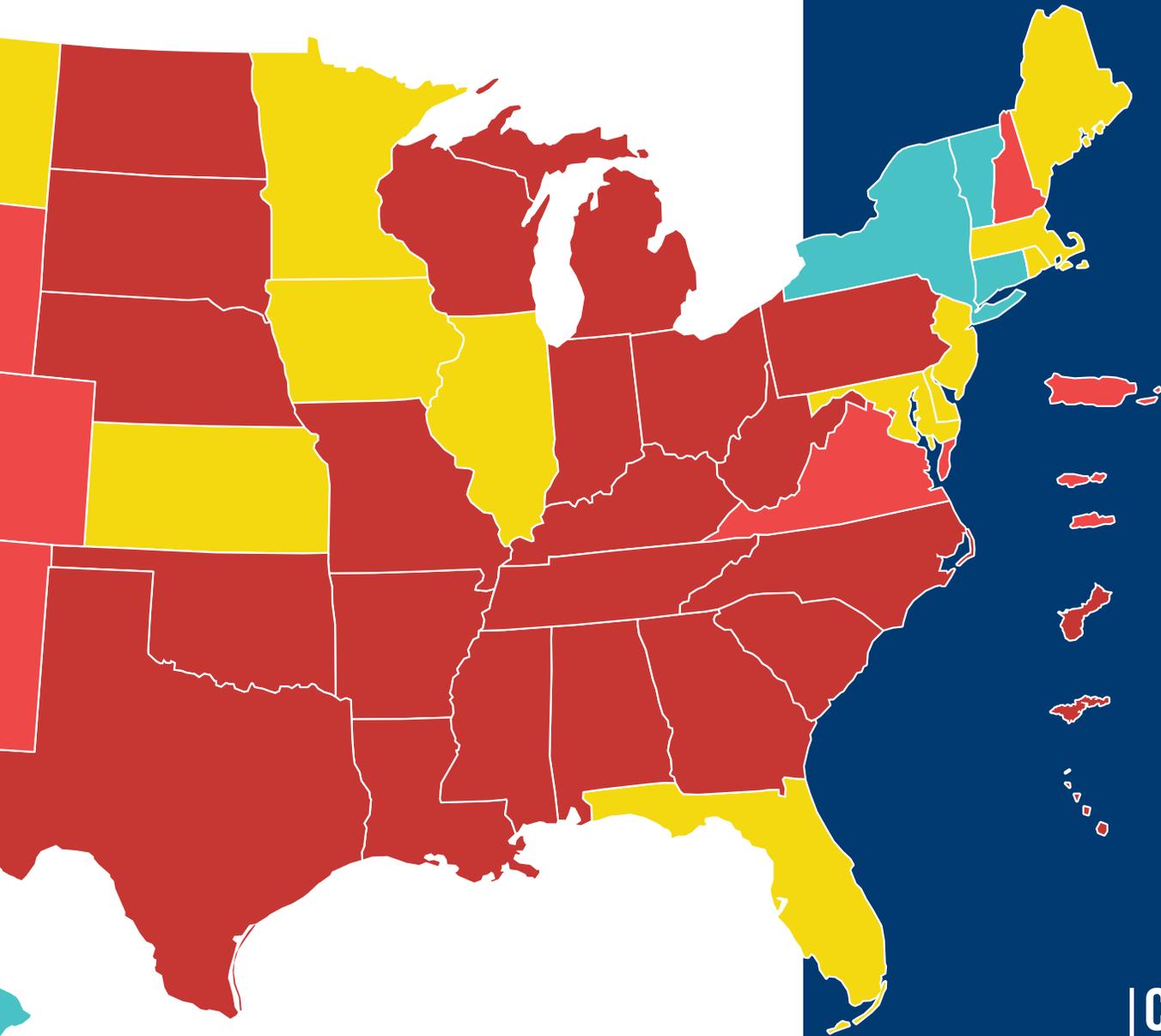


# What If *Roe* Fell 2019



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For more than 25 years, the Center for Reproductive Rights has used the power of law to advance reproductive rights as fundamental human rights around the world.

We envision a world where every person participates with dignity as an equal member of society, regardless of gender. Where every woman is free to decide whether or when to have children and whether to get married; where access to quality reproductive health care is guaranteed; and where every woman can make these decisions free from coercion or discrimination.

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# Letter from Nancy Northup

*Roe v. Wade*—the landmark Supreme Court case establishing abortion as a constitutional right—remains under constant attack. Within the past two years, the coordinated national campaign to dismantle *Roe* has escalated its efforts dramatically. President Trump promised that he would only nominate Supreme Court Justices who would overturn *Roe* and the Senate has now confirmed two of his nominees to our highest court. The Center for Reproductive Rights first published *What if Roe Fell?* in 2004 under similar circumstances—a sitting president committed to putting Justices on the Supreme Court who would overturn *Roe* and eviscerate abortion on a national scale. Fifteen years later, we are publishing our newest edition of this critical tool, as opponents of *Roe* further escalate efforts to outlaw abortion.

In the last decade, states have enacted over 450 restrictive abortion laws and, in 2019, numerous states enacted blatantly unconstitutional abortion bans as part of this coordinated strategy. If the Court were to limit or overturn *Roe*, it is likely that 24 states and three U.S. territories would attempt to prohibit abortion entirely. Abortions rights are protected by state law in only 21 states and no U.S. territories. In the remaining five states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, abortion may remain accessible but vulnerable without affirmative legal protection. With several abortion cases already seeking review at the Supreme Court and others making their way toward it, we now are facing an existential threat to reproductive rights.

Public discussion of abortion rights has focused on determining which states would prohibit or heavily restrict abortion access if allowed to do so by the Supreme Court. *What if Roe Fell?* provides our legal analysis of abortion law, state-by-state and territory-by-territory. We analyzed state constitutions, statutes, regulations, and court opinions in each of the fifty states, the District of Columbia, and the five most populous U.S. territories to answer this critical question: what would happen where you live if the Supreme Court limited or overturned *Roe v. Wade*?

In this report we examine how abortion rights could change based on whether abortion currently is protected under state or territory law and if the state has enacted policies to expand access or restrict access. This report groups each state, territory, and the District of Columbia into one of four categories: “Expanded Access,” “Protected,” “Not Protected,” and “Hostile” and includes detailed information on the laws and policies that helped us determine that placement. For example, some states have trigger bans that may prohibit abortion if *Roe* were to be limited or overturned, while others have laws that would protect the right to abortion even in *Roe*’s absence. Just this year, New York, Vermont, Illinois, and Rhode Island have enacted new laws protecting reproductive rights. This report concludes that abortion is protected in slightly less than half the states, without affirmative legal protection in a handful of states and territories, and likely to be prohibited in 24 states if the federal right to abortion is limited or overturned.

We invite you to join us in advocating for reproductive rights in your community, your state, and throughout the country. We must ensure that abortion is available regardless of geography or identity and that people who decide to have an abortion can do so with dignity and respect.

*Nancy Northup*

President & CEO  
Center for Reproductive Rights

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# Glossary

The following terms are used throughout this report.

## Abortion Bans

### Pre-*Roe* bans

States and territories passed these abortion bans before *Roe* was decided, but the landmark decision made them unenforceable. If *Roe* is overturned, these laws could be revived in one of two ways. In some states, a ban was never declared unconstitutional or blocked by the courts, and therefore if *Roe* is limited or overturned, state officials could seek to enforce it. In other states, where courts have blocked or limited a pre-*Roe* ban based on the decision, officials could file court actions asking courts to activate the ban if *Roe* fell.

- Alabama, Arizona, Arkansas, Delaware, Michigan, Mississippi, New Mexico, Oklahoma, West Virginia, and Wisconsin have unenforced pre-*Roe* bans. Texas's pre-*Roe* ban is permanently enjoined.

### Trigger bans

Abortion bans passed since *Roe* that could become effective if the Supreme Court limited or overturned *Roe*. (*None of these bans is enforced.*)

- Arkansas, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, South Dakota, and Tennessee

### Pre-viability gestational bans

Laws that prohibit abortion before a fetus is viable; these laws are unconstitutional under *Roe*. Gestational age is counted in weeks either from the last menstrual cycle (LMP) or from fertilization. (*Some of these bans are not enforced.*)

- Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin

### Method bans

Laws that prohibit a specific method of abortion care, most commonly dilation and extraction (D&X) procedures and dilation and evacuation (D&E) procedures. (*Some of these bans are not enforced.*)

- Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin

## Reason bans

Laws that prohibit abortion if sought or potentially sought for a particular reason. These bans name sex, race, and genetic anomaly as prohibited reasons. However, there is no evidence that pregnant people are seeking abortion care because of the sex or race of their fetus.<sup>1</sup> *(Some of these bans are not enforced.)*

- Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Missouri, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, and Utah

## Criminalization of self-managed abortion (SMA)

Some states criminalize people who self-manage their abortion, i.e., perform it outside of a clinical setting.

- Arizona, Delaware, Idaho, Oklahoma, and South Carolina include SMA in their criminal codes. Idaho's statute is permanently enjoined.

# Abortion Restrictions

## TRAP laws

Targeted regulation of abortion providers laws single out physicians who provide abortion care and impose various legal requirements that are different from and more burdensome than those imposed on physicians who provide comparable types of care. These laws do not increase patient safety and are counter to evidence-based clinical guidelines.<sup>2</sup> TRAP laws fall into several categories, including regulation of locations where abortion is provided and/or facility specifications, provider qualifications, and reporting requirements. Compliance is often costly and can require unnecessary facility modifications. *(Some of these laws are not enforced.)*

- **Regulations of locations where abortion is provided or facility requirements:**  
Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin
- **Hospital admitting privileges or transfer agreements:**  
Alabama, Arizona, Arkansas, Florida, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Dakota, South Carolina, Tennessee, Texas, Utah, and Wisconsin

- **Reporting:**

Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming

## Parental involvement

Laws that require providers or clinics to notify parents or legal guardians of minors seeking abortion prior to an abortion (parental notification) or document parents' or legal guardians' consent to a minor's abortion (parental consent). In order to be constitutional, parental involvement laws must include a process whereby a judge can approve a minor's petition without parental involvement.<sup>3</sup> *(Some of these laws are not enforced.)*

- **Parental notification:**

Alaska, Colorado, Delaware, Florida, Illinois, Iowa, Maryland, Minnesota, Montana, Nevada, New Hampshire, New Jersey, South Dakota, and West Virginia

- **Parental consent:**

Alabama, Arizona, Arkansas, California, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Wisconsin

- **Parental notification and consent:**

Oklahoma, Texas, Utah, Virginia, and Wyoming

## Consent laws

Laws that require pregnant people to receive biased and often inaccurate counseling or an ultrasound prior to receiving abortion care, and, in some instances, to wait a specified amount of time between the counseling and/or ultrasound and the abortion care. These laws serve no medical purpose but, instead, seek to dissuade pregnant people from exercising their fundamental right. *(Some of these laws are not enforced.)*

- **Biased counseling:**

Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Carolina,

North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin

- **Mandatory ultrasound:**

Alabama, Arizona, Arkansas, Florida, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Texas, Virginia, and Wisconsin

- **Waiting period:**

Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin

## Hyde Amendment

In 1976, Rep. Henry Hyde (R-IL) successfully introduced a budget rider, known as the Hyde Amendment, that prohibits federal funding for abortion. Congress has renewed the Hyde Amendment every year since its introduction.

## Abortion Protections

### Statutory protections for abortion

Laws passed by states that protect the right to abortion.

- California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Nevada, New York, Oregon, Rhode Island, Vermont, and Washington

### State constitutional protection

A declaration from the state's highest court affirming that the state constitution protects the right to abortion, separately and apart from the existence of any federal constitutional right.

- Alaska, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Montana, and New Jersey

## Abortion Access

### Public funding

States are required to provide public funding through the state Medicaid program for abortion care necessitated by life endangerment, rape, or incest. Some states dedicate state-only funding to cover all or most medically necessary abortion care for Medicaid recipients.

- Alaska, California, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, Oregon, Vermont, and Washington

### Private insurance requirements

States can require private health-insurance plans that are regulated by the state to contain specific benefits, including abortion coverage.

- California, Illinois, Maine, New York, Oregon, and Washington require all state-regulated private insurance plans to cover abortion; some states require parity with maternity care or pregnancy-related services.

### Clinic safety and access

Laws that prohibit, for example, the physical obstruction of clinics, threats to providers or patients, trespassing, and telephone harassment of the clinic, and/or create a protected zone around the clinic.

- California, Colorado, District of Columbia, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New York, North Carolina, Oregon, Virginia, Washington, and Wisconsin

## Abortion Provider Qualifications

Scope of practice for health-care practitioners is regulated by state legislatures and licensing boards. Generally, state legislation does not outline specific medical care that is within or beyond a practitioner's scope of practice.

However, many states have treated abortion differently by restricting the provision of abortion to physicians. Other states have taken proactive measures to expand the types of clinicians who may lawfully provide abortion care by repealing physician-only laws or expressly authorizing physician assistants, certified nurse midwives, nurse practitioners, and other qualified medical professionals to provide abortion care through legislation, regulations, or attorney general opinions.<sup>4</sup>

## Repeal by implication

When a law is expressly repealed, the legislature passes a new law that explicitly states that the old law is repealed.<sup>5</sup> Under the doctrine of implied repeal, if a new statute is enacted that conflicts with an older statute, the older statute is said to have been “repealed by implication” and can no longer be enforced.

In order to argue successfully that an abortion ban has been repealed by implication and is therefore no longer enforceable, it is usually necessary to show that the state has subsequently enacted laws regulating abortion that cannot be reconciled with the ban. For example, after *Roe* was decided, the Louisiana State Legislature passed several statutes regulating abortion and setting forth the circumstances under which abortions would be permitted, without explicitly repealing its pre-*Roe* ban. A federal district court reviewing the laws found that an irreconcilable conflict existed between the statutes stating when abortion would be legal and the pre-*Roe* ban making abortion illegal. Therefore, the ban was repealed by implication.<sup>6</sup>

However, this determination is often not so clear-cut. For example, many states have enacted restrictions on the abortions that are permitted in the state—such as a requirement that pregnant people wait twenty-four hours after receiving certain state-scripted and biased information before obtaining an abortion (“mandatory-delay/biased-counseling” laws)—rather than passing a statute affirmatively setting forth the conditions under which abortions are permitted. In this situation, a court could decide that these later enacted statutes were not irreconcilable with an earlier ban statute by interpreting the mandatory-delay/biased-counseling law as a regulation on the few abortions that might be allowed under the ban statute. To further complicate things, although most states recognize the doctrine of implied repeal, courts in many states are reluctant to find implied repeal. Thus, while repeal by implication may be the best legal argument available against immediate enforcement of a pre-*Roe* ban, abortion rights advocates should consider other strategies as well.

## In effect

A law has been enacted, and the effective date in the legislation has passed.

## Enjoined

The state cannot enforce a law that would otherwise be effective because of the decision by a court to temporarily or permanently enjoin its enforcement.



# Executive Summary

This report provides an overview of what could happen to abortion rights in the fifty states, the District of Columbia, and the five most populous U.S. territories if the U.S. Supreme Court were to limit or overturn *Roe v. Wade*, the landmark Supreme Court ruling from 1973 that established abortion as a fundamental right. Understanding the abortion policy of a state, the District of Columbia, or a U.S. territory requires careful legal analysis of constitutions, laws, regulations, and court decisions, as well as legislative and access considerations. This report provides a snapshot of that analysis and anticipates how these governments would respond to a limitation or reversal of *Roe* and the likelihood that abortion rights would remain secure in some places and prohibited in others.

In order to contextualize laws and policies on abortion, this report provides an overview of international human rights standards and the right to abortion, as well as the U.S. legal landscape, including current constitutional protections for abortion and the types of cases making their way to the Supreme Court. Even while *Roe* remains the law of the land, this report acknowledges that because of federal, state, and territory abortion restrictions, too many people currently are unable to access abortion care and are living in what we describe as a “No-*Roe*” reality. Finally, this report offers some potential solutions, including federal and state legislation, and highlights the importance of civic engagement and funding abortion care, all of which could move a state, district, or territory along the spectrum from “Hostile” to “Expanded Access.” All terms used in this report are defined in a glossary.

All laws included in this report are in effect, unless otherwise noted, including legislation enacted in 2019. Between January 1, 2019, and August 28, 2019, eighteen states have enacted forty-six laws that prohibit or restrict abortion. Nine states enacted unconstitutional pre-viability bans in 2019, including Alabama’s total ban; the six-week bans enacted in Georgia, Kentucky, Louisiana, Mississippi, and Ohio; Missouri’s eight-week ban; and the eighteen-week bans enacted in Arkansas and Utah. On the other hand, states such as Illinois, Maine, Nevada, New York, Rhode Island, and Vermont have enacted laws that create a state right to abortion.

## Methodology

To determine how a limitation or reversal of *Roe* could affect abortion rights, we first examined whether the right to abortion is protected under state, territory, or D.C. law (“Protected”); if it is, we looked to see whether the state, territory, or District of Columbia enacted laws or policies that enhanced access to abortion care (“Enhanced Access”). If abortion is not protected by state, territory, or D.C. law (“Not Protected”), we then looked to see if the government enacted laws or policies to restrict or prohibit access to abortion care (“Hostile”). Based on our analysis, we then placed each state, territory, and the District of Columbia into one of these four categories, which exist along a spectrum from “Expanded Access” to “Protected” to “Not Protected” and, finally, to “Hostile.”

The laws and policies identified as creating enhanced access to abortion include public funding and the requirement that abortion be included in private insurance coverage, unrestricted access for minors, the breadth of health-care practitioners who provide abortion care, and protections for clinic safety and access. We assessed hostility based on

abortion bans (pre-*Roe*, trigger, gestational, reason, and method) and abortion restrictions (TRAP, parental involvement, consent, and physician-only laws). While these bans and restrictions generally have exceptions, this report does not list them in detail because those exceptions do not provide meaningful access and usually are difficult to utilize. Unless otherwise noted, all bans and restrictions discussed are in effect.

## Findings

Based on our analysis described above, if the Supreme Court were to limit or overturn *Roe*, abortion would remain legal in twenty-one states and likely would be prohibited in twenty-four states and three territories.

### Expanded Access

There are seven states in the “Expanded Access” category. In these states, the right to abortion is protected by state statutes or state constitutions, and other laws and policies have created additional access to abortion care.

- California, Connecticut, Hawaii, New York, Oregon, Vermont, and Washington

### Protected

Moving across the spectrum, there are fourteen states in the “Protected” category, meaning that the right to abortion is protected by state law but there are limitations on access to care.

- Alaska, Delaware, Florida, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, and Rhode Island

### Not Protected

There are five states, the District of Columbia, and two territories in the “Not Protected” category. In these places, abortion may continue to be accessible but would be unprotected by state and district law. In some of these states, it is unclear whether the legislature would enact a ban if *Roe* is limited or reversed, but concern is warranted.

- Colorado, District of Columbia, New Hampshire, New Mexico, Puerto Rico, U.S. Virgin Islands, and Wyoming.

States would then be divided into abortion deserts, where it would be illegal to access care, and abortion havens, where care would continue to be available.

### Hostile

Finally, there are twenty-four states—nearly all of which are situated in the central and southern parts of the country—and three territories that we characterize as “Hostile,” meaning they could immediately prohibit abortion entirely. These states and territories are extremely vulnerable to the revival of old abortion bans or the enactment of new ones, and none of them has legal protections for abortion.

- Alabama, American Samoa, Arizona, Arkansas, Georgia, Guam, Idaho, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, the Northern Mariana Islands, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin

## Conclusion

If the Supreme Court gives states more leeway to restrict abortion or prohibit it all together, almost half the states would likely enact new laws as restrictive as possible or seek to enforce current, unconstitutional laws prohibiting abortion. States would then be divided into abortion deserts, where it would be illegal to access care, and abortion havens, where care would continue to be available. Millions of people living in abortion deserts, mainly in the South and Midwest, would be forced to travel to receive legal care, which would result in many people simply being unable to access abortion for a variety of financial and logistical reasons. However, the Supreme Court does not need to overturn *Roe* for the twenty-four “Hostile” states to act. Allowing states to increase enforcement of abortion restrictions that have no proven medical benefits will result in access being further decreased or essentially prohibited. It is critical that the five “Not Protected” states and the District of Columbia create a state right to abortion, and that the fourteen “Protected” states enact laws and policies that move them into “Enhanced Access.”

# IV. The Legal Landscape

This section details international human rights standards and the right to abortion, the right to abortion under the U.S. Constitution, legal challenges working their way to the U.S. Supreme Court, and recent state constitutional amendments prohibiting the right to abortion.

## A. International Human Rights Standards & the Right to Abortion

International human rights law recognizes and protects access to safe and legal abortion as essential to guaranteeing the full range of human rights, including the rights to life, health, equality and non-discrimination, privacy, bodily autonomy, and freedom from cruel, inhuman, and degrading treatment. Efforts to ban abortion in the United States run directly counter to these human rights protections.

In recent years, UN human rights mechanisms have expressed concern about the impact of severe legal restrictions, barriers, and stigma on abortion access. They have called on governments to amend legislation to legalize abortion, lift barriers, remove criminal penalties, and prevent stigmatization of women and girls seeking abortion, so as to ensure effective access to safe, legal abortion services.<sup>7</sup>

UN human rights treaty monitoring bodies have clearly established that when abortion is legal under domestic law, it must be available, accessible (including affordable), acceptable, and of good quality.<sup>8</sup> In doing so, they have specified that states are obliged to abolish procedural barriers to abortion services, including third-party authorization requirements, mandatory waiting periods, and biased counseling.<sup>9</sup> They have also urged countries to provide financial support for those who cannot afford abortion services and to guarantee the availability of skilled health-care providers who can offer safe abortion services and ensure that provider refusals on the grounds of religion or conscience do not interfere with women's access to services.<sup>10</sup>

Importantly, they have recognized that laws that prohibit abortion and thereby force women to choose between continuing a pregnancy and traveling to another country to access legal abortion services can cause anguish and suffering, noting the financial, social, and health-related burdens and hardships that are placed on women in such situations.<sup>11</sup> They have repeatedly found that denials of access to abortion services can amount to violations of the rights to life, health, privacy, non-discrimination, and freedom from cruel, inhuman, and degrading treatment.<sup>12</sup>

The committee overseeing implementation of the UN Convention on the Elimination of Discrimination Against Women (CEDAW) has framed the right to abortion as an aspect of women's autonomy,<sup>13</sup> and it has emphasized that a state's failure or refusal to provide reproductive health services constitutes gender discrimination.<sup>14</sup>

In 2018, the UN Human Rights Committee, which oversees implementation of the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by the United States, made clear that the right to life includes the right to access safe and legal abortion.<sup>15</sup> The committee stated that the right to life requires states to provide safe, legal, and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or when carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering.<sup>16</sup> States may not introduce new barriers to abortion and should remove existing barriers that deny effective access by women and girls to safe and legal abortion.<sup>17</sup> States should likewise prevent the stigmatization of women and girls seeking abortion.<sup>18</sup>

The World Health Organization recognizes that in countries with restrictive abortion laws induced abortion rates are high, the majority of abortions are unsafe, and women’s health and lives are frequently put at risk. Legal restrictions on abortion do not result in fewer abortions. Instead, they compel women to risk their lives and health by seeking out unsafe abortion services. According to the World Health Organization’s safe abortion guidelines, in countries where induced abortion is highly restricted or unavailable, “safe abortion has frequently become a privilege of the rich, while poor women have little choice but to resort to unsafe providers.”<sup>19</sup> Conversely, the removal of legal restrictions on abortion has shifted clandestine, unsafe procedures to legal and safe ones, resulting in significantly reduced rates of maternal mortality and morbidity.

The UN human rights treaty bodies have made clear that countries cannot roll back rights once they have been established. A core human rights principle prohibits retrogression, which is a backward step in law or policy that impedes or restricts the enjoyment of a right. The Committee on Economic, Social and Cultural Rights has particularly noted the importance of avoiding retrogressive measures in the area of sexual and reproductive health and rights, such as the imposition of barriers to sexual and reproductive health information, goods, and services.<sup>20</sup>

In recent years, UN human rights experts have issued numerous findings and recommendations with respect to the right to abortion access in

The UN human rights treaty bodies have made clear that countries cannot roll back rights once they have been established.

the United States, in particular. For example, the UN Working Group on Discrimination Against Women in Law and Practice has recommended that the United States ensure that women be able to exercise their existing constitutional right under *Roe v. Wade*, repeal the Hyde Amendment, and combat the stigma attached to reproductive and sexual health care.<sup>21</sup> The UN Special Rapporteur on Extreme Poverty has noted that low-income women face legal and practical obstacles to exercising their constitutional, privacy-derived right to access abortion services in the United States, and this lack of access to abortion services traps many women in cycles of poverty.<sup>22</sup>

## B. U.S. Constitutional Right to Abortion

### Overview of Supreme Court Decisions on Abortion and the Right to Liberty

Three major abortion cases—*Roe v. Wade* (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), and *Whole Woman’s Health v. Hellerstedt* (2016)—have defined the contours of the right to abortion. In its landmark ruling in *Roe*, the Supreme Court recognized that the specific protection for “liberty” in the Fourteenth Amendment of the U.S. Constitution includes the right to decide whether to continue or end a pregnancy. Since *Roe* and, most important, in *Casey*, the Court has reaffirmed the Constitution’s protection for this essential liberty, which guarantees each individual the right to make personal decisions about family, relationships, and bodily autonomy. Over the decades since the Court first held that the Constitution encompasses protection for the right to abortion, most recently in *Whole Woman’s Health*, it has also recognized that the right is meaningless if restrictions are allowed to dismantle actual access to abortion services.

### The Landmark Ruling in *Roe v. Wade*

On January 22, 1973, the Supreme Court struck down Texas’s criminal ban on abortion and held that the right to abortion is a “fundamental right.”<sup>23</sup> In a 7–2 opinion, the Court held that, along with decisions relating to marriage, contraception, education, and family relationships, the decision

about whether to continue or end a pregnancy is fundamental to “personal liberty.”<sup>24</sup> In doing so, the Court recognized the great “detriment that the State would impose upon the pregnant woman by denying this choice,” including forcing her to endure health risks associated with pregnancy and the costs of bringing a child into a family not prepared for one.<sup>25</sup>

*Roe* had two key parts: First, the Court ruled that, before viability, it is a pregnant person’s decision—and not the government’s—whether to continue a pregnancy. Accordingly, the government cannot ban abortion for any reason prior to viability.<sup>26</sup> Second, *Roe* held that, as with other fundamental rights, restrictions on the right to abortion were subject to strict scrutiny—the most stringent level of constitutional review. This legal standard required that infringements on the right be narrowly tailored to serve a compelling government interest and used the trimester system to determine when each of these state interests was compelling.<sup>27</sup> *Roe* permitted more regulation as pregnancy advanced but only when that regulation was evidence-based and consistent with how other similar medical procedures were treated; crucially, under *Roe*, the government was not permitted to put its thumb on the scale to pressure pregnant people about their decision whether to continue or end a pregnancy.<sup>28</sup>

At the time *Roe* was decided, nearly all states banned abortion, except in certain limited circumstances. Under *Roe*, these bans were unconstitutional, making abortion legal, more accessible, and safer for many pregnant people throughout the country.

The erosion of *Roe*’s protections began immediately. Well-funded abortion opponents pressed state and federal lawmakers to enact a wide range of restrictive abortion laws attempting to reverse, directly or indirectly, *Roe*’s guarantee of reproductive freedom. Many states enacted barriers to abortion, such as requirements that married women involve their spouses and that young people involve their parents in their abortion decisions, restrictions on abortion coverage in state Medicaid programs and state employee health plans, bans on the performance of abortions in public hospitals, requirements that pregnant people delay their abortion for a certain period of time—usually twenty-four hours—after receiving certain state-scripted and biased information before obtaining an abortion (“mandatory delay/biased counseling” laws), and bans on abortion procedures.

## Post-*Roe* and Pre-*Casey*: Chipping Away at the Right to Abortion

As lawsuits against these restrictions multiplied and some reached the Supreme Court, a changing Court issued a series of decisions diluting *Roe*.

In 1980, the Court held in *Harris v. McRae* that the federal government could prohibit poor people who rely on Medicaid for their insurance coverage from using that coverage to pay for medical care to end a pregnancy. The Court concluded that a federal ban on Medicaid coverage for abortion did not “interfere” with a woman’s right to make reproductive decisions, and that the government could “favor childbirth over abortion” through discriminatory funding.<sup>29</sup> Since *Harris*, the annual federal budget rider known as the Hyde Amendment has continued to restrict the decisions of millions of low-income pregnant people—who are disproportionately women of color—about whether to continue a pregnancy.

The Court also upheld restrictions on a young person’s right to abortion. In a handful of cases, the Court upheld parental notice and consent requirements so long as they included a provision permitting a young person to obtain a judge’s permission to bypass the parental involvement requirement (“judicial bypass”).<sup>30</sup> Today, more than thirty-five states require either parental notice or consent for a young person seeking an abortion.<sup>31</sup>

The Court, however, continued to invalidate restrictions on the rights of adult, non-indigent pregnant people to end a pregnancy, such as twenty-four-hour mandatory delay laws, biased counseling, and other medically unnecessary requirements.<sup>32</sup>

In 1988, President Reagan appointed a new justice (and the first woman) to the Supreme Court: Sandra Day O’Connor. The new composition of the Court led many to believe that *Roe* would be overturned. Yet, in *Webster v. Reproductive Health Services* (1989), a majority of the Court declined to overrule *Roe*, finding that the question of *Roe*’s validity was not properly before them.<sup>33</sup> Soon after, the territory of Guam and two states—Louisiana and Utah—enacted bans criminalizing virtually all abortions, providing the direct challenge to *Roe* that *Webster* lacked, which federal courts blocked.<sup>34</sup>

In the early 1990s, the fate of *Roe* was again in question. Anti-abortion state legislatures continued to enact restrictions on abortion that had previously been declared unconstitutional. For example, Mississippi,

North Dakota, and Pennsylvania enacted twenty-four-hour mandatory delay and biased counseling requirements, and Pennsylvania went beyond other states by imposing a spousal notice requirement.

## Casey: Reaffirming Roe's Central Holding but Allowing More Restrictions to Stand

In 1991, the Supreme Court granted review of a challenge to several Pennsylvania abortion restrictions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *Casey* squarely presented the question to the Court of whether to overturn or reaffirm *Roe*.<sup>35</sup>

In *Casey*, a majority of the Court voted to reaffirm *Roe*. Justices O'Connor, Souter, and Kennedy issued a controlling joint opinion stating that for decades “people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion” and that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>36</sup> The Court could not dismiss “the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case.”<sup>37</sup>

*Casey* therefore reaffirmed *Roe*'s central holding: that “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”<sup>38</sup> The Court elaborated that abortion “involve[s] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,” and is “central to the liberty protected by the Fourteenth Amendment.”<sup>39</sup> It emphasized the fundamental values of dignity and equality that the abortion right reflects, observing that a woman's experience is “too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of a woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”<sup>40</sup>

Although the Court affirmed *Roe*'s holding that states cannot ban abortion prior to viability, the joint opinion departed from strict scrutiny and adopted the “undue burden” standard to determine which restrictions were unconstitutional.<sup>41</sup> This less protective standard displaced strict scrutiny to recognize more fully the state's interest throughout pregnancy in promoting potential life.<sup>42</sup> The undue burden standard aimed to give “real substance” to “the urgent claims of the woman to retain the ultimate control

over her destiny and her body”<sup>43</sup> while permitting laws that are designed to persuade pregnant people to carry to term.<sup>44</sup> It explained that “[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”<sup>45</sup>

The *Casey* Court applied this standard to the challenged Pennsylvania restrictions: a twenty-four-hour mandatory delay on pregnant people seeking abortion; state-mandated information (biased counseling) intended to persuade pregnant people to choose childbirth over abortion; and parental consent and spousal notice mandates, among other requirements. Although in earlier cases the Court had struck down biased counseling and mandatory delay laws because they failed strict scrutiny, a plurality of the Court upheld all the challenged restrictions except the spousal notice requirement under the undue burden standard.

## After Casey: State Legislatures Enact Hundreds of Abortion Restrictions

Following *Casey*, states passed hundreds of incremental restrictions on abortion and courts evaluating the constitutionality of these laws struggled to apply key features of the undue burden test. Some held that an abortion regulation is constitutional only when it actually promotes the interest the state claims it does and advances the interest to an extent that outweighs the burdens the law imposes on abortion access.<sup>46</sup> Other courts conducted no such inquiry, maintaining that an abortion regulation is constitutional if “any conceivable rationale” exists for its enactment.<sup>47</sup>

Between *Casey* and *Whole Woman's Health*, the Supreme Court heard just four cases challenging abortion restrictions. Those cases included challenges to state and federal bans on a rarely used abortion procedure—dilation and extraction (D&E). In *Stenberg v. Carhart* (2000), the Court struck down Nebraska's ban, finding that it imposed an undue burden because it did not include a health exception and it was written so broadly that it also banned the safest abortion procedure after fourteen or fifteen weeks.<sup>48</sup> By 2007, when a challenge to the federal ban reached the Court in *Gonzales v. Carhart*, Justice Samuel Alito had replaced Justice Sandra Day O'Connor. The Court upheld the federal ban, finding that it did not impose an undue burden, in part because the federal law's textual differences from the Nebraska law the Court had previously considered led the Court to conclude that the federal ban did not affect the most commonly used second-trimester abortion procedure.<sup>49</sup> These cases, however, did not resolve disagreements in the lower courts about how to apply the undue burden standard.

## **Whole Woman's Health: Reaffirming Roe and Clarifying the Undue Burden Test Requires Meaningful Court Review of Abortion Restrictions**

The Court's most recent major abortion decision, *Whole Woman's Health v. Hellerstedt* (2016) resolved this disagreement and supplied the missing guidance. *Whole Woman's Health* clarified that the undue burden test is a form of heightened scrutiny that requires courts to undertake a meaningful review of abortion restrictions, and again reaffirmed *Roe*.<sup>50</sup> More specifically, it made clear that the undue burden standard is a robust check on legislatures that requires courts to examine closely whether abortion restrictions have real-world benefits that outweigh the real-world burdens they impose on pregnant people, and strike the restrictions if they fall short.

To apply the test, courts must evaluate whether an abortion restriction actually furthers a valid state interest.<sup>51</sup> In making this determination, courts cannot defer to a legislature's claims about how the law does or might further its interests; they must conduct their own independent inquiry based on the evidence presented in the case.<sup>52</sup> Courts must then determine if the law confers benefits that outweigh the burdens it imposes on pregnant people and declare the law unconstitutional if the burdens outweigh the benefits.<sup>53</sup> When engaging in this balancing, courts must take into account whether the evidence is based on scientifically reliable methodology.<sup>54</sup>

Applying this standard, *Whole Woman's Health* struck down the two parts of a Texas law challenged in that case: an admitting privileges provision requiring all abortion providers to obtain local hospital admitting privileges, and an ambulatory surgical center provision requiring every licensed abortion facility to meet hospital-like building standards.<sup>55</sup> Although the State of Texas claimed that it enacted these laws to advance women's health by making abortion safer, trial evidence showed that neither requirement offered any health or safety benefits. At the same time, evidence showed that they would cause most of Texas's clinics to close, leaving the state with just

The stakes for the right to abortion are high.

a few clinics clustered in urban areas and thousands of people without adequate access. Because the burdens outweighed the benefits, the Court struck down both parts of the Texas law.

*Whole Woman's Health* preserved abortion access for thousands of Texans. It also made clear that abortion restrictions are subject to rigorous review under the undue burden standard and that laws that could not withstand that scrutiny were unconstitutional.

### **At a Crossroads**

The stakes for the right to abortion are high. President Trump has stated repeatedly that he would nominate only Supreme Court justices who were opposed to *Roe*, and two of his nominees are now members of the Court—Neil Gorsuch and Brett Kavanaugh.

As they have in the past, anti-abortion politicians are enacting increasingly extreme and blatantly unconstitutional abortion bans in a competition to ask the Supreme Court to overturn *Roe*.<sup>56</sup> Over nearly fifty years, different compositions of the Supreme Court have not wavered on *Roe*'s central holding: that it is for individuals—and not the government—to decide whether to continue or end their pregnancy.

But the Supreme Court does not have to overturn *Roe* to undermine the right to abortion. The rejection of medically unnecessary and unduly burdensome abortion restrictions in *Whole Woman's Health* did not stop anti-abortion politicians from enacting them or some lower courts from upholding them.<sup>57</sup>

There are now dozens of cases challenging abortion restrictions, from outright abortion bans to various laws imposing barriers to access, making their way through the federal courts. A case that reaches the Supreme Court could give it the opportunity to reaffirm that the Constitution guarantees pregnant people meaningful access to abortion or depart from precedent that millions have come to rely upon.

## C. Cases in the Pipeline

Currently, dozens of challenges to abortion restrictions are currently making their way through the lower courts, with activity at the Supreme Court level ramping up after Justice Kennedy's retirement in June 2018. Indeed, four petitions asking the Court to hear and reverse a lower court decision were filed in the 2018–19 term, one by plaintiffs seeking to defend abortion rights and access, and three by states hoping to erode both long-standing and recent Supreme Court precedents that undergird the constitutional right to abortion. The kinds of petitions that reached the Court last term preview an anti-abortion strategy to attack the right to abortion on all fronts, with the hope that newly appointed judges will step up to slash through decades of liberty-affirming jurisprudence.

### Direct Attacks on *Roe*

The Supreme Court has so far rejected invitations to hear cases that could weaken or overturn *Roe*, signaling that one anti-abortion strategy—attacking head-on *Roe*'s core holding that abortion cannot be banned prior to viability—will not imminently prevail. The State of Indiana baited the Court by asking it to reverse a decision permanently blocking a law banning abortion if sought on account of fetal race, sex, or disability (a “reason ban”). The law is bright-line unconstitutional under *Roe* because it bans abortion prior to viability. The Court declined to hear the case in May 2019, writing that only one appellate court had considered the issue, which renders Supreme Court intervention premature.

Additional cases that seek to topple *Roe* are in the pipeline, including an Ohio reason ban on appeal after being blocked, and also bans on abortion at pre-viability gestational ages (such as six, eight, twelve, fifteen, and eighteen weeks of pregnancy). As of summer 2019, district courts had blocked all challenged pre-viability bans under *Roe*'s holding that the Constitution prohibits any ban at any gestation prior to viability, for any reason. These cases will make their way up through the courts of appeals in the coming months. Just four years ago, in 2015, the Eighth Circuit Court of Appeals struck down two pre-viability bans as unconstitutional under *Roe*, even while suggesting that *Roe* was wrongly decided and that the Supreme Court would do well to revisit it. While much has changed, including the appointment of many more federal judges who are hostile to abortion rights, *Roe*'s status as binding precedent has not. Only the Supreme Court can decide otherwise, and opponents are committed more than ever to driving forward a stream of cases designed to provoke that outcome.<sup>58</sup>

## Petitions for Certiorari Filed in the 2018–19 SCOTUS Term

### Indiana Reason Ban (pre-viability ban) and Fetal Tissue Internment Mandate

- Reason Ban: Case not taken (lower court ruling that ban is unconstitutional stands)
- Fetal Tissue Internment Mandate: Decision reversed (upholding the law as constitutional)

### Alabama D&E Ban

- Case not taken (lower court ruling that the ban is unconstitutional stands)

### Louisiana Admitting Privileges

- Emergency stay on Fifth Circuit decision granted February 2019 (temporarily blocking the law)
- Court is expected to decide in fall 2019 whether to take the case

### Indiana Ultrasound Eighteen Hours Before an Abortion

- Indiana filed a cert petition in February 2019 after lower courts preliminarily blocked the law
- The Court is expected to decide in fall 2019 whether to take the case

## Direct Attacks on *Whole Woman's Health*

Anti-choice states are simultaneously asking the Supreme Court to overturn or hobble *Whole Woman's Health*. The most direct attack comes from Louisiana, where the state continues to defend an admitting privileges law identical to the one that *Whole Woman's Health* invalidated. In *Whole Woman's Health (WWH)* the Court held that the undue burden standard requires courts to apply heightened scrutiny when reviewing abortion restrictions, instead of deferring to legislators on whether the restrictions actually advance a valid purpose. Furthermore, courts must strike down restrictions as unconstitutional if the burdens they impose outweigh their evidence-based benefits.

In the wake of *WWH*, Louisiana appealed a lower court decision that blocked its admitting privileges law. The Fifth Circuit Court of Appeals reversed and upheld the law. The Fifth Circuit mangled *WWH* by holding the burdens are constitutional unless they are “substantial,” even if they fail the balancing test. It furthermore defied *WWH* by *assuming* that the admitting privileges law actually confers benefits and by rejecting extensive fact-finding on enormous burdens.

The Fifth Circuit opinion advances efforts by anti-abortion states to overturn *WWH* by asking the Supreme Court to evaluate other health-justified laws that impose burdens that outweigh benefits but reach a different decision. In February 2019, the Supreme Court stepped in to stop the Fifth Circuit’s decision from taking effect while the plaintiff clinics filed a cert petition. The Court is expected to decide in fall 2019 whether to take the case.

There are many more challenges to “health and safety laws” that fail to advance a valid purpose, otherwise known as TRAP laws, moving through the courts. Supporters of these laws hope that each could present the Supreme Court with the chance to roll back or overturn *WWH* and its critical protections for abortion access.

## Attacks on the Undue Burden Standard

In 2018–19, the states of Indiana and Alabama found yet more ways to ask the Supreme Court to weaken the undue burden standard, a trend that is sure to continue and accelerate. Indiana petitioned for the Court to reverse a decision blocking a law that required ultrasounds to be performed eighteen hours before an abortion, arguing that the undue burden test from *WWH* doesn’t apply to so-called informed consent laws that seek to dissuade people from choosing abortion, or more generally to laws that a state claims protect fetal life (as opposed to women’s health). The Court did not act on the petition before adjourning for the summer and is expected to reconsider it in fall 2019.

Alabama made similar arguments in asking the Court to reverse an Eleventh Circuit decision holding that it was an unconstitutional undue burden to ban D&E, the standard-of-care method starting early in the second trimester of pregnancy. Its petition for certiorari argued that courts must uphold laws if there is any medical uncertainty about whether they impose health risks, and that they don’t need to confirm that laws actually advance valid interests when a state claims they protect fetal life—both arguments that fly in the face of *WWH*. The Supreme Court declined to take the case.

There are two more D&E cases pending in the courts of appeals, with more to follow. To date, lower courts, except for an Oklahoma County District Court, have blocked all D&E bans. The Supreme Court often waits for appellate courts to decide several cases before it weighs in, and the D&E cases might present just that opportunity in the near future.

## What’s Changed?

The drumbeat of cases to the Supreme Court will continue and accelerate. The types of cases are varied and raise different legal questions—strategically so, as abortion opponents attack abortion access and rights on all flanks. But the through-line is predictable: All the cases seek to overturn precedent, some of it more than forty-five years old, and some of it powerful because it’s recent. Precedent upholds the right to abortion as a fundamental liberty that the Constitution enshrines, one that’s been critical to advancing equality and dignity for millions of people over the decades. The Constitution hasn’t changed. What abortion means for equality and dignity hasn’t changed. Personal decision-making hasn’t changed. The only thing that may have changed is the views of those who are confirmed to sit on the federal courts. The coming terms and months will tell us more.

## D. State Constitutional Amendments Prohibiting the Right to Abortion

Outside of legislation, ballot initiatives allow citizens to engage in the democratic process by voting to create new statutes or affirm amendments to the state constitution. Twenty-four states and the District of Columbia allow initiatives.<sup>59</sup> Advocates have used ballot initiatives to both protect and undermine the right to abortion. In Washington and Nevada, the initiative process guaranteed that the right to an abortion is protected.<sup>60</sup> However, opponents of abortion rights have also succeeded in using ballot initiatives to strip the right to abortion from some state constitutions.<sup>61</sup> In light of the potential for the Supreme Court to limit or overturn *Roe*, it is critical that states do not amend their constitutions in ways that could be used to restrict the right to abortion or harm abortion access.

In November 2018, three ballot initiatives asked voters in Alabama, Oregon, and West Virginia to vote for or against a state constitutional amendment limiting the right to abortion. Alabama's Amendment 2 declares the state's policy to recognize the rights of zygotes, embryos, and fetuses during any point of development and that there is no state constitutional right to abortion or to public funding for abortion. This amendment was approved by a clear majority of Alabama voters. In Oregon, voters resoundingly rejected Measure 106, which would have blocked the state from providing public funding for abortion except for medically necessary procedures or those required by federal law. West Virginia's Amendment 1 states that there is no state constitutional right to abortion or to public funding of abortion. Unfortunately, this anti-abortion measure prevailed by a thin margin and had an immediate and significant impact as West Virginia stopped providing public funding for abortion at 7:30 p.m. on November 6, 2018. Alabama and West Virginia's amendments could be used to prohibit abortion entirely if *Roe* is limited or overturned.

In 2020, there may be multiple state ballot initiatives seeking to limit abortion rights. In Louisiana, the legislature passed HB 425, which created a ballot initiative for the 2020 general election, asking voters to decide whether to amend the Louisiana Constitution to state that there is no right to abortion or public funding for abortion.<sup>62</sup> Abortion opponents have signaled their intent to place similar initiatives on the ballots in states like Kansas and Oklahoma.<sup>63</sup> In other states, like Colorado and Michigan, abortion opponents have begun the process of placing voter-initiated measures on the 2020 general election ballot.<sup>64</sup> Abortion rights supporters should work to prevent or defeat all restrictive ballot initiatives.

# V.

## Current No-*Roe* Reality

Current abortion bans and restrictions already place abortion out of reach for many people. Contemplating possible action by the Supreme Court to limit or overturn *Roe* requires an acknowledgement that there are people today who cannot access abortion care because of factors that include structural and interpersonal discrimination on the basis of poverty, race, gender identity, and disability. For example, throughout the United States, areas with high poverty rates often lack resources such as hospitals, health-care providers, and accessible public transportation. Poverty occurs in both urban and rural locations, and the South has the highest poverty rates of all.<sup>65</sup> Poverty has a disproportionate impact on marginalized individuals and their communities, including women and girls, people of color, noncitizens, and people with disabilities.<sup>66</sup> Nearly a third of all transgender individuals live in poverty.<sup>67</sup> Almost one in five Hispanic people and almost a quarter of Black people live in poverty, while people with disabilities are more than twice as likely to be poor as those without disabilities.<sup>68</sup> Moreover, many people experience multiple, intersecting forms of discrimination (for instance, low-income people of color who are also transgender or disabled) that compound and intensify barriers to accessing abortion care. When pregnant people are unable to access abortion care, the consequences can be far-reaching and can affect their own well-being and economic security and that of their families.<sup>69</sup>

At the federal level, the Hyde Amendment has systematically denied abortion coverage to millions of low-income people and people of color for decades, curtailing their constitutional right to abortion. Since 1976, abortion rights opponents in Congress have used the Hyde Amendment to prohibit abortion coverage for Medicaid, Medicare, and the Children's Health Insurance Program (CHIP); federal employees and their dependents; Peace Corps volunteers; Native Americans; and people in federal prison and immigration detention centers. The Hyde Amendment has a disproportionate impact on women of color, who make up just over half of the 7.5 million women potentially affected by it.<sup>70</sup>

In addition to facing the barriers imposed by the Hyde Amendment, people with low incomes and those living in states that are hostile to abortion rights currently face numerous obstacles to abortion access. These barriers to care can include a small number of abortion providers who practice in different cities a significant distance away; going to a clinic twice, for state-mandated biased counseling twenty-four, forty-eight, or seventy-two hours before receiving abortion care, which requires time off from work or school; asking family, friends, and/or an abortion fund for help with paying for the abortion because public funding isn't available; organizing and funding transportation, hotel stays, and child care; listening to state-mandated biased counseling that might emphasize the risk of abortion while omitting the risks of pregnancy; walking through protestors outside the clinic; facing stigma from family, friends, employers, or other community members; striving to get everything in place before twenty or twenty-two weeks' gestation because care is not available in the state after that point; and knowing that the procedure costs more the longer it takes to figure out how to jump over these hurdles.

If the Supreme Court limits or overturns *Roe*, real and devastating access barriers will become a reality for even more people. Lawmakers and advocates who support abortion rights should work to prevent future access barriers while also working to tear down existing barriers.

At the federal level, the Hyde Amendment has systematically denied abortion coverage to millions of low-income people and people of color for decades, curtailing their constitutional right to abortion.

# VI. The Solutions

The 2019 legislative sessions demonstrated that abortion opponents believe that their decades-long goal to prohibit abortion entirely will soon be possible: states hostile to abortion enacted total and near-total abortion bans, and legislators spoke openly of their goal to criminalize pregnant people and abortion providers. However, abortion rights supporters achieved critical victories this session: after more than seven years of hard work, New York enacted the Reproductive Health Act, which regulates abortion as health care instead of a crime; Illinois passed its Reproductive Health Act; Vermont and Rhode Island codified a right to abortion in state law; Maine authorized advance practice clinicians to provide abortion care; Nevada repealed long-standing abortion restrictions; and Hawaii prohibited discrimination based on reproductive health-care decisions. The Center for Reproductive Rights will work to ensure that abortion remains legal and accessible throughout the United States and its territories. The following suggestions are ways that we can work together to protect abortion rights.

## A. Legislative Advocacy

Federal and state legislation protecting the right to abortion is critical in ensuring access to abortion care regardless of whether the Supreme Court acts to limit *Roe*. Supporters of abortion rights should work to build coalitions across issue areas, seed public and elected support for abortion rights, and work to codify abortion protections. As indicated in the state-by-state legal analysis that follows, the strategy in any state depends on the legal, legislative, and access realities. Whatever the local reality, there are a number of broad legislative strategies that advocates should immediately consider in order to protect access to abortion. In some states, only defensive strategies are realistic; in others, advocates should consider a proactive strategy to protect the right to abortion or to create enhanced access. The following are legislative proposals to protect reproductive rights.

### 1. Federal legislation

The federal government has the power to enact laws and policies that protect or restrict abortion rights and abortion access throughout the United States. Below is current legislation that would protect abortion access at the federal level.

#### a. The Women's Health Protection Act

The Women's Health Protection Act (WHPA) was first introduced in 2013 and has been reintroduced in each subsequent Congress. It was introduced in the 116<sup>th</sup> Congress on May 23, 2019, with 173 original cosponsors in the House and forty-two original cosponsors in the Senate.

Led by Senators Blumenthal and Baldwin in the Senate, and Representatives Chu, Frankel, and Fudge in the U.S. House of Representatives, WHPA would create a federal safeguard against restrictions and bans on abortion that single out abortion like no other health care and impede access to services. The bill creates a statutory right for providers to provide, and for their patients to receive, abortion services free from these medically unnecessary restrictions and bans. In essence, it would ensure that the right to abortion first recognized in *Roe* is a reality for people across the country, regardless of the state in which they live.

## b. EACH Woman Act

Congress should repeal the Hyde Amendment, in part by passing the Equal Access to Abortion Coverage in Health Insurance (EACH Woman) Act, which was first introduced in July 2015. The EACH Woman Act was reintroduced in the 116<sup>th</sup> Congress on March 12, 2019, by Representatives Lee, Schakowsky, and Degette in the House, and Senators Duckworth, Harris, Hirono, and Murray in the Senate. The EACH Woman Act eliminates federal coverage restrictions on abortion services, such as the Hyde Amendment's ban on coverage for Medicaid enrollees, and protects insurance providers from interference in their decision to cover abortion. Discriminatory restrictions on insurance coverage do not belong in our public policy.

## 2. State legislation

Individual states, territories, and the District of Columbia have the power to enact laws and policies that protect or restrict abortion rights and abortion access. Below are proactive approaches for protecting abortion access at the state, territory, or district level.

### a. Abortion rights legislation

Supportive lawmakers, in coordination with their local coalitions, should consider introducing and/or supporting legislation that protects the right to abortion or enhances access to abortion. A series of factors can be weighed in assessing whether a strategy is appropriate for your state. For instance:

- Does the state constitution already provide protection for the right to abortion?
- If not, how likely is abortion rights legislation to be enacted in the state?
- Will a compromise have to be reached to achieve success? Is the price of such a compromise too steep?

- What is the possibility of a legislative backlash, which could leave the state with a legal framework worse than it already has? For example, would a preemptive approach to abortion rights provoke abortion ban legislation or an anti-choice ballot initiative process?
- Is the governor likely to veto or sign abortion rights legislation?

After considering these factors, lawmakers and advocates may wish to introduce various types of supportive legislation, including statutory protections for abortion, authorization for advance practice clinicians to provide abortion care, repeal of physician-only laws, or clinic safety and access protections. Members of the State Policy & Advocacy team at the Center for Reproductive Rights are available for consultation on how best to tailor legislative proposals for a given state. Abortion rights advocates may consider other strategies that will send a strong message and strengthen the legal and policy framework to protect abortion.

### b. Fund abortion care

Lawmakers and advocates in states or territories that do not provide public funding for all medically necessary abortions should consider how such funding could be achieved. While coverage campaigns take time, supportive coalitions, and capacity, public funding can ultimately be the deciding factor in whether pregnant people can access abortion care. All\* Above All, a campaign working to restore public insurance coverage, provides ideas, strategy, and support for coverage campaigns. Further, lawmakers and advocates in states that reported to the Government Accountability Office that their state does not cover Mifeprex should work to ensure that medication abortion is available in their state. A person's income should not stand in the way of access to abortion care.

### c. Repeal abortion bans & restrictions

Abortion rights supporters should work to repeal abortion bans and restrictions. In states with pre-*Roe* laws criminalizing abortion, it is critical to expressly repeal those statutes so that states do not criminalize abortion if the Supreme Court limits *Roe*. Likewise, in the eight states with trigger bans that would go into effect if the Court limits or overturns *Roe*, lawmakers and advocates should work to build support for repeal. In fact, all of the abortion bans and restrictions detailed in this report negatively affect abortion access and should be the focus of repeal campaigns. In states that are considered supportive of abortion rights, it is critical to repeal restrictions that limit access to abortion rights. For example, TRAP laws serve no medical purpose and do not result in increased safety for patients; they should be

repealed, and clinic guidelines supported by the American College of Gynecology and Obstetrics (ACOG) and the National Abortion Federation (NAF) should be enacted in their place. Most states require parental involvement in a minor’s abortion, yet research demonstrates that a majority of minors voluntarily involve their parents or trusted adults in their decision to have an abortion.<sup>71</sup> States should not jeopardize the safety of minors who decide not to involve their parents. Repealing abortion bans and restrictions will ensure that pregnant people can access abortion care.

#### **d. Protect state constitutions**

In states where abortion rights may be protected under the state constitution, advocates should work to ensure that their highest state court judges—whether elected or appointed—are supportive of privacy and abortion rights. In the states facing hostile 2020 ballot initiatives, it is critical that abortion rights supporters—lawmakers, advocates, members of the general public—come together to defeat those initiatives. It is also wise to monitor legal challenges involving the right to privacy—even those that are not explicitly related to abortion rights—which could provide an early warning that protections for reproductive rights are at risk of being undermined.

#### **e. Block new restrictive legislation**

Lawmakers and advocates must prepare to block the passage of new bans and restrictions. The 2019 legislative sessions demonstrated that abortion rights opponents believe that a *Roe* limitation or reversal is possible. Therefore, advocates should build strong cross-issue coalitions and gather data to demonstrate how truly harmful an abortion ban would be for people in their state. While in many cases it will not be ultimately possible to block passage of these bans, advocates may be successful in reducing the severity of the language of the ban by, for example, attaching amendments with broad exceptions.

## **B. Civic Engagement**

Educating voters about the importance of engaging in local, state, and federal elections is critical to protecting abortion rights. Holding lawmakers accountable for their voting records on abortion rights and their adherence, or lack thereof, to campaign promises can make the difference in protecting or restricting abortion rights. At each level of government, elected officials are enacting laws and policies that help determine whether pregnant people can access abortion care. The outcome of presidential and senatorial elections will determine who will be nominated for Supreme Court vacancies and whether abortion rights supporters will be confirmed by the Senate. Congressional elections will determine whether abortion rights will be codified in federal law. State gubernatorial and legislative elections determine whether abortion protections or restrictions are enacted. Local elections can determine whether cities will adopt policies that enhance access to abortion care. Local, state, and federal elected officials share the ability to determine the condition of abortion rights and access for their constituencies.

Judicial elections are critically important as well because elected state court judges and justices may be called upon to determine whether state constitutions protect the right to abortion. In hostile states, state supreme court decisions can preserve the right to abortion for millions of pregnant people. While the Iowa and Kansas legislatures are hostile to abortion rights and have passed numerous abortion bans and restrictions, the Iowa and Kansas Supreme Courts recently issued opinions concluding that those states’ constitutions protect the right to abortion.<sup>72</sup> Unless those constitutions are amended, unconstitutional abortion restrictions will be struck down under the state constitutions, ensuring that abortion remains legal in Iowa and Kansas even if the United States Supreme Court limits or reverses *Roe*.

Finally, ballot initiatives can either limit or expand state protections of abortion rights. Restrictive ballot initiatives that seek to amend state constitutions in states where there is a state right to abortion place abortion rights at risk. Supportive ballot initiatives provide another method to ensure that abortion is protected by state law. Voters need to understand how civic engagement can directly affect abortion rights.

## C. Funding for Abortion Care

Funding is a crucial component of access because abortion has been, and will always be, available to people who have the ability to finance their care. Without adequate public funding for abortion, abortion providers have worked tirelessly to keep costs low, and abortion funds have worked tirelessly to provide financial and logistical support to as many people as possible. However, the need continues to exceed these resources, and governments can fund abortion care.

### 1. Government funding

For low-income people, public funding is critical to ensuring that they can access their right to abortion. Federal, state, and local governments have a role to play in funding abortion care. After *Roe*, federal Medicaid funds were available for medically necessary abortions, and Medicaid covered almost one-third of all abortions.<sup>73</sup> However, since 1976, the budget rider known as the Hyde Amendment has prohibited federal coverage for abortion through the Medicaid program, the Indian Health Service, and numerous other federal programs. In 1977, Rosie Jimenez died in Texas, becoming the first woman known to have died from an illegal abortion since the passage of Hyde.<sup>74</sup> In 1980, the U.S. Supreme Court found that the Hyde Amendment did not violate the U.S. Constitution.<sup>75</sup> Through the Hyde Amendment, Congress bans the use of federal funds to pay for abortion except when necessary to save a pregnant person's life or if the pregnancy resulted from rape or incest. The amendment has been renewed by Congress, with some variations in its scope, every year since 1976, preventing millions of pregnant people from exercising their legal right to abortion. Hyde should not be reauthorized, and the federal government should return to covering all medically necessary abortions for people enrolled in Medicaid.

States can augment federal Medicaid funding in order to provide additional abortion coverage. In 2018, the Government Accountability Office (GAO) asked states to respond to a survey about Medicaid coverage of abortion care.<sup>76</sup> One state, South Dakota, reported that its Medicaid program only covers abortion care when the pregnant person's life is endangered, a violation of federal law.<sup>77</sup> More concerning, GAO found that fourteen states are not covering Mifeprex, forcing pregnant people on Medicaid to either find other funding or undergo an aspiration abortion.<sup>78</sup> GAO called on the Centers for Medicare and Medicaid Services to take action to ensure that states

are complying with federal Medicaid requirements on abortion coverage. More states should cover all medically necessary abortion care; states voluntarily providing public funding should enact laws or rules to ensure that funding remains in place.

In June 2019, after a successful campaign led by the National Institute for Reproductive Health, New York City announced that it will fund abortion coverage in its fiscal year 2020 budget through a grant to the New York Abortion Access Fund.<sup>79</sup> The \$250,000 grant will be administered by the fund and help low-income people in New York City can access abortion. More cities should follow New York's example and provide public funding for abortion care.

### 2. Abortion funds

Abortion funds across the United States help pregnant people access abortion care by removing financial and logistical barriers. Funds provide resources to pay for medical care and sometimes assist with other expenses like transportation, childcare, translation, and travel costs. The National Network of Abortion Funds (NNAF) is the membership organization for over seventy abortion funds and provides comprehensive support to its members. Staff and board members at abortion funds often advocate at the local and state level for the people they serve and, until more public funding is available for abortion care, the funds fill a crucial hole wrenched open by the Hyde Amendment. A comprehensive list of abortion funds is available on NNAF's website.

### 3. Direct support for clinics

Abortion providers play a vital role in ensuring access to abortion care. However, their job is complicated by TRAP laws, gaps in public funding, and the stigma perpetuated by abortion opponents. Abortion providers have been murdered and targeted with other acts of violence.<sup>80</sup> Capacity is also an issue—today there are six states in which there is only one remaining abortion clinic.<sup>81</sup> And, in addition, abortion providers serve as plaintiffs in most lawsuits challenging abortion restrictions.<sup>82</sup> Without abortion providers' leadership in the courts, many restrictions would go unchallenged, as the burden would fall on the pregnant people seeking abortion to challenge these laws on their own behalf. Cognizant of these challenges, abortion clinics have worked to keep costs low while generating enough revenue to sustain clinic operations. A list of independent abortion clinics is available on the Abortion Care Network website.

# VII.

## Conclusion

International human rights law recognizes access to safe and legal abortion as essential to guaranteeing the full range of human rights. Efforts to ban abortion in the United States run directly counter to these human rights protections. Over the decades since the Supreme Court first held that the U.S. Constitution protects the right to abortion, the Court has recognized that the right is meaningless if restrictions dismantle access. However, abortion opponents continue to attack abortion access and rights in their quest to overturn precedent and harm millions of people. Yet, the Constitution has not changed, and abortion's significance for equality, dignity, and personal decision-making has not changed. The only things that may have changed are the views of those who are confirmed to sit on the federal courts.

If the Supreme Court limits or overturns *Roe*, real and devastating access barriers will become a reality for even more people. Almost half of the states likely would enact new laws that are as restrictive as possible or seek to enforce current, unconstitutional laws prohibiting abortion. States would then be divided into abortion deserts, where it would be illegal to access care, and abortion havens, where care would continue to be available. Millions of people living in abortion deserts, mainly in the South and Midwest, would be forced to travel to receive legal care, which would result in many more people being unable to access abortion for a variety of financial and logistical reasons. However, the Supreme Court does not need to overturn *Roe* for the twenty-four “Hostile” states to act. Allowing states to increase enforcement of abortion restrictions that have no proven medical benefits will result in access being further decreased or essentially prohibited. It is critical that the five “Not Protected” states and the District of Columbia create a state right to abortion, and that the fourteen “Protected” states enact laws and policies that move them into “Enhanced Access.”

The 2019 state legislative sessions demonstrated that abortion opponents believe that their decades-long quest to prohibit abortion can be achieved. However, abortion rights supporters attained critical victories in 2019. The Center for Reproductive Rights will work to ensure that abortion remains legal and accessible throughout the United States and its territories. Together, we can enact legislation at the federal, state, and territory level to repeal abortion bans and restrictions and provide protection, funding, and enhanced access. We can demonstrate our support for abortion rights through civic engagement and by supporting abortion funds and providers. Together, we can ensure that abortion remains legal and becomes accessible for all.

# Endnotes

- 1 Bonnie Steinbock, *Preventing Sex-Selective Abortions in America: A Solution in Search of a Problem*, THE HASTING CENTER (2017), <https://www.thehastingscenter.org/preventing-sex-selective-abortions-america-solution-search-problem/>.
- 2 See, e.g., ACOG, *Increasing Access to Abortion* (Nov. 2014, reaffirmed 2019), available at <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co613.pdf?dmc=1&ts=20190705T1420211808>; National Abortion Federation, *Clinical Policy Guidelines for Abortion Care* (2018), available at [https://sa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/2018\\_CPGs.pdf](https://sa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/2018_CPGs.pdf).
- 3 See *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 94, 96 S. Ct. 2831, 2852, 49 L. Ed. 2d 788 (1976) (“the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy”).
- 4 See, e.g., ME. REV. STAT. ANN. tit. 22, § 1598(1). Law was amended to allow physician assistants and advanced practice nurses to also perform abortions. See H.P. 922, 129th Leg., 1st Reg. Sess. (Me. 2019); WASH. REV. CODE § 9.02.110; WASH. ATT’Y GEN. OP 2004 No. 1 (2004); WASH. ATT’Y GEN. OP 2019 No. 1 (2019).
- 5 See, e.g., MASS. GEN. LAWS ch. 272, § 19, repealed by S.B. 784, 190th Gen. Assemb., Reg. Sess. (Ma 2018).
- 6 *Planned Parenthood of Nashville v. McWherter*, 817 S.W.2d 13, 16 (1991); see also *McCorvey v. Hill*, No. 03-10711 (5th Cir. Sept. 14, 2004) (Texas’s pre-Roe statute repealed by implication).
- 7 See *Breaking Ground: Treaty Monitoring Bodies on Reproductive Rights*, CTR. FOR REPROD. RIGHTS (2018), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Breaking-Ground-2018.pdf>.
- 8 See Committee on Economic, Social and Cultural Rights (CESCR), *Gen. Comment No. 22: on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 11-21, U.N. Doc. E/C.12/GC/22 (2016); CESCR, *Gen. Comment No. 14 (2000) The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 12, U.N. Doc. E/C.12/2000/4 (2000); Human Rights Committee (HRC), *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, U.N. Doc. CCPR/C/GC/36 (2018).
- 9 See, e.g., HRC, *Concluding Observations: The Former Yugoslav Republic of Macedonia*, para. 11, U.N. Doc. CCPR/C/MKD/CO/3 (2015) (advance unedited version) Committee on the Rights of the Child (CRC), *Gen. Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, para. 31, U.N. Doc. CRC/C/GC/15 (2013); Convention on the Elimination of Discrimination Against Women (CEDAW) Committee, *Concluding Observations: Hungary*, para. 31(c), U.N. Doc. CEDAW/C/HUN/CO/7-8 (2013); CESCR, *Gen. Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, (22nd Sess., 2000), para. 12(d), 21, 34, U.N. Doc. E/C.12/2000/4 (2000); CEDAW Committee, *Gen. recommendation No. 24: Article 12 of the Convention (women and health)*, (20th Sess. 1999), para. 22, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008).
- 10 See CEDAW Committee, *Concluding Observations on Austria*, para. 38-39, U.N. Doc. CEDAW/C/AUT/CO/7-8. 2013 (2013); CEDAW Committee, *Concluding Observations on Kuwait*, para. 43(a), U.N. Doc. CEDAW/C/KWT/CO/3-4 (2011); HRC, *Concluding Observations: Poland*, para. 23-24, U.N. Doc. CCPR/C/POL/CO/7 (Nov. 23, 2016); *Italy*, para. 16-17, U.N. Doc. CCPR/C/ITA/CO/6 (May 1, 2017); *Colombia*, para. 20-21, U.N. Doc. CCPR/C/COL/CO/7 (Nov. 17, 2016); *Poland*, para. 12, U.N. Doc. CCPR/C/POL/CO/6 (2010); *Poland*, para. 8, U.N. Doc. CCPR/CO/82/POL (2004).
- 11 See Siobhán Whelan v. Ireland, Human Rights Committee, Commc’n No. 2425/2014, para.7.5-7.9, U.N. Doc. CCPR/C/119/D/2425/2014 (2017); Amanda Jane Mellet v. Ireland, Human Rights Committee, Commc’n No. 2324/2013, para. 7.8, 7.10-7.11, 8, U.N. Doc. CCPR/C/116/D/2324/2013 (2016).
- 12 K.L. v. Peru, Human Rights Committee, Commc’n No. 1153/2003, para. 7, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); HRC, *Gen. Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, U.N. Doc. CCPR/C/GC/36 (Oct. 31, 2018); CEDAW Committee, *Gen. recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, para. 18, U.N. Doc. CEDAW/C/GC/35 (2017); CESCR, *Gen. Comment No. 14. The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 8, 21, UN Doc. E/C.12/2000/4 (2000).
- 13 See, e.g., CEDAW Committee, *Concluding Observations on New Zealand*, para. 35(a), U.N. Doc. CEDAW/C/NZL/CO/7 (2012); CEDAW Committee, *Concluding Observations on Sierra Leone*, para. 32, U.N. Doc. CEDAW/C/SLE/CO/6 (2014).
- 14 CEDAW Committee, *Gen. Recommendation No. 24: Article 12 of the Convention (women and health)*, at 360, para. 11 U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008); see e.g., L.C. v. Peru, CEDAW Committee, Commc’n No. 22/2009, para. 8.17, 9, 12(iii), U.N. Doc. CEDAW/C/50/D/22/2009 (2011).
- 15 HRC, *Gen. Comment 36 on the Right to Life*, para. 8, U.N. Doc. CCPR/C/GC/36 (Oct. 31, 2018).
- 16 *Id.*
- 17 *Id.*
- 18 *Id.*
- 19 WORLD HEALTH ORGANIZATION, *Safe Abortion: Technical and Policy Guidance for Health Systems* 23 (2012).
- 20 CESCR, *Gen. Comment No. 22: on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 38, U.N. Doc. E/C.12/GC/22 (2016).
- 21 U.N. Working Group on Discrimination Against Women in Law and Practice, *Report of the Mission to the United States of America*, para. 90(vii; x; xvi), U.N. Doc. A/HRC/32/44/Add.2 (June 7, 2016).
- 22 Special Rapporteur on extreme poverty and human rights, *Report of the Mission to the United States of America*, para. 56, U.N. Doc. A/HRC/38/33/Add.1 (May 4, 2018) (by Philip Alston).
- 23 410 U.S. at 155, 164.
- 24 See *id.* at 153
- 25 *Id.*
- 26 *Roe*, 410 U.S. at 163.
- 27 See *id.* at 164-65.
- 28 *Id.*
- 29 *Harris v. McRae*, 448 U.S. 297 (1980).
- 30 See *Ohio v. Akron Ctr for Reprod. Health*, 97 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Bellotti v. Baird*, 443 U.S. 622 (1979).
- 31 See Sec. 2, Glossary
- 32 See *Thornburgh v. Amer. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983); *Colautti v. Franklin*, 439 U.S. 379 (1979).
- 33 492 U.S. 490 (1989).
- 34 See *Jane L. v. Bangerter*, 102 F.3d 1112, 1113-1114 (10th Cir. 1996); *Sojourner T v. Edwards*, 974 F.2d 27 (5th Cir. 1992); *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1992).
- 35 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).
- 36 *Id.* at 856.
- 37 *Id.*
- 38 *Id.* at 879.
- 39 *Id.* at 851.

- 40 *Id.* at 852.
- 41 *See id.* at 877.
- 42 *See id.* at 876-78.
- 43 *Id.* at 869.
- 44 *Id.* at 877.
- 45 *Id.* at 878.
- 46 *See, e.g., Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (June 28, 2016).
- 47 *Whole Woman's Health v. Cole*, 790 F.3d 563, 587 (5th Cir.), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd and remanded sub nom. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).
- 48 530 U.S. 914 (2000).
- 49 550 U.S. 124 (2007).
- 50 136 S. Ct. 2292, 2309-10.
- 51 *Id.* at 2310.
- 52 *Id.*
- 53 *Id.* at 2309.
- 54 *See id.* at 2309-10.
- 55 *Id.* at 2313, 2318.
- 56 *See, e.g., Jackson Women's Health Org. v. Dobbs*, 379 F. Supp. 3d 549 (S.D. Miss. 2019) (preliminarily enjoining Mississippi 6-week ban), *appeal filed* 19-60455 (5th Cir. June 24, 2019); *Jackson Women's Health Org. v. Currier*, 349 F.Supp.3d 536 (S.D. Miss. 2018) (permanently enjoining Mississippi 15-week abortion ban), *appeal filed* No. 18-60868 (5th Cir. Dec. 17, 2018).
- 57 *See, e.g., June Med. Servs. v. Gee*, 905 F.3d 787 (5th Cir. 2018), *stay granted by* 139 S Ct. 663 (2019) and *petition for cert. filed* No. 18-1323 (U.S. Apr. 17, 2019).
- 58 While Indiana's attack on *Roe* did not succeed, the state successfully convinced the Supreme Court to overturn a Seventh Circuit opinion holding that a law requiring burial or cremation of fetal tissue after an abortion was unconstitutional. However, departing from typical abortion rights jurisprudence, the Seventh Circuit applied "rational basis" review instead of the undue burden standard, and struck the law down even under that relaxed test on the grounds that it was irrational. Accordingly, the Supreme Court's decision says little about how it will treat challenges to *Roe* or the undue burden standard in the future.
- 59 Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming.
- 60 WASH. REV. CODE ANN. §§ 9.02.100, 9.02.110, 9.02.140, 9.02.160
- 61 *See, e.g., TENN. CONST.* art. I, § 36, enacted by Amendment 1 (2014).
- 62 H.B. 425, 45th Gen. Assemb., Reg. Session (La. 2019).
- 63 *See, e.g., Barbara Rodriguez, Gov. Kim Reynolds supports anti-abortion language in the Iowa Constitution*, DES MOINES REGISTER (Feb. 5, 2019), <https://www.desmoinesregister.com/story/news/politics/2019/02/05/iowa-abortion-governor-kim-reynolds-language-constitution-amendment-legislature-republicans-pro-life/2778888002/>; John Hanna, *Kansas court bolsters abortion rights, blocks ban*, AP (Apr. 26, 2019), <https://www.apnews.com/3f479b218a6140719e1694fcfdb8036>; S.B. 195, 57th Leg., 1st Reg. Sess. (Ok 2019).
- 64 "End Late Term Abortions in Colorado" filed June 7, 2019, *available at* <https://www.sos.state.co.us/pubs/elections/Initiatives/title-Board/filings/2019-2020/108Final.pdf>; "Fetal Heartbeat Protection Act," approved June 19, 2019, *available at* [https://www.michigan.gov/documents/sos/MHC\\_Petition\\_061819\\_version\\_658571\\_7.pdf](https://www.michigan.gov/documents/sos/MHC_Petition_061819_version_658571_7.pdf); "Dismemberment Abortion Act," approved June 19, 2019, *available at* [https://www.michigan.gov/documents/sos/MVL\\_Petition\\_061719\\_version\\_658581\\_7.pdf](https://www.michigan.gov/documents/sos/MVL_Petition_061719_version_658581_7.pdf).
- 65 Jessica L. Semega, Kayla R. Fontenot, & Melissa A. Kollar, *Income and Poverty in the United States: 2016*, 13 U.S. Census Bureau (Sept. 2017), <https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf>.
- 66 *Id.*
- 67 S.E. James, J.L. Herman, S. Rankin, M. Keisling, L. Mottet, and M. Anafi, *The Report of the 2015 U.S. Transgender Survey*, NATIONAL CENTER FOR TRANSGENDER EQUALITY 140 (2016).
- 68 *Semega, supra* note 65.
- 69 Diana Greene Foster et al., *Socioeconomic consequences of abortion compared to unwanted birth*, AMERICAN PUBLIC HEALTH ASSOCIATION (Oct. 30, 2012), <http://apha.confex.com/apha/140am/webprogram/Paper263858.html>.
- 70 Megan K. Donovan, *In Real Life: Federal Restrictions on Abortion Coverage and the Women They Impact*, 20 GUTTMACHER POLICY REVIEW 1, 2 (2017), [https://www.guttmacher.org/sites/default/files/article\\_files/gpr2000116.pdf](https://www.guttmacher.org/sites/default/files/article_files/gpr2000116.pdf).
- 71 Stanley K. Henshaw and Kathryn Kost, 24 FAMILY PLANNING PERSPECTIVES 5 (Sept.-Oct. 1992), at 196-207, 213.
- 72 *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206 (Iowa 2018); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019).
- 73 *See James Trussell, Jane Menken, Barbara L. Lindheim and Barbara Vaughan, 12 FAMILY PLANNING PERSPECTIVES 3* (May-Jun., 1980), at 120-123, 127-130.
- 74 In 2019, Texas advocates worked to introduce a bill requiring Medicaid coverage of all medically necessary abortions. *See Rosie's Law*, H.B. 825, 86th Leg., Reg. Sess. (Tx 2019).
- 75 *Harris v. McRae*, 448 U.S. 297 (1980).
- 76 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-159, *MEDICAID: CMS ACTION NEEDED TO ENSURE COMPLIANCE WITH ABORTION COVERAGE REQUIREMENTS 17* (Jan. 2019), <https://www.gao.gov/assets/700/696338.pdf>. *But see*, West Virginia stopped providing public funding for all or most medically necessary abortions on November 6, 2018. *See* W. VA. Bureau for Medical Serv., *Revised Public Notice Regarding West Virginia Constitutional Amendment 1* (Nov. 13, 2018), <https://dhhr.wv.gov/bms/Public%20Notices/Pages/Public%20Notice%20regarding%20West%20Virginia%20Constitutional%20Amendment%201%20is%20now%20available.aspx>.
- 77 *Id.*
- 78 *Id.* at 16 ("The 14 states that reported not covering Mifeprex were Alabama, Arkansas, Colorado, District of Columbia, Florida, Idaho, Kentucky, Missouri, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas, and Utah.").
- 79 Nikita Stewart, *New York City Allocates \$250,000 for Abortions, Challenging Conservative States*, NYTIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/nyregion/abortion-funding-ny.html>.
- 80 Ed Pilkington, *Ten years after abortion doctor's murder, one woman carries the fight for reproductive rights*, THE GUARDIAN (May 31, 2019), <https://www.theguardian.com/us-news/2019/may/30/he-gave-so-much-the-woman-fighting-the-abortion-wars-begun-by-george-tiller>.
- 81 Holly Yan, *These 6 states have only 1 abortion clinic left. Missouri could become the first with zero*, CNN (June 21, 2019), <https://www.cnn.com/2019/05/29/health/six-states-with-1-abortion-clinic-map-trnd/index.html>.
- 82 *See, e.g., Roe*, 410 U.S. at 113; *Whole Woman's Health*, 136 S. Ct. 2292.

# VIII.

## Analysis of States & District of Columbia

In this section, you will find individual analysis of the state of abortion law in all fifty states and the District of Columbia.

# Alabama

## Hostile

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely Alabama will seek to enforce the total ban passed in 2019, which will criminalize providing abortion.

### Restrictions

Alabama law generally prohibits abortion at twenty weeks post-fertilization and at viability.<sup>1</sup> In 2019, the state enacted a total abortion ban without exceptions, scheduled to go into effect in November 2019.<sup>2</sup> It also prohibits D&X procedures and D&E procedures;<sup>3</sup> the latter ban is permanently enjoined.<sup>4</sup> Pregnant people who seek abortion care must undergo a mandatory forty-eight-hour waiting period, biased counseling, and an ultrasound.<sup>5</sup> Alabama limits public funding for abortion<sup>6</sup> and private insurance coverage of abortion.<sup>7</sup> Alabama law generally requires that a parent, legal guardian,<sup>8</sup> or judge<sup>9</sup> consent to a minor's abortion.

Alabama's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities,<sup>10</sup> unenforceable admitting privileges,<sup>11</sup> and reporting.<sup>12</sup> Alabama law restricts the provision of abortion care to licensed physicians.<sup>13</sup> Providers who violate Alabama's abortion restrictions may face civil and criminal penalties.<sup>14</sup>

### Protections

Alabama law does not include express constitutional or statutory protections for abortion. To the contrary, the Alabama Constitution declares that the state "acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life."<sup>15</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Alabama has a pre-*Roe* ban.<sup>16</sup>

1 ALA. CODE § 26-23B-5; *id.* § 26-22-3.

2 *Id.* § 26-23H-4.

3 *Id.* § 26-23-3; *id.* § 26-23G-2.

4 *Harris v. W. Ala. Women's Ctr.*, 588 U.S. \_\_ (2019) (denying Alabama's petition for certiorari).

5 ALA. CODE § 26-23A-4.

6 ALA. ADMIN. CODE r. 560-X-6-.09(1).

7 ALA. CODE § 26-23C-3.

8 *Id.* § 26-21-3 (A).

9 *Id.* § 26-21-3.

10 *Id.* § 26-23E-9; ALA. ADMIN. CODE r. 420-5-1-.01 *et seq.*

11 ALA. CODE § 26-23E-4(c), *invalidated by Planned Parenthood Se., Inc. v. Strange*, 172 F. Supp. 3d 1275, 1278 (M.D. Ala. 2016).

12 ALA. CODE § 22-9A-13.

13 *Id.* § 26-23A-7.

14 *See, e.g., id.* § 26-23-5; *id.* § 26-23-3.

15 ALA. CONST., § 36.06.

16 ALA. CODE § 13A-13-7.

A graphic featuring a white outline of the state of Alaska on a yellow background. The word "Alaska" is written in a large, bold, black sans-serif font across the top of the state outline. Below it, the word "Protected" is written in a smaller, black sans-serif font, also across the state outline.

# Alaska Protected

## Restrictions

Alaska law prohibits D&X procedures, but that ban is permanently enjoined.<sup>17</sup> Alaska law includes an unenforced, unconstitutional parental involvement requirement.<sup>18</sup>

Alaska's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities<sup>19</sup> and reporting.<sup>20</sup> Reporting requirements related to minors' abortions were held unconstitutional.<sup>21</sup> Alaska law restricts the provision of abortion care to licensed physicians.<sup>22</sup>

## Protections

Alaska law includes constitutional protections for abortion. The Alaska Supreme Court has interpreted the privacy provision found in the state's constitution to protect a pregnant person's right to make reproductive decisions, including abortion, as a fundamental right, and more protective than the U.S. Constitution.<sup>23</sup> The Alaska Supreme Court has also found that limits on public funding for abortion were unconstitutional under the state equal protection clause.<sup>24</sup>

## Laws that could be enforced if *Roe* is limited or overturned

Alaska does not have a pre-*Roe* ban, because certain abortions were legalized before *Roe*.<sup>25</sup>

## Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Alaska.

17 ALASKA STAT. § 18.16.050. *Planned Parenthood of Alaska, Inc. v. State*, No. 3AN-97-6019 CIV (Alaska Super. Ct. Mar. 13, 1998), appeal withdrawn, No. S-08610 (Alaska June 29, 2000).

18 *Planned Parenthood of The Great NW. v. State*, 375 P.3d 1122 (Alaska 2016) (striking down as unconstitutional ALASKA STAT. § 18.16.010-040). See also *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 585 (Alaska 2007).

19 ALASKA STAT. § 18.16.010(A)(2); ALASKA ADMIN. CODE tit. 7, § 12.370.

20 ALASKA STAT. § 18.50.245(B).

21 *Planned Parenthood of The Great NW.*, 375 P.3d at 1145 (striking down as unconstitutional ALASKA STAT. § 18.16.040).

22 ALASKA STAT. § 18.16.010(A)(1).

23 *Planned Parenthood of The Great NW.*, 375 P.3d at 1129 (Alaska 2016) ("In 1997 we examined this express privacy provision in the context of pregnancy-related decisions and held that a woman's fundamental privacy right to reproductive choice is more broadly protected by the Alaska Constitution than the United States Constitution") (citing to *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 971 (Alaska 1997)).

24 ALASKA ADMIN. CODE tit. 7, § 43.140, *invalidated by State, Dept. of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 915 (Alaska 2001) (repealed 2010); see also ALASKA STAT. § 47.07.068, *invalidated by State v. Planned Parenthood of the Great NW.*, 436 P.3d 984 (Alaska 2019).

25 1970 Alaska Sess. Laws ch. 103, § 1 (former ALASKA STAT. § 11.15.060(A)(1)-(2)).

# Arizona

## Hostile

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely the state will pass new restrictions to prohibit abortion completely.

### Restrictions

Arizona law generally prohibits abortion at twenty weeks LMP, a restriction that is permanently enjoined,<sup>26</sup> and after viability.<sup>27</sup> It also prohibits D&X procedures,<sup>28</sup> and abortions sought for reasons of race or sex.<sup>29</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period, biased counseling, and an ultrasound.<sup>30</sup> Arizona limits public funding for abortion<sup>31</sup> and private insurance coverage of abortion.<sup>32</sup> Arizona criminalizes people who self-manage their abortions.<sup>33</sup> Arizona law generally requires that a parent, legal guardian,<sup>34</sup> or judge<sup>35</sup> consent to a minor's abortion.

Arizona's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities,<sup>36</sup> admitting privileges,<sup>37</sup> and reporting.<sup>38</sup> Arizona law restricts the provision of surgical abortion care to licensed physicians.<sup>39</sup> Providers who violate Arizona's abortion restrictions may face civil and criminal penalties.<sup>40</sup>

### Protections

Arizona does not include express constitutional or statutory protections for abortion.

### Laws that could be enforced if *Roe* is limited or overturned

Arizona has a pre-*Roe* ban.<sup>41</sup>

26 ARIZ. REV. STAT. § 36-2159; *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013).

27 ARIZ. REV. STAT. § 36-2301.01.

28 *Id.* § 13-3603.01.

29 *Id.* § 13-3603.02(A).

30 *Id.* § 36-2153; *Id.* § 36-2156.

31 *Id.* § 35-196.02.

32 ARIZ. REV. STAT. § 20-121.

33 *Id.* § 13-3604.

34 *Id.* § 36-2152(A).

35 *Id.* § 36-2152(B).

36 *Id.* § 36-449.02; *id.* § 36-449.03.

37 ARIZ. REV. STAT. § 36-449.03(C)(3)(a)-(b); ARIZ. ADMIN. CODE § R9-10-1501(1); *id.* § R9-10-1507(B)(2)-(3).

38 ARIZ. REV. STAT. § 36-449.03(H); *id.* § 36-2161; *id.* § 36-2162.

39 *Id.* § 36-2155; *id.* § 36-2153(E); *id.* § 32-2531(B).

40 *See, e.g., id.* § 36-2156(B)-(D); *id.* § 36-2152(I)-(J).

41 *Id.* §§ 13-3603, 13-3604, and 13-3605 (formerly §§ 13-211, 13-212, and 13-213 (1956)).

# Arkansas

## Hostile

### Restrictions

Arkansas law generally prohibits abortion at twenty weeks post-fertilization and after viability.<sup>42</sup> The state enacted a twelve-week ban in 2012,<sup>43</sup> but this law is permanently enjoined.<sup>44</sup> In 2019, Arkansas enacted an eighteen-week LMP ban,<sup>45</sup> which is temporarily enjoined.<sup>46</sup> Arkansas prohibits both the D&X and D&E method of abortion.<sup>47</sup> The D&E ban is currently blocked by a preliminary injunction.<sup>48</sup> Arkansas bans abortions sought for sex selection.<sup>49</sup> In 2019, the state enacted a law that bans abortions if sought because of Down syndrome.<sup>50</sup> Pregnant people who seek abortion care must undergo a mandatory forty-eight-hour waiting period, biased counseling, and an ultrasound.<sup>51</sup> Arkansas also limits public funding for abortions<sup>52</sup> as well as insurance coverage of abortion care under the state's health-care exchange.<sup>53</sup> Arkansas law generally requires that a parent, legal guardian,<sup>54</sup> or judge<sup>55</sup> consent to a minor's abortion.

Arkansas targeted regulation of abortion providers (TRAP) laws include requirements related to facilities,<sup>56</sup> admitting privileges agreements,<sup>57</sup> and reporting.<sup>58</sup> Arkansas law restricts the provision of abortion care to licensed physicians.<sup>59</sup> Providers who violate Arkansas's abortion restrictions may face civil and criminal penalties.<sup>60</sup>

### Protections

Arkansas law does not include express constitutional or statutory protections for abortion. To the contrary, Amendment 68, intended to “protect the life of every unborn child,” amended the Arkansas Constitution to state “[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution.”<sup>61</sup>

### Laws that could be enforced if *Roe* is limited or overturned

In 2019, Arkansas enacted a “trigger” ban,<sup>62</sup> and the state has a pre-*Roe* ban.<sup>63</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely Arkansas will attempt to enforce its newly enacted trigger ban to prohibit abortion entirely.

42 ARK. CODE ANN. § 20-16-1405; *id.* § 20-16-705 (a).

43 *Id.* § 20-16-1304.

44 *Edwards v. Beck*, 8 F. Supp. 3d 1091 (E.D. Ark. 2014), *aff'd*, 786 F.3d 1113 (8th Cir. 2015).

45 ARK. CODE ANN. § 20-16-2004

46 *Little Rock Family Planning Servs. v. Rutledge*, No. 4:19-cv-00449-KGB, at \*185-86 (E.D. Ark. Aug. 06, 2019).

47 ARK. CODE ANN. § 20-16-1203; *id.* § 20-16-1803.

48 *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1111 (E.D. Ark. 2017).

49 ARK. CODE ANN. § 20-16-1904.

50 ARK. CODE ANN. § 20-16-2003.

51 ARK. CODE ANN. § 20-16-1703; *id.* § 20-16-1303.

52 ARK. CONST. AMEND. 68, § 1; In *Hodges v. Huckabee*, the Arkansas Supreme Court held that the state “cannot stand as a bar to the payment of Medicaid funds for abortions necessary as the result of rape or incest so long as the Hyde Amendment as written

remains in effect.” 338 Ark. 454, 462, 995 S.W.2d 341, 347 (Ark. 1999). Therefore, Amendment 68 is enforced to the limit of federal law.

53 ARK. CODE ANN. § 23-79-156.

54 *Id.* § 20-16-804.

55 *Id.* § 20-16-809.

56 *Id.* § 20-9-302; ARK. ADMIN. CODE 007.052-12.

57 ARK. CODE ANN. § 20-16-1504; ARK. ADMIN. CODE 007.052-8. The Supreme Court denied certiorari, allowing a “contract physician” admitting privileges requirement to go into effect. See *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 138 S. Ct. 2573, 201 L. Ed. 2d 292 (2018).

58 ARK. CODE ANN. § 20-16-1108; *id.* § 20-16-1406.

59 *Id.* § 5-61-101.

60 See, e.g., *id.* § 20-16-1408; *id.* § 20-16-704.

61 ARK. CONST. AMEND. LXVIII, § 2.

62 S.B. 149, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019).

63 ARK. CODE ANN. § 5-61-102.



# California

## Expanded Access

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in California.

### Restrictions

California law generally prohibits abortion at viability.<sup>64</sup> California law includes an unconstitutional and unenforced requirement that a parent or legal guardian consent to a minor's abortion; it has not been repealed.<sup>65</sup>

Providers who violate California's abortion restrictions may face civil and criminal penalties.<sup>66</sup>

### Protections

California has enshrined in statute a protection for abortion as a fundamental right.<sup>67</sup> The law provides:

*The legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions. Accordingly, it is the public policy of the State of California that: (a) Every individual has the fundamental right to choose or refuse birth control. (b) Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion, except as specifically limited by this article. (c) The state shall not deny or interfere with a woman's fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically permitted by this article.*<sup>68</sup>

Furthermore, California has strong state constitutional protections for the right to abortion. Indeed, California recognized the existence of the right of procreative choice under the state constitution four years before the U.S. Supreme Court issued the *Roe* decision.<sup>69</sup>

The state constitution was amended to include an explicit protection for privacy and this provision has been interpreted as protecting the right to choose abortion.<sup>70</sup>

While the state restricts the provision of abortion care to licensed physicians, it authorizes certain advance practice clinicians (APCs) to provide medication or aspiration abortion care during the first trimester.<sup>71</sup> California also provides public funding for abortion<sup>72</sup> and requires private insurance coverage of abortion.<sup>73</sup> The state protects clinic safety and access by prohibiting the obstruction of health-care facilities.<sup>74</sup>

### Laws that could be enforced if *Roe* is limited or overturned

California does not have a pre-*Roe* ban, as the state legalized some abortions before *Roe* was decided.<sup>75</sup>

64 CAL. HEALTH & SAFETY CODE § 123468.

65 *Id.* § 123450, invalidated by *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 436-45, 940 P.2d 797, 883-89 (1997).

66 *See, e.g.*, CAL. BUS. & PROF. CODE § 2052; CAL. PENAL CODE § 1170.

67 CAL. HEALTH & SAFETY CODE § 123462; CAL. HEALTH & SAFETY CODE § 123466.

68 CAL. HEALTH & SAFETY CODE § 123462.

69 *People v. Belous*, 458 P.2d 194, 199 (Cal. 1969) (“[t]he fundamental right of the woman to choose whether to bear children follows from the Supreme Court’s and this court’s repeated acknowledgement of a ‘right of privacy’ or ‘liberty’ in matters related to marriage, family and sex.”). This case was decided before the California constitutional privacy protections were added to the state constitution in 1974.

70 *See* CAL. CONST. Art. I, § 1 (Added 1974); *Comm.*

*to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981) (striking down limits on Medicaid coverage for abortions, finding that all women possess a fundamental constitutional right to choose abortion under the California constitutional privacy provision); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (invalidating parental-consent requirement).

71 CAL. BUS. & PROF. CODE § 2253 (B).

72 *Committee to Defend Reprod. Rights v. Myers*, 29 Cal. 3d 252, 625 P.2d 779 (Cal. 1981).

73 Michelle Rouillard, Director of Department of Managed Health Care letter to Mark Morgan, California President of Anthem Blue Cross, RE: Limitations or Exclusions of Abortion Services. August 22, 2014.

74 CAL. CIV. CODE § 3427.1.

75 Therapeutic Abortion Act, CAL. HEALTH & SAFETY CODE § 25950 et seq. (West Supp. 1971).

# Colorado

Not  
Protected

## Restrictions

Colorado law limits public funding for abortion.<sup>76</sup> The state generally requires that parents or legal guardians be notified about a minor's abortion;<sup>77</sup> alternatively, a judge can approve a minor's petition without parental notification.<sup>78</sup>

Colorado law requires abortion providers to submit reports to the state.<sup>79</sup> For an abortion to be reimbursed with public funds, it must be provided by a licensed physician.<sup>80</sup> Providers who violate Colorado's abortion restrictions may face civil penalties.<sup>81</sup>

## Protections

Colorado law does not include express constitutional or statutory protections for abortion. The state does not restrict the type of health-care practitioner who can provide abortion care. Colorado law includes protections for clinic safety or access by prohibiting obstruction and creating a buffer zone.<sup>82</sup>

## Laws that could be enforced if *Roe* is limited or overturned

Colorado repealed its pre-*Roe* ban in 2013.<sup>83</sup>

## Conclusion

If *Roe v. Wade* is limited or overturned, abortion will likely remain accessible in Colorado, but without legal protection.

76 COLO. REV. STAT. § 25-5-3-106; COLO. REV. STAT. § 25-5-4-415; 10 COLO. CODE REGS. § 2505-10:8.770.4.A.

77 COLO. REV. STAT. § 13-22-704.

78 *Id.* § 13-22-707.

79 COLO. CODE REGS. § 1006-1-110.

80 COLO. REV. STAT. § 25-5-3-106 (3) (a); *id.* § 25-5-4-415 (3) (a).

81 *See, e.g., id.* § 13-22-706.

82 *Id.* § 18-9-122; *upheld in* Hill v. Colorado, 530 U.S. 703 (2000).

83 COLO. REV. STAT. §§ 18-6-101 to 18-6-105, 12-32-107(3)(m), 12-36-117(1)(b), 25-1-1202(1)(ee), 30-10-606(1)(d) *repealed by* 2013 Laws, ch. 372, §3, p. 2392.

# Connecticut

## Enhanced Access

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Connecticut.

### Restrictions

Connecticut law generally prohibits abortion post-viability and during the third trimester.<sup>84</sup>

Connecticut's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities<sup>85</sup> and reporting.<sup>86</sup>

### Protections

Connecticut law includes an express statutory protection for abortion.<sup>87</sup> It states:

*The decision to terminate a pregnancy prior to the viability of the fetus shall be solely that of the pregnant woman in consultation with her physician.*

Connecticut funds medically necessary abortions.<sup>88</sup> While the state restricts the provision of abortion care to licensed physicians, it authorizes certain advance practice clinicians (APCs) to provide medication abortion care.<sup>89</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Connecticut repealed its pre-*Roe* ban in 1990.<sup>90</sup>

84 CONN. GEN. STAT. ANN. § 19a-602(b); CONN. AGENCIES REGS. § 19-13-D54(h).

85 CONN. AGENCIES REGS. § 19-13-D54(c)-(d); *id.* § 19a-116-1(d).

86 *Id.* § 19-13-D54(b).

87 CONN. GEN. STAT. ANN. § 19a-602(a).  
*See also Meloney-Distasio v. Weinstein*, No. FSTC136018746S, 2014 WL 7462584, at \*3 (Conn. Super. Ct. Nov. 20, 2014) (“[T]he proposition that with respect to a decision to have an abortion, decision-making authority is vested solely in the

person actually pregnant... is definitively resolved in this state by General Statutes § 19a-602.”).

88 *Doe v. Maher*, 40 Conn. Supp. 394, 515 A.2d 134 (Conn. Super. Ct. 1986); CONN. OP. ATT’Y GEN. NO. 1998-022 (Nov. 16, 1998).

89 CONN. AGENCIES REGS. § 19-13-D54(A); CONN. OP. ATT’Y GEN. NO. 2001-003 (Feb. 7, 2001); CONN. OP. ATT’Y GEN. NO. 2001-015, July 2, 2001.

90 CONN. GEN. STAT. ANN. §§ 53-29 to 53-31 (West 1960) repealed by 1990 Conn. Acts 90-113, § 4 (Reg. Sess.).

# Delaware Protected



## Restrictions

Delaware law generally prohibits abortion after viability<sup>91</sup> and limits public funding for abortion.<sup>92</sup> Delaware criminalizes people who self-manage their abortions.<sup>93</sup> Delaware law generally requires that a parent or legal guardian be notified prior to a minor's abortion;<sup>94</sup> alternatively, a judge can approve a minor's petition without parental notification.<sup>95</sup>

Delaware requires abortion providers to submit reports to the state.<sup>96</sup> Delaware law restricts the provision of abortion care to licensed physicians.<sup>97</sup> Providers who violate Delaware's abortion restrictions may face civil and criminal penalties.<sup>98</sup>

## Protections

Delaware law includes express statutory protections for abortion.<sup>99</sup>

## Laws that could be enforced if *Roe* is limited or overturned

Delaware has unenforced pre-*Roe* bans,<sup>100</sup> but it has repealed or amended other pre-*Roe* bans.<sup>101</sup>

## Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Delaware.

91 DEL. CODE ANN. tit. 24, § 1790 (b).

92 16 DEL. ADMIN. CODE §§ 1.15, 1.2, 2.2.

93 DEL. CODE ANN. tit. 11, § 652; DEL. CODE ANN. tit. 24, § 1792 (prohibition on assistance or participation in unlawful termination of pregnancy).

94 DEL. CODE ANN. tit. 24, § 1783 (1).

95 *Id.* § 1783 (2); *Id.* § 1784.

96 DEL. CODE ANN. tit. 16, § 3133.

97 DEL. CODE ANN. tit. 24, § 1790 (a).

98 *See, e.g., id.* § 1789B; *Id.* § 1789.

99 *Id.* § 1790.

100 DEL. CODE ANN. tit. 11, §§ 651, 652, 653, 654; DEL. CODE ANN. tit. 24 §§ 1766, 1792. *See Delaware Women's Health Org., Inc. v. Wier*, 441 F. Supp. 497 (D. Del. 1977) (dismissed for lack of federal jurisdiction because of Delaware's policy of non-enforcement). Assessment of Op. Att'y Gen., 73-030 (Apr. 4, 1973) (stating that Delaware's pre-*Roe* criminal abortion bans will not be prosecuted).

101 DEL. CODE ANN. tit. 24 §§ 1793, 1794 repealed by 81 Del. Laws ch.35, § 4 (2017); 24 DEL. CODE ANN. § 1790 amended by 81 Del. Laws ch.35, § 4 (2017).

# District of Columbia

## Not Protected

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will likely remain accessible in the District of Columbia, but without legal protection. Furthermore, the district remains subject to plenary congressional power,<sup>107</sup> and it is possible that the U.S. Congress would prohibit or severely restrict abortion in the absence of *Roe*.<sup>108</sup>

### Restrictions

The federal government limits public funding for abortion in the District of Columbia.<sup>102</sup>

District law prohibits certified nurse midwives from providing surgical abortion care.”<sup>103</sup>

### Protections

The District of Columbia does not include express statutory protections for abortion. However, if it did, protections may not be immune from congressional interference.<sup>104</sup> The district protects clinic safety and access by prohibiting obstruction, trespassing, and interference.<sup>105</sup>

### Laws that could be enforced if *Roe* is limited or overturned

The district repealed its pre-*Roe* ban in 2004.<sup>106</sup>

102 Pub. L. 111-117 §814 (2009); Pub. L. 112-10 § 1572 (2011).

103 D.C. MUN. REGS. tit. 17 § 5808.5.

104 U.S. CONST. art. I, § 8, cl. 17.

105 D.C. CODE § 22-1314.02.

106 *Id.* § 22-101 (1981), *repealed by* 2003 D.C. Laws 15-154, § 2.

107 U.S. CONST. art. I, § 8, cl. 17.

108 *See generally, Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002) (upholding the validity of a congressional enactment prohibiting the District

of Columbia from reducing the penalties for use or possession of marijuana); *Banner v. United States*, 303 F. Supp. 2d 1 (D.D.C. 2004) (upholding validity of congressional prohibition against commuter tax on nonresidents working in the District of Columbia). In 2016, the District of Columbia enacted a Death with Dignity Act, *see* D.C. Code § 7-661.01 *et seq*; subsequently, the House of Representatives unsuccessfully sought to repeal the Death with Dignity Act through an appropriations rider, *see* H.R. 3354, 115th Congress, Reg. Sess. (U.S. 2017).



## Restrictions

Florida law generally prohibits abortion at viability.<sup>109</sup> Florida has a permanently enjoined method ban that was found to include D&E, D&X, and labor induction procedures.<sup>110</sup> Requirements that pregnant people who seek abortion care undergo a twenty-four-hour mandatory waiting period, biased counseling, and ultrasounds have been enjoined.<sup>111</sup> Florida also limits public funding for abortion,<sup>112</sup> and generally prohibits policies sold on the state's health-care exchange from covering abortion.<sup>113</sup> The Florida Constitution expressly authorizes parental notification for minors.<sup>114</sup> Florida law generally requires that a parent or legal guardian be notified prior to a minor's abortion;<sup>115</sup> alternatively a judge can approve a minor's petition without parental notification.<sup>116</sup>

Florida's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities that provide second-trimester procedures,<sup>117</sup> admitting privileges or, alternatively, transfer agreements,<sup>118</sup> and recordkeeping.<sup>119</sup> State law restricts the provision of abortion care to licensed physicians.<sup>120</sup> Providers who violate Florida's abortion restrictions may face civil and criminal penalties.<sup>121</sup>

## Protections

Florida law includes constitutional protections for abortion as part of the state's fundamental right to privacy.<sup>122</sup>

## Laws that could be enforced if *Roe* is limited or overturned

Florida repealed its pre-*Roe* bans in 1972.<sup>123</sup>

## Conclusion

If *Roe v. Wade* is limited or overturned, it is likely that abortion will remain legal in Florida.

109 FLA. STAT. § 390.01112; *see also, id.* § 390.0111 (third trimester ban).

110 *See A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148, 1154-55 (S.D. Fla. 1998) (finding that FLA. STAT. § 390.0111(5) unduly burdens patients seeking a D&E, labor induction, or D&X procedure prior to viability of the fetus and permanently enjoining it).

111 FLA. STAT. § 390.0111(3); *see Gainesville Woman Care, LLC v. Florida*, No. 2015-CA-001323 (Fla. Cir. Ct. Jan. 09, 2018).

112 FLA. ADMIN. CODE R. § 59G-4.001; FLORIDA AGENCY FOR HEALTH CARE ADMIN., *Florida Medicaid Provider Reimbursement Handbook, CMS-1500*, 3-53 (2008); *Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1038-40 (Fla. 2001) (Medicaid funding ban was constitutional).

113 FLA. STAT. § 627.64995.

114 FLA. CONST. art. X, § 22.

115 FLA. STAT. § 390.01114.

116 *Id.*

117 FLA. ADMIN. CODE R. 59A-9.022.

118 *Id.* 59A-9.023.

119 FLA. STAT. § 390.01112.

120 FLA. STAT. § 390.0111(2); FLA. ADMIN. CODE R. 59A-9.023.

121 *See, e.g.,* FLA. STAT. § 390.0111(10)-(11).

122 FLA. CONST. ART. I, § 23. *See Gainesville Woman Care v. State*, 210 So. 3d 1243, 1254 (Fla. 2017) ("Florida's constitutional right of privacy encompasses a woman's right to choose to end her pregnancy."); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 634-36 (Fla. 2003) (rejecting application of "undue burden" test, as established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992) in favor of strict scrutiny); *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) ("The Florida Constitution embodies the principle that [f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision ... whether to end her pregnancy. A woman's right to make that choice freely is fundamental.") (internal quotations and citations omitted).

123 FLA. STAT. §§ 782.10, 797.01, *repealed by* 1972 Fla. Laws ch. 72-196, § 9; *see also State v. Barquet*, 262 So. 2d 431, 438 (Fla. 1972) (holding that Fla. Stat. § 782.10 and § 797.01 violate the United States Constitution and the due process clause of the Florida Constitution).

# Georgia

## Hostile

### Conclusion

If *Roe v. Wade* is limited or overturned, Georgia will likely move to enforce its newly enacted six-week ban to prohibit abortion almost entirely.

### Restrictions

Georgia law generally prohibits abortion at twenty weeks post-fertilization.<sup>124</sup> Georgia enacted a six-week ban that is not in effect.<sup>125</sup> It also prohibits D&X abortion procedures.<sup>126</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period and biased counseling.<sup>127</sup> Georgia also limits public funding for,<sup>128</sup> and private insurance coverage of, abortion.<sup>129</sup> Georgia law generally requires that a parent, legal guardian,<sup>130</sup> or judge<sup>131</sup> consent to a minor's abortion.

Georgia requires abortion providers to submit reports to the state.<sup>132</sup> State law restricts the provision of abortion care to licensed physicians.<sup>133</sup> Providers who violate Georgia's abortion restrictions may face civil and criminal penalties.<sup>134</sup>

### Protections

Georgia law does not include express constitutional or statutory protections for abortion. To the contrary, Georgia's six-week ban states that "unborn children are a class of living, distinct persons and more expansive state recognition of unborn children as persons did not exist when *Planned Parenthood v. Casey* (1992) and *Roe v. Wade* (1973) established abortion related precedents."<sup>135</sup>

### Laws that could be enforced if *Roe* is limited or overturned

The Supreme Court invalidated certain provisions of the state's pre-*Roe* ban.<sup>136</sup>

124 GA. CODE ANN. § 16-12-141.

125 H.B. 481, 155th Gen. Assemb., Reg. Sess. (Ga 2019), to be codified at GA. CODE ANN. § 16-12-141.

126 GA. CODE ANN. § 16-12-144(b).

127 *Id.* § 31-9A-3.

128 Georgia Department of Community Health, Division of Medical Assistance, Policies, and Procedures for Hospital Services, § 911 (2011).

129 GA. CODE ANN. § 33-24-59.17.

130 *Id.* § 15-11-682.

131 *Id.* § 15-11-684.

132 *Id.* § 16-12-141.1; *id.* § 31-10-19.

133 *Id.* § 16-12-141(b)(2).

134 *See, e.g.*, GA. CODE ANN. § 16-12-141.1 (f); *id.* § 16-12-143.

135 H.B. 481, 155th Gen. Assemb., Reg. Sess. (Ga 2019), to be codified at GA. CODE ANN. § 16-12-141.

136 *Doe v. Bolton*, 410 U.S. 179, 199, 93 S. Ct. 739, 751-2 (1973); *but see* 1973 GA. LAWS 635-38 and GA. CODE ANN. § 16-12-140, formerly GA. CODE ANN. § 26-1201.



# Hawaii

## Expanded Access

### Restrictions

Hawaii law allows abortion until viability.<sup>137</sup>

Hawaii law restricts the provision of surgical abortion care to licensed physicians.<sup>138</sup> Providers who violate Hawaii's abortion restrictions may face criminal penalties.<sup>139</sup>

### Protections

Hawaii law includes express statutory protections for abortion.<sup>140</sup>

In addition, the Hawaii Constitution contains a right to privacy, which may provide additional protections for abortion.<sup>141</sup> The state provides public funding for abortion care.<sup>142</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Hawaii does not have a pre-*Roe* ban, as the state legalized abortion on March 13, 1970.<sup>143</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Hawaii.

<sup>137</sup> HAW. REV. STAT. § 453-16 (D).

<sup>138</sup> *Id.* § 453-16 (a)(1).

<sup>139</sup> *See, e.g., id.* § 453-16 (d).

<sup>140</sup> *Id.* § 453-16 (c).

<sup>141</sup> HAW. CON. ART. I, § 6.

<sup>142</sup> STATE OF HAWAII. *Medicaid Provider Manual*, ch. 6 (Oct. 2002, revised Jan. 2011), available at <https://medquest.hawaii.gov/content/dam/formsanddocuments/resources/Provider-Resources/provider-manuals/PMChpo6.pdf>.

<sup>143</sup> 1970 Haw. Sess. Laws, ch. 1, § 2. Haw. Rev. Stat. § 453-16 (Supp. 1971).

# Idaho

## Hostile



### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely Idaho will attempt to completely prohibit abortion.

### Restrictions

Idaho law generally prohibits abortion after twenty weeks post-fertilization; however, this provision has been held unconstitutional and enjoined.<sup>144</sup> It also prohibits D&X procedures,<sup>145</sup> but this ban is permanently enjoined.<sup>146</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period and biased counseling.<sup>147</sup> Idaho also limits public funding for, and private insurance coverage of, abortion.<sup>148</sup> The Idaho criminal statute prohibiting people from self-managing their abortions is permanently enjoined.<sup>149</sup> Idaho law generally requires that a parent, legal guardian,<sup>150</sup> or judge<sup>151</sup> consent to a minor's abortion.

Idaho's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities, which is unconstitutional,<sup>152</sup> and reporting.<sup>153</sup> Idaho law restricts the provision of abortion care to licensed physicians.<sup>154</sup> Providers who violate Idaho's abortion restrictions may face civil and criminal penalties.<sup>155</sup>

### Protections

Idaho law does not include express constitutional or statutory protections for abortion. To the contrary, Idaho's statutes indicate its policy preference for childbirth over abortion: "It is hereby declared to be the public policy of this state that all state statutes, rules and constitutional provisions shall be interpreted to prefer, by all legal means, live childbirth over abortion."<sup>156</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Idaho repealed its pre-*Roe* ban in 1973.<sup>157</sup>

144 *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128 (D. Idaho 2013), *aff'd sub nom. McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015); IDAHO CODE § 18-505.

145 IDAHO CODE § 18-613.

146 *Weyhrich v. Lance*, No. CV 98-0117-S-BLW, 1999 WL 33884457 (D. Idaho Oct. 12, 1999).

147 IDAHO CODE § 18-609 (2), (4)-(5).

148 *Id.* § 56-209c; IDAHO ADMIN CODE R. 16.03.09.511; IDAHO CODE § 41-3439; IDAHO CODE § 41-3924. Idaho Code § 41-1848.

149 IDAHO CODE § 18-606 (2), *invalidated by McCormack*, 900 F. Supp. 2d at 1144.

150 IDAHO CODE § 18-609A (1).

151 *Id.* § 18-609A (2).

152 *Id.* § 18-608(1), *invalidated by McCormack v. Hiedeman*, 900 F. Supp. 2d 1128 (D. Idaho 2013), *aff'd sub nom. McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015).

153 IDAHO CODE § 18-506.

154 IDAHO CODE § 18-608A.

155 *See, e.g., ID.* § 18-609G(2); *id.* § 18-613; *id.* § 18-605.

156 *Id.* § 18-601.

157 *See* 1973 Idaho Sess. Laws 442, ch. 197, § 2.

# Illinois Protected



## Restrictions

Illinois law generally prohibits abortion after viability<sup>158</sup> and requires that a parent or legal guardian be notified prior to a minor's abortion;<sup>159</sup> alternatively, a judge can approve a minor's petition without parental notification.<sup>160</sup>

Illinois has limited targeted regulation of abortion providers (TRAP) laws for certain abortion facilities<sup>161</sup> and reporting requirements.<sup>162</sup>

## Protections

In 2019, Illinois enacted a statutory protection for abortion as a fundamental right.<sup>163</sup> It states:

*(a) Every individual has a fundamental right to make autonomous decisions about the individual's own reproductive health, including the fundamental right to use or refuse reproductive health care. (b) Every individual who becomes pregnant has a fundamental right to continue the pregnancy and give birth or to have an abortion, and to make autonomous decisions about how to exercise that right. (c) A fertilized egg, embryo, or fetus does not have independent rights under the laws of this State.*

Furthermore, the Illinois Supreme Court has held that the due process clause in the state constitution provides protections for abortion equivalent to those provided by the federal due process clause.<sup>164</sup> Illinois provides public funding for all or most medically necessary abortions and requires private insurance plans to cover abortion care.<sup>165</sup> Illinois law authorizes physicians and certain advance practice clinicians (APCs) to provide abortion care consistent with their scope of practice.<sup>166</sup>

## Laws that could be enforced if *Roe* is limited or overturned

Illinois repealed its pre-*Roe* ban in 1973.<sup>167</sup> In 2017, the legislature also repealed language in Illinois law that expressed the desire to prohibit abortion if *Roe* is overturned.<sup>168</sup>

## Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Illinois.

<sup>158</sup> 775 ILL. COMP. STAT. 55/1-25(a).

<sup>159</sup> 750 ILL. COMP. STAT. 70/15.

<sup>160</sup> *Id.* 70/20; *id.* 70/25.

<sup>161</sup> ILL. ADMIN. CODE tit. 77, § 205.710.

<sup>162</sup> 775 ILL. COMP. STAT. 55/1-25(B); ILL. ADMIN. CODE tit. 77, § 505.40.

<sup>163</sup> 775 ILL. COMP. STAT. 55/1-15.

<sup>164</sup> *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745, 760 (Ill. 2013).

<sup>165</sup> 305 ILL. COMP. STAT. 5/5-5 (restriction on abortion coverage repealed by Pub. Act 100-0538, 2017 Ill. Legis. Serv. P.A. 100-538 (codified in scattered

sections of Ill. Comp. Stat.)); 215 ILL. COMP. STAT. ANN. 5/356z.4a.

<sup>166</sup> 775 ILL. COMP. STAT. 55/1-25(a). Illinois repealed its physician-only requirement provisions in 2019, see 720 ILL. COMP. STAT. 510/3.1 and 720 ILL. COMP. STAT. 510/2(2), repealed by Pub. Act 100-0013, 2019 Ill. Legis. Serv. P.A. 101-13 (codified in scattered sections of Ill. Comp. Stat.).

<sup>167</sup> See 1973 Ill. Laws 692-695; see also *People v. Frey*, 54 Ill. 2d 28, 32, 294 N.E.2d 257, 259 (1973).

<sup>168</sup> 720 ILL. COMP. STAT. ANN. 510/1, repealed by Pub. Act 100-0538, 2017 Ill. Legis. Serv. P.A. 100-538 (codified in scattered sections of Ill. Comp. Stat.)

# Indiana

## Hostile

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely that Indiana will try to prohibit abortion entirely.

### Restrictions

Indiana law prohibits abortion at “the earlier of viability... or twenty weeks post-fertilization.”<sup>169</sup> It also prohibits D&X<sup>170</sup> and D&E procedures (although the D&E ban is preliminarily enjoined),<sup>171</sup> and abortions sought for reasons of sex, disability, race, color, national origin, or ancestry of the fetus—though the reason bans are enjoined.<sup>172</sup> Pregnant people who seek abortion care must undergo an eighteen-hour mandatory waiting period, biased counseling, and an ultrasound.<sup>173</sup> Indiana also limits public funding for, and private coverage of, abortion.<sup>174</sup> Indiana law generally requires that a parent, legal guardian,<sup>175</sup> or judge<sup>176</sup> consent to a minor’s abortion. A law requiring parental notice is preliminarily enjoined.<sup>177</sup>

Indiana’s targeted regulation of abortion providers (TRAP) laws include requirements related to facilities,<sup>178</sup> admitting privileges,<sup>179</sup> and reporting.<sup>180</sup> Indiana law restricts the provision of abortion care to licensed physicians.<sup>181</sup> Providers who violate Indiana’s abortion restrictions may face civil and criminal penalties.<sup>182</sup>

### Protections

Indiana law does not include express constitutional or statutory protections for abortion. To the contrary, Indiana’s statutes include language indicating its policy preference to ban abortion to the fullest extent of the law, stating that “[c]hildbirth is preferred, encouraged, and supported over abortion.”<sup>183</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Indiana expressly repealed two pre-*Roe* bans in 1977.<sup>184</sup>

169 IND. CODE ANN. § 16-34-2-1 (a)(2).

170 *Id.* § 16-34-2-1.

171 *Id.* § 16-18-2-96.4; see *Bernard v. Individual Members of Indiana Med. Licensing Bd.*, No. 119CV01660SEBDML, 2019 WL 2717620, at \*24 (S.D. Ind. June 28, 2019).

172 IND. CODE ANN. §§ 16-34-2-1.1(a)(K), 16-34-4-4, 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8; see *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019).

173 IND. CODE ANN. § 16-34-2-1.1; *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 896 F.3d 809, 834 (7th Cir. 2018), *petition for cert. filed*, No. 18-1019 (U.S. 2019) (waiting period after ultrasound enjoined).

174 405 IND. ADMIN. CODE 5-28-7; IND. CODE ANN. §§ 16-34-1-8; 27-8-13.4-2; 27-13-7-75.

175 IND. CODE ANN. § 16-34-2-4 (a).

176 *Id.* § 16-34-2-4 (d). See also, *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm’r, Indiana State Dep’t of Health*, 258 F. Supp. 3d 929, 946 (S.D. Ind. 2017).

177 *Whole Woman’s Health All. v. Hill*, No. 19-2051, 2019 WL 3949690 (7th Cir. Aug. 22, 2019).

178 *Id.* § 16-21-2-10; *id.* § 16-18-2-1.5.

179 *Id.* § 16-34-2-4.5.

180 *Id.* § 16-34-2-5.

181 *Id.* § 16-34-2-4.5; *id.* § 16-34-2-1.

182 See, e.g., *id.* § 16-21-3-1(6); *id.* § 16-34-2-1.

183 *Id.* § 16-34-1-1.

184 *Id.* §§ 35-1-58-1, 35-1-58-2 repealed by 1977 Ind. Acts 1524; see also *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 989 n.2, (Ind. 2005) (Dickson, J., concurring) (providing history of Indiana’s abortion laws).



Iowa

Protected

## Restrictions

Iowa law generally prohibits abortion at six weeks LMP, twenty weeks post-fertilization, and in the third trimester, but the six-week ban is permanently enjoined.<sup>185</sup> It also prohibits D&X procedures,<sup>186</sup> but this ban is permanently enjoined.<sup>187</sup> Pregnant people who seek abortion care must undergo biased counseling and an ultrasound; the seventy-two-hour waiting period has been stricken from the statute.<sup>188</sup> Iowa also limits public funding for abortion.<sup>189</sup> Iowa law generally requires that a parent or legal guardian is notified about a minor's abortion;<sup>190</sup> alternatively, a judge can approve a minor's petition without parental notification.<sup>191</sup>

Iowa's targeted regulation of abortion providers (TRAP) laws include reporting requirements.<sup>192</sup> Iowa law restricts the provision of abortion care to licensed physicians.<sup>193</sup> Providers who violate Iowa's abortion restrictions may face civil and criminal penalties.<sup>194</sup>

## Protections

Iowa law includes constitutional protections for abortion. The Iowa Supreme Court held that the due process and equal protection clauses of the Iowa Constitution protect the fundamental right to abortion, and that restrictions on that right are subject to strict scrutiny.<sup>195</sup>

## Laws that could be enforced if *Roe* is limited or overturned

Iowa repealed its pre-*Roe* ban in 1976.<sup>196</sup>

## Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Iowa for as long as the state constitution is not amended. Iowa lawmakers will likely introduce legislation to amend the state constitution and nullify the constitutional protection.

185 IOWA CODE § 146C.2; *id.* § 146B.2; *id.* § 707.7; *id.* § 146C.2 *invalidated by* Planned Parenthood of the Heartland, Inc. v. Reynolds, No. EQCE83074, 2019 WL 312072 at \*5 (Iowa Dist. Jan. 22, 2019).

186 IOWA CODE § 707.8A.

187 *Planned Parenthood Inc. v. Miller*, 195 F.3d 386, 388 (8th Cir. 1999).

188 IOWA CODE § 146A.1. However, the Supreme Court of Iowa held that the 72-hour waiting period requirement was unconstitutional and struck it from the statute. *Planned Parenthood of the Heartland v. Reynolds ex re. State*, 915 N.W.2d 206, 246 (Iowa 2018).

189 IOWA ADMIN. CODE r. 441-78.1(249A).

190 IOWA CODE § 135L.3 (1).

191 *Id.* § 135L.3 (3).

192 *Id.* § 146B.2(3); IOWA ADMIN. CODE R. 641-100.5(144).

193 IOWA CODE § 707.7.

194 *See, e.g., id.* § 146B.3; *id.* § 135L.3(n).

195 *Planned Parenthood*, 915 N.W.2d at 236-37, 241.

196 1976 Iowa Acts 774. Sec. 526 repealed Chapter 701, including IOWA CODE § 701.1 (1950): "If any person, with intent to produce a miscarriage of any woman, willfully administer to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life, he shall be imprisoned." Text available in *State v. Snyder*, 244 Iowa 1244, 1246, 59 N.W.2d 223, 225 (Iowa 1953).

# Kansas

## Protected

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Kansas for as long as the state constitution is not amended. Kansas lawmakers will likely introduce legislation to amend the state constitution and nullify the constitutional protections.

### Restrictions

Kansas law generally prohibits abortion at twenty-two weeks LMP and post-viability.<sup>197</sup> It prohibits D&X procedures<sup>198</sup> and D&E procedures, although the latter ban is enjoined,<sup>199</sup> and abortions sought for reasons of sex selection.<sup>200</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period and biased counseling.<sup>201</sup> Kansas also limits public funding for,<sup>202</sup> and private insurance coverage of, abortion.<sup>203</sup> Kansas law generally requires that both parents, the legal guardian,<sup>204</sup> or a judge<sup>205</sup> consent to a minor's abortion.

Kansas's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities,<sup>206</sup> temporarily enjoined admitting privileges,<sup>207</sup> and reporting.<sup>208</sup> Kansas law restricts the provision of abortion care to licensed physicians,<sup>209</sup> Providers who violate Kansas's abortion restrictions may face civil and criminal penalties.<sup>210</sup>

### Protections

Kansas law includes constitutional protections for abortion. In 2019, the Kansas Supreme Court held that the "right to personal autonomy is firmly embedded" within the state constitution's "natural rights guarantee and its included concepts of liberty and the pursuit of happiness."<sup>211</sup> The opinion also roundly rejects the notion "that upon becoming pregnant, women relinquish virtually all rights of personal sovereignty."<sup>212</sup> Accordingly, under the Kansas Constitution, the correct standard of review is strict scrutiny.<sup>213</sup> Kansas protects clinic access by prohibiting trespass or physical obstruction for health-care facilities.<sup>214</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Kansas repealed its pre-*Roe* ban in 1992.<sup>215</sup>

197 KAN. STAT. ANN. § 65-6724(a); *id.* § 65-6703.

198 *Id.* § 65-6721.

199 *Id.* § 65-6743; *Hodes & Nauser, MDS, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019).

200 KAN. STAT. ANN. § 65-6726.

201 *Id.* § 65-6709.

202 KANSAS MEDICAL ASSISTANCE PROGRAM, *Kansas Medical Assistance Program Provider Manual*, 28 (2019), available at [https://www.kmap-state-ks.us/Documents/Content/Provider%20Manuals/Professional\\_04062010\\_10021.pdf](https://www.kmap-state-ks.us/Documents/Content/Provider%20Manuals/Professional_04062010_10021.pdf).

203 KAN. STAT. ANN. § 40-2,190.

204 *Id.* § 65-6705(a).

205 *Id.* § 65-6705(b).

206 *Id.* § 65-4a01, -4a02; *id.* § 65-4A07; KAN. ADMIN. REGS. § 28-34-126 to 28-34-144.

207 KAN. STAT. ANN. §§ 65-4a08(b), 65-4a09(d); KAN. ADMIN. REGS. § 28-34-132; see *Hodes v Moser*, No. 11C1298, 2011 WL 7714071 (Kan. Dist. Ct. Dec. 02, 2011).

208 KAN. STAT. ANN. § 65-445.

209 *Id.* § 65-4a10.

210 See, e.g., *id.* § 65-6724(g), (j); *id.* § 65-6726.

211 *Hodes*, 440 P.3d at 483.

212 *Id.* at 486.

213 *Id.* at 493-98.

214 KAN. STAT. ANN. § 21-5808(a)(2).

215 *Id.* § 21-3407, repealed by 1992 Kan. Sess. Laws 729.



# Kentucky

## Hostile

### Restrictions

Kentucky law generally prohibits abortion at six weeks LMP, twenty weeks post-fertilization, and post-viability;<sup>216</sup> however, the six-week ban is temporarily enjoined.<sup>217</sup> It also prohibits D&E, D&X, and saline instillation procedures,<sup>218</sup> and generally prohibits abortions sought for reasons of sex and race selection, and the diagnosis or potential diagnosis of disability.<sup>219</sup> Each of these method and reasons bans, except for the D&X ban, is currently enjoined.<sup>220</sup> Pregnant people who seek abortion care must generally undergo a mandatory twenty-four-hour waiting period, biased counseling, and an ultrasound.<sup>221</sup> Kentucky also limits public funding for,<sup>222</sup> and private insurance coverage of, abortion.<sup>223</sup> Kentucky law generally requires that a parent, legal guardian,<sup>224</sup> or judge<sup>225</sup> consent to a minor's abortion.

Kentucky's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities,<sup>226</sup> transfer agreements,<sup>227</sup> and reporting.<sup>228</sup> Kentucky law restricts the provision of abortion care to licensed physicians.<sup>229</sup> Providers who violate Kentucky's abortion restrictions may face civil and criminal penalties.<sup>230</sup>

### Protections

Kentucky law does not include express constitutional or statutory protections for abortion. To the contrary, Kentucky's policy preference is to ban abortion to the fullest extent of the law: "Children, whether born or unborn, are the greatest natural resource in the Commonwealth of Kentucky."<sup>231</sup>

### Laws that could be enforced if *Roe* is limited or overturned

In 2019, Kentucky enacted a trigger ban;<sup>232</sup> however, the state repealed its pre-*Roe* ban in 1974.<sup>233</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely Kentucky will attempt to enforce its newly enacted trigger ban to prohibit abortion entirely.

216 KY. REV. STAT. § 311.7706; *id.* § 311.782; *id.* § 311.780.

217 *EMW Women's Surg. Ctr. v. Beshear*, No. 3:19-cv-178-DJH, 2019 WL 1233575, at \*2 (W.D. Ky. Mar. 27, 2019), [https://www.aclu-ky.org/sites/default/files/field\\_documents/tro\\_sb9\\_hb5\\_extended.pdf](https://www.aclu-ky.org/sites/default/files/field_documents/tro_sb9_hb5_extended.pdf).

218 KY. REV. STAT. §§ 311.787(2), 311.765, 311.770.

219 KY. REV. STAT. § 311.731.

220 *See EMW Women's Surg. Ctr. v. Beshear*, 373 F. Supp. 3d 807, 826 (W.D. Ky. 2019) (striking down D&E ban), *appeal filed* No. 19-5516 (6th Cir. May 15, 2019); *Wolfe v. Schroering*, 541 F.2d 523, 527 (6th Cir. 1976) (sustaining invalidation of saline method ban); *EMW Women's Surg. Ctr.*, No. 3:19-cv-178-DJH at \*2 (reason bans temporarily enjoined).

221 KY. REV. STAT. §§ 311.725, 311.727.

222 *Id.* § 311.715.

223 *Id.* § 304.5-160.

224 *Id.* § 311.732(2).

225 *Id.* § 311.732(2).

226 *Id.* §§ 216B.015, 216B.0431.

227 *Id.* § 216B.0435.

228 *Id.* § 213.101.

229 *Id.* § 311.750.

230 *See, e.g., id.* §§ 311.782, 213.101.

231 H.R. 96, 152nd Gen. Assemb., Reg. Sess. (Ky 2018).

232 H.B. 148, 153rd Gen. Assemb., Reg. Sess. (Ky 2019).

233 1974 Ky. Acts 487, 889 ("KRS 435.040 and 436.020 are repealed.")

# Louisiana

## Hostile

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely the state will attempt to enforce its trigger ban to prohibit abortion entirely.

### Restrictions

Louisiana law generally prohibits abortion at twenty weeks post-fertilization and post-viability.<sup>234</sup> Louisiana enacted a six-week and a fifteen-week ban, but they are not in effect.<sup>235</sup> The state prohibits D&X and D&E procedures<sup>236</sup> and abortions after twenty or more weeks post-fertilization sought for reasons of disability.<sup>237</sup> The state is not currently enforcing the D&E and reason bans.<sup>238</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period, biased counseling, and an ultrasound.<sup>239</sup> Louisiana also limits public funding for,<sup>240</sup> and private insurance coverage of, abortion.<sup>241</sup> Louisiana law generally requires that a parent, legal guardian,<sup>242</sup> or judge<sup>243</sup> consent to a minor's abortion.

Louisiana's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities;<sup>244</sup> admitting privileges, which are enjoined<sup>245</sup> but have forced multiple clinics to close;<sup>246</sup> and reporting.<sup>247</sup> Louisiana law restricts the provision of abortion care to licensed physicians.<sup>248</sup> Providers who violate Louisiana's abortion restrictions may face civil and criminal penalties.<sup>249</sup>

### Protections

Louisiana law does not include express constitutional or statutory protections for abortion. In November 2020, voters will decide whether to amend the state constitution to state that it does not protect the right to abortion.<sup>250</sup>

### Laws that could be enforced if *Roe* is limited or overturned

In 2006, Louisiana enacted a trigger ban.<sup>251</sup> Louisiana retains a statute that prohibits abortion, although federal courts have found it repealed by implication and, once the legislature amended and reenacted it, unconstitutional.<sup>252</sup>

234 LA. STAT. ANN. § 40:1061.1(D)-(G); *id.* § 40:1061.13.

235 S.B. 184, 45th Gen. Assemb., Reg. Session (La. 2019); LA. STAT. ANN. § 14:87.

236 LA. STAT. ANN. § 40:1061.1.1; *id.* § 40:1061.28.

237 *Id.* § 40:1061.1.2.

238 These restrictions are part of the ongoing challenge, *June Med. Servs., LLC v. Gee*, No. CV 16-444-BAJ-RLB (M.D. La.).

239 LA. STAT. ANN. § 40:1061.16 (Louisiana is currently enforcing a 24-hour waiting period, see *June*, No. CV 16-444-BAJ-RLB); LA. STAT. ANN. § 40:1061.17; *id.* § 40:1061.10.

240 *Id.* § 40:1061.6. Rape and incest claims must be reported to law enforcement. See *id.* § 40:1061.18.

241 LA. STAT. ANN. § 22:1014(B).

242 *Id.* § 40:1061.14.

243 *Id.* § 40:1061.14(a)(2).

244 *Id.* § 40:2175.4.

245 *Id.* § 40:1061.10; *June Med. Servs., L.L.C. v. Gee*, 139 S. Ct. 663 (2019).

246 Maria Clark, *Louisiana's remaining clinics face closure under new law*, THE TIMES-PICAYUNE (Jan. 26, 2019), <https://www.nola.com/news/2019/01/louisianas-remaining-abortion-clinics-face-closure-under-new-law.html>

247 LA. STAT. ANN. § 40:1061.21(C).

248 *Id.* § 40:1061.10.

249 See, e.g., *Id.* § 40:1061.29.

250 H.B. 425, 45th Gen. Assemb., Reg. Session (La. 2019).

251 LA. STAT. ANN. § 40:1061, formerly *id.* § 140:1299.30.

252 *Weeks v. Connick*, 733 F. Supp. 1036, 1039 (E.D. La. 1990) (holding that pre-*Roe* criminal abortion statutes, LA. STAT. ANN. §§ 14:87, 87.4, 88, were repealed by implication). *Sojourner v. Roemer*, 772 F. Supp. 930, 931 (E.D. La. 1991), *aff'd sub nom. Sojourner T v. Edwards*, 974 F.2d 27 (5th Cir. 1992) *cert denied*, 507 U.S. 972, 113 S. Ct. 1414, 122 L. Ed. 2d 785 (1993) (holding LA. STAT. ANN. §§ 14:87 unconstitutional after reenactment).

# Maine Protected



## Restrictions

Maine law generally prohibits abortion after viability.<sup>253</sup> The state generally requires that a parent, legal guardian,<sup>254</sup> or judge<sup>255</sup> consent to a minor's abortion. However, providers can waive parental consent.<sup>256</sup>

Maine requires abortion providers to submit reports to the state.<sup>257</sup> Providers who violate Maine's abortion restrictions may face civil and criminal penalties.<sup>258</sup>

## Protections

Maine law includes express statutory protections for abortion.<sup>259</sup> In 2019, the legislature passed a law to provide public funding for abortion and require private insurance coverage of abortion if maternity care is covered.<sup>260</sup> While Maine restricts who can provide abortion care, the list of health-care practitioners is broader than simply physicians and includes some advanced practice clinicians (APCs).<sup>261</sup> Maine law protects clinic safety and access by prohibiting interference.<sup>262</sup>

## Laws that could be enforced if *Roe* is limited or overturned

Maine repealed its pre-*Roe* ban in 1979.<sup>263</sup>

## Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Maine.

253 ME. REV. STAT. ANN. TIT. 22, § 1598.

254 *Id.* § 1597-A(2); *id.* § 1597-A(1)(C).

255 *Id.* § 1597-A(6).

256 *Id.* § 1597-A(2)(B).

257 *Id.* § 1596(2).

258 *See, e.g., id.* § 1594; *id.* § 1598.

259 *Id.* § 1598(1).

260 H.P. 594, 129th Leg., 1st Reg. Sess. (Me. 2019), *to be codified* at ME. REV. STAT. tit. 22, § 3196 and ME. REV. STAT. tit. 24-A, § 4320-M.

261 ME. REV. STAT. ANN. tit. 22, § 1598(1). Law was amended to allow physician assistants and advanced practice nurses to also perform abortions. *See* H.P. 922, 129th Leg., 1st Reg. Sess. (Me. 2019), *to be codified* at ME. REV. STAT. tit. 22, § 1596.

262 ME. REV. STAT. ANN. tit. 5, § 4684-B.

263 1979 Me. Laws 514 (repealing ME. REV. STAT. ANN. tit. 17, § 51 (1979)).



# Maryland

## Protected

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Maryland.

### Restrictions

Maryland law requires that a parent or legal guardian be notified about a minor's abortion.<sup>264</sup> Judicial bypass is not available in Maryland, but physicians can waive notice in certain instances.<sup>265</sup>

Maryland's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities<sup>266</sup> and transfer protocols.<sup>267</sup> Maryland law restricts the provision of abortion care to licensed physicians.<sup>268</sup>

### Protections

Maryland law includes express statutory protections for abortion.<sup>269</sup> Maryland provides public funding for medically necessary abortions<sup>270</sup> and protects clinic access by preventing interference with entering and exiting a facility.<sup>271</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Maryland repealed its pre-*Roe* ban in 1991.<sup>272</sup>

<sup>264</sup> MD. CODE., HEALTH-GEN. § 20-103(A).

<sup>265</sup> *Id.* § 20-103(c).

<sup>266</sup> MD. CODE REGS. 10.12.01.01(B)(6); *id.* 10.12.01.02; *id.* 10.12.01.15.

<sup>267</sup> *Id.* 10.12.01.10.

<sup>268</sup> MD. CODE, HEALTH-GEN. § 20-208.

<sup>269</sup> *Id.* § 20-209.

<sup>270</sup> MD. CODE REGS. 10.09.08.04.

<sup>271</sup> MD. CODE, CRIM. LAW § 10-204.

<sup>272</sup> See 1991 Md. Laws 1 (repealing MD. CODE HEALTH - GENERAL CODE §§ 21-201 through 20-206, 20-208, 20-210, and 20-211).



# Massachusetts

## Protected

### Restrictions

Massachusetts generally bans abortion at twenty-four weeks post-fertilization,<sup>273</sup> and state law still includes an unenforced, unconstitutional mandatory twenty-four-hour waiting period.<sup>274</sup> Pregnant people who seek abortion care must receive biased counseling.<sup>275</sup> Massachusetts law generally requires that both parents<sup>276</sup> or a judge<sup>277</sup> consent to a minor's abortion.

Massachusetts law requires providers to report certain abortions to the state.<sup>278</sup> Massachusetts law restricts the provision of surgical abortion care to licensed physicians.<sup>279</sup> Providers who violate Massachusetts abortion restrictions may face criminal penalties.<sup>280</sup>

### Protections

Massachusetts law includes constitutional protections for abortion. In 1981, the Massachusetts Supreme Court held that the due process protections of the state constitution protect abortion.<sup>281</sup> Massachusetts provides public funding for abortion care.<sup>282</sup> The state protects clinic safety and access by prohibiting obstruction and providing a buffer zone.<sup>283</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Massachusetts repealed its pre-*Roe* ban in 2018.<sup>284</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Massachusetts.

<sup>273</sup> MASS. GEN. LAWS ch. 112, § 12M.

<sup>274</sup> *Id.* § 12S (waiting period), invalidated by *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1016 (1st Cir. 1981).

<sup>275</sup> MASS. GEN. LAWS ch. 112, § 12S.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* § 12R.

<sup>279</sup> *Id.* § 12L.

<sup>280</sup> *See, e.g.*, MASS. GEN. LAWS ch. 112, § 12N.

<sup>281</sup> *Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 645-648, 417 N.E.2d 387, 397-99 (Mass. 1981); *Planned Parenthood League of Mass. v. Attorney General*, 677 N.E.2d 101, 103-04, 107-08 (Mass. 1997).

<sup>282</sup> *Moe*, 382 Mass. at 629.

<sup>283</sup> MASS. GEN. LAWS ch. 266, § 12O (preventing obstruction); *id.* § 12OE (providing a buffer zone).

<sup>284</sup> MASS. GEN. LAWS ch. 272, § 19, repealed by S.B. 784, 190th Gen. Assemb., Reg. Sess. (Ma 2018).

# Michigan

## Hostile

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely that Michigan will attempt to enforce its pre-*Roe* ban, prohibiting abortion with only a life-endangerment exception.

### Restrictions

Michigan law generally prohibits abortion at the point of viability.<sup>285</sup> It also prohibits the D&X method of abortion.<sup>286</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period and biased counseling.<sup>287</sup> Michigan also limits public funding for abortion care<sup>288</sup> and restricts private insurance coverage.<sup>289</sup> Michigan law generally requires that a parent, legal guardian,<sup>290</sup> or judge<sup>291</sup> consent to a minor's abortion.

Michigan's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities,<sup>292</sup> and reporting.<sup>293</sup> Michigan law restricts the provision of abortion care to physicians.<sup>294</sup> Providers who violate Michigan's abortion restrictions may face civil and criminal penalties.<sup>295</sup>

### Protections

Michigan law does not include express constitutional or statutory protections for abortion. To the contrary, in *Mahaffey v. Attorney General*, the Court of Appeals of Michigan specifically held that that the state constitution adopted in 1963 does not "establish a constitutional right to abortion."<sup>296</sup> The case further iterates that the public policy of the state is to ban abortion so long as the ban is narrowed to follow federal law.<sup>297</sup> Michigan protects clinic safety by prohibiting trespassing and harassment.<sup>298</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Michigan has a pre-*Roe* ban dating back to 1931.<sup>299</sup>

285 MICH. COMP. LAWS § 750.323.

286 *Id.* § 750.90h.

287 *Id.* § 333.17015.

288 *Id.* § 400.109a.

289 *Id.* § 550.543; *id.* § 550.542.

290 MICH. COMP. LAWS § 722.903.

291 *Id.*; *id.* § 722.904.

292 MICH. ADMIN. CODE r. 325.3802 (d); MICH. ADMIN. CODE r. 325.3811(1).

293 MICH. COMP. LAWS § 333.2835(2); *id.* § 333.2837(1).

294 *Id.* § 333.17015(1).

295 *See, e.g.*, MICH. COMP. LAWS § 722.907; MICH. COMP. LAWS § 750.323.

296 564 N.W.2d 104, 110 (1997).

297 *Id.* at 110-11 (citing *People v. Bricker*, 389 Mich. 524, 527-29, 208 N.W.2d 172, 174 (1973)).

298 MICH. COMP. LAWS § 333.20198(1).

299 *Id.* §§ 750.14, 750.323. *People v. Bricker* is the chief case addressing the constitutionality of the complete pre-*Roe* ban. 389 Mich. 524, 527, 208 N.W.2d 172, 174 (1973). In 1973, the Michigan Supreme Court held that Michigan law must be read to be consistent with the United States Constitution and therefore that whatever pieces of the criminal abortion law remain constitutional under *Roe* are still binding law. This statute has never been repealed and a Michigan appellate court held that it has not been repealed by implication. *People v. Higuera*, 244 Mich. App. 429, 435, 625 N.W.2d 444, 448 (2001).



# Minnesota Protected

## Restrictions

Minnesota law generally prohibits abortion after viability, but this statute was held unconstitutional.<sup>300</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period and biased counseling.<sup>301</sup> Minnesota law generally requires that a parent or legal guardian be notified about a minor's abortion;<sup>302</sup> alternatively, a judge can approve a minor's petition without parental notification.<sup>303</sup>

Minnesota law requires abortion providers to submit reports to the state.<sup>304</sup> Minnesota law restricts the provision of abortion care to licensed physicians.<sup>305</sup> Providers who violate Minnesota's abortion restrictions may face civil and criminal penalties.<sup>306</sup>

## Protections

Minnesota law includes constitutional protections for abortion.<sup>307</sup> Minnesota law provides public funding for medically necessary abortions<sup>308</sup> and protects clinic access by prohibiting obstruction.<sup>309</sup>

## Laws that could be enforced if *Roe* is limited or overturned

Minnesota repealed its pre-*Roe* ban in 1974.<sup>310</sup>

## Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Minnesota.

<sup>300</sup> MINN. STAT. § 145.412 subd. 3, held unconstitutional in *Hodgson v. Lawson*, 542 F.2d 1350 (8th Cir. 1976) (per curiam).

<sup>301</sup> MINN. STAT. § 145.4242; *id.* § 145.4243.

<sup>302</sup> *Id.* § 144.343 subd. 2.

<sup>303</sup> *Id.* § 144.343 subd. 6(c)(i).

<sup>304</sup> *Id.* §§ 145.4131 subd. 2, 145.4132, 145.413; MINN. R. 4615.3600.

<sup>305</sup> MINN. STAT. § 145.412 (i). This provision was not challenged in *Hodgson v. Lawson*, 542 F.2d 1350 (8th Cir. 1976) (per curiam).

<sup>306</sup> *See, e.g.*, MINN. STAT. § 145.4247; MINN. STAT. § 144.343 subd. 5.

<sup>307</sup> *See Women of State v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995) (“We therefore conclude that the right of privacy under the Minnesota Constitution encompasses a woman’s right to decide to terminate her pregnancy”); *see also State v. Davidson*, 481 N.W.2d 51, 56 (Minn. 1992) (“We have stated that in appropriate

cases we will construe liberties more broadly under the state constitution than under the federal, although we will not do so lightly.”); *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987) (holding that the Minnesota Constitution protects the right to privacy just as the federal Constitution does); *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985) (“It is axiomatic that a state supreme court may interpret its own state constitution to offer greater protection of individual rights than does the federal constitution.”).

<sup>308</sup> *Women of State v. Gomez*, 542 N.W.2d 17, 32 (Minn. 1995) (striking down law limiting public funds for abortions except in cases of life, rape, or incest because “the State cannot refuse to provide abortion to MA/GAMC-eligible women when the procedure is necessary for therapeutic reasons” under the right to privacy of the Minnesota Constitution).

<sup>309</sup> MINN. STAT. § 609.7495.

<sup>310</sup> *Id.* §§ 617.18, 617.19 (repealed by 1974 Minn. Laws 265, ch. 177, §7).

# Mississippi

## Hostile

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely the state will attempt to enforce its trigger ban to prohibit abortion entirely.

### Restrictions

Mississippi law generally prohibits abortion at six weeks LMP, fifteen weeks LMP, and twenty weeks LMP.<sup>311</sup> The first two bans are temporarily and permanently enjoined, respectively.<sup>312</sup> It also prohibits D&E and D&X procedures.<sup>313</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period, biased counseling, and an ultrasound.<sup>314</sup> Mississippi also limits public funding for,<sup>315</sup> and private insurance coverage of, abortion.<sup>316</sup> Mississippi law generally requires that both parents<sup>317</sup> or a judge<sup>318</sup> consent to a minor's abortion.<sup>319</sup>

Mississippi's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities,<sup>320</sup> permanently enjoined admitting privileges,<sup>321</sup> and reporting.<sup>322</sup> Mississippi law restricts the provision of abortion care to licensed physicians.<sup>323</sup> Providers who violate Mississippi's abortion restrictions may face civil and criminal penalties.<sup>324</sup>

### Protections

Mississippi law does not include express constitutional or statutory protections for abortion. To the contrary, Mississippi's policy preference is to ban abortion to the fullest extent of the law: "Abortion carries significant physical and psychological risks to the maternal patient, and these physical and psychological risks increase with gestational age."<sup>325</sup>

### Laws that could be enforced if *Roe* is limited or overturned

In 2007, Mississippi enacted a trigger ban.<sup>326</sup> Mississippi also has an unenforced pre-*Roe* ban.<sup>327</sup>

311 MISS. CODE ANN. §§ 41-41-34-1, 41-41-191, 41-41-137.

312 *Jackson Women's Health Org. v. Dobbs*, No. 3:18-CV-171-CWR-FKB, 2019 WL 2240532, at \*1 (S.D. Miss. May 24, 2019); *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536 (S.D. Miss. 2018).

313 MISS. CODE ANN. § 41-41-355 (1); *id.* § 41-41-73 (1).

314 *Id.* § 41-41-33; *id.* § 41-41-34.

315 *Id.* § 41-41-91.

316 *Id.* § 41-41-99.

317 *Id.* § 41-41-53 (1).

318 *Id.* § 41-41-53 (3).

319 *Id.* § 41-41-53.

320 *Id.* §§ 41-75-1 *et seq.*

321 *Id.* § 41-75-1(F), *invalidated by Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014), cert. denied, 136 S. Ct. 2536 (mem.) (2016); *Jackson Women's Health Org. v. Currier*, No. 3:12-cv-436-DPJ-FKB (S.D. Miss. Mar. 17, 2017).

322 MISS. CODE ANN. §§ 41-41-77, 41-41-109

323 *Id.* § 97-3-3 (1).

324 *See, e.g., id.* §§ 41-41-191, 41-41-163.

325 *Id.* § 41-41-191.

326 *Id.* § 41-41-45.

327 *Id.* § 97-3-3.



# Missouri

## Hostile

### Restrictions

Missouri law generally prohibits abortion at eight weeks LMP, a ban that is currently enjoined, and after viability.<sup>328</sup> It also prohibits D&X procedures<sup>329</sup> and abortions sought for reasons of sex, race, or Down syndrome.<sup>330</sup> Pregnant people who seek abortion care must undergo a mandatory seventy-two-hour waiting period, receive biased counseling, and be offered an ultrasound.<sup>331</sup> Missouri limits public funding for,<sup>332</sup> and private insurance coverage of, abortion.<sup>333</sup> Missouri law generally requires that both parents, a legal guardian,<sup>334</sup> or a judge<sup>335</sup> consent to a minor's abortion.

Missouri's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities,<sup>336</sup> admitting privileges,<sup>337</sup> and reporting,<sup>338</sup> which together have forced multiple clinics to close.<sup>339</sup> Missouri law restricts the provision of abortion care to physicians.<sup>340</sup> Providers who violate Missouri's abortion restrictions may face civil and criminal penalties.<sup>341</sup>

### Protections

Missouri law does not include express constitutional or statutory protections for abortion. To the contrary, Missouri's policy preference is to ban abortion to the fullest extent of the law: "It is the intention of the general assembly of the state of Missouri to: (1) [d]efend the right to life of all humans, born and unborn; (2) [d]eclare that the state and all of its political subdivisions are a 'sanctuary of life' that protects pregnant women and their unborn children; and (3) [r]egulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes."<sup>342</sup>

### Laws that could be enforced if *Roe* is limited or overturned

In 2019, Missouri enacted a trigger ban;<sup>343</sup> however, the state repealed its pre-*Roe* ban in 1977.<sup>344</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely the state will move to enforce its newly enacted trigger ban to prohibit abortion entirely.

328 H.B. 126, 100th Gen. Assemb., Reg. Sess. (Mo. 2019); see Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. et al. v. Parson, No. 2:19-cv-4155-HFS (W.D. Mo. Aug. 27, 2019); MO. REV. STAT. § 188.030(1).

329 MO. REV. STAT. § 565.300.3.

330 H.B. 126, 100th Gen. Assemb., Reg. Sess. (Mo. 2019).

331 MO. REV. STAT. § 188.027.

332 *Id.* § 188.205.

333 *Id.* § 376.805.

334 *Id.* § 188.028.

335 *Id.* § 188.028.

336 *Id.* § 197.200 et seq.

337 *Id.* § 188.080.

338 *Id.* § 188.052.

339 Lauren Webber, *What The Possible End Of Abortions In Missouri Means For Neighboring States*, KAISER HEALTH NETWORK (May 28, 2019), <https://khn.org/news/what-the-end-of-abortions-in-missouri-means-for-neighboring-states/>.

340 MO. REV. STAT. § 188.020.

341 *See, e.g., id.* §§ 188.250, 188.030.

342 *Id.* § 188.010 (as modified by H.B. 126).

343 H.B. 126, 100th Gen. Assemb., Reg. Sess. (Mo. 2019).

344 MO. ANN. STAT. § 559.100 (Vernon 1969); 1977 Mo. Laws, 658, 662-63.

# Montana

## Protected

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Montana. However, it is likely that the legislature will pass new restrictions.

### Restrictions

Montana law prohibits abortion after viability<sup>345</sup> and D&X procedures.<sup>346</sup> The state has not repealed requirements that pregnant people who seek abortion care undergo a mandatory twenty-four-hour waiting period and biased counseling, although the requirement is permanently enjoined.<sup>347</sup> Montana law generally requires that a parent or legal guardian be notified about a minor's abortion if the minor is sixteen years old or younger;<sup>348</sup> alternatively, a judge can approve a minor's petition without parental notification.<sup>349</sup>

Montana law includes reporting requirements.<sup>350</sup> Providers who violate Montana's abortion restrictions may face criminal penalties.<sup>351</sup>

### Protections

Montana has constitutional protections for abortion. The Montana Constitution provides that “[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”<sup>352</sup> The Supreme Court of Montana describes this provision as “one of the most stringent protections of its citizens’ right to privacy in the United States—exceeding even that provided by the federal constitution.”<sup>353</sup> In addition, the Court has held that this right includes a right to “procreative autonomy” that protects to a woman’s access to abortion.<sup>354</sup> Although Montana law limits public funding for abortion, that restriction is permanently enjoined, and the state provides public funding.<sup>355</sup> While the state restricts the provision of abortion care to licensed physicians and physician assistants,<sup>356</sup> a temporary injunction allows advanced practice nurses to provide abortion care.<sup>357</sup> Montana protects clinic access by prohibiting obstruction.<sup>358</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Montana state repealed its pre-*Roe* ban in 1974.<sup>359</sup>

345 MONT. CODE ANN. § 50-20-109.

346 *Id.* § 50-20-401.

347 *Id.* §§ 50-20-104, 50-20-106 invalidated by *Planned Parenthood of Missoula v. State*, No. BDV-95-722 (Mont. Dist. Ct. Dec. 29, 1999).

348 MONT. CODE ANN. § 50-20-223; see *Planned Parenthood of Montana v. State*, 2015 MT 31, 378 Mont. 151, 342 P.3d 684 (Mont. 2014) (challenging H.B. 391, 97th Leg., Reg. Sess. (Mont. 2013)) (Sections 50-2-221 through 235 were originally enacted in 2011 as Legislative Referendum 120, which took effect on Jan. 1, 2013, after approval by Montana voters in 2012. H.B. 391 was enacted in 2013; it repealed Legislative Referendum 120 and replaced it with §§ 50-20-501 through 511).

349 MONT. CODE ANN. § 50-20-507.

350 *Id.* § 50-20-110; *id.* § 50-20-306; MONT. ADMIN. R. 37.21.110.

351 See, e.g., MONT. CODE ANN. § 50-20-306; *id.* § 50-20-109; *id.* § 50-20-112.

352 MONT. CONST., ART. II, § 10.

353 *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, 376 (Mont. 1999).

354 *Id.* at 296.

355 MONT. ADMIN. R. 37.86.104, invalidated by *Jeannette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. May 22, 1995).

356 MONT. CODE ANN. § 50-20-109.

357 *Weems v. State*, 2019 MT 98, 395 Mont. 350, 440 P.3d 4 (Mont. 2019).

358 MONT. CODE ANN. § 45-8-110.

359 *Id.* §§ 94-401 and 94-402 (1947), repealed by 1974 Mont. Laws, Ch. 284.

# Nebraska

## Hostile

### Restrictions

Nebraska law generally prohibits abortion at twenty weeks post-fertilization and after viability.<sup>360</sup> The state has not repealed the prohibition on D&X procedures, although the Supreme Court held that the statute is unconstitutional.<sup>361</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period; biased counseling; and, if utilized, have an ultrasound at least one hour before an abortion.<sup>362</sup> Nebraska also limits public funding for,<sup>363</sup> and private insurance coverage of, abortion.<sup>364</sup> Nebraska law requires that a parent, legal guardian,<sup>365</sup> or judge<sup>366</sup> consent to a minor's abortion.

Nebraska's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities<sup>367</sup> and reporting.<sup>368</sup> Nebraska law restricts the provision of abortion care to licensed physicians.<sup>369</sup> Providers who violate Nebraska's abortion restrictions may face civil and criminal penalties.<sup>370</sup>

### Protections

Nebraska law does not include express constitutional or statutory protections for abortion. To the contrary, Nebraska's policy preference to ban abortion to the fullest extent of the law: "the members of the Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the United States Supreme Court's [*Roe v. Wade*] decision on abortion of January 22, 1973."<sup>371</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Nebraska repealed its pre-*Roe* ban in 1973.<sup>372</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, the legislature will likely pass new restrictions or prohibit abortion entirely.

<sup>360</sup> NEB. REV. STAT. § 28-3,106; *id.* § 28-329.

<sup>361</sup> *Id.* § 28-328; *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>362</sup> NEB. REV. STAT. § 28-327.

<sup>363</sup> 471 NEB. ADMIN. CODE § 10-005.09; 471 NEB. ADMIN. CODE § 10-005.01.

<sup>364</sup> NEB. REV. STAT. § 44-8403.

<sup>365</sup> *Id.* § 71-6902.

<sup>366</sup> *Id.* §§ 71-6903 TO 71-6905.

<sup>367</sup> *Id.* § 71-416(1), (2); 175 NEB. ADMIN. CODE § 7-003.

<sup>368</sup> NEB. REV. STAT. § 28-343.

<sup>369</sup> *Id.* § 28-335(1).

<sup>370</sup> *See, e.g.*, NEB. REV. STAT. § 28-327.04; *id.* § 28-3,108.

<sup>371</sup> *Id.* § 28-325(2)-(3).

<sup>372</sup> NEB. REV. STAT. §§ 28-404, 28-405, *repealed by* 1973 Neb. Laws 806.

# Nevada Protected

## Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Nevada.

## Restrictions

Nevada law generally prohibits abortion at twenty-four weeks post-fertilization.<sup>373</sup> Nevada limits public funding for abortion,<sup>374</sup> and generally requires that a parent or legal guardian be notified about a minor's abortion;<sup>375</sup> alternatively, a judge can approve a minor's petition without parental notification.<sup>376</sup>

Nevada law includes reporting requirements.<sup>377</sup> The state restricts the provision of abortion care to licensed physicians.<sup>378</sup> Providers who violate Nevada's abortion restrictions may face civil and criminal penalties.<sup>379</sup>

## Protections

Nevada law includes express statutory protections for abortion,<sup>380</sup> directly ratified by Nevada voters in a 1990 referendum.<sup>381</sup> For this reason, the law can be amended or repealed only by another referendum.<sup>382</sup> The state protects clinic access by prohibiting interference with entering or exiting a facility.<sup>383</sup>

## Laws that could be enforced if *Roe* is limited or overturned

Nevada amended one pre-*Roe* ban in 1973 and repealed additional, unenforced pre-*Roe* bans in 2019.<sup>384</sup>

373 NEV. REV. STAT. § 442.250 (“No abortion may be performed... unless [it] is performed within 24 weeks after the commencement of the pregnancy”).

374 DIV. OF HEALTH CARE FIN. AND POLICY, *Medicaid Services Manual*, § 603.3 (2019), available at [http://dhcfnv.gov/uploadedFiles/dhcfpnvgov/content/Resources/AdminSupport/Manuals/MSM/Medicaid\\_Services\\_Manual\\_Complete.pdf](http://dhcfnv.gov/uploadedFiles/dhcfpnvgov/content/Resources/AdminSupport/Manuals/MSM/Medicaid_Services_Manual_Complete.pdf).

375 NEV. REV. STAT. § 442.255.

376 *Id.*

377 *Id.* § 442.260; NEV. ADMIN. CODE § 442.200; NEV. REV. STAT. § 442.265.

378 NEV. REV. STAT. § 442.250(1).

379 *See, e.g., id.* § 442.270; *id.* § 442.257.

380 *Id.* § 442.250.

381 NEVADA LEGISLATIVE COUNSEL BUREAU, *Nevada Ballot Questions*, <https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1990.pdf>.

382 NEV. CONST. art. XIX, § 1(3) (“If a majority of the voters voting upon the proposal submitted at such election votes approval of such statute or resolution or any part thereof, such statute or resolution or any part thereof shall stand as the law of the state and shall not be amended, annulled, repealed, set aside, suspended or in any way made inoperative except by the direct vote of the people.”).

383 NEV. REV. STAT. § 449.531.

384 NEV. REV. STAT. § 200.220, amended by 1973 Nev. Laws 1639; NEV. REV. STAT. § 201.120, 2120 TO 201.140, repealed by 2019 Nev. Laws ch 265, § 6.

# New Hampshire

Not  
Protected

## Restrictions

New Hampshire law prohibits D&X procedures<sup>385</sup> and limits public funding for abortion.<sup>386</sup> The state generally requires that a parent or legal guardian be notified about a minor’s abortion before abortion care is provided;<sup>387</sup> alternatively, a judge can approve a minor’s petition without parental notification.<sup>388</sup>

New Hampshire’s targeted regulation of abortion providers (TRAP) laws include requirements related to reporting D&X procedures in emergency situations.<sup>389</sup> New Hampshire prohibits nurse midwives from providing abortion care.<sup>390</sup> Providers who violate New Hampshire’s abortion restrictions may face civil and criminal penalties.<sup>391</sup>

## Protections

New Hampshire law does not include express constitutional or statutory protections for abortion. However, in 2018, New Hampshire voters approved an amendment to the New Hampshire Constitution that specifically recognized a privacy right related to private or personal information. Article 2-b of the Bill of Rights of the New Hampshire Constitution, which is titled “Right to Privacy,” states: “An individual’s right to live free from governmental intrusion in private or personal information is natural, essential, and inherent.”<sup>392</sup> To date, the state supreme court has not determined whether this amendment includes the right to abortion. New Hampshire protects clinic safety and access through a buffer zone.<sup>393</sup>

## Laws that could be enforced if *Roe* is limited or overturned

New Hampshire repealed its pre-*Roe* ban in 1997.<sup>394</sup>

## Conclusion

If *Roe v. Wade* is limited or overturned, abortion will likely remain accessible in New Hampshire but without legal protection.

385 N.H. REV. STAT. § 329:34.

386 See NH HEALTHY FAMILIES, *New Hampshire Medicaid Care Management Member Handbook 41* (2019), <https://www.nhhealthyfamilies.com/content/dam/centene/NH%20Healthy%20Families/Medicaid/pdfs/NH-Model-Handbook-20190606-Clean-Final.pdf>.

387 N.H. REV. STAT. § 132:33.

388 *Id.* § 132:34.

389 *Id.* § 329:35.

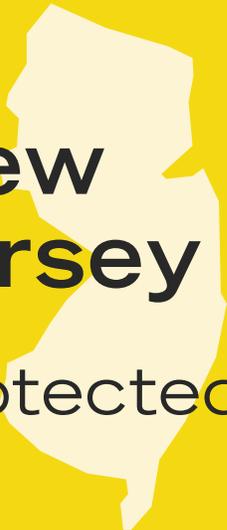
390 N.H. CODE ADMIN. R. ANN. He-W 538.05.

391 See, e.g., N.H. REV. STAT. § 329:37; *id.* § 329:36.

392 N.H. CONST. PT. 1, ART. 2-b (effective on December 5, 2018).

393 N.H. REV. STAT. § 132:37; *id.* § 132:38.

394 N.H. REV. STAT. ANN. § 585:12 et seq. (1955), *repealed by* 1997 N.H. Laws 81, ch. 99, §1.



# New Jersey Protected

## Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in New Jersey.

## Restrictions

New Jersey law generally prohibits D&X procedures;<sup>395</sup> although the ban was held unconstitutional, the statute has not been repealed.<sup>396</sup> Likewise, the legislature has not repealed a requirement that a parent or legal guardian be notified about a minor's abortion,<sup>397</sup> which the New Jersey Supreme Court held was unconstitutional under the equal protection clause of the state constitution.<sup>398</sup>

New Jersey's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities<sup>399</sup> and reporting D&E procedures.<sup>400</sup> New Jersey law restricts the provision of surgical abortion care to licensed physicians.<sup>401</sup>

## Protections

The New Jersey Supreme Court has recognized that the right to privacy protected under the state constitution is more expansive than the federal Constitution and encompasses a "fundamental right of a woman to control her body and destiny."<sup>402</sup> New Jersey provides public funding for abortion care.<sup>403</sup>

## Laws that could be enforced if *Roe* is limited or overturned

New Jersey repealed its pre-*Roe* ban in 1979.<sup>404</sup>

395 N.J. STAT. ANN. § 2A:65A-6.

396 *Planned Parenthood v. Farmer*, 220 F.3d 127 (3d Cir. 2000).

397 N.J. STAT. ANN. §§ 9:17A-1.1 to 9:17A-1.12.

398 *Planned Parenthood of Cent. N.J. v. Farmer*, 165 N.J. 609, 641-42, 762 A.2d 620, 638-39 (N.J. 2000).

399 N.J. ADMIN. CODE §§ 8:43A-1.3, 8:43A-12, 13:35-4.2.

400 *Id.* § 13:35-4.2(f)(7).

401 *Id.* § 13:35-4.2(b).

402 *Right to Choose v. Byrne*, 91 N.J. 287, 306, 450 A.2d 925 (1982) (striking restriction of Medicaid funding for medically necessary abortions based on a recognized right to privacy).

403 New Jersey has a statute prohibiting public funding for abortion unless necessary to preserve the patient's life, which was held unconstitutional. N.J. STAT. ANN. § 30:4D-6.1, *invalidated by Byrne*, 91 N.J. at 308.

404 N.J. STAT. ANN. § 2A:87-1, 2A:87-2, *repealed by* 1978 N.J. Laws 482, 687-88, ch. 95, § 2C:98-2.

# New Mexico

Not Protected

## Restrictions

New Mexico law prohibits D&X procedures.<sup>405</sup> New Mexico has not repealed a requirement that a parent or legal guardian consent to a minor's abortion, although the New Mexico attorney general issued an opinion stating that the law is unenforceable.<sup>406</sup>

New Mexico's targeted regulation of abortion providers (TRAP) laws include reporting requirements.<sup>407</sup> Providers who violate New Mexico's D&X ban may face criminal penalties.<sup>408</sup> While a New Mexico statute restricts the provision of surgical abortion care to licensed physicians,<sup>409</sup> certified nurse practitioners are authorized to prescribe and dispense the medication abortion regimen due to a court decision.<sup>410</sup>

## Protections

While the New Mexico Constitution contains an equal rights amendment (ERA), the state supreme court has not ruled that the state constitution or the ERA protects the right to abortion. New Mexico provides public funding for medically necessary abortions.<sup>411</sup>

## Laws that could be enforced if *Roe* is limited or overturned

New Mexico has a pre-*Roe* ban.<sup>412</sup>

## Conclusion

If *Roe v. Wade* is limited or overturned, abortion will likely remain accessible in New Mexico but without legal protection. It would be possible, however improbable, for the state to seek to enforce its pre-*Roe* ban, which would greatly limit access to abortion.

405 N.M. STAT. ANN. § 30-5A-3.

406 *Id.* § 30-5-1; N.M. Att'y Gen. Op. No. 90-19 (Oct. 3, 1990).

407 N.M. STAT. ANN. § 24-14-18.

408 *See, e.g., id.* § 30-5A-5.

409 *Id.* § 30-5-1.

410 *Planned Parenthood of N.M. v. New Mexico*, No. CV-200604230 (N.M. Dist. Ct. 2007).

411 *New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788, 975 P.2d 841 (N.M. 1998); *see* N.M. CONST., art. II, § 18 (1973) ("No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.").

412 N.M. STAT. ANN. § 30-5-1 through § 30-5-3; *but see State v. Strance*, 84 N.M. 670, 506 P.2d 1217 (Ct. App. 1973) (finding that the provisions relating to accredited hospitals, special hospital boards, and the four enumerated circumstances for justified medical termination were all unacceptable limitations in light of *Roe v. Wade* and *Doe v. Bolton*); N.M. Att'y Gen. Op. No. 90-19 (Oct. 3, 1990) (concluding that "under current law, MSA 1978, § 30-5-2 is entirely enforceable, and §§ 30-5-1 and 30-5-3 are enforceable only to the extent that they criminalize and punish the act of performing an abortion on an unconsenting woman, or the performance of an abortion by a person who is not a physician licensed by the State of New Mexico").



# New York

## Expanded Access

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in New York.

### Restrictions

As of 2019, New York law generally prohibits abortion after twenty-four weeks post-fertilization, unless the fetus is not viable or the pregnant person's life or health, including mental health, is at risk.<sup>413</sup>

### Protections

In 2019, New York enacted a statutory protection for abortion as a fundamental right.<sup>414</sup> It states:

*The legislature finds that comprehensive reproductive health care is a fundamental component of every individual's health, privacy and equality. Therefore, it is the policy of the state that: 1. Every individual has the fundamental right to choose or refuse contraception or sterilization. 2. Every individual who becomes pregnant has the fundamental right to choose to carry the pregnancy to term, to give birth to a child, or to have an abortion, pursuant to this article. 3. The state shall not discriminate against, deny, or interfere with the exercise of the rights set forth in this section in the regulation or provision of benefits, facilities, services or information.*

The state provides public funding for abortion and requires private insurance coverage of abortion care.<sup>415</sup> State law authorizes certain health-care practitioners, including advance practice clinicians (APCs), to provide abortion care,<sup>416</sup> and includes protections for clinic safety and access by prohibiting interference.<sup>417</sup> Through its FY20 budget, New York City provided \$250,000 to the New York Abortion Access Fund.<sup>418</sup>

### Laws that could be enforced if *Roe* is limited or overturned

New York does not have a pre-*Roe* ban, as the state first legalized abortion in 1970 without residency requirements.<sup>419</sup>

<sup>413</sup> N.Y. PUB. HEALTH LAW §§ 2599-aa to 2599-bb.

<sup>414</sup> *Id.*

<sup>415</sup> DEP'T OF HEALTH, *Medicaid Family Planning Services*, [https://www.health.ny.gov/health\\_care/managed\\_care/famplan10ques.htm](https://www.health.ny.gov/health_care/managed_care/famplan10ques.htm); N.Y. Ins. Law § 3217-c; N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16 (c) and (o).

<sup>416</sup> N.Y. PUB. HEALTH LAW § 2599-bb; N.Y. EDUC. LAW § 6500 *et seq.*

<sup>417</sup> N.Y. PENAL LAW § 240.70 (1)(a) - (b), (d).

<sup>418</sup> Nikita Stewart, *New York City Allocates \$250,000 for Abortions, Challenging Conservative States*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/nyregion/abortion-funding-ny.html>.

<sup>419</sup> N.Y. PENAL LAW § 125.05(3) (McKinney Supp. 1971).



# North Carolina

## Hostile

### Restrictions

North Carolina law includes an enjoined twenty-week gestational ban.<sup>420</sup> It also prohibits abortions sought for reasons of sex.<sup>421</sup> Pregnant people who seek abortion care must undergo a mandatory seventy-two-hour waiting period and biased counseling.<sup>422</sup> North Carolina also limits public funding for abortion.<sup>423</sup> North Carolina law generally requires that a parent, legal guardian,<sup>424</sup> or judge<sup>425</sup> consent to a minor's abortion.

North Carolina's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities<sup>426</sup> and reporting.<sup>427</sup> North Carolina law restricts the provision of abortion care to licensed physicians.<sup>428</sup> Providers who violate North Carolina's abortion restrictions may face criminal penalties.<sup>429</sup>

### Protections

North Carolina law does not include express constitutional or statutory protections for abortion but protects clinic access by prohibiting obstruction.<sup>430</sup>

### Laws that could be enforced if *Roe* is limited or overturned

North Carolina has a pre-*Roe* ban, which is enjoined to the extent that it prevents abortion prior to viability.<sup>431</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely the state will attempt to enforce its pre-*Roe* ban and pass new restrictions.

420 N.C. GEN. STAT. § 14-45.1(A), *invalidated by Bryant v. Woodall*, 363 F. Supp. 3d 611 (M.D.N.C. 2019), *appeal filed*, *Amy Bryant v. Jim Woodall*, 19-1685.

421 N.C. GEN. STAT. § 90-21.121(a).

422 *Id.* § 90-21.81; *id.* § 90-21.82; *id.* § 90-21.85 (ultrasound requirement invalidated by *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014)).

423 N.C. GEN. STAT. § 143C-6-5; 10A N.C. ADMIN. CODE 25P.0405.

424 N.C. GEN. STAT. § 90-21.7 (a).

425 *Id.* § 90-21.7 (b); *id.* § 90-21.8.

426 *Id.* § 14-45.1.

427 *Id.*

428 *Id.*

429 *See, e.g., id.* §§ 14-44, 14-45.

430 *Id.* § 14-277.4.

431 *Id.* § 14-44; *see Bryant*, 363 F. Supp. 3d 611.

# North Dakota

## Hostile

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely the state will attempt to enforce its trigger ban to prohibit abortion entirely.

### Restrictions

North Dakota law generally prohibits abortion at six weeks,<sup>432</sup> twenty weeks post-fertilization,<sup>433</sup> and after viability.<sup>434</sup> However, the six-week ban is permanently enjoined.<sup>435</sup> It also prohibits D&X procedures,<sup>436</sup> D&E procedures,<sup>437</sup> and abortions sought for reasons of sex or diagnosed or potential genetic abnormalities.<sup>438</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period,<sup>439</sup> biased counseling,<sup>440</sup> and be given the offer of having and viewing an ultrasound.<sup>441</sup> North Dakota limits public funding for,<sup>442</sup> and private insurance coverage of, abortion.<sup>443</sup> North Dakota law generally requires that both living parents, legal guardians,<sup>444</sup> or a judge<sup>445</sup> consent to a minor's abortion.

North Dakota's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities,<sup>446</sup> admitting privileges,<sup>447</sup> and reporting.<sup>448</sup> North Dakota law restricts the provision of abortion care to licensed physicians.<sup>449</sup> Providers who violate North Dakota's abortion restrictions may face civil and criminal penalties.<sup>450</sup>

### Protections

North Dakota law does not include express constitutional or statutory protections for abortion. To the contrary, North Dakota's policy preference to ban abortion to the fullest extent of the law: "Between normal childbirth and abortion, it is the policy of the state of North Dakota that normal childbirth is to be given preference, encouragement, and support by law and by state action, it being in the best interests of the well-being and common good of North Dakota citizens."<sup>451</sup>

### Laws that could be enforced if *Roe* is limited or overturned

In 2007, North Dakota enacted a trigger ban;<sup>452</sup> however, the state repealed its pre-*Roe* ban in 1973.<sup>453</sup>

432 N.D. CENT. CODE § 14-02.1-05.2.

433 *Id.* § 14-02.1-05.3(3).

434 *Id.* § 14-02.1-04(3).

435 *MKB Mgmt. Corp. v. Burdick*, 16 F. Supp. 3d 1059 (D.N.D. 2014), *aff'd sub nom. MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015).

436 N.D. CENT. CODE § 14-02.6-02(1).

437 *Id.* § 14-02.1-04.2

438 *Id.* § 14-02.1-04.1.

439 *Id.* § 14-02.1-03(1); *Id.* § 14-02.1-02(11)(A).

440 *Id.* § 14-02.1-02 (11)(A)(2).

441 *Id.* § 14-02.1-04 (4).

442 *Id.* § 14-02.3-01(3); N.D. ADMIN. CODE 75-02-02-08(2)(i).

443 N.D. CENT. CODE § 14-02.3-03.

444 *Id.* § 14-02.1-03.1.

445 *Id.*

446 *Id.* § 14-02.1-04(2)-(3).

447 *Id.* § 14-02.1-04.

448 *Id.* § 14-02.1-07.

449 *Id.* § 14-02.1-04(1).

450 *See, e.g., id.* § 14-02.1-03.2; *id.* § 14-02.6-02(1).

451 *Id.* § 14-02.3(1).

452 *Id.* § 12.1-31-12, *amended by* 2019 N. D. Laws Ch. 126 (H.B. 1546).

453 N.D. CENT. CODE §§ 12-25-01, 12-25-02 (1970), *repealed by* 1973 N.D. Laws 300, ch. 116, §41.

# Ohio

## Hostile

### Restrictions

Ohio law generally bans abortions at six weeks LMP,<sup>454</sup> although the ban is preliminary enjoined,<sup>455</sup> and when the “probable post-fertilization age of the unborn child is twenty weeks or greater.”<sup>456</sup> It also prohibits both D&E<sup>457</sup> and D&X<sup>458</sup> procedures, although the D&E ban is enjoined.<sup>459</sup> The state prohibits abortions sought because of Down syndrome, but this ban is also enjoined.<sup>460</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period and biased counseling.<sup>461</sup> Ohio also limits public funding under narrow circumstances,<sup>462</sup> and insurance plans sold on the state exchange are prohibited from covering abortion services.<sup>463</sup> Ohio law generally requires that a parent, legal guardian,<sup>464</sup> or judge<sup>465</sup> consent to a minor’s abortion.

Ohio’s targeted regulations of abortion providers (TRAP) laws include reporting requirements.<sup>466</sup> Ohio law restricts the provision of abortion care to physicians.<sup>467</sup> Providers who violate Ohio’s abortion restrictions may face civil and criminal penalties.<sup>468</sup>

### Protections

Ohio law does not include express constitutional or statutory protections for abortion. To the contrary, Ohio’s laws include a policy preference to support fake clinics, or crisis pregnancy centers, and fund them with taxpayer dollars.<sup>469</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Ohio expressly repealed its pre-*Roe* ban in 1974.<sup>470</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion rights opponents likely will seek to enforce its six-week ban and to enact new restrictions.

454 OHIO REV. CODE § 2919.195(A).

455 *Preterm-Cleveland v. Yost*, No. 1:19-cv-00360-MRB (S.D. Ohio July 3, 2019), <https://assets.documentcloud.org/documents/6182242/7-3-19-Pre-Term-Cleveland-Opinion.pdf>.

456 OHIO REV. CODE § 2919.201.

457 *Id.* § 2919.15.

458 *Id.* § 2919.151.

459 *Planned Parenthood Sw. Ohio Region v. Yost*, No. 1:19-CV-00118-MRB, 2019 WL 1305762, at \*43 (S.D. Ohio April 18, 2019) (order granting preliminary injunction), <https://assets.documentcloud.org/documents/5956265/D-E-Preliminary-Injunction.pdf>.

460 OHIO REV. CODE § 2919.10; *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746 (S.D. Ohio 2018) (6th Cir. appeal docketed Apr. 2018).

461 OHIO REV. CODE § 2317.56.

462 *Id.* § 5101.56.

463 *Id.* § 3901.87.

464 *Id.* §§ 2919.12(B)(1)(a), (c)(2).

465 *Id.* §§ 2919.12(B)(1)(a)(iv), 2151.85.

466 *Id.* § 2919.71.

467 *Id.* §§ 2919.11, 4731.41.

468 *See, e.g., id.* § 2919.17.

469 *Id.* § 5101.804.

470 OHIO REV. CODE §§ 2919.11, 2919.12, *repealed by* 1974 Ohio Laws 982.

# Oklahoma

## Hostile

### Conclusion

If *Roe v. Wade* is limited or overturned, Oklahoma will attempt to enforce its pre-*Roe* bans.

### Restrictions

Oklahoma generally prohibits abortion after twenty weeks post-fertilization with narrow exceptions.<sup>471</sup> It also prohibits the D&E procedures, a ban that is currently enjoined,<sup>472</sup> and D&X<sup>473</sup> procedures and abortions sought for reasons of sex selection.<sup>474</sup> Pregnant people who seek abortion care must undergo a mandatory seventy-two-hour waiting period and biased counseling.<sup>475</sup> Oklahoma also limits public funding for, and private insurance coverage of, abortion.<sup>476</sup> Oklahoma criminalizes people who self-manage their abortions.<sup>477</sup> Oklahoma law generally requires that a parent or legal guardian be notified prior to a minor's abortion<sup>478</sup> and consent to it.<sup>479</sup> Alternatively, a judge can approve a minor's petition.<sup>480</sup>

Oklahoma's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities<sup>481</sup> and reporting.<sup>482</sup> The legislature has not repealed permanently enjoined admitting privileges requirements.<sup>483</sup> Oklahoma law restricts the provision of abortion care to licensed physicians.<sup>484</sup> Providers who violate Oklahoma's abortion restrictions may face civil and criminal penalties.<sup>485</sup>

### Protections

Oklahoma law does not include express constitutional or statutory protections for abortion. To the contrary, Oklahoma's Public Health Code states that it cannot be "construed as creating or recognizing right to abortion."<sup>486</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Oklahoma has unenforced pre-*Roe* bans.<sup>487</sup>

471 OKLA. STAT. tit. 63, § 1-745-5.

472 *Id.* § 1-737.9 (A); see *Tulsa Women's Reproductive Clinic, LLC v. Hunter*, No. CV-2015-1838 (Okla. Dist. Ct. July 12, 2019).

473 OKLA. STAT. tit. 21, § 684 (A).

474 OKLA. STAT. tit. 63, § 1-731.2 (B).

475 *Id.* § 1-738.2 (B); *id.* § 1-738.2; *Nova Health Sys. v. Pruitt*, 2012 OK 103, 292 P.3d 28, as corrected (Okla. 2012) (Oklahoma's ultrasound requirement is permanently enjoined by court order).

476 See, e.g., OKLA. STAT. tit. 63, § 1-741.1 (A)-(D); OKLA. STAT. tit. 63, § 1-741-3.

477 OKLA. STAT. tit. 63, § 1-733. See also OKLA. STAT. tit. 21, § 862.

478 OKLA. STAT. tit. 63, § 1-740.2(B)(1).

479 *Id.* § 1-740.2(B)(3).

480 *Id.* § 1-740-3.

481 OKLA. ADMIN. CODE § 310:600-3-1 et seq.

482 *Id.* § 310:600-13-3.

483 OKLA. STAT. tit. 63, § 1-748; *Burns v. Cline*, 2016 OK 122, 387 P.3d 348 (Okla. 2016).

484 OKLA. STAT. tit. 63, § 1-731.

485 See, e.g., *id.* § 1-729.3 (civil penalty); *id.* § 1-729.2 (criminal penalty).

486 *Id.* § 1-729.6.

487 OKLA. STAT. tit. 21, §§ 861, 862, invalidated by *Jobe v. State*, 1973 OK CR 51, 509 P.2d 481 (Okla. Crim. App. 1973). Likewise, in *Henrie v. Derryberry*, the court refused to enjoin the statutes, but it ordered sections 861 and 862 "void and unenforceable," as applied to "the intervenors and all others similarly situated and residing in the State of Oklahoma..." 358 F. Supp at 719, 724 (N.D. Okla. 1973).



# Oregon

## Expanded Access

### Restrictions

Oregon requires abortion providers to submit reports to the state.<sup>488</sup>

### Protections

Oregon law includes an express statutory protection for abortion,<sup>489</sup> which states:

*[A public body] may not: (1) Deprive a consenting individual of the choice of terminating the individual's pregnancy; (2) Interfere with or restrict, in the regulation or provision of benefits, facilities, services or information, the choice of a consenting individual to terminate the individual's pregnancy; (3) Prohibit a health care provider, who is acting within the scope of the health care provider's license, from terminating or assisting in the termination of a patient's pregnancy; or (4) Interfere with or restrict, in the regulation or provision of benefits, facilities, services or information, the choice of a health care provider, who is acting within the scope of the health care provider's license, to terminate or assist in the termination of a patient's pregnancy.*

While Oregon added an equal rights amendment (ERA) by voter initiative in 2014, the ERA has not yet been interpreted as to whether it protects abortion.<sup>490</sup> The amendment states: “Equality of rights under the law shall not be denied or abridged by the state of Oregon or by any political subdivision in this state on account of sex.”

Oregon provides public funding for abortion<sup>491</sup> and requires private insurance coverage of abortion.<sup>492</sup> The state does not restrict the type of health-care practitioner who can provide abortion care. The state protects clinic safety and access by prohibiting the obstruction of health-care facilities.<sup>493</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Oregon repealed its pre-*Roe* ban in 1983.<sup>494</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Oregon.

488 OR. REV. STAT. § 435.496.

489 *Id.* § 659.880.

490 OR. CONST. ART. I, § 46. Added by voter initiative (Measure 89, approved Nov. 4, 2014), *eff.* Dec. 4, 2014.

491 OR. ADMIN. R. 410-130-0562; *See Planned Parenthood Ass'n v. Dep't of Human Res.*, 663 P.2d 1247 (Or. Ct.

App. 1983), *a ff'd* on other grounds, 687 P.2d 785 (Or. 1984) (striking down administrative rule denying funding for medically necessary abortions).

492 OR. REV. STAT. § 743A.067.

493 *Id.* § 164.365.

494 *Id.* § 435.405 *et seq.* (Repealed by Laws 1983, c. 470, § 1).

# Pennsylvania

## Hostile

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain accessible in Pennsylvania for as long as there is a governor who is supportive of abortion rights.

### Restrictions

Pennsylvania law prohibits abortion at twenty-four weeks LMP.<sup>495</sup> It also prohibits abortions sought for reasons of sex.<sup>496</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period and biased counseling.<sup>497</sup> Pennsylvania also limits public funding for,<sup>498</sup> and private insurance coverage of, abortion.<sup>499</sup> Pennsylvania law generally requires that a parent, legal guardian,<sup>500</sup> or judge<sup>501</sup> consent to a minor's abortion.

Pennsylvania's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities<sup>502</sup> and reporting.<sup>503</sup> Pennsylvania law restricts the provision of abortion care to physicians.<sup>504</sup> Providers who violate Pennsylvania's abortion restrictions may face civil and criminal penalties.<sup>505</sup>

### Protections

Pennsylvania does not include express constitutional or statutory protections for abortion. To the contrary, Pennsylvania's policy preference to ban abortion to the fullest extent of the law: "[i]n every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this Commonwealth encouraging childbirth over abortion."<sup>506</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Pennsylvania's pre-*Roe* ban was held unconstitutional in Pennsylvania Supreme Court cases following *Roe*<sup>507</sup> and explicitly repealed in 1974.<sup>508</sup>

495 18 PA. CONS. STAT. § 3211(a); *id.* § 3203.

496 *Id.* § 3204(c).

497 28 PA. CODE § 29.37 (b); 18 PA. CONS. STAT. § 3205 (a) (1)-(2).

498 18 PA. CONS. STAT. § 3215(c).

499 *Id.* § 3215(e).

500 *Id.* § 3206 (a).

501 *Id.* § 3206 (c).

502 35 PA. CONS. STAT. § 448.806 (h); 28 PA. CODE § 29.43 (a).

503 18 PA. CONS. STAT. § 3214 (a) (1).

504 *Id.* § 3204 (a).

505 *See, e.g., id.* § 3217; *id.* § 3211 (d).

506 *Id.* § 3202 (c).

507 *Com. v. Page*, 451 Pa. 331, 336, 303 A.2d 215, 217 (1973); *Com. v. Jackson*, 454 Pa. 429, 433, 312 A.2d 13, 15 (1973).

508 18 PA. CONS. STAT. §§ 4718, 4719, repealed by 1974 Pa. Laws 642, Act No. 209, § 10.



# Rhode Island

## Protected

### Restrictions

Rhode Island law generally prohibits post-viability abortions<sup>509</sup> and limits public funding for abortion.<sup>510</sup> Rhode Island law generally requires that a parent, legal guardian,<sup>511</sup> or judge<sup>512</sup> consent to a minor's abortion.

Rhode Island's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities<sup>513</sup> and reporting.<sup>514</sup> Providers who violate Rhode Island's abortion restrictions may face civil penalties.<sup>515</sup>

### Protections

In 2019, Rhode Island enacted express statutory protections for abortion<sup>516</sup> while repealing a law prohibiting abortion on a "quick child,"<sup>517</sup> an unconstitutional ban on D&X procedures,<sup>518</sup> and limitations on private insurance coverage of abortion.<sup>519</sup> The Rhode Island Constitution includes equal protection language, but it specifies that it does not grant any right relating to abortion.<sup>520</sup> Although Rhode Island restricts the provision of surgical abortion to licensed physicians, it otherwise allows licensed physicians and other health-care practitioners to provide abortion care within their scope of practice.<sup>521</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Rhode Island repealed its pre-*Roe* ban in 1973<sup>522</sup> and its unconstitutional post-*Roe* criminal ban in 2019.<sup>523</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Rhode Island.

509 R.I. Gen. Laws § 23-4.13-2(d).

510 210 R.I. CODE R. 30-05-2.27(A)(2) (restriction on Medicaid coverage); R.I. GEN. LAWS § 36-12-2.1(A) (restriction prohibiting coverage for state employees).

511 R.I. GEN. LAWS § 23-4.7-6.

512 *Id.*

513 216 R.I. CODE R. 20-10-6.3.

514 R.I. GEN. LAWS § 23-3-17.

515 *See, e.g., id.* § 23-4.7-7.

516 R.I. Gen. Laws § 23-4.13-2(a) (repealed R.I. Gen. Laws Ann. § 11-3 *et seq.*).

517 R.I. GEN. LAWS § 11-23-5, *repealed by 2019 R.I. Pub. Laws, ch. 27, § 4.*

518 R.I. GEN. LAWS §§ 23-4.12-1 - 23-4.12-6, *repealed by*

*2019 R.I. Pub. Laws, ch. 27, § 6; Rhode Island Med. Soc'y. v. Whitehouse, 239 F.3d 1004 (1st Cir. 2001).*

519 R.I. GEN. LAWS § 27-18-28, *repealed by 2019 R.I. Pub. Laws, ch. 27, § 7; Nat'l Educ. Ass'n of R.I. v. Garrahy, 598 F. Supp. 1374, 1384 (D.R.I. 1984), aff'd, 779 F.2d 790 (1st Cir. 1986).*

520 R.I. CONST. art. 1, § 2 (1986).

521 216 R.I. CODE R. § 20-10-6.3.

522 R.I. GEN. LAWS § 11-3-1 (1956), *repealed by 1973 R.I. Pub. Laws 68, ch. 15 § 1.*

523 R.I. GEN. LAWS § 11-3-1 TO -5, *repealed by Reproductive Privacy Act, H.B. 5125, 146th Gen. Assemb., Reg. Sess. (R.I. 2019), codified at 23 R.I. Gen. Laws § 23-4.13-1; see Doe v. Israel, 358 F. Supp. 1193 (D.R.I. 1973).*



# South Carolina

## Hostile

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely the legislature will enact a highly restrictive or total abortion ban.

### Restrictions

South Carolina law generally prohibits abortion at twenty weeks post-fertilization<sup>524</sup> and in the third trimester.<sup>525</sup> It also prohibits D&X procedures.<sup>526</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period and be offered biased counseling.<sup>527</sup> South Carolina also limits public funding for abortion<sup>528</sup> and private insurance coverage of abortion.<sup>529</sup> South Carolina criminalizes people who self-manage their abortions.<sup>530</sup> South Carolina law generally requires that a parent, grandparent, legal guardian,<sup>531</sup> or judge<sup>532</sup> consent to a minor's abortion.

South Carolina's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities,<sup>533</sup> admitting privileges agreements,<sup>534</sup> and reporting.<sup>535</sup> South Carolina law restricts the provision of abortion care to physicians and explicitly prohibits nurse midwives from the provision of abortion care.<sup>536</sup> Providers who violate South Carolina's abortion restrictions may face civil and criminal penalties.<sup>537</sup>

### Protections

South Carolina law does not include express constitutional or statutory protections for abortion.

### Laws that could be enforced if *Roe* is limited or overturned

South Carolina repealed its pre-*Roe* bans in 1974.<sup>538</sup>

524 S.C. CODE ANN. § 44-41-450(A).

525 *Id.* § 44-41-20(c).

526 *Id.* § 44-41-85.

527 *Id.* § 44-41-330.

528 *Id.* § 1-1-1035.

529 *Id.* § 38-71-238.

530 *Id.* § 44-41-80(b).

531 *Id.* § 44-41-31.

532 *Id.*

533 S.C. CODE REGS. Ch. 61-12.

534 *Id.* 61-12.205 (C) (2).

535 S.C. CODE ANN. § 44-41-60; S.C. CODE REGS. 61-12.403.

536 S.C. CODE ANN. § 44-41-20, S.C. CODE REGS. 61-24.

537 *See, e.g.,* S.C. CODE ANN. § 44-41-35; S.C. CODE § 44-41-85.

538 S.C. CODE ANN. §§ 16-87 through 16-89 (Supp.1971), repealed by 1974 S.C. Acts 2837, 2841, Act No. 1215, § 8.



# South Dakota

## Hostile

### Restrictions

South Dakota law generally prohibits abortion at twenty-two weeks LMP.<sup>539</sup> It also prohibits the D&X method of abortion<sup>540</sup> and abortions sought because of the sex of the pregnancy.<sup>541</sup> Pregnant people who seek abortion care must undergo a mandatory seventy-two-hour waiting period (excluding weekends and annual holidays) and biased counseling.<sup>542</sup> South Dakota also limits public funding for abortion.<sup>543</sup> South Dakota law generally requires that a parent or legal guardian is notified forty-eight hours prior to a minor's abortion;<sup>544</sup> alternatively, a judge can approve a minor's petition without parental notification.<sup>545</sup>

South Dakota's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities<sup>546</sup> and reporting.<sup>547</sup> South Dakota law restricts the provision of abortion care to physicians and explicitly restricts certified nurse practitioners and certified nurse midwives from the provision of abortion care.<sup>548</sup> Providers who violate South Dakota's abortion restrictions may face civil and criminal penalties.<sup>549</sup>

### Protections

South Dakota does not include express constitutional or statutory protections for abortion.

### Laws that could be enforced if *Roe* is limited or overturned

In 2005, South Dakota enacted a trigger ban.<sup>550</sup> South Dakota repealed its pre-*Roe* ban in 1977.<sup>551</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely the state will attempt to enforce its trigger ban to prohibit abortion entirely.

539 S.D. CODIFIED LAWS § 34-23A-5.

540 *Id.* § 34-23A-27 to 34-23A-33.

541 *Id.* § 34-23A-63 to 34-23A-64.

542 *Id.* §§ 34-23A-10.1, 34-23A-56.

543 *Id.* § 28-6-4.5.

544 *Id.* §§ 34-23A-1(6), 34-23A-7, 34-23A-7.1.

545 *Id.*

546 S.D. CODIFIED LAWS § 34-23A-51; S.D. ADMIN. R. art. 44:67.

547 S.D. CODIFIED LAWS §§ 34-23A-34 TO 34-23A-42.

548 *Id.* §§ 34-23A-3, 36-9A-17.2.

549 *See, e.g., id.* § 34-23A-41; *id.* § 34-23A-27.

550 2005 S.D. Sess. Laws ch. 187, §§ 1-4, 7. (H.B. 1249).

551 *See* S.D. CODIFIED LAWS § 22-17-1, *repealed by* 1977 S.D. Sess. Laws ch. 189, § 126.

# Tennessee

## Hostile

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely the state will attempt to enforce its newly enacted trigger ban to prohibit abortion entirely.

### Restrictions

Tennessee law generally prohibits abortion at twenty weeks LMP and after viability.<sup>552</sup> It also prohibits D&X procedures.<sup>553</sup> Pregnant people who seek abortion care undergo a mandatory forty-eight-hour waiting period, receive biased counseling, and are offered an ultrasound.<sup>554</sup> Tennessee also limits public funding for,<sup>555</sup> and private insurance coverage of, abortion.<sup>556</sup> Tennessee law generally requires that a parent, legal guardian,<sup>557</sup> or judge<sup>558</sup> consent to a minor's abortion.

Tennessee's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities which are permanently enjoined,<sup>559</sup> permanently enjoined admitting privileges,<sup>560</sup> and reporting.<sup>561</sup> Tennessee law restricts the provision of abortion care to licensed physicians and explicitly prohibits physician assistants from providing medication abortion.<sup>562</sup> Providers who violate Tennessee's abortion restrictions may face civil and criminal penalties.<sup>563</sup>

### Protections

Tennessee law does not include express constitutional protections for abortion. To the contrary, Tennessee's constitution was amended in 2014 to preclude protections for abortion rights.<sup>564</sup>

### Laws that could be enforced if *Roe* is limited or overturned

In 2019, Tennessee enacted a trigger ban.<sup>565</sup> The state repealed its pre-*Roe* ban in 1973.<sup>566</sup>

552 TENN. CODE ANN. § 39-15-212; *id.* §§ 39-15-211(b)(1)-(2).

553 *Id.* § 39-15-209.

554 *Id.* § 39-15-202.

555 *Id.* § 9-4-5116.

556 *Id.* § 56-26-134.

557 *Id.* § 37-10-303.

558 *Id.* §§ 37-10-303(b), 304.

559 TENN. CODE ANN. § 68-11-201(3); TENN. COMP. R. & REGS. 1200-08-10-.02; *id.* 1200-08-10-.06(1)(s).

560 Partial Judgment on Consent at 3, *Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-00705 (M.D. Tenn. Apr. 14, 2017) (ECF No. 60).

561 TENN. CODE ANN. §§ 39-15-203, 68-3-505.

562 *Id.* § 39-15-201, TENN. COMP. R. & REGS. 0880-03-.21(3).

563 *See, e.g.*, TENN. CODE ANN. § 39-15-202; TENN. CODE ANN. § 39-15-211.

564 TENN. CONST. art. I, § 36 (superseding *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 4 (Tenn. 2000) (holding "a woman's right to terminate her pregnancy is a vital part of the right to privacy guaranteed by the Tennessee Constitution" and that "the right is inherent in the concept of ordered liberty embodied in our constitution and is therefore fundamental").

565 2019 Tenn. Pub. Acts 351 (S.B. 1257) (to be codified at TENN. CODE ANN. § 39-15-2).

566 TENN. CODE ANN. §§ 39-301, 39-302 (1956), *repealed by* 1973 Tenn. Pub. Acts 901 et seq., ch. 235, §§ 1, 3.

# Texas

## Hostile



### Restrictions

Texas law generally prohibits abortion at twenty weeks post-fertilization and during the third trimester.<sup>567</sup> It also prohibits D&X and D&E procedures,<sup>568</sup> although the D&E ban was held unconstitutional.<sup>569</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period, biased counseling, and an ultrasound.<sup>570</sup> Texas also limits public funding for,<sup>571</sup> and private insurance coverage of, abortion.<sup>572</sup> Texas law generally requires that a parent or legal guardian be notified prior to a minor's abortion<sup>573</sup> and consent to it.<sup>574</sup> Alternatively, a judge can approve a minor's petition.<sup>575</sup>

Texas's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities<sup>576</sup> and reporting<sup>577</sup> as well as unconstitutional requirements that have not been repealed.<sup>578</sup> TRAP regulations have forced multiple clinics to close.<sup>579</sup> Texas law restricts the provision of abortion care to licensed physicians.<sup>580</sup> Providers who violate Texas's abortion restrictions may face civil and criminal penalties.<sup>581</sup>

### Protections

Texas law does not include express constitutional or statutory protections for abortion. To the contrary, Texas's law defines "individual" as including "an unborn child at every state of gestation from fertilization until birth."<sup>582</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Texas has a pre-*Roe* criminal ban that the Fifth Circuit held was repealed by implication.<sup>583</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely that Texas will enact legislation to prohibit abortion entirely.

<sup>567</sup> TEX. HEALTH & SAFETY CODE § 171.044; *id.* § 170.002(a).

<sup>568</sup> *Id.* § 171.102(a); *id.* § 171.152(a).

<sup>569</sup> *Whole Women's Health v. Paxton*, 280 F. Supp. 3d 938, 940 (W.D. Tex. 2017), *appeal docketed*, No. 17-51060 (5th Cir. Jan. 16, 2018), *held in abeyance by Doc.* 514871170 (5th Cir. Mar. 13, 2019).

<sup>570</sup> TEX. HEALTH & SAFETY CODE § 171.011; *id.* § 171.012.

<sup>571</sup> TEX. ADMIN. CODE § 354.1167.

<sup>572</sup> TEX. INS. CODE § 1218.003; *id.* § 1218.004.

<sup>573</sup> TEX. FAM. CODE § 33.002

<sup>574</sup> *Id.* § 33.0021; TEX. OCC. CODE § 164.052.

<sup>575</sup> TEX. FAM. CODE § 33.003.

<sup>576</sup> TEX. HEALTH & SAFETY CODE § 171.002; 25 TEX. ADMIN. CODE § 139.32; 25 TEX. ADMIN. CODE § 139.48.

<sup>577</sup> TEX. HEALTH & SAFETY CODE § 245.011(A); 25 TEX. ADMIN. CODE §§ 139.4, 139.5.

<sup>578</sup> TEX. HEALTH & SAFETY CODE §§ 245.010(A), § 171.0031 (held unconstitutional by *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)).

<sup>579</sup> Alexa Ura, Ryan Murphy, Annie Daniel & Lindsay Carbonell, *Here Are the Texas Abortion Clinics That Have Closed Since 2013*, THE TEXAS TRIBUNE (June 28, 2016), <https://www.texastribune.org/2016/06/28/texas-abortion-clinics-have-closed-hb2-passed-2013/>.

<sup>580</sup> TEX. HEALTH & SAFETY CODE § 171.003.

<sup>581</sup> *See, e.g., id.* § 171.104; *id.* § 171.018.

<sup>582</sup> TEX. CIV. PRAC. & REM. CODE § 71.001.

<sup>583</sup> *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) ("The Texas statutes that criminalized abortion (former Penal Code Articles 1191, 1192, 1193, 1194 and 1196) and were at issue in [*Roe v. Wade*, 410 U.S. 113 (1973)], have, at least, been repealed by implication.").

# Utah Hostile

## Conclusion

If *Roe v. Wade* is limited or overturned, it is likely the state will enact legislation prohibiting abortion completely.

## Restrictions

Utah law generally prohibits abortion at eighteen weeks LMP and after viability,<sup>584</sup> although the eighteen-week ban is preliminarily enjoined.<sup>585</sup> It also prohibits D&X and saline procedures,<sup>586</sup> and abortions sought solely because of Down syndrome.<sup>587</sup> Pregnant people who seek abortion care must undergo a mandatory seventy-two-hour waiting period and biased counseling.<sup>588</sup> Utah also limits public funding for,<sup>589</sup> and private insurance coverage of, abortion.<sup>590</sup> Utah law generally requires that a parent or legal guardian be notified prior to a minor's abortion<sup>591</sup> and consent to it.<sup>592</sup> Alternatively, a judge can approve a minor's petition.<sup>593</sup>

Utah's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities<sup>594</sup> and reporting.<sup>595</sup> Utah law restricts the provision of abortion care to licensed physicians and explicitly prohibits certified nurse midwives from providing abortion care.<sup>596</sup> Providers who violate Utah's abortion restrictions may face civil and criminal penalties.<sup>597</sup>

## Protections

Utah law does not include express constitutional or statutory protections for abortion. To the contrary, Utah's policy preference to ban abortion to the fullest extent of the law: "It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life..."<sup>598</sup> During counseling, a patient must be told that the state's preference is for childbirth over abortion.<sup>599</sup>

## Laws that could be enforced if *Roe* is limited or overturned

Utah repealed its pre-*Roe* ban in 1973.<sup>600</sup>

584 UTAH CODE ANN. § 76-7-302.5; *id.* § 76-7-302.

585 *Planned Parenthood Ass'n of Utah v. Miner*, No. 2:19-cv-00238-EJF (C.D. Utah 2019).

586 UTAH CODE ANN. §§ 76-7-326, 76-7-310.5.

587 *Id.* § 76-7-302.4.

588 *Id.* § 76-7-305; *id.* § 76-7-305.5.

589 *Id.* § 76-7-331.

590 *Id.* § 31A-22-726.

591 *Id.* § 76-7-304 (2).

592 *Id.* § 76-7-304.5 (1)(A).

593 *Id.* § 76-7-304.5 (3).

594 *Id.* § 26-21-2 (1), *id.* § 26-21-2(23)-(24); UTAH ADMIN. CODE r. R432-600-5.

595 UTAH CODE ANN. § 76-7-313.

596 *Id.* §§ 76-7-302 (2), 58-77-603.

597 *See, e.g., id.* §§ 76-7-327, 76-7-326.

598 *Id.* § 76-7-301.1.

599 *Id.* § 76-7-305.5(2)(b).

600 UTAH CODE ANN. §§ 76-2-1, 76-2-2 (1953), *repealed by* 1973 Utah Laws 584, 684, ch. 196 (sub.) ch. 10, pt. 14.

# Vermont

## Expanded Access

### Restrictions

Vermont requires abortion providers to submit reports to the state.<sup>601</sup>

### Protections

Vermont enacted an independent statutory protection for abortion as a fundamental right throughout pregnancy in June 2019.<sup>602</sup>

*The State of Vermont recognizes the fundamental right of every individual who becomes pregnant to choose to carry a pregnancy to term, to give birth to a child, or to have an abortion.<sup>603</sup> ... [A public entity] shall not, in the regulation or provision of benefits, facilities, services, or information, deny or interfere with an individual's fundamental rights to choose or refuse contraception or sterilization or to choose to carry a pregnancy to term, to give birth to a child, or to obtain an abortion. No State or local law enforcement shall prosecute any individual for inducing, performing, or attempting to induce or perform the individual's own abortion.<sup>604</sup>*

Vermont provides public funding for medically necessary abortions.<sup>605</sup> The state does not restrict the type of health-care practitioner who can provide abortion care.

### Laws that could be enforced if *Roe* is limited or overturned

Vermont had a pre-*Roe* statute that imposed criminal penalties on third parties who assisted with or performed an abortion. It was held invalid by the Vermont Supreme Court in 1972 and expressly repealed by the legislature in 2014.<sup>606</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Vermont.

<sup>601</sup> VT. STAT. ANN. tit. 18, § 5222.

<sup>602</sup> *Id.* § 9493 *et seq.*

<sup>603</sup> *Id.* § 9493 (b).

<sup>604</sup> *Id.* § 9494.

<sup>605</sup> *Doe v. Celani*, No. S81-84CnC at 5 (Vt. Super. Ct. May

23, 1986) (holding that ban on Medicaid funding violated state constitution).

<sup>606</sup> See VT. STAT. ANN. tit. 13, §§ 101-104, invalidated by *Beecham v. Leahy*, 130 Vt. 164, 170, 287 A.2d 836, 840 (Vt. 1972), repealed by 2013, No. 98, § 1, *eff. Mar. 24, 2014*.



# Virginia

## Not Protected

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will likely remain accessible in Virginia but without legal protection.

### Restrictions

Virginia law generally prohibits abortion after “the second trimester.”<sup>607</sup> It also prohibits the D&X method of abortion.<sup>608</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period, biased counseling, and an ultrasound.<sup>609</sup> Virginia also limits public funding for,<sup>610</sup> and state exchange insurance coverage of, abortion.<sup>611</sup> Virginia law generally requires that a parent or “authorized person” be notified prior to a minor’s abortion<sup>612</sup> and consent to it.<sup>613</sup> Alternatively, a judge can approve a minor’s petition.<sup>614</sup>

Virginia targeted regulation of abortion providers (TRAP) laws include requirements related to facilities<sup>615</sup> and reporting.<sup>616</sup> Virginia law restricts the provision of abortion care to licensed physicians.<sup>617</sup> Providers who violate Virginia abortion restrictions may face civil and criminal penalties.<sup>618</sup>

### Protections

Virginia law does not include express constitutional or statutory protections for abortion. To the contrary, in 2017, Virginia enacted House Resolution 268 indicating its policy preference to ban abortion to the fullest by designating January 22 as the “Day of Tears” in the state to mourn the anniversary of *Roe*.<sup>619</sup> On this day, Virginia citizens are “encouraged to lower their flags to half-staff to mourn the innocents who have lost their lives to abortion.”<sup>620</sup> Virginia protects clinic safety by prohibiting trespassing.<sup>621</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Virginia repealed its pre-*Roe* ban in 1975.<sup>622</sup>

607 VA. CODE ANN. § 18.2-74.

608 *Id.* § 18.2-71.1.

609 *Id.* § 18.2-76(A)-(D).

610 *Id.* § 32.1-92.2; *id.* § 32.1-92.1.

611 *Id.* § 38.2-3451.

612 *Id.* § 16.1-241(w).

613 *Id.* § 16.1-241.

614 *Id.*

615 *Id.* §§ 18.2-73, 32.1-123, 32.1-125, 32.1-127; 12 VA. ADMIN. CODE §§ 5-412-10, 5-412-20.

616 VA. CODE ANN. § 32.1-264.

617 *Id.* § 18.2-72.

618 *See, e.g., id.* § 18.2-76; *id.* § 18.2-71.1.

619 H.R. 268, 2019 Gen. Assemb., Reg. Sess. (Va. 2017).

620 *Id.*

621 VA. CODE ANN. § 18.2-119.

622 *Id.* §18.1-62 *et seq.* (1971), *repealed by* 1975 Va. Acts 18, ch. 14, §1, ch. 15, §1. Text of the restriction found in note 1, *see Russo v. Commonwealth*, 207 Va. 251, 252, 148 S.E.2d 820, 822 (1966).



# Washington

## Expanded Access

### Restrictions

Washington law generally prohibits abortion at viability.<sup>623</sup>

Washington law includes reporting requirements.<sup>624</sup> Providers who violate Washington's post-viability ban may face criminal penalties.<sup>625</sup>

### Protections

Washington law includes a statutory protection for abortion as a fundamental right.<sup>626</sup> In 1991, voters approved a ballot initiative that provides, in part:

*The sovereign people hereby declare that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions. Accordingly, it is the public policy of the state of Washington that: (1) Every individual has the fundamental right to choose or refuse birth control; (2) Every woman has the fundamental right to choose or refuse to have an abortion, except as specifically limited... (3) Except as specifically permitted...the state shall not deny or interfere with a woman's fundamental right to choose or refuse to have an abortion; and (4) The state shall not discriminate against the exercise of these rights in the regulation or provision of benefits, facilities, services, or information.*<sup>627</sup>

Washington authorizes physicians and some advance practice clinicians (APCs) to provide abortion care.<sup>628</sup> Washington provides public funding for abortion care<sup>629</sup> and, when maternity care is covered, requires private insurance coverage of abortion.<sup>630</sup> The state protects clinic safety and access by prohibiting interference.<sup>631</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Washington repealed its pre-*Roe* statutes in 1992.<sup>632</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion will remain legal in Washington.

<sup>623</sup> WASH. REV. CODE § 9.02.110.

<sup>624</sup> WASH. ADMIN. CODE § 246-490-100.

<sup>625</sup> WASH. REV. CODE § 9.02.120.

<sup>626</sup> *Id.* §§ 9.02.100, 9.02.110, 9.02.140, 9.02.160.

<sup>627</sup> *Id.* § 9.02.100.

<sup>628</sup> *Id.* § 9.02.110; WASH. ATT'Y GEN. OP 2004 NO. 1 (2004); WASH. ATT'Y GEN. OP 2019 NO. 1 (2019).

<sup>629</sup> WASH. ADMIN. CODE § 182-532-123.

<sup>630</sup> WASH. REV. CODE § 48.43.073.

<sup>631</sup> *Id.* § 9A.50.020.

<sup>632</sup> See Reproductive Privacy Act, 1992 Wash. Legis. Serv. Ch. 1 (repealing § 9.02.010 through § 9.02.010 and § 9.02.060 through § 9.02.090).



# West Virginia Hostile

## Conclusion

If *Roe v. Wade* is limited or overturned, it is likely the state will enact a total ban on abortion, utilizing the recent constitutional amendment.

## Restrictions

West Virginia law generally prohibits abortion at twenty weeks post-fertilization.<sup>633</sup> It also prohibits D&X and D&E procedures, although the D&X ban is permanently enjoined.<sup>634</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period, biased counseling, and be offered an ultrasound.<sup>635</sup> West Virginia also limits public funding for abortion.<sup>636</sup> West Virginia law generally requires that a parent or legal guardian be notified about a minor's abortion;<sup>637</sup> alternatively, a judge can approve a minor's petition without parental notification.<sup>638</sup>

West Virginia law requires abortion providers to submit reports to the state.<sup>639</sup> Providers who violate West Virginia's abortion restrictions may face civil and criminal penalties.<sup>640</sup>

## Protections

West Virginia law does not include express constitutional or statutory protections for abortion.<sup>641</sup> To the contrary, in November 2018, West Virginia's voters approved a ballot initiative that added the following language to the state constitution: "Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion."<sup>642</sup>

## Laws that could be enforced if *Roe* is limited or overturned

West Virginia retains a pre-*Roe* ban that the Fourth Circuit found unconstitutional in 1975.<sup>643</sup>

633 W. VA. CODE §§ 16-2M-2(7), 16-2M-4.

634 *Id.* §§ 33-42-3(3), 33-42-8; *id.* § 16-2O-1; *Daniel v. Underwood*, 102 F. Supp. 2d 680 (S.D.W. Va. 2000).

635 W. VA. CODE §§ 16-2I-1 TO 16-2I-5.

636 W. VA. CONST. ART. VI, § 57; W. VA. BUREAU FOR MEDICAL SERV., *Revised Public Notice Regarding West Virginia Constitutional Amendment 1* (Nov. 13, 2018), available at <https://dhhr.wv.gov/bms/Public%20Notices/Pages/Public%20Notice%20regarding%20West%20Virginia%20Constitutional%20Amendment%201%20is%20now%20available.aspx>.

637 W. VA. CODE § 16-2F-3.

638 *Id.* § 16-2F-4.

639 *Id.* § 16-2I-7.

640 *See, e.g., id.* § 16-2M-6; *id.* § 33-42-8.

641 W. VA. CONST. ART. VI, § 57.

642 *Id.*

643 W. VA. CODE § 61-2-8, *invalidated by Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638 (4th Cir. 1975).



# Wisconsin

## Hostile

### Restrictions

Wisconsin law generally prohibits abortion at twenty weeks post-fertilization and post-viability.<sup>644</sup> The state has not repealed its unconstitutional ban on D&X procedures.<sup>645</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period, biased counseling, and an ultrasound.<sup>646</sup> Wisconsin also limits public funding for,<sup>647</sup> and private insurance coverage of, abortion.<sup>648</sup> Wisconsin law generally requires that a parent, legal guardian, adult family member, foster parent,<sup>649</sup> or judge<sup>650</sup> consent to a minor's abortion.

Wisconsin's targeted regulation of abortion providers (TRAP) laws include requirements related to facilities,<sup>651</sup> permanently enjoined admitting privileges,<sup>652</sup> transfer agreements,<sup>653</sup> and reporting.<sup>654</sup> Wisconsin law restricts the provision of abortion care to physicians.<sup>655</sup> Providers who violate Wisconsin's abortion restrictions may face civil and criminal penalties.<sup>656</sup>

### Protections

Wisconsin law does not include express constitutional or statutory protections for abortion, but it does include protections for clinic safety by prohibiting trespassing.<sup>657</sup>

### Laws that could be enforced if *Roe* is limited or overturned

Wisconsin has a pre-*Roe* ban<sup>658</sup> that has been interpreted to apply only to the crime of feticide.<sup>659</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, it is likely the legislature will pass new restrictions, but the current governor is unlikely to sign them.

644 Wis. STAT. § 253.107(3); *id.* § 940.15.  
645 *Id.* § 940.16; see *Hope Clinic v. Ryan*, 249 F.3d 603, 606 (7th Cir. 2001).  
646 Wis. STAT. § 253.10.  
647 *Id.* § 20.927.  
648 *Id.* § 632.8985.  
649 *Id.* § 48.375.  
650 *Id.* § 48.375.  
651 Wis. ADMIN. CODE, MED. § 11.04.

652 Wis. STAT. § 253.095(2); *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908 (Nov. 23, 2015).  
653 Wis. ADMIN. CODE, MED. § 11.04.  
654 Wis. STAT. § 69.186.  
655 *Id.* § 940.15(s).  
656 See, e.g., Wis. STAT. § 253.10; Wis. STAT. § 253.107(3).  
657 Wis. STAT. § 943.145.  
658 *Id.* § 940.04.  
659 *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994).

# Wyoming

## Not Protected

### Conclusion

If *Roe v. Wade* is limited or overturned, abortion likely will remain accessible in Wyoming but without legal protection.

### Restrictions

Wyoming law generally prohibits abortion at viability.<sup>660</sup> Pregnant people who seek abortion care must be given the opportunity to view an ultrasound.<sup>661</sup> Wyoming limits public funding for abortion.<sup>662</sup>

Wyoming law generally requires that a parent or legal guardian be notified prior to a minor's abortion and consent to it.<sup>663</sup> Alternatively, a judge can approve a minor's petition.<sup>664</sup>

Wyoming requires abortion providers to submit reports to the state.<sup>665</sup> State law restricts the provision of abortion care to licensed physicians.<sup>666</sup> Providers who violate Wyoming's abortion restrictions may face criminal penalties.<sup>667</sup>

### Protections

Wyoming law does not include express constitutional or statutory protections for abortion. The Wyoming Constitution guarantees equality specifically for women and based on sex,<sup>668</sup> but the state supreme court has not ruled on whether it protects abortion rights.

### Laws that could be enforced if *Roe* is limited or overturned

Wyoming repealed its pre-*Roe* ban in 1977.<sup>669</sup>

<sup>660</sup> WYO. STAT. ANN. § 35-6-102.

<sup>661</sup> *Id.* § 35-6-119.

<sup>662</sup> *Id.* § 35-6-117; WYO. ADMIN. CODE 048.0037.26 § 5.

<sup>663</sup> WYO. STAT. ANN. § 35-6-118(A).

<sup>664</sup> *Id.* § 35-6-118(a)-(b).

<sup>665</sup> *Id.* § 35-6-107.

<sup>666</sup> *Id.* § 35-6-111.

<sup>667</sup> *See, e.g.*, WYO. STAT. ANN. § 35-6-110.

<sup>668</sup> WYO. CONST. ART. VI, § 1; WYO. CONST. ART. I, § 3.

<sup>669</sup> WYO. STAT. ANN. §§ 6-77, 6-78, *repealed by* 1977

Wyo. Sess. Laws 11, 14; *see Doe v. Burk*, 513 P.2d 643, 645 (Wyo. 1973).

IX.

**Analysis  
of U.S.  
Territories**

American Samoa, Guam, the Commonwealth of Northern Mariana Islands (CNMI), Puerto Rico, and U.S. Virgin Islands (USVI) are the five most populous unincorporated territories of the United States. Residents of these territories, save for American Samoans, have been granted the same due process rights as residents of the fifty states, which means that, in theory, these individuals have the same right to abortion as any pregnant person in the United States. In reality, however, abortion appears difficult, if not impossible, to access. There are currently no abortion providers in American Samoa, Guam, and the CNMI, and providers are scarce in Puerto Rico and the U.S. Virgin Islands. Many of these territories are politically hostile to abortion rights, and, without federal constitutional protection, the right to abortion would cease to exist in nearly all of these territories. Yet many people in the territories already live in a no-*Roe* world.

Understanding the current abortion access landscape in these five territories requires understanding the unique relationship each has with the United States. Each of these five localities exercises various levels of self-governance while remaining subject to the plenary power of the U.S. Congress, as provided for in the Territorial Clause of the U.S. Constitution.<sup>670</sup> In a series of cases known as the “Insular Cases,” the Supreme Court has defined the extent to which both incorporated and unincorporated U.S. territories enjoy protections set out in the U.S. Constitution.<sup>671</sup> In these cases, the Supreme Court distinguished between “unincorporated” territories, those which were “foreign...in the domestic sense,”<sup>672</sup> and “incorporated” territories, which were seen as “an integral part of the United States,” part of “the American family,” and good candidates for statehood; Hawaii and Alaska are two such examples.<sup>673</sup>

Despite fierce criticism of the racist implications that undergird the constitutional framework set forth in the Insular Cases, they remain good law.<sup>674</sup> Under this framework, the U.S. Constitution does not apply in its entirety to unincorporated territories, which are afforded only those rights that are “fundamental.”<sup>675</sup> All jurisdictions subject to United States sovereignty are entitled to the protection of fundamental rights, even those fundamental rights that are not expressly enumerated in the Constitution.<sup>676</sup> An act of Congress is required to extend additional, nonfundamental constitutional rights to the inhabitants of unincorporated territories.<sup>677</sup> Yet even though these territories have some

constitutional rights, they have varying degrees of ability to self-govern. The Department of Interior retains federal administrative responsibility for all unincorporated territories except Puerto Rico. However, American Samoa, Guam, and the U.S. Virgin Islands are governed through unilateral means, whereby Congress dictates the extension of rights, whereas the United States must obtain the consent of the inhabitants of Puerto Rico and CNMI before making such changes.<sup>678</sup> This means that fundamental rights guaranteed by the U.S. Constitution extend to all five unincorporated territories, but that Puerto Rico and the CNMI could “demand, as a precondition to American dominion, the ouster of certain ‘nonfundamental’ constitutional rights that clash with their native customs and ways.”<sup>679</sup>

Although, on paper, residents in all five unincorporated territories have the right to have an abortion, the reality on the ground is much different. American Samoa, Guam, the CNMI, and Puerto Rico are generally hostile to abortion rights, and all have attempted to limit or ban access to abortion since *Roe* was first decided. Moreover, American Samoa has a (likely unenforceable) criminal statute that outlaws nearly all abortions, while the CNMI has a territorial constitutional provision that prohibits nearly all abortions (in conflict with *Roe* and the U.S. Constitution), and Guam unlawfully attempts to prohibit pre-viability abortions. Also, in just the last few years, politicians have introduced legislative efforts to restrict abortion access Guam and Puerto Rico, with considerable success. These hostilities have the purpose and effect of making abortion difficult or impossible to access in a clinical setting, but they are not the most significant barrier to obtaining abortion care that pregnant people face. Instead, the fact that American Samoa, Guam, and the CNMI do not have any abortion providers has made it impossible to obtain an abortion in a clinical setting. The U.S. Virgin Islands and Puerto Rico have few providers, and they are concentrated in the most populous cities.

The reality on the ground in these unincorporated territories makes clear that *Roe* is necessary but not sufficient to make access a reality. Yet, without *Roe*, the desperate, post-*Roe* reality that currently exists in American Samoa, Guam, and the CNMI would be ossified, and it is possible that access would be further reduced in Puerto Rico and the U.S. Virgin Islands. Without *Roe*, the right to abortion would vanish from the majority of these territories.

670 U.S. Const. art. IV § 3, cl. 2.

671 The best-known Insular Cases are *Downes v Bidwell*, 182 U.S. 244 (1901); *Hawaii v Mankichi*, 190 U.S. 197 (1903); *Dorr v United States*, 195 U.S. 138 (1904); and *Balzac v Porto Rico*, 258 U.S. 298 (1922).

672 *Downes*, 182 U.S. at 341-42.

673 Frederick R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 834 (1926).

674 See, e.g., Hon. Juan R. Torruella, *Ruling America's Colonies:*

*The Insular Cases*, 32 YALE LAW & POLICY REV. 57, 59 (2013) (arguing that the Insular Cases established a colonial regime that permitted the United States “to continue its administration—and exploitation—of the territories” and that this regime “contravened the Constitution”); see also Rubin Francis Weston, *Racism in U.S. Imperialism: The Influence of Racial Assumptions on American Foreign Policy*, 1893-1946 (1972).

675 *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990). The D.C. Circuit has employed an alternative to the

fundamental rights test, the “anomalous and impractical test” proposed by Justice Harlan previously. See *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975).

676 *Downes*, 182 U.S. at 290-91.

677 *Pugh v. United States*, 212 F.2d 761, 762-63 (9th Cir. 1954).

678 *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984).

679 Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 804 (1992).



# American Samoa

## Hostile

### Governance

American Samoa is unique among the five unincorporated territories discussed in this report. It is governed by an executive order, which vests significant authority for administration of American Samoa in the Secretary of the Interior, so long as his actions are “in harmony with applicable law.”<sup>680</sup> Unlike the residents of the other four unincorporated territories at issue, American Samoans are not U.S. citizens; rather, they are U.S. nationals.<sup>681</sup>

### Restrictions

American Samoa generally prohibits abortion<sup>682</sup> with very limited exceptions<sup>683</sup> under its criminal code. In 2014, the local government’s family planning program director stated in a letter to a local newspaper that “termination of pregnancy is illegal in American Samoa,” and stated that neither the sole hospital on the island nor any clinics carried mifepristone.<sup>684</sup> American Samoa law restricts the provision of abortion care to physicians;<sup>685</sup> however, the island currently has no abortion provider. Individuals who violate American Samoa’s abortion restrictions may face criminal penalties.<sup>686</sup>

### Protections

American Samoa law does not protect abortion.

### Laws that could be enforced if *Roe* is limited or overturned

American Samoa does not have a pre-*Roe* ban.

### Conclusion

American Samoa essentially prohibits abortion today.<sup>687</sup> If *Roe v. Wade* is limited or overturned, it is likely that American Samoa will ban abortion outright, absent intervention from the Secretary of the Interior and/or Congress.

680 Exec. Order No. 10,264, *Transfer of the Administration of American Samoa from the Secretary of the Navy to the Secretary of the Interior*, 16 Fed. Reg. 6417 (June 29, 1951); reprinted in 48 U.S.C. § 1662.

681 8 U.S.C. § 1408(1); Sean Morrison, *Foreign in a Domestic Sense: Americans Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 121-122 (2013);

682 AM. SAMOA CODE ANN. § 46.3901 *et seq.*

683 *Id.* § 46.3902.

684 Marilyn Pavitt-Anesi, *Letter to the Editor*, SAMOA NEWS (June 27, 2014), <http://www.samoanews.com/%E2%80%9Cemergency-contraception-not-abortion-pill%E2%80%9D>.

685 AM. SAMOA CODE ANN. § 46.3903

686 *See, e.g., id.* §§ 46.3902 (c), 46.3905, 46.3906.

687 *Id.* § 46.3901 *et seq.*

# Guam

## Hostile

### Conclusion

Guam already enforces unconstitutional abortion restrictions.<sup>702</sup> If *Roe v. Wade* is limited or overturned, it is likely the island will pass a total abortion ban. Because Guam lacks a territorial constitution or bill of rights, the only potential source of protection for abortion would be statutory; there would be no local constitutional backstop to push back against a complete ban on abortion.

### Governance

Guam is an unincorporated territory of the United States, subject to the plenary power of Congress.<sup>688</sup> Congress has the power to legislate directly for Guam or to establish a government for Guam subject to congressional control. Through the Organic Act of 1950, Congress established a Bill of Rights for Guam, modeled on the Bill of Rights in the U.S. Constitution.<sup>689</sup> In 1968, Congress enacted the Mink Amendment, which extended additional constitutional rights to Guam.<sup>690</sup>

### Restrictions

Guam law generally prohibits abortion at thirteen weeks,<sup>691</sup> with narrow exceptions.<sup>692</sup> The territory also prohibits D&X procedures.<sup>693</sup> Pregnant people who seek abortion care must undergo a mandatory twenty-four-hour waiting period and biased counseling.<sup>694</sup> Guam also limits public funding for abortion.<sup>695</sup> Guam law generally requires that a parent, legal guardian,<sup>696</sup> or judge<sup>697</sup> consent to a minor's abortion.

Guam's targeted regulation of abortion providers (TRAP) laws include reporting requirements.<sup>698</sup> Guam restricts the provision of abortion care to physicians,<sup>699</sup> which is particularly problematic as the island's last remaining abortion provider retired in early 2018.<sup>700</sup> Providers who violate Guam's abortion restrictions may face civil and criminal penalties.<sup>701</sup>

### Protections

Guam law does not protect abortion.

### Laws that could be enforced if *Roe* is limited or overturned

Guam does not have a pre-*Roe* ban.

688 48 U.S.C. § 1421a.

689 *Id.* § 1421b.

690 *Id.* § 1421b(u).

691 GUAM CODE ANN. tit. 9 § 31.21 (b)(3)(A).

692 *Id.* § 31.20(b)(3)(B)-(C).

693 GUAM CODE ANN. tit. 10 § 91A104.

694 *Id.* § 3218.1; GUAM DEP'T OF PUBLIC HEALTH AND SOCIAL SERVICES, *Enforcement of "The Women's Reproductive Health Information Act" Will Commence on June 2, 2014* (Apr. 1, 2014), available at <http://dphss.guam.gov/enforcement-of-the-womens-reproductive-health-information-act-will-commence-on-june-2-2014/>.

695 KAISER FAM. FOUND., *Medicaid in the Territories: Program Features, Challenges, and Changes* 2 (Jan. 2019), <http://files.kff.org/attachment/Issue-Brief-Medicaid-in-the-Territories-Programs-Features-Challenges-and-Changes>; GUAM CODE ANN. tit. 10 § 2913(a).

696 GUAM CODE ANN. tit. 19 § 4A102.

697 *Id.* §§ 4A104, 4A107.

698 GUAM CODE ANN. tit. 10 §§ 3217, 3218; GUAM CODE ANN. tit. 19 § 4A106.

699 GUAM CODE ANN. tit. 9 § 31.20 (b)(i).

700 ASSOCIATED PRESS, *Guam's Only Abortion Provider Retires* (July 3, 2018), <https://www.nbcnews.com/news/us-news/guam-s-only-abortion-provider-retires-n888711>; as of this writing, there remains no abortion provider on the island, although Governor Lourdes Leon Guerrero, a former nurse and a supporter of reproductive autonomy, is actively recruiting providers to come to the island, see Caleb Jones, *Lack of Abortion Access Troubles Guam's First Female Governor*, Associated Press (June 7, 2019), <https://www.apnews.com/6b84d38ea8dd4d57bec0dc62184e295>.

701 See, e.g., GUAM CODE ANN. tit. 10 § 3218.1 (g)(3); GUAM CODE ANN. tit. 9 § 31.21; *id.* § 91.05(a).

702 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992) (explaining that a state may not "prohibit any woman from making the ultimate decision to terminate her pregnancy before viability").

# Northern Mariana Islands

## Hostile

### Governance

The 1976 Covenant between the United States and the Commonwealth of the Northern Mariana Islands (CNMI) outlines the relationship between the two and sets forth which sections of the Constitution are applicable to CNMI.<sup>703</sup> The Covenant states that the people of the CNMI have a right to self-governance and that both the CNMI and the United States must agree to any modification of the Covenant.<sup>704</sup>

### Restrictions

The CNMI Constitution expressly addresses abortion, stating that “[t]he abortion of the unborn child during the mother’s pregnancy is prohibited in the Commonwealth of the Northern Mariana Islands, except as provided by law.”<sup>705</sup> This constitutional provision was enacted in 1985;<sup>706</sup> however, there is no operating statute. As explained in a 1995 CNMI Attorney General Opinion, the “qualified right to abortion must be recognized and respected by the CNMI, just as the fifty states have had to recognize and respect it for the last twenty years since *Roe v. Wade* became the law.”<sup>707</sup> Yet, there does not appear to be an abortion provider in CNMI.

### Protections

CNMI does not protect abortion.

### Laws that could be enforced if *Roe* is limited or overturned

CNMI had a pre-*Roe* ban in the Trust Territory Code, which predated the 1976 Covenant.<sup>708</sup> The then-local High Court invalidated the provision in 1971 as void for vagueness, overturning in the process the conviction of a pregnant woman who had caused her own miscarriage.<sup>709</sup>

### Conclusion

If *Roe v. Wade* is limited or overturned, it is somewhat unclear what the status of abortion will be in CNMI; there is currently no law regulating abortion. The local constitution leaves open the possibility that the CNMI legislature could enact a statute protecting abortion access, because abortion is prohibited except as provided by law.<sup>710</sup> However, there is a very real possibility that abortion would be prohibited entirely.

703 48 U.S.C. § 1801 *et seq.*

704 Covenant §§ 103, 105.

705 N. MAR. I. CONST. ART. I, § 12.

706 SECOND CONST. CONV. AMEND. 3 (1995), available at <http://www.cnmilaw.org/pdf/source/1985amendments.pdf>.

707 Att’y Gen. Op., Commonwealth Register Vol. 17, No. 3 at 13,082 (March 15, 1995), [http://cnmilaw.org/pdf/cnmiregister/1995\\_Volume\\_17/1995\\_Number\\_03.pdf](http://cnmilaw.org/pdf/cnmiregister/1995_Volume_17/1995_Number_03.pdf).

708 11 T.T.C. § 51 (1966), <http://www.cnmilaw.org/pdf/ttc/t11.pdf>.

709 *Trust Territory of the Pacific Islands v. Christina Tarkong*, 5 T.T.R. 252 (H.C. App. Div. 1971), <http://www.cnmilaw.org/pdf/ttr/vols/5-TTR-549.pdf>.

710 N. MAR. I. CONST. ART. I, §. 12.



# Puerto Rico

# Not Protected

## Conclusion

If *Roe v. Wade* is limited or overturned, it is possible that Puerto Rico would enact an outright ban on abortion or severe abortion restrictions.<sup>723</sup> If so, there is a very real possibility that the ability to obtain an abortion—already out of reach for so many residents of the island—would cease.

## Governance

The United States Supreme Court has held that inhabitants of Puerto Rico enjoy due process and equal protection rights.<sup>711</sup> In 1937, a life endangerment and health exception was created for abortion<sup>712</sup> as part of a eugenic, colonial, and biomedical agenda imposed on the island, which manifested itself in forced sterilizations and birth control experiments.<sup>713</sup> Perversely, this reproductive coercion led to the creation of “an infrastructure of health facilities, services, and trained human resources, which indirectly benefited issues related to reproductive health.”<sup>714</sup> As a result, prior to *Roe*, pregnant people of means traveled from the mainland to San Juan, Puerto Rico, to obtain safe abortion care.<sup>715</sup>

## Restrictions

Puerto Rico generally prohibits abortion except when “therapeutic” and to “preserve the health or life” of the pregnant person.<sup>716</sup> Puerto Rico law restricts the provision of abortion care to licensed physicians.<sup>717</sup> Individuals who violate Puerto Rico’s abortion restrictions may face criminal penalties.<sup>718</sup> The territory requires providers to submit reports to the state.<sup>719</sup>

## Protections

The Constitution of Puerto Rico contains an explicit right to privacy,<sup>720</sup> but the Puerto Rico Supreme Court has not addressed whether it encompasses the right to abortion. Maternity leave is available for public employees who have obtained an abortion.<sup>721</sup>

## Laws that could be enforced if *Roe* is limited or overturned

Puerto Rico repealed its pre-*Roe* ban in 2011.<sup>722</sup>

711 *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976).

712 *Pueblo v. Duarte Mendoza*, 109 D.P.R. 596, 598, n.2 (1980). The Puerto Rico Supreme Court in *Duarte Mendoza* also discussed the historical context of abortion in Puerto Rico, and the fact that laws that criminalized abortion—as well as other sections of the penal code—were not representative of the country’s historical tradition. The Court also provided a then-current review of international approaches to abortion regulation.

713 Yamila Azize-Vargas and Luis A. Aviles, *Abortion in Puerto Rico: The Limits of a Colonial Legality*, 17 P.R. HEALTH SCI. J. 27, 28 (1998), [https://www.law.berkeley.edu/php-programs/centers/crrj/zotero/loadfile.php?entity\\_key=4EDXBC2J](https://www.law.berkeley.edu/php-programs/centers/crrj/zotero/loadfile.php?entity_key=4EDXBC2J).

714 *Id.*

715 *Id.*

716 33 L.P.R.A. § 4739; *id.* §§ 5147-5149.

717 *Id.* § 4739.

718 *See, e.g., id.* § 5147.

719 24 L.P.R.A. § 232.

720 *Figueroa Ferrer v. Commonwealth*, 107 D.P.R. 250 (1978).

721 21 L.P.R.A. § 4567 (f) (provided it “produces the same physiological effects that are regularly seen as a result of child-birth”).

722 33 L.P.R.A. §§ 1051-54, *repealed by* Law of July 12, 2011, No. 125, art. 1, ef. July 12, 2011.

723 *See, e.g.*, S.B. 950, 18th Leg. Assem., 3d Sess. (May 7, 2018); S.B. 950, 18th Leg. Assem., 5th Sess. (Mar. 4, 2019).

724 48 U.S.C. § 1541 *et seq.*



# U.S. Virgin Islands

Not  
Protected

## Governance

Like Guam, the U.S. Virgin Islands (USVI) has no constitution and is governed by an Organic Act, which was first enacted in 1954.<sup>724</sup> Despite convening five different constitutional conventions, the USVI has not adopted a local constitution. In 1968, Congress amended the Organic Act to extend both due process and equal protection rights to the USVI.<sup>725</sup>

## Restrictions

USVI criminal law generally prohibits abortion at twenty-four weeks<sup>726</sup> and requires abortion after twelve weeks to be performed in a hospital.<sup>727</sup> The territory restricts the provision of abortion care to licensed physicians.<sup>728</sup> USVI law allows a physician to notify a parent or legal guardian about a minor's abortion without the minor's consent.<sup>729</sup> The solicitation of patients for abortion is prohibited.<sup>730</sup>

## Protections

USVI law does not protect abortion.

## Laws that could be enforced if *Roe* is limited or overturned

USVI does not have a pre-*Roe* ban.

## Conclusion

If *Roe v. Wade* is limited or overturned, abortion will likely remain accessible in the U.S. Virgin Islands but without legal protection.

<sup>725</sup> *Id.* § 1561.

<sup>726</sup> 14 V.I.C. §§ 151, 152.

<sup>727</sup> *Id.* § 151 (b)(2).

<sup>728</sup> *Id.* § 151(b).

<sup>729</sup> 19 V.I.C. §§ 291 (a), 292 (c).

<sup>730</sup> 14 V.I.C. § 153.

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# Notes

# Notes



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