



SUPREME COURT

On June 24, the Supreme Court overturned the core reproductive rights cases *Roe v. Wade* and *Planned Parenthood v. Casey* in a 6-3, revoking a constitutional right that existed for 50 years.

The decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ granted states the full power to legislate any aspect of abortion rights not preempted by federal law. The decision brought trigger laws banning abortion into effect in 13 states. Several additional states had passed abortion bans which were blocked by the courts.

The immediate impact this unprecedented rollback of civil rights had is difficult to overstate. However, the implications extended far beyond the 52% of women of childbearing age in the US who were deprived of long-standing rights almost overnight.

For women who live in states with laws banning abortion, fears of digital surveillance, including by telecoms, health and period-tracking apps, and license plate cameras are real and justified.

Lydia Brown, policy counsel with the Center for Democracy and Technology said people are right to be concerned about what could happen when private corporations or government entities can access personal data, "especially when that data could put people in vulnerable and marginalized communities at risk for actual harm."

Andrea Ford, a research fellow at the University of Edinburgh, said "It becomes really muddy when you get into abortion." Ford asks, when abortion is outlawed in some states, "does that transcend the right to privacy that is written into the contracts in the way that child trafficking would?"

The potential decline of civil liberties resulting from the Court's decision doesn't end there.

In his concurring opinion, Justice Clarence Thomas indicated that other

rights were now also up for reconsideration, including same-sex marriage, which was granted in the Supreme Court's 2015 decision in *Obergefell v. Hodges*, 567 U.S. 644.

Thomas asserted that since the Court determined that the constitution's Due Process Clause does not secure any other rights in the *Dobbs v. Jackson Women's Health Organization* decision, that logic should apply elsewhere.

"In future cases," wrote Thomas, "we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."

The Supreme Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965) held that the Constitution granted married couples the right to purchase and use contraceptives.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court ruled that most so-called "sodomy laws" which provided for criminal punishment for consensual, adult, non-procreative sexual activity were unconstitutional.

In their dissent, Justices Elena Kagan, Sonia Sotomayor, and Stephen Breyer cautioned that, "No one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation . . . They are all part of the same constitutional fabric, protecting autonomous decision making over the most personal of life decisions."

The dissenting opinion concluded, "Either the mass of the majority's opinion is hypocrisy or additional constitutional rights are under threat. It is one or the other."

Reported in: *The Washington Post*, June 24, 2022, and June 26, 2022; *The Hill*, June 24, 2022; NPR, June

24, 2022; *The New York Times*, July 13, 2022.

On June 27, the Supreme Court ruled 6-3 that the Bremerton School District violated the First Amendment rights of high school football coach Joe Kennedy when it opted not to renew his contract for praying at the 50-yard line after games.

In their decision in *Kennedy v. Bremerton School District*, 597 U.S. ___ (2022), the Court effectively overturned *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and its prescribed test to evaluate whether or not government actions were in compliance with the establishment clause of the First Amendment.

The so-called "Lemon test" held that the government should not do anything that might signal to religious dissenters that they are outsiders.

Lawyers for the district argued that Kennedy's prayer practice was not personal, but undertaken in full view of students as part of a school event. The district offered Kennedy a place to pray off the field, but Kennedy refused this accommodation.

In her dissent, Justice Sonia Sotomayor wrote that, "the District emphasized that it was happy to accommodate Kennedy's desire to pray on the job in a way that did not interfere with his duties or risk perceptions of endorsement."

According to Richard Katskee, a lawyer for Americans United for Separation of Church and State, Kennedy instead "insisted on audible prayers at the 50-yard line with students . . . [and] announced in the press that those prayers are how he helps these kids be better people."

Sotomayor asserted that coaches serve as role models and students seeking coach Kennedy's approval and a stronger letter of recommendation for college recruiting would be inclined to follow the behavior he modeled. "The



record before the Court bears this out,” wrote Sotomayor.

Justice Neil Gorsuch said that students “were not required” to join Kennedy in prayer and rejected concerns shared by parents that their students felt “coerced” to do so.

Justices Elena Kagan and Stephen Breyer joined Sotomayor in dissenting.

Reported in: CNN, June 27, 2022; *Education Next*, June 27, 2022.

On May 2, the Supreme Court unanimously ruled that the city of Boston violated the First Amendment when it refused an application to fly a Christian flag on a flagpole in front of city hall in September 2017. In the past 12 years, the city had approved 284 requests to use the flagpole and had only denied the one made by Camp Constitution.

The crux of *Shurtleff v. City of Boston*, 596 U.S. ___ (2022) was whether or not flags flown on that particular pole represented private speech in a public forum or government speech.

The court determined that the flags flown on the communal pole did not constitute speech of the city. Subsequently, allowing a group to raise a religious flag would not violate the establishment clause of the First Amendment.

In his opinion, Justice Stephen Breyer wrote that the city created a public forum by allowing private groups to use its flagpole, so the city’s refusal to allow “Camp Constitution [to] fly their flag based on its religious viewpoint violated the free speech clause of the First Amendment.”

Justice Samuel Alito wrote that “Government speech occurs if, but only if, a government purposefully expresses a message of its own through persons authorized to speak on its behalf.”

Reported in: *The New York Times*, May 2, 2022; *SCOTUSblog*, May 2, 2022.

CIVIL RIGHTS Nationwide

On June 21, the US District Court for the Northern District of California quashed a subpoena to reveal the identity of an anonymous Twitter user on the grounds of copyright infringement.

Anonymous Twitter user, @CallMeMoneyBags, criticized private-equity billionaire Brian Sheth in a series of six tweets accompanied by photos.

On October 29, 2020, days after the tweets were posted, Bayside Advisory LLC petitioned Twitter under the Digital Millennium Copyright Act (DMCA) to take the posts down claiming they had copyright ownership of the photos.

On November 2, Bayside registered its copyrights to the photos. Twitter consented to take down the photos, but left the tweets. Bayside then obtained a subpoena under the DMCA for Twitter to disclose information identifying the operator of the @CallMeMoneyBags account.

Twitter filed a motion to quash the subpoena, arguing that it would violate the First Amendment rights of the account owner to do so.

In the opinion for case 20-mc-80214-VC, Judge Vince Chhabria quoted *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995), that an “author’s decision to remain anonymous, like other decisions concerning omissions or additions to the contents of a publication, is an aspect of the freedom of speech protected by the First Amendment.”

Chhabria explained that “to defeat Twitter’s motion to quash, Bayside must first state a prima facie case of copyright infringement. If it can do so, the Court must weigh the potential harm to Bayside if the subpoena is not enforced against the potential harm to MoneyBags if his identity were revealed to Bayside.”

Chhabria determined that Bayside failed to establish a prima facie case of copyright infringement.

Finally, Chhabria wrote that, “even if Bayside had made a prima facie showing of copyright infringement, the Court would quash the subpoena in a heartbeat.”

In their write-up of the case, the Electronic Frontier Foundation stated that “The reality is that copyright law is often misused to silence lawful speech or retaliate against speakers.” They celebrated the District Court’s decision, which “ensures that DMCA subpoenas cannot be used as a loophole to the First Amendment’s protections.”

Reported in: Electronic Frontier Foundation, June 21, 2022.

On July 8, the 9th US Circuit Court of Appeals upheld most of the Arizona Department of Corrections, Rehabilitation, and Reentry’s (ADCRR) policy banning inmates from accessing sexually explicit materials.

In the opinion in *Prison Legal News v. Charles L. Ryan* (2:15-cf-02245-ROS), Judge Eric Miller wrote that banning “content that graphically depicts nudity or sex acts” was allowable as it helps the administration “mitigate prison violence.”

The Human Rights Defense Center, which publishes *Prison Legal News*, claimed the prohibition violated inmates’ First Amendment rights and was “not rationally related to [ADCRR’s] stated goals of rehabilitation, reduction of sexual harassment, and prison security.”

Prison Legal News is sent to inmates in more than 3,000 institutions nationwide. Starting in 2014, issues that contained court documents detailing correctional officers sexually assaulting inmates were redacted or withheld from distribution in Arizona prisons.

In her now-overturned 2019 ruling, Judge Roslyn Silver found that



ADCRR's policy "violates the First Amendment on its face."

The 9th US Circuit Court of Appeals did find that the part of the policy prohibiting content "that may, could reasonably be anticipated to, could reasonably result in, is or appears to be intended to cause or encourage excitement or arousal or hostile behaviors, or that depicts sexually suggestive settings, poses, or attire," was overly broad.

The court also found that "mere mentions of sexual violence," such as that which was included in coverage of a New Mexico prison riot in *Prison Legal News*, should not have been censored.

(See: *Journal of Intellectual Freedom and Privacy, v.6 iss.2: Censorship Deadline: Prisons: Florence, Arizona*).

Reported in: *Cronkite News*, July 8, 2022.

EBOOKS

On June 13, the US District Court for the District of Maryland found that a law requiring book publishers to offer public libraries reasonable licensing fees for ebooks and digital audiobooks was "unconstitutional and unenforceable because it conflicts with and is preempted by the Copyright Act."

In *Association of American Publishers, Inc. (AAP), v. Brian E. Frosh* (DLB-21-3133), AAP argued that Maryland's

law interfered with publishers' rights to decide how to distribute their works. While other state legislatures are considering similar bills, at the time Judge Deborah Boardman made the ruling, it was the only such statute in effect.

The law was intended to protect libraries from being overcharged by publishers to license ebooks. Libraries are often charged as much as three times what consumers pay for the same ebook licenses. It passed in May, 2021, and was scheduled to go into effect in January. AAP filed a lawsuit to block it in December, 2021, and received a preliminary injunction on the law on February 16.

Reported in: *Reuters*, June 14, 2022.