

CENTER *for*
REPRODUCTIVE
RIGHTS



2021 Legislative Wrap-up

State Policy Report:
An overview of the state landscape

Current Context

Much like 2020, 2021 brought pivotal changes to the United States' political arena, shaping the legal and legislative reproductive rights landscape in the country. More abortion restrictions passed in 2021 than in any year since the *Roe v. Wade* (“*Roe*”) decision was issued by the U.S. Supreme Court in 1973. Despite the urgent need to respond to the continuing global coronavirus pandemic and violence against Black communities and other communities of color, many state legislatures instead chose to push restrictive abortion measures that increase barriers to accessing care.

These attacks against reproductive rights are intensified by the Supreme Court's May 2021 decision to hear *Dobbs v. Jackson Women's Health Organization*, a case challenging Mississippi's 15-week abortion ban, on December 1. Although lower courts struck down the ban, consistent with how lower courts across the country have struck down pre-viability bans on abortion, and there was no circuit split requiring Supreme Court intervention, the Supreme Court agreed to hear the case and for the first time in 50 years will opine on the constitutionality of pre-viability bans. This is the most consequential abortion rights case in generations, and the threat is real: Mississippi has asked the Supreme Court to overturn *Roe*.

The Supreme Court allowed a Texas law, S.B. 8, to take effect on September 1 and remain in effect. S.B. 8 prohibits abortion after six weeks and creates a private right of action that allows any person to sue anyone who helps a pregnant person get an abortion. Since September 1, thousands of people have been denied their constitutional right to abortion. People in Texas are desperately searching for abortion care, but many do not have the ability to travel out of state. S.B. 8 copycats have already been introduced in state legislatures around the country.

> Cover photo: Kenya Martin, *The Abortion Diva*, leads chants at the #AbortionisEssential Rally

> All data within this report is valid as of December 16, 2021.

Reproductive rights have never been equitably accessed by all in the United States, and these abortion restrictions and bans most hurt those who already face discriminatory barriers to health care: women; Black, Indigenous, and other people of color; the LGBTQI+ community; immigrants; young people; those working to make ends meet; and people with disabilities.

While the attacks on reproductive rights have intensified, some states have also enacted measures to protect and expand access to abortion. The Biden administration has also worked to lessen the harm created by the Trump administration, namely through removing the Hyde Amendment from the budget proposal, working to reinstate the Title X family planning program, and pausing the U.S. Food and Drug Administration's (FDA) restrictions on medication abortion during the COVID-19 public health emergency.

As the year draws to a close, both supporters and opponents of reproductive rights are preparing for the uncertainty of 2022. Hostile state legislatures will continue their relentless attacks on access to reproductive rights, underscoring the importance of safeguarding access to care at the federal, state, and local levels.

This report provides an overview of the most recent state legislative and policy efforts restricting access to abortion, the proactive approaches state policymakers are employing to strengthen access to reproductive rights, and developments at the Supreme Court. For more detailed information about each state, please visit "What If Roe Fell?" a digital tool available at reprorights.org that analyzes abortion rights and access in each state, the District of Columbia, and the five most populous U.S. territories.

Legislative Sessions

All state legislatures were actively in session this year. As of the end of November, 30 state legislatures (AL, AK, AZ, AR, CO, CT, DE, IL, IN, IA, KY, LA, ME, MD, MN, MS, MO, MT, NE, NH, NM, NY, OR, RI, SC, TX, VA, WA, WV, and WY) had adjourned their regular sessions; 14 (AL, AZ, AR, IL, KY, MN, MO, NE, NM, OR, TX, VA, WV, and WY) had called special sessions to pass abortion restrictions; 11 (FL, GA, HI, KS, NV, ND, OK, SD, TN, UT, and VT) were still in special session; and 9 (CA, DC, ID, MS, MI, NJ, NC, OH, PA, and WI) along with the District of Columbia Council had not yet adjourned. Four state legislatures (MT, ND, NE, and TX) will not be meeting in 2022.



Restrictive Bills Enacted

In 2021, the Center for Reproductive Rights (“the Center”) tracked over 500 bills, more than 400 of which were restrictive anti-abortion measures and included medication abortion restrictions, gestational and method bans, restrictions on minors’ access, religious refusal laws, and TRAP laws, among others. These measures aimed to impede access to abortion care. Many of the unconstitutional laws enacted were or are being challenged in court and have been blocked either temporarily or permanently.

MEDICATION ABORTION RESTRICTIONS

Medication abortion is safe and effective regardless of where people take it and who is involved in the process. The demand for medication abortion coupled with its safety and reliability has made it a target for abortion opponents, who introduced a record of number of restrictions and bans this year to block access. In 2021 alone, 15 states introduced 23 restrictive medication abortion bills, nine of which were enacted. The bills included telemedicine bans, total bans on medication abortion, so-called medication abortion reversal requirements, the imposition of new regulatory requirements, and the inappropriate regulation of medical practice through RhoGAM injection requirements.

Overregulation of medication abortion is not new, nor is it limited to state legislative efforts. The FDA, for example, has applied a Risk Evaluation and Mitigation Strategy (REMS) for medication abortion since 2000, requiring medication abortion to be dispensed by a certified medical prescriber in person, despite little evidence to support this need. Scientific studies and lawsuits continue to evolve this landscape, calling into question the basis of

the REMS and other over regulatory measures. In 2019, for example, Gynuity Health Projects, a nonprofit devoted to reproductive and maternal health-care policy grounded in science, pursued a large study of telemedicine provision, which demonstrated the safety of using telemedicine for medication abortions. In addition, in July 2020, a federal court ruled that, due to the pandemic, the FDA must remove medication abortion from the class of drugs that are required to be administered in person, allowing medication abortion to be more liberally dispersed. This decision was promptly appealed by the Trump administration. In January 2021, the Supreme Court allowed the FDA to again require distribution in person. Due to a challenge by the American Civil Liberties Union (ACLU), the FDA agreed to review the REMS requirements and on April 12 announced it will halt the enforcement of REMS while they are under review, making medication abortion more accessible. Currently, medication abortion can be dispensed through telemedicine and through the mail in states that do not have bans in place. On November 3, the FDA committed to finalizing its review by December 16, 2021.

In anticipation of FDA action allowing for greater access to medication abortion, and in furtherance of state efforts to block abortion at the state level, states continue to engage in state-level advocacy to overregulate medication abortion. For example, the governor of South Dakota issued an executive order on September 7, 2021, granting the State Department of Health the power necessary to regulate medication abortion in advance of the review. This regulation power includes banning the use of telemedicine for medication abortion, requiring medication abortion to be distributed by a licensed physician, requiring the physician to perform an exam before administration, and creating licensing requirements for abortion clinics that prescribe medication abortion.

This section will cover trends in medication abortion restrictions introduced in the 2021 legislative session: a) telemedicine bans; b) gestational bans for medication abortion; c) total bans on medication abortion; d) so-called

medication abortion “reversal”; e) medication abortion regulations schemes; and f) RhoGAM requirements.

Telemedicine Bans

The COVID-19 pandemic has caused a rise in patient access to telemedicine and telehealth care. In 2021, 15 telemedicine bans on medication abortion were introduced by 10 states, including Arizona, Indiana, Louisiana, Maryland, Minnesota, Montana, North Carolina, Ohio, Oklahoma, and Texas. Of the 15 bills introduced, six were enacted in Arizona, Oklahoma, Indiana, Montana, and Texas, which introduced and enacted the ban during its second special session.

Telemedicine bans introduced this year included the requirement of in-person distribution of medication abortion by a physician (with some states allowing nurse practitioners to distribute), bans on distribution through mail or delivery services, bans on virtual appointments for prescription, and mandates that providers impose biased counseling on all individuals seeking medication abortion.

Gestational Bans for Medication Abortion

The FDA allows medication abortion to be used through the 10th week of pregnancy, while research indicates that medication abortion is safe and effective later in pregnancy. In 2021, state legislatures attempted to restrict medication abortion by prohibiting it prior to 10 weeks gestation. During its regular session and first special session, Texas introduced a bill that prohibits medication abortion after 49 days of gestational age. The state enacted this ban during its second special session. Oklahoma and Indiana banned the use of medication abortion after 10 weeks of pregnancy.

Total Bans on Medication Abortion

In 2021, six total bans on medication abortion were introduced in Alabama, Arkansas, Iowa, Mississippi, West Virginia, and Wyoming, which would have completely prevented people from accessing this method of abortion care. Though none of these bans was enacted in 2021, the increased introduction of such restrictions demonstrates a disturbing appetite for enacting total bans on medication abortion.

So-Called Medication Abortion “Reversal”

Since 2015, politicians across the country have passed medication abortion “reversal” legislation trying to force providers to promote the medically inaccurate idea that a medication abortion can be “reversed”—a discredited, unscientific claim promoted by anti-abortion advocates. Similar abortion “reversal” laws have been opposed by leading medical groups, including the American Medical Association and the American College of Obstetricians and Gynecologists (ACOG). Medication abortion “reversal” restrictions are usually introduced in amendments to biased counseling requirement bills. A federal district judge temporarily blocked the medication abortion “reversal” provision of the recently passed Indiana omnibus bill that includes several abortion restrictions.

During 2021, 16 medication abortion “reversal” restrictions were introduced in 12 states (Alabama, Arkansas, Indiana, Iowa, Louisiana, Maine, Michigan, North Carolina, Oklahoma, South Carolina, South Dakota, and West Virginia). Of these, Arkansas, Indiana, Louisiana, Montana, Oklahoma, West Virginia, and South Dakota enacted the restrictions.

Medication Abortion Regulation Schemes

In further efforts to restrict medication abortion, Arkansas introduced, and Oklahoma enacted, legislation that would create regulatory schemes, separate from FDA regulations, to regulate medication abortion production, manufacturing, and distribution. These schemes also grant medical and pharmaceutical licensure bodies the power to revoke abortion providers' ability to administer medication abortion or impose fines or criminal penalties for providers in violation of the law. Oklahoma enacted a bill that creates such a regulatory scheme.

RhoGAM Requirements

These bills create additional medically unnecessary requirements for abortion providers. In this instance, providers are required to test for Rh blood test prior to providing abortion care. If the test comes back Rh-negative, the provider must administer RhoGAM to prevent Rh immunization before a medication abortion is performed. Typically, RhoGAM is administered between 26 and 28 weeks of pregnancy. These measures aim to burden providers and further penalize them for providing care.

In 2021, Texas, Oklahoma, and Montana enacted medication abortion requirements that include the administering of RhoGAM.

GESTATIONAL BANS

Changes in the composition of the Supreme Court have emboldened states to introduce and enact unconstitutional pre-viability bans in an attempt to ban abortion completely and at six weeks, 12 weeks, 20 weeks, and 22 weeks. During 2021, 96 gestational bans were introduced in 30 states. These gestational bans include: a) total bans; b) pre-viability bans; and c) viability bans.

Total Bans

Thirty states introduced 44 total abortion bans, through bills establishing fetal personhood, banning abortions outright, or revoking medical licensure of providers who offer abortion care.

In 2021, 11 fetal personhood bills were introduced that would grant personhood to a fetus of any gestational age thereby legally entitling a fetus to the same level of state protections that an individual has. While most of these bills did not pass, Arizona enacted an omnibus bill that grants fetal personhood to a fetus of any gestational age.

Four total bans prohibiting all abortion care were enacted in Arkansas, Arizona, Oklahoma, and South Carolina.

Oklahoma enacted a total ban through amending physician licensure to define performing an abortion as “unprofessional” conduct; this definition makes it possible for a physician who performs an abortion to have their license suspended or revoked.

All these bans are being challenged in the courts, and all but Arizona’s have been temporarily prevented from being enforced as they make their way through the courts.

Pre-viability Bans

Thirteen states (Arizona, Idaho, Illinois, Iowa, Minnesota, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, West Virginia, and Wyoming) introduced 34 six-week bans that would ban abortion after six-weeks gestational age, directly challenging the core holding of *Roe*. Of the 34, four six-week bans were enacted (Idaho, Oklahoma, South Carolina, and Texas). As of the beginning of December, the ban in Texas is the only one in effect.

In 2021, nine states introduced other pre-viability bans that would ban abortion after 12 weeks, 20 weeks, and 22 weeks. Texas and Iowa introduced the two 12-week bans, neither of which was enacted. Arizona, Florida, Hawaii, Illinois, Montana, Oregon, Rhode Island, and West Virginia introduced the 20-week bans, 13 in total, none of which was enacted. Montana's 20-week ban was the only 20-week pre-viability ban enacted, though West Virginia already has a 20-week ban in effect.

Viability Bans

A viability ban prohibits abortion after 24 weeks or when a fetus could live outside of the womb. Five viability bans were introduced in Massachusetts, New Hampshire, and Vermont, but only New Hampshire's was enacted. In June 2021, New Hampshire enacted its 2022 fiscal year budget, which included a ban on abortion after 24 weeks.

TRIGGER BANS

These legislative bans on abortion are not active while *Roe* is in place but are meant to be “triggered” and make abortion illegal if *Roe* is overturned, a question currently before the Supreme Court for the first time in decades. Until now, these laws have never been tested. Kentucky, Ohio, Oklahoma, South Carolina, Texas, and West Virginia introduced 18 trigger bans. Only Texas and Oklahoma enacted their bans.

REASON BANS

Reason bans prohibit abortion if sought for a particular reason, for example on account of the race, sex, or disability of the fetus. Reason bans inflict harm by promoting stigma around abortions and stereotypes of Black and brown communities, Asian Americans, and people with disabilities. They harm patient access to quality care by infringing on the doctor-patient relationship and entering a family's private decision-making, while also failing to support the populations such bans purport to protect.

Six states introduced 10 bans on race-selective abortions, none of which was enacted this year. The North Carolina legislature did pass its ban, though the governor vetoed it in June.

Ten states introduced 18 sex-selective reason bans. North Carolina's ban was the only sex-selective ban that passed a legislature, though it was subsequently vetoed by the governor.

Twenty-two disability reason bans were introduced this year. Of the 22, only Arizona and South Dakota enacted their disability reason bans, while North Carolina's ban was vetoed by the governor. Arizona's disability ban is currently being litigated by the Center; the ban has been temporarily blocked by a federal district court.

METHOD BANS

When states ban a procedural method of abortion care utilized by the medical community, pregnant people are forced to undergo additional, invasive, and unnecessary procedures to obtain abortion care. These measures harm patients and prevent doctors from exercising their best medical judgment.

In 2021, five states (Arizona, Hawaii, Montana, New Jersey, and Virginia), introduced six bills that would ban dilation and evacuation (D&E) and dilation and extraction (D&X) procedures. None of the bills was enacted.

SO-CALLED “BORN ALIVE” BANS

“Born alive” measures are fetal rights laws that extend criminal laws to cover “unlawful death” or other harm done to a fetus in the uterus or to an infant outside of the pregnant person. Laws that mandate care of a fetus “born alive” in the process of an abortion procedure are duplicative, as doctors already have an obligation to provide appropriate medical care. They are designed to confuse and scare the public and are part of anti-abortion politicians’ strategy to ban all abortions.

Thirty-five “born-alive” bills were introduced in 2021, five of which were enacted in Alabama, Kentucky, Montana, South Dakota, and Wyoming.

RESTRICTIONS ON MINORS

In 2021, 16 bills to restrict young people’s access to abortion were introduced in Arizona, Florida, Illinois, Indiana, Kentucky, Massachusetts, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming. These restrictions included amending parental consent requirements for a young person to obtain an abortion and changes to judicial bypass proceeding requirements.

Parental notification or consent measures require young people to disclose their pregnancy to, and obtain consent for an abortion from, parents or

other adults, even if it puts them at risk. Although its bill was not enacted, Washington introduced a bill that would require a pregnant young person to have one parent consent to the abortion 48 hours before the abortion is performed. Connecticut, Nevada, New Jersey, New York, and Washington introduced seven bills requiring a parent to be notified that the pregnant young person is receiving an abortion; none of these bills passed.

Other bills attempted to go beyond parental consent and impose additional requirements on the parent providing the consent. Kentucky, for example, introduced a bill that would have required a parent or guardian providing consent for a young person's abortion to present a valid government issued ID. This bill did not pass. The Indiana restrictive omnibus bill that was enacted this year included a provision requiring written consent of a parent to be notarized.

If a pregnant young person wants to pursue an alternative to parental consent, states are required to offer judicial bypass, which allows the young person to directly petition a court for an abortion. The young person must still navigate administrative barriers that tremendously hinder access, causing unnecessary delays for time-sensitive procedures. Louisiana enacted a bill that requires a pregnant young person to have a judicial bypass proceeding in the juvenile court in their parish of residence (previously, any parish court could approve a bypass proposal) and requires the court to report out on information related to the judicial bypass proceeding including the young person's name. Arizona enacted a bill that requires a guardian ad litem to be appointed for the fetus in a judicial bypass proceeding if it is determined that the representation of the fetus's interest is inadequate. Arizona and Texas introduced bills that require a fetus to be represented by an attorney in a judicial bypass proceeding; these bills were not enacted. Massachusetts introduced a bill that requires a judge to assess a young person's maturity before granting permission for an abortion; this bill also was not enacted.

RELIGIOUS REFUSALS

In 2021, 27 bills were introduced that allow health-care providers and health-care centers to refuse, based on conscientious objections, to participate in abortion procedures. These bills allow refusers to retain employment even when they refuse to participate in abortion care. Indiana and Ohio enacted three of these bills.

FETAL TISSUE

Regulations that require interment or cremation of fetal tissue further stigmatize abortion and pregnancy loss and may contradict the wishes of pregnant people. These requirements make it harder and more expensive for abortion providers, who already comply with standard protocols for handling and disposing of tissue, to provide care to their patients. Seven bills that would have regulated fetal tissue from an abortion procedure were introduced in 2021. These bills prohibited the donation of or research on fetal tissue after an abortion or required fetal tissue to be handled or disposed of by interment or cremation. Of the bills introduced, those in Arizona, Indiana, and Tennessee were enacted and require fetal tissue to be disposed of through interment or cremation.

TARGETED REGULATION OF ABORTION PROVIDERS (TRAP)

In 2021, 49 TRAP laws were introduced in 21 states. TRAP restrictions create burdensome requirements for providers and abortion clinics and are passed with the goal of forcing abortion clinics to close.

In its 2021 abortion omnibus bill, Indiana enacted a new licensing requirement for abortion clinics that requires the state health department to consider clinic inspection results when granting license renewals. This law includes many other TRAP provisions, such as fetal tissue disposition requirements and informed consent requirements.

Texas enacted a bill that instituted a reporting requirement to law enforcement. The law requires abortion clinics to report to law enforcement the suspicious behavior of a pregnant person or a person accompanying a pregnant person. This law also requires abortion clinics to post information about human trafficking in their waiting rooms and patient rooms.

Arizona enacted an abortion omnibus bill that requires abortion clinics to report to the health department any abortions performed on a fetus with a fetal anomaly. Oklahoma enacted two medication abortion bills that require a physician prescribing medication for an abortion to have admitting privileges or a transfer agreement to a hospital that provides emergency care. Arkansas also enacted a bill requiring abortion facilities to have transfer agreements with hospitals within 30 miles that provide emergency care. Kentucky enacted a law that requires abortion facilities to have a surgical smoke evacuation system in every room where a surgical abortion is performed.

ATTORNEY GENERAL POWERS

In response to questions that arose about a governor's ability to exercise executive power during a state of emergency, 11 states (Alabama, Arkansas, Arizona, Idaho, Minnesota, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and West Virginia) introduced 15 bills that would grant their attorneys general the power to enforce abortion restrictions, penalize and close abortion clinics, or bring lawsuits in response to violations of abortion restrictions. Of those bills introduced, Alabama, Arkansas, and Kentucky enacted legislation that grants their attorneys general the power to enforce abortion restrictions.

BIASED COUNSELING

Arkansas, Tennessee, and Texas—three Southern states with some of the most restrictive abortion laws in the country—introduced three bills that would create “pregnancy resource” hotlines. These bills would require providers to direct anyone seeking an abortion to a “pregnancy resource” hotline, where a person licensed by the state would provide pregnancy-related information that explicitly excludes abortion referrals or counseling, therefore misleading pregnant people and dissuading them from obtaining abortions. This call must be made prior to a patient accessing abortion care, and abortion providers must ask patients if they have been given information about the hotline prior to the procedure. None of the introduced bills passed.

PUBLIC FUNDING RESTRICTIONS

In response to the increased public support to provide abortion funding for public universities and low-income pregnant people (through Medicaid or other medical assistance programs), and the expansion of the Affordable Care Act and insurance coverage during the pandemic, state legislators introduced 65 state public funding restrictions in 36 states. Eleven of these restrictions were enacted in Alaska, Arizona, Florida, Idaho, Indiana, Montana, North Dakota, and Wyoming. These bills restrict Medicaid funding, the use of government property for providing abortions, doctors working at public university hospitals from performing abortions, and state funding for other abortion services.

STATE CONSTITUTIONAL AMENDMENTS

Twenty-six states allow for statewide ballot initiatives, which can be initiated by the legislature, the people through signature gathering, or both. This year, the Center tracked eight states seeking to amend state constitutions to limit access to abortion.

Five Midwestern states and two Southern states introduced legislation to amend their state constitutions. The proposed amendments would grant personhood at conception, prohibit public funding of abortion, amend their constitution to explicitly note that the state does not recognize a right to abortion, and grant the state the power to restrict abortion in any manner the legislature deems necessary. Of the seven states, only Kansas, Kentucky, and Iowa passed constitutional amendment legislation.

On August 2, 2022, Kansas primary voters will be asked to vote on a proposed constitutional amendment that, if approved, would amend the state constitution to not recognize a right to abortion and to prohibit public funding for abortion care. This constitutional amendment is in response to the Kansas Supreme Court having recognized a right to abortion in the case *Hodes & Nauser v. Schmidt*, litigated by the Center.

In November 2022, Kentucky general election voters will be asked to vote on a proposed constitutional amendment that, if approved, would amend the state constitution to not recognize a right to abortion and to prohibit public funding for abortion care.

In 2021, the Iowa Legislature passed IA H.J.R. 5, which seeks to amend the state constitution to not recognize a right to abortion care and to prohibit state funding of abortion. To be placed on a ballot, this resolution must be approved again by both chambers during the next legislative biennium, the 2023–25 General Assembly. If successfully passed in that biennium, the resolution would be put on the ballot for voter approval at the next general election.

OKLAHOMA

In September, five unconstitutional abortion restrictions passed by Oklahoma lawmakers were challenged in state court, including bans on abortion. The lawsuit was filed by the Center, Planned Parenthood Federation of America, Dechert LLP, and Blake Patton on behalf of the Oklahoma Call for Reproductive Justice, Tulsa Women’s Reproductive Clinic, Dr. Alan Braid, Comprehensive Health of Planned Parenthood Great Plains, and Planned Parenthood of Arkansas and Eastern Oklahoma. Plaintiffs asked the court to block the laws before they were scheduled to take effect on November 1.

The laws challenged in this lawsuit were:

1. A total abortion ban declaring that providing abortion at any stage in pregnancy qualifies as “unprofessional conduct” by physicians, which will result, at minimum, in suspension of licensure.
2. A law banning abortion as early as six weeks into pregnancy, before many people even know they are pregnant.
3. A law that would immediately decimate abortion access by disqualifying highly trained providers such as family medicine doctors because they happen not to be board-certified OB/GYNs.
4. Two laws that contain a host of restrictions on medication abortion, including requirements that have already been struck down by the Oklahoma Supreme Court and/or U.S. Supreme Court: an admitting privileges requirement, which has been struck down by both the U.S. Supreme Court and the Oklahoma Supreme Court, and an ultrasound requirement more restrictive than an ultrasound law already struck down by the Oklahoma Supreme Court.

On October 25, the Oklahoma Supreme Court blocked three of the abortion restrictions that were scheduled to take effect November—the law disqualifying providers and the two medication abortion laws.

The ruling came three weeks after a lower court blocked two abortion bans that were also set to take effect November 1, but refused to halt the three remaining laws. The bans blocked by the lower court included the total abortion ban and the six-week ban. The state conceded that these laws are unconstitutional under *Roe*.

“What a relief, to have these potentially devastating laws blocked from taking effect next week,” said Tamyia Cox, Co-Chair of Oklahoma Call for Reproductive Justice. “Pregnant people in Oklahoma, particularly Black and brown people, already need to jump through seemingly endless hoops to access

“Pregnant people in Oklahoma, particularly Black and brown people, already need to jump through seemingly endless hoops to access health care. These restrictions would have pushed abortion out of reach entirely for many.”

- Tamya Cox, Co-Chair of Oklahoma Call for Reproductive Justice

health care. These restrictions would have pushed abortion out of reach entirely for many.”

This decision also came almost two months after Texas’s six-week abortion ban took effect and eliminated the vast majority of abortion access in the state. Clinics in Oklahoma have reported huge increases in patients traveling from Texas to access care. For instance, an Oklahoma clinic reported that two-thirds of the phone calls they receive are now from Texas patients.

“The court’s decision today comes as a huge relief,” said Dr. Alan Braid, owner of Tulsa Women’s Reproductive Clinic. “Texas has shown us the heartbreaking consequences of what happens when a state bans abortion. Even Oklahomans are suffering from the Texas ban, which has created backlogs of patients here and in other surrounding states.”

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< Tamya Cox, Co-Chair of Oklahoma Call for Reproductive Justice, speaking at the #AbortionisEssential Rally



TEXAS S.B. 8

In 2021, Texas introduced a slew of anti-abortion legislation, with more than 60 bills introduced across one regular session and two special sessions.

Most devastatingly, Texas introduced and enacted TX S.B. 8, an unprecedented ban currently in effect that:

- Bans abortions at around six weeks of pregnancy, before many people know they are pregnant.
- Authorizes bounty hunters to sue abortion providers and people who help friends, family members, or others get an abortion.
- Can force abortion providers and people who “aid or abet” others who get abortion care to pay bounty hunters a minimum of \$10,000 per abortion.
- Allows bounty hunters to get an order to stop abortion and shut down health centers.

The Supreme Court considered two cases challenging the Texas ban. Both cases were heard on November 1.

Whole Woman’s Health et al. v. Jackson et al. dealt with whether federal courts have the power to review Texas’s abortion ban, which prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce that prohibition through civil actions. This case was filed by Texas abortion providers—led by Whole Woman’s Health—along with several abortion funds, practical support networks, doctors, health center staff, and clergy members.

Amy Hagstrom Miller,
President and CEO,
Whole Woman's Health
and Whole Woman's Health
Alliance, speaking at the
#AbortionIsEssential Rally



In *United States v. Texas*, the Supreme Court took up whether to reinstate the lower court's order blocking the law and whether the United States government has the authority to bring this case against the State of Texas to prevent its state court judges, state court clerks, other state officials, and private parties from enforcing S.B. 8. This case was filed by the U.S. Department of Justice (DOJ).

On December 10, the U.S. Supreme Court issued decisions in these two cases. In a 5-4 majority, the Court ruled the most significant part of *Whole Woman's Health v. Jackson* must be dismissed, maintaining the health care providers could not bring suit against the classes of state judges and clerks



“By foreclosing suit against state-court officials and the state attorney general, the Court effectively invites other states to refine S.B. 8’s model for nullifying federal rights. The Court thus betrays not only the citizens of Texas, but also our constitutional system of government.”

- Justice Sonia Sotomayor

or the state Attorney General. The Court also ruled that a narrow portion of the case may proceed against the Texas Medical Board and other licensing authorities, but this would not prevent bounty-hunter lawsuits from being filed. Dissenting Justices mourned the impact this decision will have on the Constitution itself. Chief Justice Roberts wrote, “The nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake.” In a separate dissent, Justice Sotomayor wrote, “By foreclosing suit against state-court officials and the state attorney general, the Court effectively invites other states to refine S.B. 8’s model for nullifying federal rights. The Court thus betrays not only the citizens of Texas, but also our constitutional system of government.”

Since September 1—when the ban first took effect after the Supreme Court refused to block it—most Texans who are past the earliest stages of pregnancy have been unable to access abortion in the state. The decision came after exactly 100 days of legal back-and-forth that have wreaked havoc on abortion access in Texas and the surrounding region. The impact has fallen harshest on marginalized communities, including people living on low incomes, and Black and brown communities. People who are unable to leave the state have been forced to continue their pregnancies, and those with resources are pushed to flee the state. Since S.B. 8 took effect, the average one-way driving distance for Texans to reach an abortion clinic has increased from 17 miles to 247 miles. Clinics in neighboring states reported huge upticks in Texas patients, resulting in weeks-long wait times for all patients. For instance, an Oklahoma clinic reported that two-thirds of the phone calls it received since S.B. 8 took effect were from Texas patients.

In a separate ruling on the DOJ’s challenge to the law, the Court denied the DOJ’s request to block the law and sent the case back to the Fifth Circuit Court of Appeals, which already wiped out emergency relief to restore abortion access.

With S.B. 8, Texas has designed a scheme intended to skirt judicial review by shifting enforcement of this law from the state to private individuals. Texas has so far succeeded in eroding Texans' constitutional right to abortion care, meaning that no constitutional right is safe. These cases are about much more than abortion; everyone who cares about their constitutional rights should be concerned. This kind of scheme could easily be used to ban free speech, marriage equality, or any other right.

As of September 2021, many states have stated interest in introducing a copycat of S.B. 8, including Arkansas and South Dakota. Many states are waiting for the 2022 legislative sessions to introduce such bills. As of November 2021, Florida has introduced a virtually identical copy and Ohio has introduced a total ban with a private right of action enforcement mechanism.

The decision about whether or when to have a child is one of the most personal and important of our lives. Generations of people have relied on the right to abortion to make this and other fundamental decisions about their health, futures, education, career, and lives.

The Supreme Court has repeatedly recognized the fundamental importance of the right to abortion to a person's participation in the social and economic life of the nation—and that generations have relied on this right to shape their lives and futures. Without intervention by the federal courts, this right rings hollow.

DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

On December 1, the Supreme Court heard the most consequential abortion rights case in generations. The Center and its partners filed the case in March 2018 on behalf of Jackson Women's Health Organization—the last abortion clinic in Mississippi—to block the state's ban on abortion after 15 weeks of pregnancy just hours after Gov. Phil Bryant signed the ban into law. A federal district court granted emergency relief, blocking enforcement of the ban. The ban violates Supreme Court precedent, established in *Roe* and reaffirmed as recently as 2020 in *June Medical Services v. Russo*, that a state may not ban abortion before viability. In November 2018, a federal district court granted a request for a permanent injunction, striking down the ban. In December 2019, the Fifth Circuit Court of Appeals upheld the injunction, ruling the law unconstitutional: "In an unbroken line dating to *Roe v. Wade*, the Supreme

Shannon Brewer, Clinic Director, Jackson Women's Health Organization, speaking at the #AbortionisEssential Rally



Court's abortion cases have established (and affirmed, and reaffirmed) a woman's right to choose an abortion before viability." Mississippi appealed to the Supreme Court, and on May 17, 2021, the Court announced that it would hear the case.

The threat is real: Mississippi has asked the Supreme Court to overturn *Roe*. The case, *Dobbs v. Jackson Women's Health Organization*, marks the first time in 50 years that the Court agreed to hear a case on the constitutionality of a pre-viability abortion ban. Jackson Women's Health Organization first opened in 1995 and has been the only abortion clinic in the state for over a decade.

“Abortion is absolutely a racial and economic justice issue. A large majority of our patients are Black women like me. The legislatures passing these laws in Mississippi and other Southern states are mostly male and predominantly white. The laws are inherently racist and classist; they keep Black and brown people down. . . . And if the Supreme Court overturns *Roe*, this inequality will be hugely magnified.”

- Shannon Brewer, Clinic
Director, Jackson Women's
Health Organization

Half the states in the United States are poised to ban abortion entirely if the Court overturns *Roe*, leaving people across the South and Midwest without access to care. Five states are down to a single abortion clinic (Mississippi, Missouri, North Dakota, South Dakota, and West Virginia), and approximately 90 percent of counties in the U.S. are already without a single abortion provider.

This is a matter of racial justice and gender equality. When striking down the ban, the district court said the ban “is closer to the old Mississippi.” Shannon Brewer, the clinic director at Jackson Women’s Health Organization, published an op-ed in the New York Times, writing, “Abortion is absolutely a racial and economic justice issue. A large majority of our patients are Black women like me. The legislatures passing these laws in Mississippi and other Southern states are mostly male and predominantly white. The laws are inherently racist and classist; they keep Black and brown people down. . . . And if the Supreme Court overturns *Roe*, this inequality will be hugely magnified.”

This is a pivotal moment for the Supreme Court to demonstrate that it decides cases based on precedent and rule of law, not politics or ideology. Human rights should not be left to the whims of state legislatures, and the availability of adoption does not preclude the need for abortion care. Critically, the right to abortion is not the only thing at stake. The State of Mississippi’s argument in *Dobbs v. Jackson Women’s Health Organization* threatens the Supreme Court’s precedent involving fundamental liberties, including the rights to marry, use contraception, and decide how we raise our families. This is a threat to our ability to live with autonomy, dignity, and equality. Abortion access is already abysmal in many states, and the rights granted by *Roe* aren’t a reality for everyone, but access will get infinitely worse across the country if the basic protections of *Roe* are taken away. We need a world where abortion isn’t just legal—it must be accessible, affordable, and supported in our communities.

Proactive Bills Enacted

In 2021, the Center tracked almost 100 proactive abortion bills that aim to expand or protect access to abortion care. Of these proactive bills, 11 were enacted that mandate insurance coverage for abortion care, repeal criminal penalty, expand provider scope of practice, defund crisis pregnancy centers, and repeal abortion restrictions.

New Mexico repealed its unconstitutional pre-*Roe* abortion ban. While this repeal bill does not expand access to abortion in the state, it does remove a draconian ban that could have prohibited abortion if *Roe* were to be overturned. Delaware repealed its pre-*Roe* bans, located in various sections of the criminal code that criminalizes prescribing medication abortion, self-managed abortion, and abortion generally.

Other states, like Virginia and Washington, introduced bills to expand access through public and private insurance. Virginia enacted legislation that repealed the prohibition against private insurance providers covering abortion procedures. Washington now requires public university health insurance plans that cover maternity care to also cover abortion care.

Twelve bills expanding who could perform abortions were introduced in Arizona, California, Colorado, Hawaii, Illinois, Massachusetts, Missouri, New Mexico, Virginia, and Washington. Hawaii and Washington enacted bills that expand the scope of practice to include nurse practitioners or physician assistants. Portland, Oregon, enacted a resolution to fund abortion.

Illinois passed a bill that repealed the state's parental notification act, expanding young people's access to abortion. The bill is expected to be signed by the governor.

Looking Ahead

In the face of continuing uncertainty, we at the Center, along with our clients and partners, will work determinedly until a pregnant person's bodily autonomy and agency are upheld in the law and protected from partisan politics. We will advocate for these principles in legislative bodies, articulate these values in the public sector, and go to court to strike down laws that limit our precious and bedrock freedoms.

The Center is proud to support independent abortion providers and state advocates around the country.

For more information or technical assistance, or to sign up for our monthly e-newsletter on proactive policy developments and resources, please contact the Center's State Policy & Advocacy team at statepolicy@reprorights.org.

For all press inquiries, please contact center.press@reprorights.org.

