person in New Jersey who is successfully sued in another state for their involvement in reproductive health care to file suit to recover damages resulting from the initial lawsuit."⁴³ These concepts were subsequently the basis of bills introduced in the New Jersey Legislature on June 20, 2022, (A4350) and June 23, 2022. (S2918).⁴⁴

Conclusion

Amid the fragmented post-*Dobbs* abortion landscape that now exists in the United States, New Jersey offers strong protection for the right to choose abortion. Additional provisions such as those proposed by scholars, enacted in other states and proposed by Murphy would further safeguard reproductive health care providers and their patients. Lawyers, of course, can play an important role in safeguarding those rights.⁴⁵

Endnotes

1. 597 U.S. ___ (2022).
2. 410 U.S. 113 (1973).
3. 505 U.S. 833 (1992).
4. As of April 2022, New Jersey's Supreme Court is one of 11 state high courts that "have recognized that their state constitutions protect abortion rights independent from and more strongly than the federal constitution...." Center for Reproductive Rights, *State Constitutions and Abortion Rights*, 1 (2022), reproductiverights.org/wp-content/uploads/2022/05/State-Constitutions-Report-5.12.22.pdf.
5. 91 N.J. 287, 450 A.2d 925 (1982).
6. 448 U.S. 297 (1980).
7. *Right to Choose*, 450 A.2d at 931-32.
8. *Id.* at 933. The Court relied upon Art. I, par. 1 of the New Jersey Constitution: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." *Id.*
9. *Id.*
10. *Id.* at 934.
11. *Id.*
12. *Id.* at 936-37.
13. *Id.* at 938. At the time of the decision in *Right to Choose*, only two states—Massachusetts and California—had invalidated state restrictions on public funding of abortion under their state constitutions. In subsequent years, other state courts, including those in Alaska, Connecticut, New Mexico, Minnesota and Arizona, have followed New Jersey's lead. See Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights through State Constitutions*, 15 Wm. & Mary J. of Women & L. 469, 501-510 (2009).
14. 165 N.J. 609 (2000).
15. *Id.* at 627-30 (discussing multiple decisions in which the United States Supreme Court has upheld both parental consent and notification laws that permitted a bypass of parental approval via a judicial proceeding).
16. *Id.* at 631.
17. *Id.* at 632-38.
18. *Id.* at 633-36.
19. *Id.* at 634.
20. *Id.* at 638 (quoting *Ohio v. Akron Center for Reproductive Health (Akron II)*, 497 U.S. 502, 525-26 (1990) (Blackmun, J., dissenting)).
21. *Id.* at 636.
22. *Id.* According to the Guttmacher Institute, 37 states require some parental involvement in a minor's decision to have an abortion. Guttmacher Inst., *Parental Involvement in Minors' Abortions* (June 1, 2022), guttmacher.org/state-policy/explore/parental-involvement-minors-abortions
23. N.J.S.A.10:7-2 (2022).
24. *Id.*
25. N.J.S.A. 30:4D-6s (2022).
26. N.J.S.A. 47:4-2 to 4-6 (2019).
27. Press Release, Governor Phil Murphy, *New Jersey Expands Access to Reproductive Health Care, Adopts New Rule from Unanimous Vote by State Board of Medical Examiners* (Dec. 6, 2021) nj.gov/governor/news/news/562021/20211206a.shtml.
28. *Id.*
29. *Id.*
30. *Id.*
31. Sarah Maslin Nir & Kate Zernike, *Connecticut Moves to Blunt Impact of Other States' Anti-Abortion Laws*, N.Y.Times (April 30, 2022), nytimes.com/2022/04/30/nyregion/connecticut-texas-abortion-law.html; Grace Ashford, *New York Lawmakers Push for Abortion Fund to Establish 'Safe Harbor'*, N.Y.Times (May 9, 2022), nytimes.com/2022/05/09/nyregion/letitia-james-abortion-roe-v-wade.html
32. Daniela Santamarina & Amber Phillips, *What Would Happen If Roe Were Overturned?* Wash.Post (May 3, 2022), washingtonpost.com/politics/2021/06/11/abortion-rights-roe-v-wade/
33. David S. Cohen, Greer Donley & Rebecca Rebouche, *States Want to Ban Abortion Beyond their Borders; Here's What Pro-Choice States Can Do*, N.Y.Times (Mar. 13, 2022), nytimes.com/2022/03/13/opinion/missouri-abortion-roe-v-wade.html
34. Press Release, Governor Phil Murphy, *Governor Murphy Signs Legislation to Protect Reproductive Health Care Providers and Out-of-State Residents Seeking Reproductive Services in New Jersey* (July 1, 2022), nj.gov/governor/news/news/562022/20220701a.shtml
35. *Id.*
36. *Id.*
37. *Id.*

38. *Id.*
39. Press Release, Acting Attorney General Matthew J. Platkin, Acting AG Platkin Establishes “Reproductive Rights Strike Force” to Protect Access to Abortion Care for New Jerseyans and Residents of Other States (July 11, 2022), njoag.gov/acting-ag-platkin-establishes-reproductive-rights-strike-force-to-protect-access-to-abortion-care-for-new-jerseyans-and-residents-of-other-states/
40. These measures were removed from the original Reproductive Freedom Act due to legislative resistance. The Freedom of Reproductive Choice Act enacted in 2022 directed the State Department of Banking and Insurance to study the feasibility of an abortion insurance coverage requirement but did not mandate coverage. Joey Fox, *Is New Jersey About to Face a Reckoning Over Abortion Access?* New Jersey Globe (May 20, 2022), newjerseyglobe.com/legislature/is-new-jersey-about-to-face-a-reckoning-over-abortion-access/
41. Press release, Governor Phil Murphy, *Governor Murphy Renews Efforts to Secure Reproductive Rights and Bolster Access to Reproductive Health Care in New Jersey* (May 11, 2022), nj.gov/governor/news/news/562022/20220511a.shtml
42. *Id.*
43. *Id.*
44. Eric Kiefer, *NJ Bill Would Help Women Pay for Abortions, Planned Parenthood Says*, Patch (June 22, 2022), patch.com/new-jersey/montclair/nj-bill-would-help-women-pay-abortions-planned-parenthood-says
45. See Joyce E. Cutler, *Abortion Seekers, Providers to get Free Legal Defense by Law Firms*, Bloomberg Law (June 1, 2022) news.bloomberglaw.com/business-and-practice/abortion-seekers-providers-to-get-free-legal-defense-by-firms



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