

In the Supreme Court of Rhode Island

No. SU-2020-0066-A

MICHAEL BENSON, ET ALS, PLAINTIFFS-APPELLANTS,

V.

DANIEL MCKEE, ET. ALS DEFENDANTS-APPELLEES

*ON APPEAL FROM A JUDGMENT ENTERED
IN THE SUPERIOR COURT, PROVIDENCE COUNTY
NO. PC-2019-6761
(MELISSA DARIGAN, J.)*

PLAINTIFFS-APPELLANTS' MEMORANDUM IN SUPPORT OF THEIR PETITION FOR REARGUMENT

Plaintiffs seek reargument of this case, decided by this Court on May 4, 2022. The circumstances underlying this request are, to say the least, somewhat unique.

In this Court's decision in this case, the Court determined that the Unborn Plaintiffs lacked standing because, after the United States Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Benson v. McKee*, No. SU-

2020-0066-A, slip op. at 17 (R.I. filed May 4, 2022) (quoting *Roe v. Wade*, 4410 U.S. at 158). Based on *Roe*, this Court concluded that “the unborn persons fail to assert a legally cognizable and protected interest as persons . . .” *Benson*, slip op at 17. As the Court noted in *Benson*, state law is subordinate to the United States Constitution. Thus, the United States Supreme Court’s holding in *Roe* was binding on this Court here.

But there is now good reason to question how much longer *Roe* – and its progeny, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) – remain binding on this Court. In December 2021 the United States Supreme Court heard oral argument in *Dobbs v. Jackson Womens’ Health Organization*, No. 19-1392 (U.S. argued and submitted December 1, 2021). On May 2, 2022, the *Politico* website reported that it had obtained a “leaked” copy of a draft opinion for the Court in *Dobbs* overruling *Roe* and *Casey*.¹ The *Politico* article contained what appeared to be a draft opinion for the Court by Justice Alito, joined by at least four other Justices, squarely overruling *Roe*. Any doubts about the authenticity of the draft were resolved the following day, when Chief Justice Roberts issued a public statement identifying the leaked draft as “authentic,” but

¹ J. Gerstein & A. Ward, “Supreme Court has voted to overturn abortion rights, draft opinion shows,” *Politico* (May 2, 2022) <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473?cid=apn>.

noting that it is still just a draft and “it does not represent a decision by the Court or the final position of any member on the issues in the case.” Statement of Chief Justice Roberts, May 3, 2022.²

The Chief Justice’s disclaimer notwithstanding, the question presented in *Dobbs* implicates the status of *Roe*’s precedential force. *Dobbs*, having been argued in December 2021, will almost certainly be issued by late June or early July of this year, well in advance of this Court’s 2022-23 Term. Because the significance of the leaked draft is nearly impossible to ignore, Plaintiffs-Appellants suggest that this Court should grant reargument in this case so that the parties and the Court can assess the eventual outcome of *Dobbs* and address its effect on *Roe* and, ultimately, this case.

This Court’s opinion in this case also rejected the Unborn Plaintiffs’ standing to challenge the repeal of R.I. Gen. L. sec. 11-3-4 (repealed, P.L. 2019, ch. 27, sec. 2). Sec. 11-3-4 had provided “that human life commences at the instant of conception and that said human life at said instant of conception is a person within the language and meaning of the fourteenth amendment of the constitution of the United States . . . ” *Id.* Because sec. 11-3-4 had been declared unconstitutional by the United States District Court in *Doe v. Israel*, 482 F.2d 156

² Available at https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-22

(D.R.I. 1973), this Court in this case opined that “at the time the RPA was enacted the unborn plaintiffs had no legal rights or status under chapter 3 of title 11.” *Benson*, slip op. at 17. But *Doe v. Israel* depended entirely on *Roe*. If, as appears likely, *Roe* is overruled, then the premise of *Doe v. Israel* evaporates and this Court’s reliance upon it should be reconsidered. Under this Court’s *de novo* standard of review for Rule 12 motions, these matters should be reconsidered in light of the potential overruling of *Roe*.

In addition, Plaintiffs-Appellants’ complaint set forth claims sounding in the United States Constitution’s Fifth and Fourteenth Amendments. To the extent that *Dobbs* evinces a change in the landscape – and the potential rights of unborn persons under those Amendments – this Court should reconsider the decision in this case.

Plaintiffs-Appellants recognize, as Chief Justice Roberts expressed it, that the “leak” of the draft opinion in *Dobbs* was an appalling betrayal of the confidences of the United States Supreme Court. But because this Court deemed *Roe* controlling on the issues in this case, and given *Roe*’s doubtful survival, Plaintiffs-Appellants are compelled to seek to address this changing landscape to present this Court with an opportunity to respond to it.

Plaintiffs-Appellants respectfully request that the Petition for Reargument be granted and the matter be set down for further briefing and argument after the

United States Supreme Court releases the decision in *Dobbs*. Alternatively, this Court may wish to defer consideration of this Petition until the ruling in *Dobbs* comes down and if, as anticipated, the Court overrules or greatly curtails *Roe*, the petition ought at that time to be granted.

RESPECTFULLY SUBMITTED,
PLAINTIFFS-APPELLANTS,
BY THEIR ATTORNEYS:

/s/Thomas More Dickinson (No. 2520)

Law Office of Thomas M. Dickinson
1312 Atwood Ave.
Johnston, RI 02919
Tel. 401-490-8083
Email: tmd@appealRI.com

/s/Diane Messere Magee (No. 5355)

Diane Messere Magee
Law Office of Diane Messere Magee, Inc.
572 Main St.
Warren, RI 02885
Tel. 401-245-8550
Email: DMMageeLaw@aol.com

CERTIFICATION

I hereby certify that a copy of this document was served on counsel for all parties entitled thereto via this Court's e-file & serve system.

Attorney Michael Field

Attorney Andrea Shea

Attorney Lynette Labinger

Attorney Raymond Marcaccio

In accordance with Rule 18(h)(1), nine paper copies of the within document will be filed with the Clerk within five days after notice of acceptance of it.

/s/Thomas More Dickinson (No. 2520)

Law Office of Thomas M. Dickinson

1312 Atwood Ave.

Johnston, RI 02919

Tel. 401-490-8083

Email: tmd@appealRI.com

Date: May 16, 2022