

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SR 63 (Skinner)
Version: January 3, 2022
Hearing Date: January 12, 2022
Fiscal: No
Urgency: No
TSG

SUBJECT

Women's Reproductive Health

DIGEST

This resolution marks the 49th anniversary of the U.S. Supreme Court's decision in the case *Roe v. Wade* (1973) 410 U.S. 113, which established a person's right, under the federal constitution, to choose whether or not to carry a pregnancy to term.

EXECUTIVE SUMMARY

Roe v. Wade was decided on January 22, 1973. To mark the anniversary of the decision, this resolution makes a series of California State Senate findings regarding the positive impact of that ruling on the reproductive, economic, and social life of the nation as a whole, and women in particular. The resolution highlights recent trends – legal, legislative, and in the form of targeted violence and obstruction – that threaten to weaken or even overturn *Roe v. Wade's* essential holding. It reaffirms California's strong support for every individual's fundamental right to make decisions regarding their own pregnancy and reproductive health. With this in mind, the resolution urges the U.S. President and Congress to support the constitutional right to abortion, specifically, and to support access to comprehensive reproductive health care services more generally.

The resolution is author-sponsored.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Holds that the federal constitution's implied right to privacy extends to a woman's decision about whether or not to have an abortion. (*Roe v. Wade* (1973) 410 U.S. 113.)
- 2) Authorizes the government to impose restrictions on abortion as long as those restrictions do not create an undue burden on a woman's right to choose to terminate a pregnancy prior to fetal viability. (*Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833.)

Existing state law:

- 1) Holds that the state constitution's express right to privacy extends to a woman's decision about whether or not to have an abortion. (*People v. Belous* (1969) 71 Cal.2d 954.)
- 2) Provides that every woman has the fundamental right to choose to bear a child or to choose to obtain an abortion, with specified exceptions. (Health & Saf. Code § 123462(b).)
- 3) Prohibits the state from denying or interfering with a woman's fundamental right to choose to bear a child or to choose to obtain an abortion, with specified exceptions. (Health & Saf. Code § 123462(c).)

This resolution:

- 1) Declares that:
 - a) the 49th anniversary of *Roe v. Wade* is an occasion deserving of acknowledgement;
 - b) *Roe v. Wade* has been the cornerstone of reproductive freedom for all, allowing every person who can become pregnant in the United States to decide when, if, with whom, and how many children to have, thus enabling people to parent in safe and sustainable communities and facilitating equal participation in economic and social life for all;
 - c) *Roe v. Wade* continues to protect the health and freedom of people who can become pregnant throughout the U.S. by providing access to a safe medical procedure that nearly 25 percent of people who can become pregnant will use;
 - d) prior to *Roe v. Wade*, lack of access to safe and legal abortions cost pregnant people their health and their lives;
 - e) interference with access to safe and legal abortion can lead to the criminalization of pregnancy outcomes and the incarceration of pregnant people;

- f) the central holding of *Roe v. Wade* is currently at risk of being overturned or severely eroded due to the appointment of new justices to the United States Supreme Court who have a record of hostility to the constitutional right to make choices regarding reproductive health;
 - g) in the event that *Roe v. Wade* is overturned or gutted, 26 states are poised to ban abortion access, impacting 36 million women and even more people who could become pregnant, which a study has shown could lead to an enormous increase in out-of-state women of reproductive age whose nearest abortion provider would then be in California;
 - h) last year was the worst year for abortion access in recent history;
 - i) abortion service providers continue to face serious, unrelenting attacks and threats of violence for their work; and
 - j) the State of California strongly supports the constitutional right set forth in the holding of *Roe v. Wade*.
- 2) Urges the U.S. President and Congress to express their support for abortion, as well as support for access to comprehensive reproductive care.

COMMENTS

1. Background

Roe v. Wade (1973) 410 U.S. 113, is the landmark U.S. Supreme Court decision holding that the implied constitutional right to privacy extends to a woman's decision whether to terminate a pregnancy, while allowing that some state regulation of abortion access could be permissible. The plaintiff in the case was "Jane Roe," an unmarried woman who wanted to end her pregnancy under safe and clinical conditions, but was unable to obtain a legal abortion in Texas because her life was not threatened by the continuation of the pregnancy. Unable to afford travel to another state to obtain an abortion, she challenged the statute making it a crime to perform an abortion unless a woman's life was at stake. She asserted that the Texas law abridged her right of personal privacy.

The U.S. Supreme Court struck down the Texas law, finding for the first time that the constitutional right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." At the same time, the high court also defined two compelling state interests that would satisfy restrictions on a woman's right to choose to terminate a pregnancy: 1) states may regulate the abortion procedure after the first trimester of pregnancy in ways necessary to promote a woman's health; and 2) after the point of fetal viability outside of the womb, a state may, to protect the potential life of the fetus, prohibit abortions unless the procedure is necessary to preserve a woman's life or health.

2. Ongoing legal challenges to *Roe v. Wade*

Since it was handed down 49 years ago, *Roe v. Wade* has been one of the most intensely debated U.S. Supreme Court decisions. Its application and continued validity have been contested in the courts frequently and intensely. Most significantly, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, the Court reaffirmed the basic holding of *Roe v. Wade*, yet also permitted states to impose restrictions on abortion during the first trimester as long as those restrictions do not create an undue burden on a woman's right to choose to terminate a pregnancy.

Exactly what constitutes an undue burden remains a point of frequent legal contention, however. For example, under the *Casey* standard, the U.S. Supreme Court upheld a federal statute that restricted so-called "partial birth abortions." (*Gonzales v. Carhart* (2007) 550 U.S. 124.) More recently, the Court applied the same standard to strike down a Texas law that required any facility performing abortions to meet the state requirements for an ambulatory surgical center and also required any doctor performing abortions to have admitting privileges at a hospital within 30 miles. (*Whole Woman's Health v. Hellerstedt* (2016) ___ U.S. ___; 136 S. Ct. 2292). Since, in practice, almost no abortion facility or provider could meet these mandates, the Texas law had the effect of dramatically restricting access to abortion services in the state. Although the Court reaffirmed its *Hellerstedt* ruling two years ago in *June Medical Services, L.L.C. v. Russo* (2020) ___ U.S. ___ (140 S.Ct. 2103), the outcome in that case relied upon the vote of Justice Ruth Bader Ginsburg, who subsequently passed away, and the concurrence of Chief Justice John Roberts, who joined the majority on the basis of *stare decisis* – the doctrine that courts must ordinarily follow prior precedent – alone.

Meanwhile, as the post-*Roe* jurisprudence has evolved, a minority of the U.S. Supreme Court's justices have at various times indicated their belief that *Roe v. Wade* should be overturned altogether. (See, e.g., *Webster v. Reprod. Health Servs.* (1989) 492 U.S. 490.) With former President Donald Trump's appointment of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett to the high court, it may be that a majority for that view now exists.

Indeed, the U.S. Supreme Court's recent handling of abortion-related cases strongly suggests that if the Court does not opt to explicitly overturn *Roe v. Wade* soon, it will at least dramatically narrow the constitutional right to abortion access that *Roe v. Wade* established. On December 1, 2021, the high court heard oral arguments in *Dobbs v. Jackson Women's Health Organization*. The case involves a challenge to a Mississippi state law that bans abortions after just 15 weeks of pregnancy, well before the stage of fetal viability. Mississippi passed the law in a deliberate invitation to the U.S. Supreme Court's latest crop of justices to overturn *Roe v. Wade*, and Mississippi's Solicitor General expressly called upon the Court to do so in his arguments.

No decision on the matter is expected until early summer 2022. In the meantime, there is considerable speculation over what direction the Court is likely to take. As a possible harbinger of things to come, on December 10, 2021, the Court declined to enjoin a Texas law that effectively bans abortion after just six weeks of pregnancy (before many people are even aware that they are pregnant). (*Whole Woman's Health v. Jackson* (2021) ___U.S.___ [142 S.Ct. 522].)

3. Likely impacts in California if *Roe v. Wade* were overturned

Were the U.S. Supreme Court to overturn *Roe v. Wade*, the federal constitution would no longer constrain the federal or state governments from imposing additional restrictions on abortion or even outlawing it entirely.

Within California, access to abortion probably would not be immediately affected by such a ruling since the California Supreme Court has found a right to abortion access in the state constitution's privacy clause. (*People v. Belous* (1969) 71 Cal.2d 954.) However, in the absence of a recognized federal constitutional right to abortion services, California's state constitutional protections would be at risk of preemption in the event that the federal government enacted nationwide restrictions on abortion access. By virtue of the U.S. Constitution's Supremacy Clause, such federal restrictions would trump any state protections.

Even if the federal government did not move to preempt state protections for abortion access, a reversal of *Roe v. Wade* would still have significant practical effects in California. Greater restrictions on access to abortion outside of California would likely lead to a significant influx of people moving or traveling to California to be able to make reproductive choices that would be unavailable to them in their home states. California would probably experience an increase in demand for abortion and other reproductive health services as a result.

4. *Roe v. Wade*'s beneficial impacts on gender equality

The existence of a constitutional right to choose whether, when, with whom, and how many children to bear has had a particularly profound impact on the lives of everyone who can become pregnant in the U.S. Indeed, as the U.S. Supreme Court observed in its *Planned Parenthood v. Casey* decision, "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." (*supra*, 588 U.S. 833, 856.)

In reviewing a wide selection of data in 2013, the Guttmacher Institute reached similar conclusions. "Once young women were able to satisfy their education and first full-time job aspirations with a reduced risk of unplanned interruptions, their own expectations

of their career trajectories – and the expectations of employers – evolved. Many began to seek and attain jobs and professional status in fields previously dominated by men.”¹

5. Sources for the statistics cited in the resolution

The resolution makes a number of assertions related to the importance of safe and legal access to abortion. In some instances, the resolution mentions specific studies or statistics. The sourcing for these citations is as follows:

- The resolution states that national peer-reviewed studies show that abortion is a safe medical procedure. This was the conclusion of a National Academies of Science, Engineering, and Medicine study on the matter.²
- The resolution asserts that one in every four women will access abortion services at some point in their lifetimes. This statistic is drawn from research published in the American Journal of Public Health.³
- The resolution states that, prior to *Roe v. Wade*, illegal abortion accounted for approximately 17 percent of all reported deaths attributable to pregnancy and childbirth. This figure comes from the Guttmacher Institute’s 2003 special analysis of conditions prior to the decision.⁴
- The resolution asserts that 26 states are poised to ban access to abortion in the event that *Roe v. Wade* is overturned or gutted, with an impact on over 36 million people who can become pregnant. The numbers come from an October 2021 Guttmacher Institute Policy Analysis. That analysis found that 21 states have existing abortion bans that will spring immediately into effect the moment *Roe v. Wade* is overturned. In addition, the analysis concluded that political conditions are ripe for the immediate adoption of new abortion bans in another five states.⁵

¹ Sonfield et al, *The Social and Economic Benefits of Women’s Ability to Determine Whether and When to Have Children*, (March 2013) Guttmacher Institute https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf p. 11 (as of Jan. 4, 2022).

² The Safety and Quality of Abortion Care in the United States (March 2018) National Academies of Science, Engineering, and Medicine <https://www.nap.edu/resource/24950/03162018AbortionCarehighlights.pdf> (as of Jan. 4, 2022). (“Legal abortions in the United States – whether by medication, aspiration, D&E, or induction – are safe and effective.”)

³ Rachel K. Jones, Jenna Jerman, “Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014”, *American Journal of Public Health* 107, no. 12 (December 1, 2017): pp. 1904–1909.

⁴ Gold, *Lessons from Before Roe: Will Past Be Prologue?* (March 2003) Guttmacher Institute Policy Review <https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue> (as of Jan. 4, 2022).

⁵ Nash and Cross, *26 States Are Certain or Likely to Ban Abortion Without Roe: Here’s Which Ones and Why* (Oct. 28, 2021) Guttmacher Institute <https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why> (as of Jan. 4, 2022).

- Based on the same premise that 26 states would ban abortion but for *Roe v. Wade*, the Resolution states that more than 36 million women would be impacted. That figure reflects calculations undertaken and published by Planned Parenthood and In Our Own Voice.⁶
- The resolution mentions a recent Guttmacher Institute report showing that there could be a 2,923 percent increase in out-of-state women of reproductive age who would find their nearest abortion provide in California if *Roe v. Wade* is overturned. The 2021 study, titled “If *Roe v. Wade* Falls: Travel Distance for People Seeking Abortion,” is available at <https://states.guttmacher.org/#california> .
- The resolution states that, during the past year, more than 106 abortion restrictions were enacted in 19 states, including 12 abortion bans, making it the worst year for abortion access in recent history. The statistics and conclusion are based on an October 2021 Guttmacher Institute Policy Analysis.⁷
- Data collected and published by the National Abortion Federation supports the resolution’s statistics regarding rising levels of violence against abortion providers.⁸

6. Proposed amendments

As it presently appears in print, the resolution calls upon the U.S. President and Congress to “express their support for abortion [...]” Although plainly not the intent of the resolution, this phrasing could easily be taken out of context and misconstrued to suggest that the California Senate promotes abortion as the outcome of a pregnancy. To prevent any such misinterpretation, the author proposes to offer an amendment in Committee that would strike out that language and replace it with the phrase “support for safe and legal access to abortion for all who need or choose it [...].”

⁶ *New Research from Planned Parenthood and In Our Own Voice Shows that Half of Women of Reproductive Age Could Lose Access to Legal Abortion* (Oct. 1, 2021) Planned Parenthood and In Our Own Voice <https://www.plannedparenthood.org/about-us/newsroom/press-releases/new-research-from-planned-parenthood-and-in-our-own-voice-shows-that-half-of-women-of-reproductive-age-could-lose-access-to-legal-abortion> (as of Jan. 5, 2022).

⁷ Nash, *For the First Time Ever, U.S. States Enacted More Than 100 Abortion Restrictions in a Single Year* (Oct. 4, 2021) Guttmacher Insitute <https://www.guttmacher.org/article/2021/10/first-time-ever-us-states-enacted-more-100-abortion-restrictions-single-year> (as of Jan. 4. 2022).

⁸ 2019 Violence and Disruption Statistics. National Abortion Federation <https://5aa1b263fmfh2e2mk03kk8rs63-wpengine.netdna-ssl.com/wp-content/uploads/NAF-2019-Violence-and-Disruption-Stats-Final.pdf> (as of Jan. 4, 2022).

7. Arguments supporting the resolution

According to the author:

There is an ongoing relentless attack on reproductive rights across the nation, recently heightened by laws enacted in several states that significantly limit a woman’s reproductive choices and greatly undermine the rights assured under *Roe v. Wade*. California has been a beacon for reproductive justice and we are needed now, more than ever to strengthen our leadership nationally to ensure reproductive justice is available to all. According to a report released in October 2021 by the Guttmacher Institute, if the protections under *Roe v. Wade* continue to be overturned or gutted – as they have been in Texas – most legal observers anticipate that 26 states are likely to ban abortion. This would expand the number of out-of-state patients who would find their nearest clinic in California from 46,000 to 1.4 million – a nearly 3,000% increase. It is imperative that the California Legislature take every action within our power to ensure that California continues to live up to our proclamation as a “Reproductive Freedom State.”

Support: None received.

Opposition: None received.

RELATED LEGISLATION

Pending Legislation:

HR 78 (Bauer-Kahan, 2022) is similar to SR 63. HR 78 is currently pending consideration on the Assembly Floor.

Prior Legislation:

SR 6 (Skinner, 2021) was similar to SR 63.

HR 10 (Calderon, 2021) was similar to SR 6.

SR 66 (Leyva, 2020) was similar to SR 63.

HR 69 (Limón, 2020) was similar to SR 63.

SR 7 (Leyva, 2019) was similar to SR 63.

SB 24 (Leyva, Ch. 740, Stats. 2019) required each student health care services clinic on a California State University or University of California campus to offer abortion by medication techniques, as specified, beginning in 2023.

SB 301 (Leyva, 2019) would have required the Department of Health Care Services, if there were any reductions in federal financial participation to the Family PACT Program, to submit to the Legislature a plan, within 60 days of the reduction, to ensure the sustainability of the program and other specified family planning services. SB 301 died in the Assembly Appropriations Committee.

ACR 110 (Wicks, 2019) would have declared, among other things, that California is a Reproductive Freedom State for All and would have provided that the Legislature is committed to guaranteeing the constitutionally protected right to an abortion and supporting efforts to increase access to the best available reproductive and pregnancy-related care for women and pregnant individuals. ACR 110 died in the Senate Judiciary Committee.

HR 6 (Limón, 2019) was similar to SR 63.

SR 72 (Leyva, 2018) was similar to SR 63.

SR 12 (Atkins, 2017) was similar to SR 63.

HR 32 (Atkins, 2016) was similar to SR 63.

SJR 19 (Jackson, Res. Ch. 52, Stats. 2016) was similar to SR 63.

SR 55 (Jackson, 2014) urged the U.S. Senate to reconsider and approve SB 2578, the “Not My Boss’s Business Act,” which sought to prevent employers from denying coverage of contraceptives regardless of their religious views.

SR 10 (Jackson, 2013) was similar to SR 63.

SJR 19 (Alquist, 2005) was similar to SR 63. SJR 19 was referred to this Committee but not set for hearing.

AJR 3 (Cohn, Res. Ch. 83, Stats. 2005) was similar to SR 63

AJR 57 (Jackson, Res. Ch. 50, Stats. 2004) was similar to SR 63.

AJR 2 (Jackson, Res. Ch. 63, Stats. 2003) was similar to SR 63.

SJR 3 (Karnette, Res. Ch. 112, Stats. 2001) was similar to SR 63.
