

Memorandum

From: The Smith-Free Group
Date: June 6, 2022
RE: The Big Casino – The Dobbs Decision

Before the end of June, the Supreme Court will hand down a decision in *Dobbs v. Jackson Women's Health Organization*, potentially upending federal and state rules governing abortion. The recent leak of a draft opinion in the case that would overturn *Roe v. Wade* heralds what is likely to be a protracted, volatile public debate in Washington and state capitols around the country.

Overturning, or even making major changes, to current law under *Roe* has not only forced policymakers to react, it has also served to intensify the trend of business being [pressed to comment](#) on politically sensitive issues that heretofore most private sector entities typically avoided. Taking a step back, this is a continuation of the trend that accelerated during the Trump Administration of the business community being asked to [weigh in on public policy matters](#) that while potentially affecting employees or clients may not have a direct bearing on a company's product line(s). For instance, we received as many questions from client in 2021 about voting procedures, both in Georgia and at the federal level, than any pending legislation outside of the Build Back Better effort.

We have spoken to a number of clients and friends in recent weeks whose C-Suite executives are [bracing for the ultimate release](#) of the Court's decision in *Dobbs*. In preparation for that decision, we outline below several aspects of the political and legislative dynamic on Capitol Hill surrounding the abortion debate.

This Is Only the Beginning

No matter whether the final opinion in the *Dobbs* case tracks Justice Alito's draft or veers in another direction, there is sure to be ongoing discussion on Capitol Hill for the balance of 2022 and beyond. Further, major changes or an outright repudiation by the Court of the *Roe* regime will force state legislatures to act, something that has already occurred in states such as Oklahoma. Before the Court handed down the *Roe* decision in 1973, abortion rules were almost exclusively the province of state, not federal, law. Overturning *Roe* means businesses could be asked to comment not just on congressional activity but about debate in state capitols across the country as well.

In the wake of the *Dobbs* leak the Senate voted down a broad codification of *Roe v. Wade* into federal law, but the renewed intensity of advocates means we are likely to see more votes this year and possibly for years to come. Already [several bills](#) have been introduced in Congress that would either encourage or disincentivize business involvement with employees who want abortions. Not too long ago, Congress regularly wrestled with a series of abortion-related issues and votes. But because both the House and Senate have considered fewer floor amendments to legislation in recent years, this trend has largely subsided. But the *Dobbs* decision could lead to a return to regular votes on issues such as: Hyde Amendment (public funding of abortion, typically through the Medicaid program); Mexico City policy

(use of U.S. funds for United Nations’ programs that provide abortion); partial birth abortions; parental notification policies; and FDA review of “Morning After” pills.

In short, the effects of *Dobbs* could reverberate far into the future, giving the press and parties on all sides of the issue continuing opportunities to raise aspects of the abortion issue to public and private figures.

Seismic Shifts Move Everything

Roe has been the law of the land for almost a half-century. While in the intervening years several Court decisions tweaked the baseline analysis, for the most part – at least at the federal level – the dynamics surrounding abortion have been relatively static. Lawmakers and staff on all sides of the question have settled, pat answers to the major questions typically posed by the press and constituents. If *Dobbs* leads to a re-ordering of abortion law, it forces policymakers to adjust and recalibrate. This takes time and a massaging of thinking and communicating that will lead to a period of disorder while courts and voters adjust to the new legal regime. Plus, even if the final decision in *Dobbs* is scaled back dramatically from the Alito draft, the leak has still raised the specter of the Court eventually acting to overturn *Roe*. All of this adds up to an unsettled period that could yield surprising and unpredictable developments to businesses are forced to react. Just as markets favor certainty, so do candidates and lawmakers. Upending *Roe* would inject tremendous uncertainty into the political and legislative marketplace.

There Are Always Unexpected Tremors After Earthquakes

Far-reaching events like the potential outcome in *Dobbs* are never one-off events. Like major earthquakes, they produce aftershocks that cannot be predicted. Considering we are discussing the emotional issue in American public policy, that means we should prepare for unexpected ripples throughout the public debate. On top of that, consider how quickly medical science is advancing and the new issues around abortion that will engender. For instance, in recent years advances in ultra-sound procedures, unknown when *Roe* was issued, opened a new front of debate and myriad legislative proposals. Early in the congressional debate following *Roe*, abortion rights supporters were seen to have the upper hand. But when Congress began to address the partial-birth abortion question in the mid-1990s, the dynamic shifted perceptibly on Capitol Hill. Similarly, after the Hyde Amendment was adopted not long after the *Roe* decision was handed, it was widely accepted as settled law on Capitol Hill: but that once sacrosanct rule has come under what many see as surprisingly strong threat in few years.

Because of the passionate feelings the abortion issue evokes, companies that take public stands – or do not – are going to earn detractors. In some instances, there could even be [threats](#) to a business that can be easily monetized. At the same time, other high-profile events that spur sharp public reaction like the recent school shootings means that when it comes to public policy the focus on reaction from corporate America might only continue to intensify.