US Supreme Court draft order would reinstate emergency abortions in Idaho

Decisions also filed Wednesday reject right-wing challenge to government pressure on Facebook and hold that gratuities paid after official acts are not bribes

John Burton
26 June 2024

On Wednesday afternoon, the US Supreme Court temporarily posted a draft order that would dismiss Idaho's writ of certiorari challenging a lower court injunction against its prohibition of emergency abortions deemed necessary for the health of the mother, although perhaps not necessary to save her life.

The draft order would dissolve the Supreme Court stay entered on January 5, thus restoring the discretion of emergency medical providers to perform medically necessary abortions in federally-funded hospitals.

Patricia McCabe, the Supreme Court's public information officer, later announced that "The court's publications unit inadvertently and briefly uploaded a document to the court's website," and that a final opinion in *Idaho v. United States* "will be issued in due course."

The 22-page document, which was downloaded by Bloomberg News and made available, reflects a 6-3 vote that certiorari was "improvidently granted," which usually is interpreted to mean that after taking a closer look at the record, a majority of justices determined that further facts should be developed in the lower courts before the Supreme Court decides the case.

The draft order has separate concurring opinions by moderate Justice Elena Kagan, joined by Sonia Sotomayor and Ketanji Brown Jackson, and by conservative Amy Coney Barrett, joined by Chief Justice John Roberts and Justice Brett Kavanaugh. Jackson issued a separate opinion, concurring in part and dissenting in part. Extreme right-wing Justice Samuel Alito dissented, joined by fellow ultra-reactionaries Clarence Thomas and Neil Gorsuch.

Unlike the deliberately leaked draft opinion by Alito in *Dobbs v. Jackson Women's Health Organization* that would later become final and overrule the constitutional right to abortion access established by *Roe v. Wade* in 1973, the temporarily posted document is not properly formatted, and Alito's dissent is obviously incomplete. There is no reason to doubt, however, that with perhaps a few modifications the ruling and text will soon become final.

The case has an unusual history. After the *Dobbs* decision two years ago, the far-right Idaho state government enacted a prohibition against all abortions not deemed medically necessary to prevent a woman's death. Seeking to capitalize on popular support for abortion access, the Biden administration sued Idaho under the Emergency Medical Treatment and Labor Act (EMTALA), which covers hospitals that receive federal funds. An Idaho federal court issued an injunction that would protect those abortions medically necessary to stabilize patients and prevent grave harm short of death, such as the loss of a uterus.

That injunction remained in effect for more than a year, but while under review in the Ninth Circuit Court of Appeals, the Supreme Court suddenly granted Idaho's emergency petition for certiorari and stayed the injunction, activating the state prohibition and triggering chaos in Idaho emergency rooms. Over the last six months, the state's largest emergency care provider has airlifted pregnant women out of state roughly every other week rather than risk providing them medical treatment that may later be deemed unnecessary to prevent their death.

While dismissal of the certiorari petition would revive the lower court injunction and alleviate the immediate crisis in Idaho hospitals, there will be no decision on the merits and therefore no precedent to protect women in other states, such as Texas, which have similar prohibitions.

The Supreme Court's dodge is reminiscent of its June 13 dismissal of the case brought by anti-abortion doctors

against the distribution of mifepristone, the abortion inducing medication, because of a technical lack of standing, illustrating the tightrope some Republicans are trying to walk between the overwhelming popular support for abortion access and the anti-abortion fanatics who comprise much of the party's fascistic base.

Justice Jackson's draft concurrence rips the majority for "put[ting] off the decision," rhetorically asking "how long must pregnant patients wait for an answer?"

Jackson wrote:

> After today, there will be a few months—maybe a few years—during which doctors may no longer need to airlift pregnant patients out of Idaho. But having not heard from this Court on the ultimate pre-emption issue, Idaho's doctors will still have to decide whether to provide emergency medical care in the midst of highly charged legal circumstances with no guarantee that this fragile detente over the State's categorical prohibitions will be maintained.
>
> And for as long as we refuse to declare what the law requires, pregnant patients in Idaho, Texas, and elsewhere will be paying the price.

Alito, in a sense, agreed, writing, "That question is as ripe for decision as it ever will be." Obviously referring to the popular outrage over *Dobbs*, he added, "Apparently, the court has simply lost the will to decide the easy but emotional and highly politicized question that the case presents. That is regrettable."

Also on Wednesday, the Supreme Court formally issued 6-3 decisions in two of its remaining 12 cases, leaving another nine pending. There are three cases involving federal regulatory powers, two raising the control by individual states over internet content, one dealing with the Purdue Pharma bankruptcy settlement, one concerning whether the unhoused can be arrested for sleeping in public, another on whether obstruction charges can be brought against January 6 insurrectionists, and finally Trump's claim to be immune from prosecution for crimes he committed while president.

In *Murthy v. Missouri*, an opinion by Justice Barrett joined by Roberts, Kavanaugh and the three moderates, the Supreme Court ruled that the plaintiffs had no standing to challenge the federal government's alleged collaboration with Facebook to censor the posting of COVID-19 misinformation and alleged 2020 election lies, principally the contents of Hunter Biden's laptop.

The plaintiffs included signatories to the infamous "Great Barrington Declaration," which advocated for murderous herd immunity policies during the first year of the pandemic, Jim Hoft, the founder of the Gateway Pundit conspiracy website, and the states of Louisiana and Missouri.

Describing the dispute as "one of the most important free speech cases to reach this Court in years," Alito penned a mammoth 33-page dissent, joined by Thomas and Gorsuch, which blames COVID-19 on a laboratory leak in Wuhan, China, and questions the efficacy and safety of vaccines.

While the ruling is being heralded as a major win for the Biden administration and a setback for conspiracy-obsessed serial liars of the ultra-right, the rigid application of the constitutional requirement that a plaintiff must show a cognizable injury before suing against government-instigated internet censorship can be used to derail challenges by socialists and others who use social media to oppose the status quo.

Finally, in *Snyder v. United States*, the six-justice right-wing majority united to overturn the bribery conviction of James Snyder, a former mayor of Portage, Indiana, who received $13,000 for "consulting" after steering more than $1 million in city contracts to a local truck dealership.

Kavanaugh wrote that the federal bribery statute, 18 USC § 666, does not prohibit "gratuities ... that may be given as a token of appreciation after the official act." One does not know whether to laugh or cry given the recent exposure of millions in "gratuities" doled out to Clarence Thomas.

Jackson dissented, joined by Kagan and Sonia Sotomayor. In what could be interpreted as a dig at the Thomas corruption scandal, Jackson wrote that the majority's distinguishing of "gratuities" from outright bribes was an "absurd and atextual reading of the statute" that "only today's court could love."