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# AMC 2025

## Session 5

# Reproductive Rights Update: In Wisconsin & Nationwide


**Presented by:**

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*Diane M. Welsh, Pines Bach LLP, Madison*

# About the Presenters...

**Abigail S. Cutler**, MD, MPH, is an Assistant Professor, Associate Residency Program Director and Director of the Ryan Program in Family Planning at the University of Wisconsin School of Medicine and Public Health. Her clinical practice includes general obstetrics and gynecology in the outpatient and inpatient settings at UW Health, as well as family planning services at Planned Parenthood of Wisconsin. As a subspecialist in Complex Family Planning, her clinical and research interests include provision of contraception and abortion care, decision-making around reproductive health, and abortion-related policy impacts on health outcomes and medical education.

**Elizabeth Pierson,** Yale 2018, is an attorney at Pines Bach, LLP. She represents and advises clients in matters related to elections and voting, labor and employment, environmental law, health law, and more. She has experience litigating in state trial and appellate courts, federal district court, and before administrative agencies. Elizabeth's prior legal experience includes time at nonprofits and a judicial clerkship in the U.S. District Court for the Northern District of Illinois. Elizabeth is a member of the Legal Association for Women of Dane County and serves on the State Bar of Wisconsin's Civil Rights and Liberties Section Board.

**Michelle L. Velasquez** is the Chief Strategy Officer for Planned Parenthood of Wisconsin and Planned Parenthood Advocates of Wisconsin . She oversees, plans, and coordinates all legal, legislative, and administrative policy advocacy to protect and expand access to sexual and reproductive healthcare and to improve health equity. Michelle is responsible for developing agency-wide strategies primarily focused on external facing efforts to promote the long-term sustainability of PPWI's business model, including public policy, strategic relationships, and formal relationships. She also oversees all matters related to compliance within both organizations. Prior to joining Planned Parenthood, Michelle worked in various areas of public interest law, including appellate criminal defense with the State Public Defender, and at non-profits providing representation in criminal, family and immigration matters for low-income litigants. Prior to law school Michelle was a social worker. Her entire professional career has been dedicated to social justice. She grew up in the City of Milwaukee and attended the University of Wisconsin Madison and Marquette Law School.

**Diane Welsh** is a Partner at Pines Bach LLP, prior to joining Pines Bach LLP, she served as Chief Legal Counsel for the Wisconsin Department of Health Services and as assistant attorney general at the Wisconsin Department of Justice. Diane is an experienced litigator, having handled matters ranging from administrative hearings to judicial appeals, she's litigated hundreds of cases before the Wisconsin Court of Appeals and the Wisconsin Supreme Court. She's served as a United States Supreme Court Fellow with the National Association of Attorneys General and has practiced in the United States Supreme Court, the Seventh Circuit Court of Appeals, federal district courts, state courts, and the Division of Hearings and Appeals. Diane is an active member of the community and has served on the Board of Directors for the Wisconsin Democracy Campaign, Domestic Abuse Intervention Services, and Wisconsin Women in Government. She is currently a member of the Dean's Advisory Board for the University of Wisconsin-Whitewater College of Letters and Sciences.

**Reproductive Rights Update: Wisconsin and Nationwide**

State Bar of Wisconsin Annual Meeting
Presented by the Civil Rights and Liberties Section
Friday, June 20, 2025

Diane Welsh (Pines Bach LLP)
Michelle Velasquez (Planned Parenthood of Wisconsin)
Dr. Abigail S. Cutler (UW School of Medicine and Public Health)
Elizabeth Pierson (Pines Bach LLP; Moderator)

I. Welcome and introductions.

II. Federal caselaw: *Dobbs* and more
   a. *Dobbs v. Jackson Women's Health* (2022): U.S. Constitution does not protect the right to abortion
      i. *Roe* and *Casey* overruled
      ii. State legislatures can decide whether and under what circumstances abortions are legal—"We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."
      iii. Rational basis standard applies to abortion restrictions
      iv. Dicta indicates that majority would also reject a challenge under the Equal Protection Clause
   *b. FDA v. Alliance for Hippocratic Medicine* (2024): mifepristone
      i. **Summary:** Anti-abortion doctors and medical associations sued the Food and Drug Administration in November 2022 over its approval and deregulation of mifepristone. The plaintiffs brought the case in the Northern District of Texas and sought to remove mifepristone from the market in all 50 states.
      **ii. Why it matters:**
         1. Mifepristone is one of two drugs used for medication abortions.
         2. Medication abortions are a safe and very common form of abortion.

3. Biden-era changes to FDA policies allowed additional medical professionals (besides doctors) to prescribe the drug, and rescinded the in-person visit requirement.

iii. **Procedural history:** District Court blocked the FDA approval of mifepristone; the 5th Circuit refused to stay the order and eventually affirmed it; SCOTUS stayed the district court order and ultimately granted certiorari review.

iv. **Issues presented to SCOTUS:**
   1. Whether plaintiffs/respondents have Article III standing to challenge FDA's 2016 and 2021 actions.
   2. Whether FDA's 2016 and 2021 actions were arbitrary and capricious.
   3. Whether the district court properly granted preliminary relief.

v. **SCOTUS Decision: Reversed and remanded 5th Circuit, 9-0.**
   1. Rejected on standing grounds: "Under Article III of the Constitution, a plaintiff's desire to make a drug less available *for others* does not establish standing to sue." 602 U.S. 367 at 373.

vi. Missouri, Kansas, and Idaho was permitted by the district court to file an amended complaint. A motion to dismiss is pending. Still a live issue

c. *Idaho v. U.S., Moyle v. U.S.* (2024): emergency abortion care under EMTALA
   i. Emergency Medical Treatment and Labor Act (EMTALA) was passed in 1986 and requires hospitals that receive Medicare funds to provide stabilizing treatment to patients in emergency situations
      1. Includes abortion care
      2. Emergency need not rise to risk of death
   ii. Impact of *Dobbs*:
      1. Some politicians in states with extreme abortion bans have used *Dobbs* to argue that emergency abortions are no longer available to pregnant people facing medical emergencies.
      2. Hospitals and doctors feared providing care required under EMTALA against the backdrop of threats of criminal prosecution.

3. U.S. Department of Health and Human Services guidance: "Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss" (issued July 11, 2022; as of May 30, 2025 it is still in place)

iii. Summary of the Idaho cases: disputes over the interaction of Idaho's broad abortion ban and EMTALA.

iv. Issues before SCOTUS:
    1. From Idaho's application for a stay of the injunction: Does EMTALA preempt Idaho's Defense of Life Act?
    2. Raised later: Can Congress, in reliance on the spending clause, obligate recipients of federal funds to violate state criminal law? (per Justice Barrett)

v. **SCOTUS Decision:** Dismissed the petition for writ of certiorari as improvidently granted (Idaho law had changed twice since suit began), leaving ambiguous the interplay of EMTALA and state abortion bans.
    1. Kagan, concurring: "**EMTALA unambiguously requires** that a Medicare-funded hospital provide whatever medical treatment is necessary to stabilize a health emergency—and an abortion, in rare situations, is such a treatment."
    2. Barrett, concurring: "Since this suit began in the District Court**, Idaho law has significantly changed**—twice. And since we granted certiorari, the parties' litigating positions have rendered the scope of the dispute unclear, at best."
    3. Jackson, concurring/dissenting: "Today's decision is **not a victory for pregnant patients in Idaho. It is delay.** While this Court dawdles and the country waits, pregnant people experiencing emergency medical conditions remain in a precarious position, as their doctors are kept in the dark about what the law requires."
    4. Alito, dissenting: "the text of **EMTALA conclusively shows that it does not require hospitals to perform abortions.**"

vi. ***Adkins v. Labrador:*** Idaho state court case ruling in favor of plaintiffs challenging law, clarifying that the abortion ban's exceptions include conditions that threaten the life of the pregnant person, even if not imminent or certain, issued April 11, 2025.

vii. Still a live issue

III. Wisconsin law: the 1849 "abortion ban" and more

a. In the wake of *Dobbs*, states have been left to regulate abortion

b. Wis. Stat. § 940.04 Abortion**.**

**(1)** Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony.

**(2)** Any person, other than the mother, who does either of the following is guilty of a Class E felony:

**(a)** Intentionally destroys the life of an unborn quick child; or

**(b)** Causes the death of the mother by an act done with intent to destroy the life of an unborn child. It is unnecessary to prove that the fetus was alive when the act so causing the mother's death was committed.

**(5)** This section does not apply to a therapeutic abortion which:

**(a)** Is performed by a physician; and

**(b)** Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

**(c)** Unless an emergency prevents, is performed in a licensed maternity hospital.

**(6)** In this section "unborn child" means a human being from the time of conception until it is born alive

c. *Kaul v. Urmanski*, 2023AP2362

i. Began in circuit court, challenging the 1849 ban

ii. Circuit court ruled the law is *not* an abortion ban, but rather a feticide statute, and overruled it based on *State v. Black*

iii. Respondent Joel Urmanski appealed & filed Petition to Bypass, which Supreme Court of Wisconsin granted

iv. Oral arguments were held on November 11, 2024

v. Awaiting decision as of May 30, 2025

d. *Planned Parenthood v. Wisconsin*, 2024AP330

i. Original action at Supreme Court of Wisconsin seeking to recognize a state constitutional right to abortion

ii. Claims arise under Article I, Section 1 of the Wisconsin Constitution

1. Life and liberty – individual right to choose whether and when to have children & to access reproductive healthcare
2. Equal protection – individual right to choose whether and when to have children & to access reproductive healthcare
3. Equal protection – physicians' right to provide safe, effective, and desired medical care
4. Life and liberty – physicians' right to provide safe, effective, and desired medical care

iii. "Our constitution was written independently of the United States Constitution and we must interpret it as such, based on its own language and our state's unique identity. When we do so, there are several compelling reasons why we should read Article I, Section 1 as providing broader protections for individual liberties than the Fourteenth Amendment." *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶ 50, 411 Wis. 2d 389, 425, 5 N.W.3d 238, 255, *cert. denied sub nom. A.M. B. v. McKnight*, 145 S. Ct. 1051, 220 L. Ed. 2d 382 (2025) (Dallet, J., concurring)

iv. Wisconsin Supreme Court accepted the Petition for Original Action on July 2, 2024, but as of May 30, 2025, the Court has not issued a briefing schedule or taken further action.

v. Current status: awaiting action from the Supreme Court.

e. Many other state statutes regulate abortion

i. Wis. Stat. § 940.15, Abortion

**(1)** In this section, "viability" means that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him or her, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support.

**(2)** Whoever intentionally performs an abortion after the fetus or unborn child reaches viability, as determined by reasonable medical judgment of the woman's attending physician, is guilty of a Class I felony.

**(3)** Subsection (2) does not apply if the abortion is necessary to preserve the life or health of the woman, as determined by reasonable medical judgment of the woman's attending physician.

**(4)** Any abortion performed under sub. (3) after viability of the fetus or unborn child, as determined by reasonable medical judgment of the woman's attending physician, shall be performed in a hospital on an inpatient basis.
**(5)** Whoever intentionally performs an abortion and who is not a physician is guilty of a Class I felony.
**(6)** Any physician who intentionally performs an abortion under sub. (3) shall use that method of abortion which, of those he or she knows to be available, is in his or her medical judgment most likely to preserve the life and health of the fetus or unborn child. Nothing in this subsection requires a physician performing an abortion to employ a method of abortion which, in his or her medical judgment based on the particular facts of the case before him or her, would increase the risk to the woman. Any physician violating this subsection is guilty of a Class I felony.
**(7)** Subsections (2) to (6) and s. 939.05, 939.30 or 939.31 do not apply to a woman who obtains an abortion that is in violation of this section or otherwise violates this section with respect to her unborn child or fetus.

ii. Also:
    1. Section 940.16, "partial-birth abortion"
    2. Section 253.105, medication abortion
    3. Section 253.095, physicians' admitting privileges
    4. Section 253.107, 20-week ban
    5. Section 253.10, waiting period, informed consent, and other information

IV. Implications for medical care providers (Abby)
  a. Uncertainty creates risk for providers and patients
  b. "Absence of legal clarity surrounding the 1849 law led to confusion and wide variations in institutional comfort and clinical practice, which resulted in substandard, delayed, and fragmented patient care. Overwhelmingly, the threat of criminalization after *Dobbs* exacerbated barriers for physicians providing comprehensive pregnancy care and patients seeking it." Cutler AS, Hale CM, Bennett E, Jacques L, Higgins J. Experiences of Obstetrician-Gynecologists Providing Pregnancy Care

After *Dobbs*. *JAMA Netw Open*. 2025;8(3):e252498. doi:10.1001/jamanetworkopen.2025.2498.

c. Concerns include:
    i. Meeting standard of care
    ii. Licensure issues
    iii. Malpractice insurance
    iv. Prosecution

**Resources:**

- Cutler AS, Hale CM, Bennett E, Jacques L, Higgins J. *Experiences of Obstetrician-Gynecologists Providing Pregnancy Care After Dobbs*. JAMA Netw Open. 2025;8(3):e252498. doi:10.1001/jamanetworkopen.2025.2498.
- *State and Federal Reproductive Rights and Abortion Litigation Tracker*, KFF (updates regularly), https://www.kff.org/report-section/state-and-federal-reproductive-rights-and-abortion-litigation-tracker-federal-litigation/.
- *After Roe Fell: Abortion Laws by State*, Center for Reproductive Rights, http://reproductiverights.org/maps/abortion-laws-by-state/.
- James R. Jolin, *A Brief History of Abortion Jurisprudence in the United States*, Bill of Health, https://blog.petrieflom.law.harvard.edu/2022/06/09/a-brief-history-of-abortion-jurisprudence-in-the-united-states/

# Reproductive Rights Update: In Wisconsin and Nationwide

Presented by the Civil Rights and Liberties Section of the State Bar of Wisconsin

State Bar of Wisconsin Annual Meeting

Friday, June 20, 2025

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## Presenters

- Michelle Velasquez, Planned Parenthood of Wisconsin (panelist)
- Dr. Abigail Cutler, UW School of Medicine and Public Health (panelist)
- Diane Welsh, Pines Bach LLP (panelist)
- Elizabeth Pierson, Pines Bach LLP (moderator)

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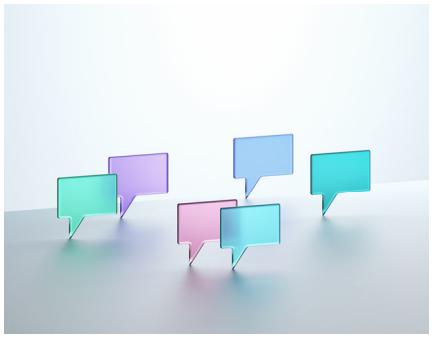
## What we'll discuss:

- How we got here: a brief review of ***Dobbs v. Jackson Women's Health Organization***
- Recent and pending federal cases, actions
- Wisconsin law and pending litigation
- Implications for medical providers, patients



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## A Brief Review of Dobbs:

*Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022)

- **Overturned *Roe v. Wade* and *Planned Parenthood v. Casey,* 6-3**
- Holdings:
  - U.S. Constitution does not create a right to abortion.
  - *Stare decisis* does not save *Roe* and *Casey*.
  - New standard for challenges to state abortion regulations: **rational basis review**.
- Thomas concurred and said he'd go farther; Roberts concurred and said he wouldn't have gone as far.
- Breyer, Sotomayor, and Kagan dissented.
- States are now left to regulate abortion.

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# Medication Abortion

*FDA v. Alliance for Hippocratic Medicine*

- Summary of Case
- Issues presented to SCOTUS
- SCOTUS Decision
- What Next?

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## Summary of Case:

- Attempt to remove common medication for abortions from the market in all 50 states following FDA approval & deregulation of mifepristone.
- Issues presented to SCOTUS:

1. Whether respondents have Article III standing to challenge FDA's 2016 and 2021 actions.

2. Whether FDA's 2016 and 2021 actions were arbitrary and capricious.

3. Whether the district court properly granted preliminary relief.

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## SCOTUS Decision:

- **Reversed and remanded, 9-0.** *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 144 S.Ct. 1540 (2024).
- "Under Article III of the Constitution, a plaintiff's desire to make a drug less available *for others* does not establish standing to sue." 602 U.S. 367 at 373.
- Rejected all three standing theories:
  - Conscience injuries to doctors ✖
  - Monetary and related injuries ✖
  - Associational standing ✖
- Mifepristone remains available. ✓

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## Access to Emergency Care Under EMTALA
## *Idaho v. United States*, *Moyle v. United States*

- Background on EMTALA
- Summary of Cases
- Issues presented to SCOTUS
- SCOTUS Decision
- What Next?

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## Background on EMTALA and impact of *Dobbs*

- Emergency Medical Treatment and Labor Act (EMTALA) was passed in 1986
- This federal law requires hospitals that receive Medicare funds to provide stabilizing treatment to patients in emergency situations.
  - This includes emergency abortion care.
  - An emergency under EMTALA need not rise to risk of death.

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## . . . EMTALA and *Dobbs*

- Some politicians in states with broad abortion bans have used *Dobbs* to argue that emergency abortions are no longer available to pregnant people facing medical emergencies
- Hospitals and doctors feared providing care required under EMTALA
- DHHS guidance affirmed emergency abortion care must be provided

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## Summary:

- Dispute over the interaction of Idaho's broad abortion ban and EMTALA.
- EMTALA has long been interpreted to require abortion care if needed to resolve an emergency.
- The stakes for doctors:
  - "Criminal abortion shall be a **felony punishable by a sentence of imprisonment of no less than two (2) years and no more than five (5) years in prison.** The professional license of any health care professional who performs or attempts to perform an abortion or who assists in performing or attempting to perform an abortion in violation of this subsection shall be suspended by the appropriate licensing board for a minimum of six (6) months upon a first offense and shall be permanently revoked upon a subsequent offense." Idaho Code Ann. § 18-622 (West).

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## Summary of *Idaho v. United States*:

- U.S. DOJ initiated litigation to block Idaho ban, to the extent the ban was in conflict with EMTALA
- District Court granted preliminary injunction;
- 9th Circuit stayed injunction, then reversed stay *en banc*;
- SCOTUS granted Idaho's applications for stay of district court injunction, granted certiorari review and consolidated the cases.

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## Issues Presented to SCOTUS:

1. From Idaho's application for a stay of the injunction: Does EMTALA preempt Idaho's Defense of Life Act?

2. Raised later: Can Congress, in reliance on the spending clause, obligate recipients of federal funds to violate state criminal law? (per Justice Barrett)

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## SCOTUS Decision:

- *Moyle v. United States*, 603 U.S. 324 (2024)
- Dismissed the petition for writ of certiorari as improvidently granted.
- This leaves ambiguous the interplay of EMTALA and state abortion bans.
- One-sentence per curiam order – but 34 pages of concurrences and dissents

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## What Next?

- Case returns to 9th Circuit
  - Further proceedings
  - Reinstates District Court Order blocking enforcement of Idaho ban to the extent the ban conflicts with EMTALA
  - Allows Idaho physicians to provide abortion care when necessary to stabilize the health of pregnant patients who present to a hospital emergency department
- Issue may return to SCOTUS
- ***Adkins v. Labrador***: some additional clarity gained through state court litigation

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## What about Wisconsin?

- After *Dobbs*, some, including DAs and those running for statewide office, assumed/asserted that an 1849 law effectively banning abortion came into effect
- Many other laws govern abortion in Wisconsin
- Court challenges followed

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## Kaul v. Urmanski

- 2023AP2362
- Attorney General Kaul's challenge to the 1849 ban
- Circuit court: the law is a feticide statute, not an abortion ban
- Issues before SCOW:
  - Has subsequent legislation superseded and repealed section 940.04?
  - Is section 940.04 a feticide statute?
- SCOW: heard oral arguments November 11, 2024
- Awaiting decision (as of May 30, 2025)

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## Planned Parenthood of Wisconsin v. Urmanski

- 2024AP330
- Original action filed by PPWI, physicians, and individuals challenging the 1849 ban
- Seeks recognition of state constitutional right to abortion
- Court granted petition for original action in July 2024 but has taken no further action

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## What's the point of a state constitutional claim?

- "Our constitution was written independently of the United States Constitution and we must interpret it as such, based on its own language and our state's unique identity. When we do so, there are several compelling reasons why we should read Article I, Section 1 as providing broader protections for individual liberties than the Fourteenth Amendment."

*Matter of Adoption of M.M.C.*, 2024 WI 18, ¶ 50, 411 Wis. 2d 389, 425, 5 N.W.3d 238, 255, *cert. denied sub nom. A.M. B. v. McKnight*, 145 S. Ct. 1051, 220 L. Ed. 2d 382 (2025) (Dallet, J., concurring)

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## Questions?

**Presentation by:**
Diane Welsh, Michelle Velasquez, Dr. Abigail Cutler, and Elizabeth Pierson

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