Boston Bar Association

Statement of Principles Concerning Reproductive Rights and Related Issues

Boston Bar ASSOCIATION

Boston Bar Association
Statement of Principles Concerning Reproductive Rights and Related Issues

EXECUTIVE SUMMARY

Following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. __, 142 S. Ct. 2228 (2022), President Chinh H. Pham of the Boston Bar Association (BBA) formed a Task Force on Reproductive Rights to consider and recommend actions that the BBA should take to help protect reproductive rights in Massachusetts. As part of its work, the Task Force recommended that the BBA adopt a set of principles to serve as the foundation for its advocacy on issues pertaining to reproductive rights.

The Boston Bar Association (BBA) believes that every person seeking reproductive care that is legal in Massachusetts - even if that person resides elsewhere - should have the full ability to make decisions regarding their own reproductive care, without undue interference by government authorities. The BBA believes that the constitutional right to liberty protects personal decisions relating to procreation, contraception, and family formation, including termination of a pregnancy. The Massachusetts Declaration of Rights and the Massachusetts General Laws also protect these rights and should continue to do so. The bar should be vigilant to ensure that changes in the laws of other states or in the interpretation of federal law do not limit the ability of people to seek, or of providers to provide, appropriate medical care in Massachusetts.

While we cannot predict the needs and challenges that will arise as the national legal landscape continues to shift in response to *Dobbs*, it appears likely that the BBA will be called upon to take considered and consistent positions on reproductive rights and related issues in the future. The BBA accordingly adopts the following principles to guide its work in this rapidly-evolving area:

Principle 1: Reproductive rights are essential human and civil rights. Every person should have the full ability to exercise their rights to reproductive autonomy and self-determination.

Principle 2: All people should have meaningful access to reproductive care regardless of race, gender identity, religion, sexual orientation, socioeconomic status, or disability. No person should be discriminated against or have their rights or human dignity diminished during or because of a pregnancy.

Principle 3: Massachusetts has enshrined the right to reproductive freedom in the Declaration of Rights and has further enshrined the right to seek and obtain an abortion in its General Laws and additional Executive Orders, and this body of law should be safeguarded.

Principle 4: Health care providers should be able to provide all patients with medically appropriate health care consistent with their training and abilities without undue interference by government.

Boston Bar Association
Statement of Principles Concerning Reproductive Rights and Related Issues

REPORT

Introduction

The Boston Bar Association is a professional association of over 15,000 members drawn from private practice, corporations, government agencies, legal services organizations, the courts, and higher education. Our mission is to facilitate access to justice, to advance the highest standards of excellence for the legal profession, to foster a diverse and inclusive professional community, and to serve the community at large. We believe that our profession has a unique responsibility to promote and to uphold the rule of law as a fundamental principle of our nation's democracy and to warn against the undermining of civil rights.

The BBA has taken a clear position on reproductive rights[1] and access to abortion[2] and recognizes the essential right to bodily autonomy. The BBA acknowledges that reproductive justice is fundamental to the dignity, equality, health, and well-being of every person, and that equality under the law and in society requires bodily autonomy. Such autonomy includes the right to decide whether, when, and by what means to have children, as well as access to reproductive health care such as abortion, life-saving obstetrics care, prenatal care, and contraception.

The BBA believes that every person seeking reproductive care that is legal in Massachusetts - even if that person resides elsewhere - should have the full ability to make decisions regarding their own reproductive care, without undue interference by government authorities. The BBA believes that the constitutional right to liberty protects personal decisions relating to procreation, contraception, and family formation, including termination of a pregnancy. The Massachusetts Declaration of Rights and the Massachusetts General Laws also protect these rights.

To express its solidarity with individuals seeking to exercise their reproductive rights in Massachusetts and to guide its future public policy and legal work, the BBA has adopted the following principles as the foundation for its advocacy on issues pertaining to reproductive rights.

[1] BBA Statement on U.S. Supreme Court Decision in Dobbs v. Jackson Women's Health Organization, Boston Bar Association, (June 24, 2022), https://bostonbar.org/news/bba-statement-on-u-s-supreme-court-decision-in-dobbs-v-jackson-womens-health-organization/.
[2] BBA Statement on Mifepristone Ruling, Boston Bar Association, (Apr. 9, 2023), https://bostonbar.org/news/bba-statement-on-mifepristone-ruling/.

Principle 1: Reproductive rights are essential human and civil rights. Every person should have the full ability to exercise their rights to reproductive autonomy and self-determination.

- The BBA supports the rights of all individuals to reproductive autonomy and self-determination, including the right to decide whether, when, and how to have a child. All individuals should be able to exercise and enjoy such rights without undue interference from government authorities.

- The BBA believes that the Massachusetts Declaration of Rights and United States Constitution protect the fundamental human right to reproductive autonomy, including the right of every person to make decisions about their own bodies, including decisions regarding abortion, contraception, and sexual health services, free from coercion or undue government interference.

- The BBA believes that the Supreme Court was correct to hold, in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), that the decision whether to bear or beget a child free from unwarranted government intrusion is central to the liberty protected by the Fourteenth Amendment to the U.S. Constitution.

- The BBA believes each person also has the right to self-determination, including the right to make decisions about reproductive and gender-affirming care, marriage, and family formation.

The BBA recognizes that each person should have the freedom to make decisions about their own bodies without undue government influence. Self-determination is an essential and widely recognized principle of international law,[3] and foundational to the concepts of liberty and freedom embodied in the U.S. Constitution and in Massachusetts law, including the Declaration of Rights. *See also Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 645-48 (1981); G.L. ch. 12, § 11I ½ (b). While government may impose reasonable limits on the provision of health care, the right to self-determination and to seek abortion are essential rights that should not be singled out or subject to unique burdens.

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. __, 142 S. Ct. 2228 (2022), placed at risk not only individual rights, such as the right to privacy and personal autonomy, but also social values such as adherence to the rule of law. The Supreme Court's decisions in *Roe* and *Casey*, which *Dobbs* overruled, had properly determined that the Constitution's protection of privacy rights also includes the right to abortion, and people across

[3] Frank Przetacznik, *The Basic Collective Human Right to Self Determination of Peoples and Nations as a Prerequisite for Peace*, 8(1) N.Y.L. Sch. J. Hum. Rts. 49, 49-50 (1990), https://digitalcommons.nyls.edu/journal_of_human_rights/vol8/iss1/3; Human Rights Watch, "Q&A: Access to Abortion is a Human Right" (June 24, 2022), https://www.hrw.org/news/2022/06/24/qa-access-abortion-human-right.

the country relied on the existence of that right for nearly half a century. Stripping that right created an alarming precedent that foreshadows that other established privacy rights may not be safe. Indeed, *Roe* was built on the substantive due process decisions that came before it: *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage), *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to contraception for married couples), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to contraception for unmarried couples), and provided the doctrinal foundation for decisions that came after, such as *Lawrence v. Texas*, 539 U.S. 558 (2003) (consensual sex between members of the same sex) and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (same-sex marriage). The Supreme Court's decision in *Dobbs* cracked the foundation of confidence in the stability and predictability of these precedents and the rule of law writ large.

Dobbs calls into question the entire constellation of rights tied to privacy and threatens the longstanding principle that individuals have a right to both privacy and bodily autonomy. In an era where advances in technology only increase the threats to personal privacy and the possibility of surveillance, this development undermines the slow progress in protecting individuals from increasingly powerful surveillance by the government and private entities.

The BBA also recognizes that reproductive rights are human rights, and that women and people capable of becoming pregnant need to be able to decide freely and independently whether and when to have children. When abortion is restricted, pregnant people are forced either to resort to less-safe methods to terminate a pregnancy, potentially jeopardizing their health and well-being, or to carry an unwanted or medically unsafe pregnancy to term against their will, which is associated with poorer socioeconomic and health outcomes, including increases in maternal mortality.[4]

According to the Guttmacher Institute's Abortion Patient Survey, which is a national sample of demographic and other information about people seeking abortion, in the 12 months before *Dobbs*, individuals living in states where abortion would likely be outlawed if federal constitutional protection was lost faced significant financial and logistical barriers to obtaining an abortion when compared to individuals obtaining abortions in states where abortion was "likely to remain legal."[5] Since *Dobbs*, legislators have restricted or altogether banned abortion

---

[4] *See, e.g.*, Diana Greene Foster, The Turnaway Study: Ten Years, a Thousand Women, and the Consequences of Having—or Being Denied—an Abortion (2021); Heidi D. Nelson, et al., *Associations of Unintended Pregnancy with Maternal and Infant Health Outcomes: A Systematic Review and Meta-Analysis*, 328(17) JAMA 1714 (2022); Sara K. Redd, et al., "Variation in Restrictive Abortion Policies and Adverse Birth Outcomes in the United States from 2005 to 2015," 32(2) Women's Health Issues 103 (Mar.-Apr. 2022), https://www.sciencedirect.com/science/article/pii/S1049386721001596; Elyssa Spitzer, Tracy Weitz, and Maggie Jo Buchanan, "Abortion Bans Will Result in More Women Dying," Center for American Progress (Nov. 2, 2022), https://www.americanprogress.org/article/abortion-bans-will-result-in-more-women-dying/#:~:text=Longitudinal%20research%20shows%20that%20women,also%20overwhelmingly%20likely%20to%20worsen; Lauren J. Ralph, et al., *Self-reported Physical Health of Women Who Did and Did Not Terminate Pregnancy After Seeking Abortion Services: A Cohort Study*, 171(4) Ann. Intern. Med. 238 (Aug. 20, 2019), https://pubmed.ncbi.nlm.nih.gov/31181576/.

[5] Rachel K. Jones & Doris W. Chiu, *Characteristics of abortion patients in protected and restricted states accessing clinic-based care 12 months prior to the elimination of the federal constitutional right to abortion in the United States*, Persp. Sex. Reprod. Health 1 (Apr. 2023); *see also* Guttmacher Institute, "National Study Provides Baseline Data on Experiences of People Seeking Abortion Care Prior to the Overturning of Roe v. Wade", (Apr. 11, 2023),

access in nearly half of the states across the country. Over a third of the total U.S. population of people capable of becoming pregnant lives in a state where abortion is banned or severely restricted.[6] As a result, from July through December 2022, there were 32,260 fewer abortions, compared to the average monthly number of abortions observed in the pre-*Dobbs* period.[7] This decrease in access to reproductive care will only worsen if states continue to pass laws criminalizing abortion-related travel, "aiding and abetting" an abortion, transporting minors for abortions, and selling or distributing medication abortion pills.[8]

In recent months, laws restricting gender-affirming care for minors have also been passed in thirteen states.[9] While gender-affirming care is considered safe and medically necessary by all major medical associations, including the American Medical Association and the American Academy of Pediatrics, there has recently been a coordinated effort to target access to medical care by transgender and non-binary youth. The Human Rights Campaign is currently tracking more than 800 anti-LGBTQIA+ bills in the United States.

These types of state-level restrictions are clear examples of government interference with the individual right to control decisions related to a person's body. These efforts may expand to other types of personal medical decision-making, including contraception, vaccines, and access to the HIV pre-exposure prophylaxis (PrEP).

Finally, the BBA believes that implicit in the right to reproductive autonomy is the right to make decisions about marriage and family formation. To have the full ability to exercise this right, there must be access and choice around issues relating to family formation. Likewise, the BBA recognizes that state restrictions on access to gender-affirming care are part of a broader attack on LGBTQIA+ individuals and families. The BBA believes that all people should have the right to marry a person regardless of either spouse's gender identity, and that all people should have the ability to choose whether, when, and how to have or parent a child, which for LGBTQIA+ people, means ensuring access to assisted reproductive technologies and the legal recognition of familial relationships, including parentage.

Rolling back abortion rights already in existence is rare in democracies, which have historically moved in the opposite direction, creating greater access to reproductive care and allowing more, not fewer, reproductive freedoms.[10] In the United States, over 60% of Americans across the

---

https://www.guttmacher.org/news-release/2023/national-study-provides-baseline-data-experiences-people-seeking-abortion-care

[6] Marielle Kistein, et al., "100 Days Post-Roe: At Least 66 Clinics Across 15 US States Have Stopped Offering Abortion Care," Guttmacher Institute (Oct. 6, 2022), https://www.guttmacher.org/2022/10/100-days-post-roe-least-66-clinics-across-15-us-states-have-stopped-offering-abortion-care

[7] Society for Family Planning, "#WeCount Report: April 2022 to December 2022", (Apr. 11, 2023), https://www.societyfp.org/wp-content/uploads/2023/03/WeCountReport_April2023Release.pdf.

[8] Gabriella Borter & Sharon Bernstein, "How U.S. states are protecting or restricting abortion access", Reuters, (Apr. 28, 2023), https://www.reuters.com/world/us/us-state-abortion-legislation-watch-2023-2023-03-17/

[9] Elana Redfield, et al., "Prohibiting Gender-Affirming Medical Care for Youth," Williams Institute, (Mar. 2023), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Mar-2023.pdf

[10] Hanna Kozlowska, "Where Democracy Falters, so do Reproductive Rights," Foreign Policy (Mar. 16, 2022), https://foreignpolicy.com/2022/03/16/where-democracy-falters-so-do-reproductive-rights/; Mary Fitzgerald, "The World is Lifting Abortion Restrictions. Why is the U.S. Moving Against the Tide?" NY Times (Dec. 2, 2021),

political spectrum support legalizing abortion in all or most cases,[11] and abortion restrictions have been repeatedly and decisively defeated at the ballot box since the *Dobbs* decision. Despite strong support for abortion amongst the American electorate, several state legislatures have proceeded to enact total or near-total abortion bans and have tried to curtail abortion access in other states where abortion remains protected, including by targeting medication abortion and interstate travel. Vigilance to prevent further erosion of the rights to privacy and self-determination is now crucial.

https://www.nytimes.com/2021/12/02/opinion/abortion-restrictions-roe-wade-usa.html; Max Fisher, "As Abortion Rights Expand, the US Joins a Handful of Telling Exceptions," NY Times (Sept. 9, 2021), https://www.nytimes.com/2021/09/09/world/abortion-rights-us.html

[11] Hannah Hartig, "About six-in-ten Americans say abortion should legal in all or most cases," Pew Research Center, (June 13, 2022), https://www.pewresearch.org/short-reads/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/.

Principle 2: All people should have meaningful access to reproductive care regardless of race, gender identity, religion, sexual orientation, socioeconomic status, or disability. No person should be discriminated against or have their rights or human dignity diminished during or because of a pregnancy.

- The BBA recognizes that matters of reproductive justice are also matters of economic and racial justice, and public health, and that all individuals, not just those in a position of privilege, should be able to make their own reproductive health care decisions with dignity.

- The recent rollback across the United States of the right to abortion and reproductive autonomy unjustly places even greater burdens on groups and communities that already face significant challenges in obtaining health and reproductive care.

The Commonwealth of Massachusetts is a diverse state. The BBA strives to reflect that diversity, and to support and foster the inclusion and legal protection of *all* people living in Massachusetts, regardless of their race, gender identity, religion, sexual orientation, socioeconomic status, or disability. The BBA recognizes that matters of reproductive justice and bodily autonomy are also matters of economic and racial justice and supports efforts to provide equal rights to all people under the law, including equitable access to health care, reproductive care, and family planning. Studies show that inadequate access to meaningful and affordable reproductive care has life-altering consequences and that minorities and people with disabilities are disproportionately unable to receive the reproductive care they need.[12] Restrictions on the right to abortion and reproductive autonomy will only exacerbate such disparities.

The need for access to reproductive care is particularly acute for people with disabilities because their disabilities may make it dangerous for them to carry a pregnancy to term.[13] People with disabilities already face greater health care inequities, sexual violence, poverty, and at times even loss of the autonomy to make decisions about their own bodies. For example, according to the federal Bureau of Justice Statistics, disabled people are over three times more likely than nondisabled people to experience serious violent crime such as rape and sexual assault, and the

[12] Abortion bans push pregnant people into poverty or debt; pregnancy and childbirth alone can cost thousands of dollars. *See* Diana G. Foster, et al., Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States, 108(3) Am. J. Pub. Health 407, 410–12 (Mar. 2018) (finding that individuals who were denied abortions and eventually gave birth were almost four times more likely to have household incomes below the federal poverty level and were more likely to report being unable to afford basic necessities).

[13] The Hastings Center provides an insightful perspective: "It is not hard to imagine how [the abortion ban] could harm people living with all kinds of chronic illnesses and disabilities. Some people with psychiatric disabilities might fear a relapse of crisis-causing symptoms as a result of the medication changes and hormonal fluctuations that accompany pregnancy. Some of the 1 in 4 diabetics who are forced to ration their insulin, making it difficult to keep their blood sugar in the range recommended for pregnancy, might fear that being pregnant would exacerbate kidney disease and neuropathy, which they already contend with. But even if people in abortion-restricted states fear for their lives with these risks, they likely would not be able to end their pregnancy until their life was acutely under threat." Liz Bowen, "The End of Roe v. Wade Will Be a Nightmare for Disabled Americans", The Hastings Center, Bioethics Forum Essay (June 24, 2022), https://www.thehastingscenter.org/the-end-of-roe-v-wade-will-be-a-nightmare-for-disabled-americans//

likelihood is even greater for people with multiple disabilities.[14] These vulnerabilities are compounded by socioeconomic inequities, as people with disabilities are more likely to lack adequate financial resources to access needed care. According to the Center for American Progress, women with disabilities have a poverty rate of 22.9%, compared to 11.4% for women without disabilities.[15]

Racial minorities are also disproportionately harmed by laws and policies that limit access to reproductive care. Black, Hispanic, American Indian and Alaska Native (AIAN), and Native Hawaiian and Other Pacific Islander (NHOPI) women and pregnant people have more limited access to health care, which affects their access to contraception and other sexual health services.[16] As experts at KFF note, the health care system has a long history of racist practices targeting the sexual and reproductive health of people of color, including forced sterilization and medical experimentation. Many people of color continue to experience discrimination by their providers, leading to frequent reports of dismissive treatment, resort to stereotypes, and inattention to conditions, such as fibroids, that take a disproportionate toll on people of color.[17] These factors have contributed to mistrust of the health care system, which some women and pregnant people cite as a reason they may not access needed reproductive care. In addition, inequities in income, housing, safety, and education also affect decisions related to family planning and reproductive health. According to the federal Bureau of Justice Statistics, racial minorities have less access to health care and higher rates of poverty compared to non-Hispanic white women.[18] The Economic Policy Institute also notes that Black, AIAN, and Hispanic women are much more likely to be uninsured than their white counterparts.[19]

Placing burdens and restrictions on the right to abortion and reproductive autonomy, including burdening the right to travel to access needed health care, will worsen these existing disparities. All individuals should be able to make their own reproductive health care decisions with dignity and should have the ability to access the health care necessary to carry out those decisions.

---

[14] *See* Erika Harrell, "Crime Against Persons with Disabilities, 2009-2014 – Statistical Tables", U.S. Department of Justice Bureau of Justice Statistics (Nov. 2016), https://bjs.ojp.gov/content/pub/pdf/capd0914st.pdf.

[15] Robin Bleiweis, et al., "The Basic Facts about Women in Poverty", Center for American Progress (Aug. 3, 2020), https://www.americanprogress.org/article/basic-facts-women-poverty/

[16] *See* Samantha Artiga, et al., "What are the Implications of the Overturning of Roe v. Wade for Racial Disparities?", KFF, (July 15, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-overturning-of-roe-v-wade-for-racial-disparities/

[17] *See id.*

[18] *See* E. Ann Carson, "Prisoners in 2019", U.S. Department of Justice Bureau of Justice Statistics, (Oct., 2020), https://bjs.ojp.gov/content/pub/pdf/p19.pdf.

[19] Bailey Nelson, "Abortion bans prove yet again there is no race-neutral policy", Economic Policy Institute, (Aug. 19, 2022), https://www.epi.org/blog/abortion-bans-prove-yet-again-there-is-no-race-neutral-policy/

The BBA's position is consistent with federal and state laws that prohibit discrimination against minorities,[20] LGBTQIA+ people,[21] and people with disabilities[22] when they seek medical care. It is also consistent with Article CVI of the Massachusetts Declaration of Rights, which establishes that:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Additionally, chapter 272, section 98 of the Massachusetts General Laws forbids discrimination in any place of public accommodation on the basis of: "race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, deafness, blindness or any physical or mental disability or ancestry relative." These principles of equality and non-discrimination are also reflected elsewhere in Massachusetts law.[23] The BBA supports state and federal laws and policies that protect equitable access to reproductive care and family planning for all people. The BBA urges the adoption of further appropriate laws and policies that will ensure that access to the full spectrum of reproductive care is provided fully and equitably to all people.

---

[20] Section 1557 of the Affordable Care Act prohibits discrimination based on race, color, national origin, sex, age, or disability by state health care programs or activities that receive federal financial assistance (e.g., MassHealth). 42 U.S.C. § 18116. Additionally, Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, or national origin by both public and private entities that receive federal financial assistance, although private physicians are excluded. 42 U.S.C. § 2000d et seq.

[21] The Emergency Medical Treatment and Active Labor Act (EMTALA) requires hospitals to provide stabilizing medical care in emergency situations to all patients in need (i.e., hospitals cannot turn people away based on insurance coverage). 42 U.S.C. § 1395dd. Additionally, in *Bostock v. Clayton County*, 140 S. Ct 1731 (2020), the Supreme Court held that the prohibition in Title VII of the Civil Rights Act against discrimination on the basis of "sex" included a prohibition against discrimination on the basis of sexual orientation or gender identity (i.e., being homosexual, queer, or transgender). Title VII prohibits discrimination in the workplace, but the reasoning of the Supreme Court may be extended to other federal laws that prohibit discrimination on the basis of "sex."

[22] The Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities and requires that health care entities provide full and equal access for people with disabilities. *See* ADA title II (government-owned clinics), codified at 42 U.S.C. §§ 12131 *et seq.*; title III (privately owned clinics as places of "public accommodation"), codified at 42 U.S.C. §§ 12181 *et seq.* Additionally, Section 504 of the Rehabilitation Act prohibits discrimination against people with disabilities by all programs and entities that receive federal financial assistance, as well as by federal programs (e.g., Medicare). 29 U.S.C. § 794.

[23] For example, the Pregnant Workers Fairness Act, G.L. ch. 151B, § 4, forbids a variety of discrimination by employers against pregnant people.

Principle 3: Massachusetts has enshrined the right to reproductive freedom in the Declaration of Rights and has further enshrined the right to seek and obtain an abortion in its General Laws and additional Executive Orders, and this body of law should be safeguarded.

- The Massachusetts 2022 Shield Law, 2022 Mass. Acts, ch. 127 ("Shield Law") reflects a commitment by the Massachusetts legislature to protect individuals seeking and providing reproductive health care services in Massachusetts.

- Executive Order 609, issued by Governor Maura Healey on April 10, 2023, reflects the Governor's continued commitment to ensuring that the Shield Law is fully implemented, and that patients and providers are protected for actions that are taken in Massachusetts.

- Massachusetts should continue to protect the reproductive rights of people seeking care in Massachusetts against incursion by other states.

Massachusetts leads the nation in comprehensive abortion rights legislation and support services for individuals seeking reproductive health care. The Shield Law, 2022 Mass. Acts, ch. 127, creates statutory protections for providers, patients, pharmacists, and people who help others access abortion services. More specifically, the Shield Law protects individuals' professional licensure status, shields them from out-of-state investigations, and creates a private right of action for anyone sued in another state for providing, accessing, or helping secure abortion services in Massachusetts. The medical malpractice provision of the Shield Law prohibits medical malpractice insurers from discriminating against or increasing premiums against reproductive health care or gender-affirming care providers on the basis of an out-of-state ban.[24] The Shield Law also bars the executive branch, absent an appropriate court order, from cooperating with out-of-state investigations and legal actions intended to inquire about or punish individuals who have sought, performed, or assisted others in accessing or performing reproductive health care services that are permitted in Massachusetts. Other provisions in the Shield Law protect access to and insurance coverage for reproductive health care services.[25]

The executive branch has also acted to protect reproductive freedom. Former Governor Charlie Baker and current Governor Maura Healey each issued Executive Orders (E.O. 600 (June 24, 2022) and E.O. 609 (April 10, 2023)), which directed various agencies and offices within state

[24] The Shield Law prohibits medical malpractice insurers from discriminating against a provider or adjusting or calculating a provider's risk classification or premium charges on the basis that: (1) the provider offers reproductive health care services or gender affirming care services that are unlawful in another state, (2) another state's laws create potential or actual liability for those services, or (3) a provider has been subjected to an out-of-state judgment for services that were lawful and consistent with good medical practice as provided if the service was provided in the Commonwealth. Shield Law, 2022 Mass. Acts, ch. 127.

[25] Statutes amended or added as a result of the Shield Law include: G.L. ch. 9A, §§ 2, 7; G.L. ch. 12, §§ 11½, 11¾; G.L. ch. 13, § 105; G.L. ch. 15A, §§ 46, 47; G.L. ch. 32A, § 17C; G.L. ch. 94C, § 19A; G.L. ch. 112, §§ 5F½, 9H, 12N, 32, 77, 128, 137; G.L. ch. 118E, § 10A; G.L. ch. 147, § 63; G.L. ch. 175, §§ 47F, 193U; G.L. ch. 176A, § 8H; G.L. ch. 176B, § 4H; G.L. ch. 176G, § 4I; G.L. ch. 223A, § 11; G.L. ch. 231, § 59H; G.L. ch. 233, § 13A; G.L. ch. 272, § 21A; G.L. ch. 276, §§ 13, 14, 20A, 20B, 20C.

government to take action to further ensure the protection of patients and providers from discrimination, discipline, or legal liability associated with accessing or providing reproductive health care services.

- Section 5 of E.O. 609 directs the Division of Insurance to issue guidance to insurers making clear that they cannot discriminate against providers or adjust their risk classification or premiums based on their offering of reproductive health care services in Massachusetts.

- Section 2 of E.O. 600 and Section 6 of E.O. 609 directed Public Health and Professional Licensure boards to implement policies to ensure that providers are not subjected to discipline, including disqualification from licensure, for providing or assisting in the provision of reproductive health care services so long as they would have been lawful and consistent with standards for good professional practice in Massachusetts.

- Section 7 of E.O. 609 calls upon public institutions of higher education to implement plans to ensure access to medication abortion and medical management of miscarriage services.

The BBA supports these legal efforts to protect reproductive rights in Massachusetts and urges all branches of the government to continue to uphold and strengthen reproductive and related privacy rights.

The BBA will continue to monitor potential legal challenges to these new laws. Such challenges likely will establish new precedent not only in the area of abortion rights, but also in the application of principles governing interstate commerce, jurisdictional limits, and executive power. At the time of adoption of these principles, the FDA's authority to approve mifepristone is subject to an ongoing court challenge.[26]

Implementing and protecting the Shield Act will require members of the bar to remain vigilant against litigation efforts from other states and other attempts to erode abortion protections in Massachusetts.

[26] See *Alliance for Hippocratic Medicine v. FDA*, No. 2:22-CV-223-Z, -- F. Supp. 3d -- (N.D. Tex. Apr. 7, 2023), *appeal docketed*, No. 23-10362 (5th Cir.). Should issues of the availability of medical abortion arise in Massachusetts, it is notable that Section 1 of E.O. 609 makes clear that "reproductive health care services" as defined in the Shield Law include medication abortion and medical management of miscarriage, including but not limited to the use, prescribing, dispensing, and administration of mifepristone and misoprostol. The same Executive Order directs all executive department offices and agencies to construe the term "reproductive health care services" as it appears in the Shield Law to include medication abortion and medical management of miscarriage.

Principle 4: Health care providers should be able to provide all patients with medically appropriate health care consistent with their training and abilities without undue interference by government.

- The BBA believes that clinicians should be able to provide their patients with evidence-based reproductive care consistent with their training, professional judgment, and ethical responsibilities, without undue interference by government authorities.

- The BBA believes that reproductive care, including abortion, is a fundamental pillar of health care, and is opposed to any undue restriction on a patient's access to health care.

- The BBA believes that the Emergency Medical Treatment and Active Labor Act (EMTALA) offers protection to providers who render abortion care consistent with EMTALA, regardless of state law abortion restrictions.

Physicians and other health care providers have a duty to act in the best interests of the patient, and this Principle aligns with many elements of the American Medical Association's Code of Ethics,[27] which provides the "standards of conduct that define the essentials of honorable behavior for the physician."[28] Among the principles are the requirements that a physician (1) regard his or her responsibility to the patient as paramount, and (2) respect the law, while recognizing "a responsibility to seek changes in those requirements which are contrary to the best interests of the patient."

This Principle is also rooted in the knowledge that, in the wake of the *Dobbs* decision, providers in states with abortion bans or severe restrictions on abortions increasingly face a clash between state law and their exercise of sound clinical judgment and the provision of care that meets generally accepted medical standards. By way of example, the Texas Policy Evaluation Project

---

[27] The Code of Ethics Provides as follows:

1. A physician shall be dedicated to providing competent medical care, with compassion and respect for human dignity and rights.
2. A physician shall uphold the standards of professionalism, be honest in all professional interactions, and strive to report physicians deficient in character or competence, or engaging in fraud or deception, to appropriate entities.
3. A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient.
4. A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law.
5. A physician shall continue to study, apply, and advance scientific knowledge, maintain a commitment to medical education, make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other health professionals when indicated.
6. A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care.
7. A physician shall recognize a responsibility to participate in activities contributing to the improvement of the community and the betterment of public health.
8. A physician shall, while caring for a patient, regard responsibility to the patient as paramount.
9. A physician shall support access to medical care for all people.

[28] American Medical Association Code of Medical Ethics (adopted June 1957; revised June 1980; revised June 2001), https://code-medical-ethics.ama-assn.org/principles.

(TxPEP) assessed reports from 50 providers who described instances where their ability to provide care deviated from accepted medical standards due to new laws restricting abortion and other reproductive health care.[29] The TxPEP preliminary findings detailed lengthy delays in care, poor outcomes, and preventable complications (including infection/sepsis and excessive blood loss) and situations where disagreements about what a state law permitted or prohibited led to mid-level providers being instructed not even to examine patients for fear of potential legal action. Examples included a provider afraid to remove an IUD from a patient who had become pregnant despite her use of the device, patients sent home after premature membrane rupture only to return days later with severe sepsis, and patients left in observation while bleeding heavily until their situation became life threatening so that providers could render care without risking legal exposure.[30] These dilemmas impact not only OB/GYNs, but also emergency room physicians, nurses, other mid-level providers, and pharmacists, among others. These problems are also likely to worsen, and provider shortages may increase in areas with abortion bans[31] if medical schools in states with abortion restrictions reduce or eliminate opportunities for complete obstetrics and gynecology training[32].

The federal Emergency Medical Treatment and Active Labor Act (EMTALA) should be enforced as a means to hold institutions accountable for prohibiting or restricting providers from offering emergency medical treatment to pregnant individuals who require abortions, miscarriage management, or other emergency reproductive health care services. On May 1, 2023, Secretary for Health and Human Services Xavier Becerra issued a statement to hospitals and providers throughout the country reiterating their obligations under EMTALA.[33] At the same time, the Secretary announced that he sent letters to two hospitals in Missouri alleging that their failure to provide an abortion to a woman whose membranes ruptured at 18 weeks and rendered the pregnancy non-viable (requiring her to go to a third hospital located in Illinois to receive necessary care) violated EMTALA. A provider at one of the Missouri hospitals is reported to have gone so far as to document in the patient's medical record that "[t]herefore contrary to the most appropriate management based (sic) my medical opinion, due to the legal language of MO law, we are unable to offer induction of labor at this time."[34] Accounts of patients being turned away from emergency care for ectopic pregnancies, early or incomplete miscarriages, and underlying conditions complicating their care (e.g., hypertension, dilation, hemorrhage) have also been reported.[35] If the reports are accurate, the failure to treat patients in these circumstances flies in the face of EMTALA requirements.

---

[29] Daniel Grossman, et al., "Care Post-Roe: Documenting cases of poor-quality care since the Dobbs decision", Advancing New Standards in Reproductive Health & Texas Policy Evaluation Project (May 2023), https://sites.utexas.edu/txpep/files/2023/05/ANSIRH-Care-Post-Roe-Report-Embargoed-until-15-May-23.pdf

[30] *Id.*

[31] *See* Arielle Dreher & Oriana González, "New Doctors Avoid Residencies in States with Abortion Bans", Axios (Apr. 18, 2023) https://www.axios.com/2023/04/18/abortion-ban-states-drop-student-residents.

[32] *See* Jamie McGee, "Residency Programs and Medical Practices Drew them to Tennessee. Then Came Dobbs", Tennessee Lookout (Apr. 25, 2023) https://tennesseelookout.com/2023/04/25/residency-programs-and-medical-practices-drew-them-to-tennessee-then-came-dobbs/.

[33] *See* HHS Secretary Xavier Becerra Statement on EMTALA Enforcement (May 1, 2023), https://www.hhs.gov/about/news/2023/05/01/hhs-secretary-xavier-becerra-statement-on-emtala-enforcement.html.

[34] *See* Rudi Keller, "Hospitals in Joplin, KCK cited for denying emergency abortion to Missouri woman", Missouri Independent (May 1, 2023), https://missouriindependent.com/2023/05/01/hospitals-in-joplin-kck-cited-for-denying-emergency-abortion-to-missouri-woman/

[35] *See* Grossman et al., "Care Post-Roe", *supra*.

Since the *Dobbs* decision, reports have proliferated of providers who believe they cannot care for their patients in the manner dictated by their training, expertise, and ethical responsibilities. Instead, laws criminalizing abortion are placing pressures on providers to withhold treatment or information from patients; some even feel pressure to put vague or incomplete information into medical records for fear of prosecution.[36] Such improper pressures should never be placed on providers in Massachusetts, and Massachusetts should continue to ensure that its laws empower providers to provide patients full information and access to the full panoply of reproductive care, including contraception and abortion.

Conclusion

As part of its mission and values, the BBA has long supported access to justice, upholding the rule of law, and equality under the law regardless of race, gender, or identity. These Principles further the BBA's mission by ensuring that its advocacy and public policy initiatives seek to protect the right to reproductive care, and more broadly the rights to personal liberty and privacy, that are and should remain protected under Massachusetts and federal law.

[36] Abigail Abrams, "'Am I a Felon?' The fall of *Roe v. Wade* Has Permanently Changed the Doctor-Patient Relationship," TIME, (Oct. 17, 2022), https://time.com/6222346/abortion-care-after-roe-doctors-lawyers/; Sarah McCammon, "5 Texas women denied abortions sue the state, saying the bans put them in danger," National Public Radio, (Mar. 8, 2023), https://www.npr.org/2023/03/07/1161486096/abortion-texas-lawsuit-women-sue-dobbs; Selena Simmons-Duffin, "For doctors, abortion restrictions create an 'impossible choice' when providing care," National Public Radio, (June 24, 2022), https://www.npr.org/sections/health-shots/2022/06/24/1107316711/doctors-ethical-bind-abortion

BBA Task Force on Reproductive Rights (2022-2023)

(Affiliations are for identification purposes only)

Mark C. Fleming, Co-Chair
Wilmer Cutler Pickering Hale and Dorr LLP

Ingrid S. Martin, Co-Chair
Todd & Weld

Dana L. Fleming
Tufts University

Amanda Hainsworth
Massachusetts Attorney General's Office

Christopher Escobedo Hart
Foley Hoag

Miranda Hooker
Goodwin

Krietta Bowens Jones
Dana-Farber Cancer Institute

Priya Lane
Lawyers for Civil Rights

Emma Melton
Partners Healthcare

Adrianne Ortega
Ropes & Gray

Christine G. Savage
Choate