

APRIL 2024 SNAPSHOT: Anti-Abortion Policymaking

Understanding the tactics anti-abortion policymakers are using across the country is crucial in addressing attempts to restrict access to healthcare and stopping those who seek or perform abortions. CWLC has been tracking national legislation, ballot referenda and litigation on anti-abortion policymaking since the 2022 *Dobbs v. Jackson Women's Health* decision in an effort to better understand the overarching strategy of anti-abortion advocates.

LEGISLATIVE AND POLICY MEANS TO RESTRICT ABORTION

Banning abortion

- ▶ As of early 2024, **14 states** have a total ban and/or criminalize abortion, and ten additional states have laws heavily restricting abortion.¹
- ▶ Legislators throughout abortion-hostile states are introducing and passing legislation that criminalizes abortion providers, seekers, and those who assist them. The most common means to criminalize the procedure is to penalize abortion providers, as this limits access and often forces women seeking abortions to travel across states to find comprehensive reproductive care.
- ▶ But some states *are* criminalizing women. Specifically, in **Alabama**, although a bill that would have made women who get abortions guilty of murder failed, the state Attorney General greenlit the use of "chemical endangerment of a child" laws to criminalize women.²

Restricting abortion access

- ▶ Some states do not have total abortion bans, but heavily restrict the procedure, making it virtually inaccessible. At least seven states enforce abortion bans after a certain number of gestational weeks.³
 - **Montana:** narrowed the scope of the state's constitutional right to privacy so that abortion is not included in its protections.⁴
- ▶ Often, legislators will introduce abortion bans that contain "exceptions" for things like rape, incest, or severe harm to the mother, but the exceptions are unclear and often ineffective. For example:
 - **Louisiana:** current law allows abortion in certain cases when a pregnant patient's life or health may be at risk, but even after physicians criticized the

bill language which limited their ability to provide medical care, the state legislature stopped two bills intended to provide physicians with the clarity they needed.⁵

- **Texas:** Kate Cox, a **Texas** mother of two, sought an abortion after learning her baby was diagnosed with a genetic condition that caused severe developmental problems.⁶ Despite her doctor advising her of the necessity of an abortion for her health, the Texas Supreme Court determined she was not eligible for the state's abortion ban exception intended to cover "a serious risk of substantial impairment of a major bodily function."⁷ Cox had to flee the state to receive necessary medical care.
- ▶ Abortion Trafficking laws
 - The first abortion trafficking law passed in **Idaho** in 2023 (though it is temporarily on hold during a legal challenge).⁸ This makes it illegal to help a minor procure an abortion without parental consent, whether through medication or by leaving the state to receive an abortion.⁹
- ▶ Some other anti-abortion bills introduced in 2023 and 2024 legislative sessions include:
 - **Montana:** requiring prior authorization before Medicaid may pay for abortion services¹⁰
 - General prohibition of "dismemberment" abortions.¹¹
 - **Oklahoma:** institutes reporting requirements that can be used to create a database of people who have received abortions.¹²
 - **Kansas:** legislation to prohibit medication abortions.¹³

BALLOT INITIATIVES AND REFERENDA

When the people are given the chance to vote on abortion, they overwhelmingly choose to protect these rights. Since *Dobbs*, voters in six states have voted to protect reproductive decision making, to repeal archaic abortion bans, and to reject constitutional amendments that would deny the right to an abortion.¹⁴ At least **thirteen more states** currently have initiatives asking voters to decide whether to establish constitutional rights to abortion or declare that their state's constitution does *not* protect abortion.¹⁵

Anti-abortion policymakers are reacting to the pro-abortion ballot measure trend by trying to limit voters' access to the ballot initiative process altogether:

- ▶ The **Mississippi** legislature has worked on a bill to re-instate the ballot measure process in the state, but only if it could not be used to change abortion laws.¹⁶
- ▶ in **Ohio, Missouri, Florida, Oklahoma, and Utah**, legislatures have been proposing measures to increase the percentage of the vote needed for ballot initiatives to succeed in an effort to slow or prevent abortion-related measures from passing.¹⁷
- ▶ In **Florida**, a lawsuit was filed to prevent a pro-abortion ballot measure from reaching the voters by calling it "deceptive" in how far it will expand access to abortions.¹⁸

LITIGATION

The courts are a powerful tool in the anti-abortion effort. Across the country, activists strategically use the judicial system to advance an anti-abortion agenda:

- ▶ Reversing precedent that supported abortion:
 - In **Iowa**, the state Supreme Court reversed the fundamental right to an abortion passed by voters and added to their state Constitution just four years before.¹⁹
- ▶ Allowing abortion bans to take effect:
 - **Multiple states** had "trigger bans" (bans that automatically went into effect if *Roe v. Wade* was ever overturned) or otherwise passed anti-abortion legislation soon after the *Dobbs* decision. Quickly, many of these bans were challenged, opening the door to courts to uphold their validity. **South Carolina** and **Indiana**, among other states, had abortion bans approved by their state judiciary.²⁰
- ▶ Attacking healthcare access:
 - **EMTALA**: The federal Emergency Medical Treatment and Active Labor Act (EMTALA) requires certain hospitals stabilize patients in emergency circumstances, and the Department of Justice argues this preempts state abortion bans that do not allow pregnant women to access abortions in emergency situations.²¹ Two Idaho cases have been consolidated and the United States Supreme Court has agreed to rule on the issue this year.²²
 - **Abortion Pill Reversal**: Colorado passed a bill that relied on the recommendations of state healthcare officials to outlaw "Abortion Pill Reversal" (APR), a medically unverified process of providing high dosages of progesterone to people who have already taken the first dose of a medication abortion in an attempt to "reverse" the abortion process.²³ Although unsafe and unproven, APR is commonly promoted by people opposed to abortion; one organization offering APR has sued to prevent this law from going into effect, and a US District Judge has enjoined the law.²⁴
 - **Mifepristone**: Some anti-abortion advocates are attacking medication abortion by challenging the FDA's approval of Mifepristone (the first of two drugs in the medication abortion regimen) and its subsequent decisions to expand access.²⁵ The United States Supreme Court heard oral arguments on the case in March 2024.

ENDNOTES

- 1 *Abortion Laws by State*, Center for Reproductive Rights, <https://reproductiverights.org/maps/abortion-laws-by-state/>.
- 2 Shawna Mizella and Chris Boyette, *Alabama Attorney General Says People Who Take Abortion Pills Could Be Prosecuted*, CNN, <https://www.cnn.com/2023/01/12/politics/alabama-abortion-women-prosecution/index.html>.
- 3 *Abortion Laws by State*, *supra* n.1, Center for Reproductive Rights, <https://reproductiverights.org/maps/abortion-laws-by-state/>.
- 4 Jonathon Amarion, *Gianforte Signs Series of Bills Tightening Montana Abortion Restrictions*, KTVH, <https://www.ktvh.com/news/68th-session/gianforte-signs-series-of-bills-tightening-montana-abortion-restrictions>.
- 5 Anisha Kohli, *Doctors Are Still Confused by Abortion Exceptions in Louisiana. It's Limiting Essential Care*, TIME, <https://time.com/6282288/louisiana-abortion-exceptions-confusion-doctors/>.
- 6 Tracy Smith, *Texas mother Kate Cox on the outcome of her legal fight for an abortion: "It was crushing"*, CBS News, <https://www.cbsnews.com/news/kate-cox-on-her-legal-fight-for-abortion-trisomy-18/>.
- 7 *In re State of Texas*, et al., Texas Supreme Court case no. 23-0994, available at: <https://www.courthousenews.com/wp-content/uploads/2023/12/texas-supreme-court-ruling-cox-v-texas.pdf>.
- 8 Rebecca Boone, *Federal Judge Puts Idaho's 'Abortion Trafficking' Law on Hold During Lawsuit*, Associated Press, <https://apnews.com/article/idaho-abortion-trafficking-travel-ban-270a403d7b4a5e99e566433556614728>.
- 9 *Id.*
- 10 Montana's 68th Legislature, House Bill 544, 2023, <https://leg.mt.gov/bills/2023/billpdf/HB0544.pdf>.
- 11 Montana's 68th Legislature, House Bill 721, 2023, <https://leg.mt.gov/bills/2023/billpdf/HB0721.pdf>.
- 12 Oklahoma State Legislature, Bill Information for HB 3216, 2024, <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb3216&Session=2400>.
- 13 Kansas Legislature, Session of 2024, *House Bill No. 2492*, https://www.kslegislature.org/li/b2023_24/measures/documents/hb2492_00_0000.pdf.
- 14 Mabel Felix, Laurie Sobel, and Alina Salganicoff, *Addressing Abortion Access through State Ballot Initiatives*, Kaiser Family Foundation, <https://www.kff.org/womens-health-policy/issue-brief/addressing-abortion-access-through-state-ballot-initiatives/>.
- 15 *Id.*
- 16 Michael Goldberg, *Mississippi Ballot Initiative Proposal Would Not Allow Changes to Abortion Laws*, Associated Press, <https://apnews.com/article/mississippi-ballot-initiative-abortion-2da2169722fc76035d2200f9d3cc3e4c>.
- 17 Felix, et al., *supra* n.14.
- 18 Brendon Farrington, *Florida Asks State Supreme Court To Keep Abortion Rights Amendment Off The November Ballot*, via Public Broadcasting Service, <https://www.pbs.org/newshour/politics/florida-asks-state-supreme-court-to-keep-abortion-rights-amendment-off-the-november-ballot>.
- 19 *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 975 N.W.2d 710 (Iowa 2022).
- 20 *Planned Parenthood S. Atl. v. State*, No. 2023-000896 (S.C. Aug. 23, 2023); *Members of the Med. Licensing Bd. of Ind. v. Planned Parenthood N.W. Haw., Alaska, Ind., Ky.*, 214 N.E.3d 348 (Ind. 2023).
- 21 Sara Rosenbaum, *EMTALA Pregnancy Protections Versus State Abortion Bans: The Supreme Court Will Decide*, Health Affairs, <https://www.healthaffairs.org/content/forefront/emtala-pregnancy-protections-versus-state-abortion-bans-supreme-court-decide>.
- 22 *Id.*
- 23 *Facts Are Important: Medication Abortion "Reversal" Is Not Supported by Science*, The American College of Obstetricians and Gynecologists, <https://www.acog.org/advocacy/facts-are-important/medication-abortion-reversal-is-not-supported-by-science>.
- 24 Bente Birkeland, *Judge Blocks Colorado's Ban on Abortion Pill Reversal Treatments*, Colorado Public Radio, <https://www.cpr.org/2023/10/23/judge-blocks-colorados-ban-on-abortion-pill-reversal-treatments/>.
- 25 Pam Belluck and Abbie VanSickle, *The Abortion Pill Case: What's at Stake and What's Next*, *The New York Times*, <https://www.nytimes.com/article/supreme-court-abortion-pill-ruling.html#:~:text=After%20the%20Supreme%20Court%20overturned,pill%20withdrawn%20from%20the%20market>.