CENTER *for* REPRODUCTIVE RIGHTS

Legal Analysis

Building protections for reproductive autonomy

State Constitutions and Abortion Rights

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Abortion Access

CENTER *for* REPRODUCTIVE RIGHTS

Introduction

The right to decide whether to continue a pregnancy is core to life, liberty, and equality – all rights protected under the U.S. Constitution. Human rights principles and international and comparative law recognize that abortion must be legal and accessible. And yet, the federal judicial system in the United States has not treated abortion as a fundamental right that must receive the strongest possible protections against governmental interference.

State courts, however, offer wider possibilities. Each state has a unique constitution and court system that is free to protect reproductive autonomy under novel legal theories and rights that the federal constitution may not currently recognize or secure. For decades, the Center for Reproductive Rights (the Center) has brought cases in state courts to strengthen abortion rights and guarantee access beyond the federal system's growing constraints.

To date, the high courts in 11 states have recognized that their state constitutions protect abortion rights independently from and more strongly than the federal constitution or have struck down restrictions that the U.S. Supreme Court has upheld – such as limits on public funding for abortion. The Center has worked on seven of these cases, which collectively demonstrate a vision for reproductive rights that protects abortion access more strongly and inclusively, regardless of age or economic status. This report explores those seven state high court opinions in depth.

Although the U.S. Supreme Court recognized abortion as a liberty right under the Fourteenth Amendment in *Roe v. Wade* in 1973, since 1992 it has evaluated abortion regulations under an "undue burden" standard that permits states to restrict abortion as long as burdens on access are not too severe. In practice, courts have upheld a range of restrictions that make abortion much harder to access, especially for people of color, people living with low-incomes, young people, immigrants, disabled people, and others with limited resources. But this federal legal standard only sets a floor.

The state court opinions detailed in this report provide stronger protections than the federal undue burden standard. Instead, they adopt searching judicial review – often called "strict scrutiny" – for laws that infringe on

STATE CONSTITUTIONS PROTECTING ABORTION RIGHTS

1. Alaska
2. Arizona
3. California
4. Florida
5. Iowa
6. Kansas
7. Massachusetts
8. Minnesota
9. Montana
10. New Jersey
11. New Mexico

Center Cases

Partner Organization Cases

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To learn more about access throughout the country, see What If Roe Fell and Evaluating Priorities.

decision-making about pregnancy, finding them invalid if they are not necessary to advance a compelling state interest, are too broad or too narrow, or harm some groups more than others. Courts including the Alaska and Montana Supreme Courts have held that pressuring people to choose childbearing over abortion is not a state interest that justifies making abortion access harder. Instead, they recognize that states must leave reproductive decision-making up to individuals, including minors and low-income people, all of whom have fundamental rights to continue or end a pregnancy on equal terms.

Going beyond the liberty framework, state court jurisprudence often builds on state constitutional rights that are not part of the federal constitution's text.

For example, the highest courts in Alaska, Florida, Minnesota, and Montana have couched abortion rights in rights to privacy, stressing that government may not intrude into private decision-making across areas of law that include abortion. The Kansas Supreme Court has held that "natural rights" protect "personal autonomy," including the right to abortion which is essential to bodily integrity, human dignity, and self-determination.

Some state court opinions have focused on the equality dimensions of abortion. The New Mexico Supreme Court interpreted the state constitution's Equal Rights Amendment to find that restrictions on abortion funding discriminated against women relative to men. The Alaska Supreme Court held that the law must treat minors and low-income people who want to continue a pregnancy equally to those who seek abortion care. And the Arizona Supreme Court decided that if a state program funds abortion when a pregnant person faces a threat to life, equal protection requires it to provide funding for threats to health.

State courts have also shown how interpretive analysis methods can robustly support abortion rights. The Kansas and Montana courts looked at how the drafters of their constitutions, in 1859 and 1972 respectively, used broad language that would encompass both the issues of the day and unanticipated future circumstances. Instead of using text and history to limit rights, this approach recognizes how these interpretive methods can support an expanding and evolving vision of reproductive autonomy, grounded in the principle that guarantees of liberty, privacy, and equality apply to all people. Several state courts have stressed that federal constitutional analysis has fallen short by refusing to consider real-world harms, rejecting the U.S. Supreme Court's holding that bans on abortion funding do not burden the rights of people living with low incomes.

LEARN MORE

To learn more about judicial selection and state courts, see Judicial Selection: An Interactive Map.

PARTNER ORGANIZATION VICTORIES

Partner organizations across the country have also secured important protections for abortion access through state court litigation. State supreme courts in California,[2] Iowa (see box on pg. 11),[3] Massachusetts,[4] and New Jersey[5] have all recognized a right to abortion in their state constitutions, warranting heightened judicial review. Accordingly, each of these state courts has struck down restrictions (many of which the U.S. Supreme Court has upheld in similar form) that interfere with the fundamental right to decide whether to continue a pregnancy or violate equality by treating people seeking abortion differently without justification.

While state court precedents demonstrate the basis for a stronger and more inclusive vision of reproductive autonomy, there is still much work to be done. To date, neither state nor federal court majorities have recognized how racial discrimination underpins abortion restrictions that target or disparately impact communities of color.[1] And courts have not yet fully explored how novel theories or language in state constitutions might guarantee a right to pregnancy, childbirth, and security for families as key parts of reproductive autonomy, just as they protect abortion.

As challenges mount to enforcing reproductive rights in the federal courts, state constitutions and courts matter more than ever. Not only do they offer an expanded and strengthened legal basis for abortion rights, they shield access in highly restrictive parts of the country, not just for people in states with protections, but for many others who travel to them because abortion is unavailable where they live. Constitutional protections in states like Kansas and Florida have helped preserve access for people in surrounding states where providers are few.

But litigation victories in the state courts are no silver bullet. In the past, and increasingly in recent years, state courts face backlash when they decide cases that protect abortion rights. In Kansas, an initiative to strip abortion rights from the state constitution will appear on the ballot in 2022 and attempts to recall judges are frequent. In Florida, state Supreme Court justices who joined judicial opinions striking down abortion restrictions have been replaced with jurists who disfavor abortion rights. This puts key court opinions protecting abortion in those states at risk of reversal. To maintain past gains and build on the wider possibilities state constitutions offer for reproductive autonomy, we cannot afford to overlook the need to protect judicial independence in the states.

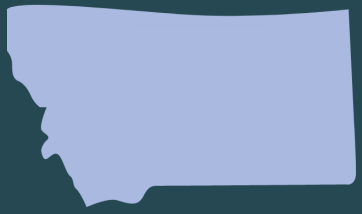
This report details the ways in which seven state supreme courts have recognized abortion protections through litigation brought by the Center for Reproductive Rights over three decades. It explains the legal underpinnings of each decision, impacts on access in those states, and how some of these decisions have positively influenced the high courts in other states. In conclusion, this report considers how this jurisprudence might further expand and shape future efforts to secure reproductive rights.

I. Historical Constitutional Analysis: State Traditions of Personal Autonomy

Constitutional interpretation by federal jurists often relies on history and tradition – in other words, backward-looking analysis of what rights existed when the Constitution and amendments were drafted – to reject rights such as same-sex marriage, intimacy, and abortion. In contrast, state courts in Kansas and Montana (along with Iowa, see Partner Organization Victories box on pg. 4) have interpreted constitutional history and traditions expansively, to protect personal rights, in particular those linked to the body.

Kansas

Montana



KANSAS

The Kansas Constitution protects abortion as a fundamental right, exceeding protections under the U.S. Constitution. Kansas state courts are required to evaluate any abortion restrictions using the strictest standard of judicial review.

The Center brought the legal challenge that led the Kansas Supreme Court to recognize state constitutional protections in 2019, strengthening protection for abortion access in the face of relentless legislative attacks. The landmark decision is informing challenges to other restrictions in the state.

- The Kansas Constitution contains a guarantee of "equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness," which the Kansas Supreme Court has recognized includes the right to abortion.
- The Court employed historical analysis of the constitution's drafting in 1859 to find that the framers intended to broadly protect "personal autonomy," "human dignity," "bodily integrity," and "self-determination" without tethering those values to specific circumstances of the day.
- The Court also analyzed the constitution's text to adopt an expansive definition of "natural rights."

BACKGROUND

Over the past decade, Kansas has become increasingly hostile to abortion access, enacting a wave of restrictions almost every year. In 2015, Kansas became the first state to ban abortions by dilation and evacuation (D&E), the most common abortion procedure after 15 weeks of pregnancy (early in the second trimester of pregnancy). In Kansas each year, about 11% of abortions are provided in the second trimester.[6]

When Kansas enacted the D&E ban, it became the state with the most restrictions on abortion in the country at that time and prefaced an alarming national trend.[7] Oklahoma banned D&E one day after Kansas, and similar bills were introduced in Missouri, South Dakota, and South Carolina shortly after.[8] By early 2022, 12 states had banned D&E and a federal court had upheld a ban in Texas.[9]

VICTORY IN STATE COURT

The Center challenged the D&E ban in Kansas state court in 2015 on behalf of a father-daughter team of physicians with 40 years of combined experience.[10] After years of litigation in the lower court, the Kansas Supreme Court in *Hodes & Nauser v. Schmidt* (2019) recognized for the first time that the Kansas Constitution protects the right to abortion.

NOVEL RIGHTS IN THE KANSAS CONSTITUTION

While Sections 1 and 2 of the Kansas Constitution share language with the Fourteenth Amendment to the U.S. Constitution, they collectively extend more explicit guarantees, including protection for "natural rights." Section 1 states that "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."[11] The Constitutional Accountability Center and the American Civil Liberties Union (ACLU) Foundation of Kansas filed an amicus brief in support of the Center that analyzed this language to argue that both Section 1 and the Fourteenth Amendment were designed to ensure broad protection of substantive fundamental rights in line with the federal Declaration of Independence, which lays out an expansive vision of personal liberty and self-determination.[12]

The Kansas Supreme Court found that Section 1 of the state constitution, in particular its natural rights guarantee, protects "personal autonomy," which is "the heart of human dignity" and "encompasses our ability to control our own bodies, to assert bodily integrity, and to exercise self-determination... For women, these decisions can include whether to continue a pregnancy."[13] Directly implicating this sweeping guarantee, "abortion laws do not merely restrict a particular action; they can impose an obligation on an unwilling woman to carry out a long-term course of conduct that will impact her health and alter her life."[14]

The Court undertook a historical analysis of the drafting of the Kansas Constitution to determine that natural rights include reproductive rights, finding that "the historical record overwhelmingly shows an intent to broadly and robustly protect natural rights and to impose limitations on the governmental intrusion into an individual's right."[15] It rejected the state's

argument that the Kansas Constitution's drafters did not intend for it to be applied in instances of abortion, writing that "true equality of opportunity in the full range of human endeavor is a Kansas constitutional value, and it cannot be met if the ability to seize and maximize opportunity is tethered to prejudices from two centuries ago."[16]

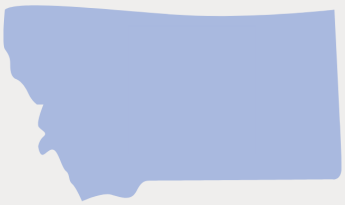
The Court held that the right to abortion is protected under a strict scrutiny standard that makes a restriction presumptively unconstitutional unless the state can show that it is narrowly tailored to serve a compelling state interest. This standard, the Court emphasized, is "more searching" and "rigorous" than the federal constitution's undue burden standard. It wrote that anything less than strict scrutiny "risks allowing the State to then intrude into all decisions about childbearing, our families, and our medical decision-making," and that to do so would "cheapen the rights at stake."[17]

This decision not only creates constitutional protections for the right to abortion in Kansas that are stronger than federal protections, but also shows how courts can use textual analysis, constitutional history, and a natural rights-based analysis to strongly protect abortion and related rights.

ACCESS IN KANSAS TODAY

Continuing efforts to restrict abortion access, as well as ongoing Center litigation in the state, highlight the vital importance of this state constitutional victory. There are only four medical clinics providing abortion in Kansas – 98% of Kansas counties have no clinics that provide abortions, and 61% of Kansas women live in those counties.[18] The numerous abortion restrictions currently enforced in the state – including a 24-hour waiting period and a ban on telemedicine to administer medication abortion – make access even more difficult, especially for people who must travel to reach a provider.[19]

The Center is currently litigating three other challenges in the state to restrictions that include onerous facilities and staffing requirements for clinics, and a ban on prescribing medication abortion through telemedicine. The state legislature continues to introduce new hostile bills that, if enacted, would further restrict access. And anti-abortion groups have pushed forward an initiative to strip abortion rights from the state constitution that will appear on the ballot in 2022, posing a serious threat to existing protections.



MONTANA

In Montana, the state Supreme Court has recognized that the Montana Constitution's right of privacy includes a right of "procreative autonomy." This right confers stronger protections for abortion than the U.S. Constitution. The Center is engaged in ongoing efforts to protect abortion access in Montana state court against a new onslaught of assaults.

- The Montana Supreme Court has held that privacy broadly protects the right to make medical decisions affecting bodily integrity and health, including decisions about reproduction.

- In broadly defining privacy, the Court embraced intentionally open-ended text in the Montana Constitution, writing that the expansive nature of privacy rights demanded a flexible and evolving judicial approach.

BACKGROUND

In its first case in the Montana state courts in 1995, the Center successfully challenged the state's policy of excluding abortion coverage under its Medicaid program. In *Jeannette v. Ellery*, a state district court ruled that if a program funds childbirth services, it must also fund abortion. The Court recognized that both the right of privacy and the guarantee of equal protection in the Montana Constitution protect abortion rights.[20] Furthermore, like other state courts interpreting state constitutions, it critiqued and declined to follow the U.S. Supreme Court's opinion in *Harris v. McRae* (see box on pg. 15).[21]

Shortly after this victory, the Center was back in court to oppose a new restrictive policy on abortion. In April 1995, the legislature enacted a law that specifically excluded certified physician assistants from providing abortions, which for decades they had been able to do under the supervision of a physician.[22] Physician assistant Susan Cahill began providing abortion services in 1976 and was on the vanguard of bringing advanced practice clinicians into abortion care.[23] Ms. Cahill was the only physician assistant providing abortion care in Montana when the legislature enacted the 1995 law.[24]

The Center represented Ms. Cahill and a group of Montana physicians who initially challenged the law in federal court, bringing claims under the U.S. Constitution. In *Armstrong v. Mazurek*, the group argued that the law imposed an undue burden because the Montana legislature enacted it with the purpose and effect of making it harder to access abortion.[25] The case made its way to the

RIGHT TO PRIVACY IN THE MONTANA CONSTITUTION

Although the federal constitution does not have an explicit right to privacy, several state constitutions do, including Montana's. Article II, Section 10 of the Montana Constitution reads "The 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."[27] In 1972, when Montana held a constitutional convention to create a new constitution, delegates viewed the right of privacy, or the "right to be let alone," as the "most important right of them all."[28]

U.S. Supreme Court which summarily upheld the law without oral argument or full briefing. At that stage of the case, the effects of the law were not at issue, and the Supreme Court held that there was insufficient evidence that the legislature had acted with the improper purpose of restricting abortion.[26]

VICTORY IN STATE COURT

In 1997, again represented by the Center, Ms. Cahill and other Montana abortion providers refiled the case in Montana state court, bringing claims under Montana's unique state constitution. In *Armstrong v. State*, they argued that the restriction violated the state's constitutional guarantees of privacy, due process, and equal protection.

The state's Supreme Court held that a fundamental right of individual privacy "broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference."[29] This broad right includes a specific right to "procreative autonomy" which encompasses abortion.[30]

In its decision, the Montana Supreme Court reviewed proceedings of the state's 1972 constitutional convention to note that delegates "deliberately drafted a broad and undefined right of 'individual' privacy" that, in eschewing limits, was "as narrow as is necessary to protect against a specific unlawful infringement of individual dignity and personal autonomy by the government…and as broad as are the State's ever innovative attempts to dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular."[31] The Court embraced this lack of textual constraint, writing that the expansive nature of privacy rights demanded a flexible and evolving judicial approach.

Applying strict scrutiny, the Court struck down the challenged restriction as a violation of the privacy right's application to personal and procreative autonomy, which included making decisions about abortion and other health care with a chosen provider without interference from the state.[32]

BUILDING ON STATE CONSTITUTIONAL PROTECTIONS

Despite the Montana Supreme Court's clear rebuke, abortion access in the state remained vulnerable to attack. In 2014, Ms. Cahill's clinic, All Families Healthcare, was vandalized, requiring her to close the facility indefinitely and essentially retire after nearly 40 years of providing health care services.[33] The clinic was the only one in northwestern Montana that provided abortions, and after the vandalism, the next closest clinic saw a staggering increase in patients.[34]

Responding to the access crisis, advanced practice registered nurse Helen Weems reached out to Ms. Cahill in 2016 and asked her to come out of retirement to provide mentorship and help with re-opening All Families Healthcare. The clinic re-opened in 2018 with Ms. Weems and Ms. Cahill as the two primary health care providers.[35] That same year, the Center (with the ACLU of Montana) filed another case in state court to extend legal permission for abortion care to nurse practitioners. The district court granted a preliminary injunction on existing restrictions, and, in 2019, the Montana Supreme Court affirmed the injunction,[36] enabling Ms. Weems to provide services while the case is ongoing.

ACCESS IN MONTANA TODAY

Abortion access in Montana is presently under attack.

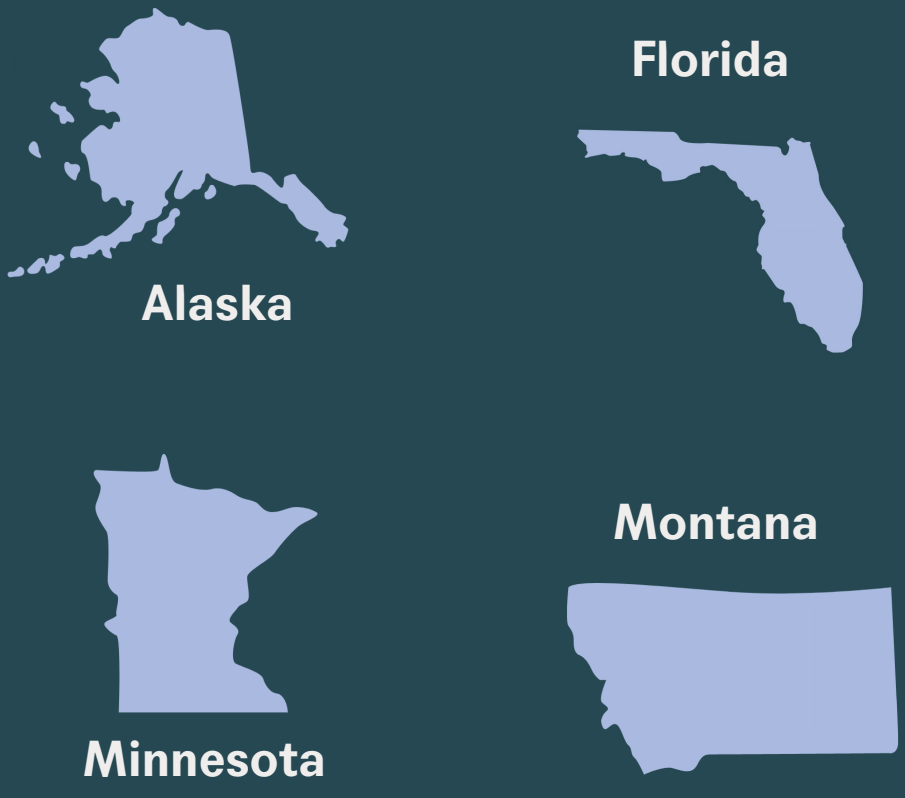
Montana currently bans abortions at or after viability (except to preserve the patient's life or health), while additional restrictions involving waiting periods, biased counseling, and mandatory ultrasounds are enjoined.[37] Furthermore, in 2021 the legislature enacted and the governor signed several restrictions, including a ban on abortion after 20 weeks, which a lower court blocked under the state constitution while litigation proceeds.[38]

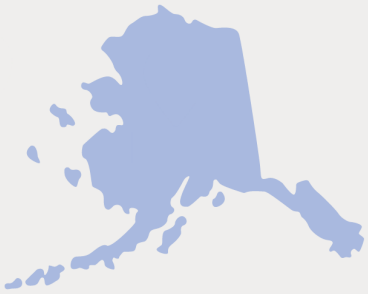
THE IOWA SUPREME COURT'S FORWARD-LOOKING APPROACH TO LIBERTY EQUALITY, AND REPRODUCTIVE AUTONOMY

In *Planned Parenthood of the Heartland v. Reynolds ex rel. State* (2018), a challenge brought by Planned Parenthood and the Iowa ACLU, the Iowa Supreme Court held that a mandated 72-hour waiting period before abortion, which would require patients to make two trips to a provider, violated the state constitution's due process and equal protection clauses. The Court recognized that abortion was a fundamental liberty right under the state constitution, and that intertwined concepts of liberty and equality supported reproductive autonomy, especially when restrictions drew on outdated sex stereotypes. The majority rejected a narrow view of "history and tradition" to define rights, writing that "[o]ur constitution recognizes the ever-evolving nature of society, and thus, our inquiry cannot be cabined within the limited vantage point of the past."[39] It modeled a forward-looking, expansive method of constitutional interpretation that recognized links between "the profoundly personal decisions Iowans make about family, procreation, and child rearing,"[40] all of which fell within broad liberty guarantees that the state constitution's framers drafted to "gather meaning with experience."[41] Recognizing that reproductive autonomy, including the fundamental right to choose abortion, is essential to sex equality, the court applied strict scrutiny to invalidate the waiting period.

II. Abortion as a Fundamental Right: Decisions Grounded in Privacy

The U.S. Constitution does not include a textual right to privacy. While earlier U.S. Supreme Court and federal court opinions found that the right to liberty includes privacy, later opinions on the right to abortion moved away from a privacy analysis. State courts in Alaska, Florida, Minnesota, and Montana (along with California, Massachusetts, and New Jersey, see Partner Organization Victories box on pg. 4) have relied on rights to privacy in their state constitutions to recognize the strongest protections for abortion.





ALASKA

Alaska's Constitution recognizes reproductive rights and the right to abortion as fundamental, including for minors and people who receive Medicaid. The right to privacy, and in some instances a guarantee of equal protection, encompass these protections. Both are stronger than under the U.S. Constitution.

The Center has litigated in Alaska state court for over a decade to secure these rights and maintain abortion access for all.

- Alaska's Constitution contains a right of privacy, which the Alaska Supreme Court holds protects the right to abortion.
- Alaska's Supreme Court has held that the law must treat the decision to carry a pregnancy to term and abortion as legally equivalent choices and rejected state discrimination against people who made the decision to end a pregnancy.
- Alaska state court opinions recognize that low-income people face high or unsurmountable barriers to abortion access, holding that excluding abortion from Medicaid coverage while funding pregnancy care burdens their fundamental right to decide whether to continue a pregnancy, in violation of equal protection.

BACKGROUND

Prior to *Roe*, certain abortions were legalized in Alaska in 1970, including those that a physician provided in a hospital or other state Department of Health and Social Services-approved facility.[42] However, even this partial right proved largely hollow. In 1992, Valley Hospital Administration (VHA), a quasi-public, non-profit corporation in the state, enacted a new policy that prohibited abortions at its facility unless: (1) the fetus had a condition incompatible with life; (2) the pregnant person's life was threatened; or (3) the pregnancy was the result of rape or incest.[43] The policy's effect was to prohibit almost all abortions. Given the size and remote geography of Alaska, VHA was the only hospital serving those in the region (at the time home to over 10,000 women of reproductive age).[44] It was also the only provider of second trimester abortion services in the state.[45]

VICTORIES IN STATE COURT

The Center (with the Alaska Civil Liberties Union) challenged the hospital's stringent abortion policy in 1993 in *Valley Hospital Association, Inc. v. Mat-Su Coalition for Choice*, in which the Alaska Supreme Court for the first time recognized abortion protections under the Alaska Constitution. The Court held that the state constitution's privacy provision, adopted by the people in 1972, provides greater protection for individual privacy than the U.S. Constitution. The Court recognized that "[a] woman's control of her body, and the choice whether or when to bear children, involves the kind of decision-making that is 'necessary for ... civilized life and ordered liberty,'" and that "the right to an abortion is the kind of fundamental right and privilege encompassed within the intention and spirit of Alaska's constitutional language."[46] The Court further held that the state constitution required searching judicial review of a policy that infringed on this fundamental right, in order to determine whether it was the least restrictive way to advance a compelling state interest. Under this legal test, the Court held the VHA policy of denying abortion care, as "a matter of conscience, and not a medical, safety, or economic issue," could not withstand constitutional scrutiny.[47]

Shortly after *Mat-su*, the Center was back in state court to protect the rights of young people seeking abortion care. In 1997, the Alaska legislature passed a law that would have prevented any unmarried woman under 17 years of age from having an abortion unless she had obtained the consent of a parent, guardian, or custodian, or secured a court order authorizing the procedure.[48] The Center, together with the Alaska Civil Liberties Union, argued that the law violated the state constitution's guarantees of privacy, equal protection, freedom from discrimination based on sex, and due process.[49] The Alaska Supreme Court ruled that under the right to privacy, the right to an abortion, as established in the previous *Mat-su* case, applied to minors just as it applied to adults.[50] The Supreme Court remanded the case for the lower court to consider whether mandating parental consent furthered state interests using the least restrictive means available. When the case again made its way back up to the Alaska Supreme Court in 2007, the Court held the law was unconstitutional because giving parents "veto power" over a minor's decision to terminate a pregnancy is not narrowly tailored to advance a state interest in protecting minors or promoting parental involvement and robs those minors of their fundamental privacy rights.[51]

The Court's decision spurred new attacks on constitutional protection for a minor's right to decide whether or not to continue a pregnancy. In 2010, Alaska voters passed an initiative making it a criminal offense for

OBSTACLES TO CARE FOR PREGNANT MINORS

In Alaska, pregnant minors seeking abortion who were unable to obtain parental consent or notify their parents would have had to apply for court authorization, a process involving substantial procedural hurdles and threats to confidentiality. The challenged laws required minors to file a notarized bypass petition, travel to court, and participate in a hearing before a judge. These barriers to access were especially severe for people from Native communities with unique linguistic diversity and residents of remote regions.[52] While federal courts have upheld parental notice and consent laws, the Alaska Supreme Court rejected the state's arguments that helping parents to fulfill their responsibilities, or protecting minors from their immaturity, justified such requirements.

a physician to provide an abortion to a patient under the age of 18 unless a parent, guardian, or custodian consented in writing or was notified 48 hours prior to the procedure.[53] A minor's only alternative was to provide a notarized and corroborated statement that they were abused or obtain authorization from a judge to proceed without parental involvement.[54] In 2016, the state Supreme Court rejected this attempt and struck down the notification requirement, ruling that it violated the constitution's equal protection clause. The Court reasoned that the state lacked a compelling reason for discriminating against minors who decided not to continue a pregnancy, given that they were legally equal to minors who choose to carry to term, a decision that did not require parental notice or consent.[55]

The Center has also worked to ensure low-income Alaskans can access their constitutional right to abortion care. In 2001, in response to a challenge brought by the ACLU and Planned Parenthood, the Alaska Supreme Court held that a regulation denying Medicaid funding for medically necessary abortion care except in cases of life endangerment, rape, or incest violated the state constitution's equal protection clause.[56] For years, the state funded abortions through Medicaid, but in 2013-14, the legislature and health department enacted a new law and regulations that narrowed the definition of "medically necessary" to exclude almost all abortion care. The Center and Planned Parenthood filed a lawsuit that blocked the new restrictions during

ABORTION FUNDING UNDER THE FEDERAL CONSTITUTION: *HARRIS V. MCRAE*

In *Harris v. McRae* (1980), a pregnant person who received Medicaid benefits challenged the Hyde Amendment, a federal restriction on Medicaid funding for abortion except in cases of life endangerment, rape, or incest. The Supreme Court held the restriction did not burden the fundamental right to abortion, reasoning that there was no entitlement to resources for reproductive health care, even if withholding them forced people living with low incomes to continue unplanned pregnancies. It also rejected an equal protection challenge, holding that the constitution did not guarantee poor people equal treatment under the law. For decades, *Harris* has permitted states to refuse to provide insurance coverage for abortion in their Medicaid programs under the federal constitution.

years of litigation. In 2019, the Alaska Supreme Court affirmed that the scheme violated the Alaska Constitution's equal protection clause because it treated people seeking abortion differently from those seeking pregnancy care, burdening their fundamental reproductive rights. Stating that the Alaska Constitution's protections are stronger than federal analogs, the Court cited Justice Brennan's dissent in *Harris v. McRae*, the U.S. Supreme Court case upholding restrictions on funding for abortion under federal Medicaid, to assert that "the State burdens the exercise of a fundamental right for indigent people when it only subsidizes the inevitable alternative [to abortion]."[57]

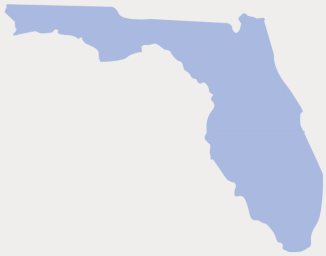
The Alaska Supreme Court's series of opinions addressing minors and Medicaid funding expressly compare pregnancy and abortion care, holding that people seeking either are legally equivalent in the exercise of their fundamental reproductive rights. Accordingly, they must be able to make reproductive decisions on the same terms, without discrimination by the state. These holdings establish an inclusive view of reproductive autonomy that federal jurisprudence interpreting the U.S. Constitution has failed to recognize.

Victories in Alaska have supported the expansion of rights in other state courts across the country, some of which have cited Alaska Supreme Court opinions and employed parallel legal analysis, recognizing similarities to the Alaska Constitution in their own states.[58]

ACCESS IN ALASKA TODAY

Continuing efforts to restrict abortion access in Alaska highlight the vital importance of these state constitutional victories, especially since Alaska's geography heightens the impact of burdens. Most recent data show that 20% of women in Alaska had to travel over 150 miles to access care.[59] As of 2019, 86% of the counties in the state had no clinics that provided abortions, and 32% of Alaskan women lived in those counties.[60]

The political climate in the state remains challenging, with state leaders opposed to abortion rights. Alaska still has several abortion restrictions in place – a number that could be much higher, as it is in many other hostile states, had the state court failed to recognize heightened constitutional protections.[61]



FLORIDA

The right of privacy in the Florida Constitution encompasses the right to abortion. These protections are broader in scope than those in the U.S. Constitution and resulted from decades of ongoing litigation in Florida state court by the Center and partner organizations on behalf of the state's providers.

- The Florida Supreme Court has recognized that the right of privacy in the state constitution protects abortion.
- Modeling a consistent rejection of government interference, the Court has treated abortion like other privacy rights, including medical decision-making and non-disclosure of personal information, that receive the most searching judicial scrutiny.

BACKGROUND

The Florida Supreme Court first recognized abortion as a fundamental right under the Florida Constitution in *In re T.W.* (1989). The case challenged a statute requiring minors either to obtain parental consent or convince a court to grant permission for an abortion.[62] The Florida Supreme Court held that the state constitution's provision guaranteeing an express right of privacy protected abortion rights.

Citing other Florida state court decisions that protected rights under the privacy clause, among them medical decision-making and non-disclosure of personal information, the Court stated that it could "conceive of few

THE FLORIDA CONSTITUTION'S RIGHT TO PRIVACY

In a 1980 general election, voters amended the Florida Constitution to provide a right of privacy which states: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."[63] The Florida Supreme Court has held that, because privacy is a fundamental right, the state is required to demonstrate a compelling interest to justify any intrusion. Even then, laws that impact privacy must use the least restrictive means possible.

more personal or private decisions concerning one's body that one can make in the course of a lifetime."[64] It further held that this right extended to minors, given that the language unambiguously included "[e]very natural person."[65] Applying a "highly stringent" standard that required the state to provide a compelling interest and show that the law accomplished it in the least intrusive way, the court struck down the law, holding that "[s]uch a substantial invasion of a pregnant female's privacy by the state for the full term of pregnancy is not necessary for the preservation of maternal health or the potentiality of life."[66]

VICTORIES IN STATE COURT

In 1999, Florida again attempted to limit access to abortion for minors by passing the Florida Parental Notice Act, which was similar to the statute invalidated in *In re T.W.*, but required parental notice instead of consent. In response to a challenge brought by the Center and Planned Parenthood in *North Florida Women's Health & Counseling Services, Inc. v. State*, the Florida Supreme Court in 2003 held that the law unconstitutionally restricted a minor's right of privacy under the state constitution and failed to further a compelling state interest. The Court echoed its previous ruling, holding that "few decisions are more private and properly protected from government intrusion than a woman's decision whether to continue her pregnancy."[67]

The Court declined to jettison the strict scrutiny applied to abortion restrictions under the state constitution in favor of the federal constitution's weaker undue burden standard, as doing so would "abandon an extensive body of clear and settled Florida precedent in favor of an ambiguous federal standard."[68] The Court further emphasized that the privacy clause in the Florida Constitution was a unique and robust guarantor of the fundamental right to make personal decisions without government interference.[69]

Twelve years later in 2015, Florida enacted a mandatory delay law that imposed an extra trip to a provider by requiring people seeking abortion care to listen to state-mandated biased "counseling," then wait at least 24 hours before they could receive an abortion. The Center returned to state court with the ACLU, challenging the law in *Gainesville Woman Care LLC v. State*. In 2017, the Florida Supreme Court upheld a trial court's temporary injunction blocking the law. The Court reaffirmed that "Florida's constitutional right of privacy encompasses a woman's right to choose to end her pregnancy," and held that the state "presented no evidence of a compelling state interest, much less that the law served such an interest through the least restrictive means."[70] The Court again rejected the state's

INTIMATE PARTNER VIOLENCE AND ABORTION ACCESS

People who are in abusive relationships are at heightened risk of unintended pregnancy, as are those caught in human trafficking situations. Research shows that physical violence often escalates during pregnancy for these groups. Furthermore, barriers to reproductive health care are severe for people experiencing abuse. Abusers may monitor travel and finances, and confidentiality is difficult or impossible to maintain, making a two-trip requirement especially burdensome. Experts on intimate partner violence submitted an amicus brief detailing harms to survivors in the challenge to Florida's waiting period law, which the Florida Supreme Court cited in its opinion blocking the law.

invitation to downgrade protection to a level approximating the federal undue burden standard, reasoning that such a holding "...would contradict our precedent emphasizing the importance of Florida's fundamental right of privacy."[71] The Center is continuing to litigate in the lower Florida courts to permanently enjoin the law.[72]

ACCESS IN FLORIDA TODAY

While these victories in Florida have been crucial, the state courts have nonetheless upheld other restrictions. In 2006, the state Supreme Court rejected the Center's challenge to the "Woman's Right to Know Act," a statute that imposes state-mandated counseling on people seeking abortion.[73] Additionally, Florida courts have upheld the state's policy denying Medicaid funding for most abortions, holding that it does not violate the right of privacy or equal protection.[74]

Politics in the state have also brought setbacks. In 2004, Floridians amended their state constitution to specifically permit the legislature to enact a parental notice statute, overriding the Court's decision in *North Florida Women's Health & Counseling Services, Inc. v. State*. In addition, vacancies on the Florida Supreme Court have led to a changed membership that may narrow protections for abortion in future cases.

Outside the courts, Florida is still a hostile state for abortion access, with a variety of burdensome restrictions currently in effect across the state, including parental notice requirements, limitations on public funding, and restrictions that only allow physicians to provide abortion care.[75] Between 2014 and 2017, the number of clinics in the state declined by 8%.[76] Leaders in state government oppose abortion,[77] and the past five years have seen the introduction, and often the enactment, of multiple new restrictions and aggressive measures.[78]

MINNESOTA

In Minnesota, the state Supreme Court has recognized that multiple provisions in the Minnesota Constitution protect abortion as a privacy right more broadly and strongly than the U.S. Constitution. It applied this right to hold that the state's medical assistance program must fund abortion to make it accessible for low-income people.

- The Minnesota Supreme Court has ruled that privacy rights – not just equal protection – require the state to fund abortion.
- The Minnesota Supreme Court explicitly rejected the U.S. Supreme Court's reasoning in *Harris v. McRae*, which held that the federal constitution does not require states to fund abortion on the same terms as other pregnancy care. The Minnesota high court recognized that "*McRae* has the practical effect of not protecting a woman's fundamental right to choose to have an abortion and allowing funding decisions to accomplish its nullification of that right."[79]

BACKGROUND

Shortly after the U.S. Supreme Court's decision in *Roe v. Wade*, the Minnesota Commissioner of Public Welfare issued a policy bulletin announcing that Medical Assistance ("MA"), the state's publicly funded health care program, would cover the cost of abortions if performed by a licensed provider. A few years later, however, the state Supreme Court invalidated this bulletin for violating rulemaking provisions and the state adopted prohibitions on abortion funding.[80]

By the early 1990s, MA would cover abortion only to save the life of the pregnant person, or if the pregnancy was the result of criminal sexual conduct or incest that was reported to law enforcement, even while it covered a wide range of other pregnancy-related services.[81] The impact was drastic. In 1977, prior to these restrictions, the state funded abortions in 1,942 cases. By 1993, the number had dwindled to two.[82]

VICTORY IN STATE COURT

The Center challenged these restrictions in *Women of Minnesota v. Gomez* in 1995. Plaintiffs in the case included providers, clinics, advocacy organizations, and Jane Doe, an individual who had become pregnant through sexual assault that she could not report to law enforcement.[83] The

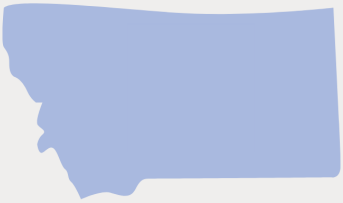
Center asked the Court to hold that – contrary to the U.S. Supreme Court's ruling in *Harris v. McRae* – a policy denying funding for abortion to indigent women infringed on the fundamental right to decide whether to continue a pregnancy.

The Court ruled in the Plaintiffs' favor, holding that because the restrictions impacted only those pregnant recipients of MA seeking an abortion for therapeutic reasons, and not those choosing to carry a pregnancy to term, they violated the right of privacy rooted in several provisions of the Minnesota Constitution. The Court observed that it could "think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion," and clarified that "the right of privacy under our constitution protects not simply the right to an abortion, but rather it protects the woman's *decision* to abort."[84]

The Minnesota Supreme Court explicitly interpreted the state constitution to provide more protection than the federal constitution, grounding its reasoning in what it viewed as the state's unique circumstances and precedents that include "a long tradition of affording persons on the periphery of society a greater measure of government protection and support than may be available elsewhere."[85] It furthermore rejected the U.S. Supreme Court's reasoning in *Harris v. McRae*, recognizing that "*McRae* has the practical effect of not protecting a woman's fundamental right to choose to have an abortion and allowing funding decisions to accomplish its nullification of that right."[86]

ACCESS IN MINNESOTA TODAY

There are still multiple restrictions in place in Minnesota, including a mandatory 24-hour waiting period, biased counseling, and a parental notification requirement.[87] Litigation by Center partners in state court to challenge these restrictions is ongoing. As of 2017, some 97% of Minnesota counties had no clinics that provided abortions, and 61% of Minnesota women lived in those counties.[88]

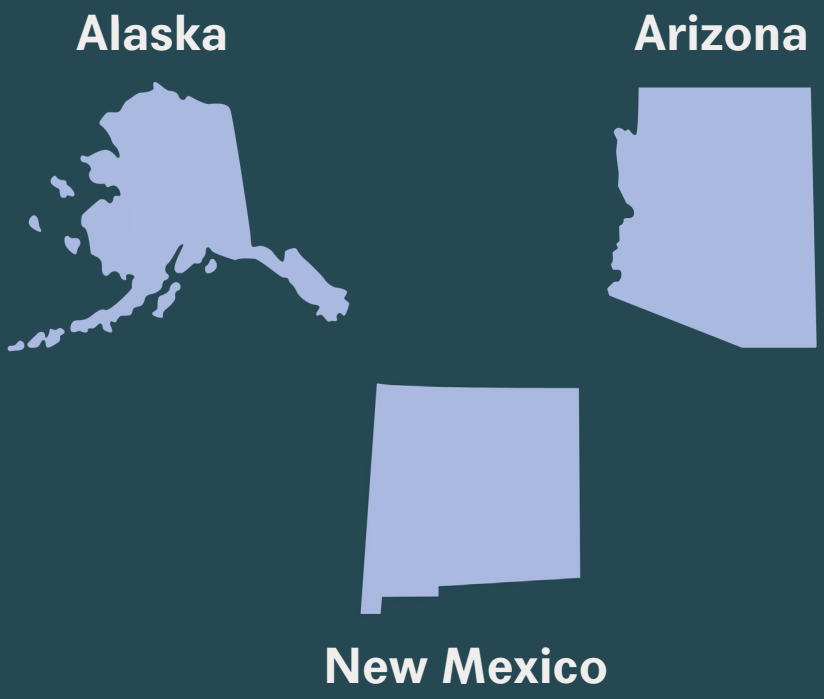


MONTANA

As discussed in Section I above, the Montana Supreme Court has found that the right to privacy in the state constitution protects abortion. By analyzing the provision's history and drafting, the Court held that it extends a broad right of medical decision-making and procreative autonomy that includes abortion.

III. Anti-Discrimination Principle: Decisions Requiring Equal Treatment for People Seeking Abortion

The U.S. Supreme Court has not held that abortion restrictions violate equal protection guarantees in the federal constitution, and in one context – Medicaid funding for abortion – directly upheld policies that discriminate against low-income pregnant people as consistent with equal protection (see *Harris v. McRae* box on pg. 15). In contrast, high courts in Arizona and Alaska have struck down laws that treat groups of people seeking abortion differently (as have courts in California, Iowa, and New Jersey; see Partner Organization Victories box on pg. 4). The Supreme Court and federal courts have also failed to treat abortion restrictions as a form of sex discrimination, which the New Mexico Supreme Court has done.



ARIZONA

In Arizona, the state Supreme Court expanded access to abortion for low-income people by requiring the state's Medicaid program to cover abortion care when a patient faced threats to health. As a result of litigation brought by the Center, in 2002 the Court held that limitations on state funding for abortion violated the equal privileges and immunities clause of the Arizona Constitution, which has stronger protections than the U.S. Constitution.

- The Arizona Supreme Court recognized that low-income patients facing threats to their health must qualify for abortion funding to the same extent as patients facing threats to their life.

BACKGROUND

As of 2002, Arizona's state Medicaid program would fund abortion care only in cases of life endangerment, rape, or incest.[89] Abortions to preserve patient health were not covered, even for conditions that imposed serious long-term harms or when critical drug or therapy regimens had to be suspended during pregnancy.[90]

VICTORY IN STATE COURT

In response to a challenge that the Center brought on behalf of providers in the state, the Arizona Supreme Court held in *Simat Corp. v. Arizona Health Care Cost Containment System* that the policy violated the state constitution's equal privileges and immunities clause. Under this clause, the state could not fund abortions for pregnant Arizona Health Care Cost Containment System (AHCCCS) patients facing a threat to life without also providing the same funding for threats to health.[91]

Reviewing this differential treatment under strict scrutiny, it found the policy unconstitutional.[92] The Court wrote that "the regulation in question discriminates between two classes of women: those who require recognized and necessary medical treatment to save their lives and those who require such treatment to save their health and perhaps eventually their lives."[93] It further concluded that although the state's interest in protecting the fetus and promoting childbirth was legitimate, it was not more compelling than protecting the health of a pregnant patient facing serious disease.[94]

In reaching its decision, the Arizona Supreme Court stopped short of holding (as had the trial court that had struck down the policy in the first

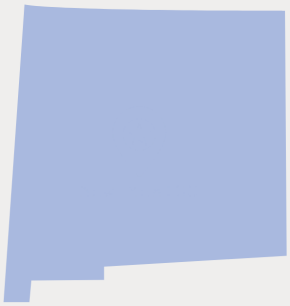
instance) that the Arizona Constitution protects the right to abortion under its privacy clause. Nor did it interpret the state constitution to require the government to fund medically necessary abortions to the same extent as other pregnancy services.[95]

Thus, even in a narrow decision limited to extending coverage for abortion care to preserve health, the state court afforded patients greater protections under the state constitution than were available under the federal constitution.

ACCESS IN ARIZONA TODAY

Arizona severely restricts abortion care, highlighting the importance of even limited holdings that protect access, as well as the work that remains to be done.

Currently, a wide range of restrictions severely limit abortion access in Arizona. These include waiting periods, biased counseling, and parental consent, as well as numerous regulations related to facilities, admitting privileges, and reporting. Additional bans on abortion after 20 weeks and if sought for reason of race, sex, or disability are blocked.[96] In each year since 2016, the legislature has introduced, and often enacted, multiple new abortion restrictions that further burden patients and providers.[97] The hostile climate makes the prior state Supreme Court opinion even more critical for preserving access to care.



NEW MEXICO

In New Mexico, the state Supreme Court has ruled that the state's Medicaid program must fund medically necessary abortions, expanding access for low-income people. The Court's holding interpreted the Equal Rights Amendment in the state constitution, finding that it does not permit withholding benefits from women but not men on the grounds that only women become pregnant.

- The New Mexico Supreme Court invalidated the state Medicaid program's strict limitations on abortion funding by holding that they discriminated against women.

- To date, no other state supreme court has struck down abortion restrictions as sex discrimination, and neither have the federal courts.

BACKGROUND

In 1972, by popular vote, New Mexicans amended Article II, Section 18 of their constitution to state that "[e]quality of rights under law shall not be denied on account of the sex of any person."[98] Over twenty years later, that provision was crucial in expanding access to abortion in the state.

VICTORY IN STATE COURT

In 1995, the New Mexico Human Services Department restricted funding for abortion under the state's Medicaid program, except when necessary to save the life of the patient, or in instances of an ectopic pregnancy, rape, or incest.[99] In *New Mexico Right to Choose/NARAL v. Johnson*, the Center (with the ACLU and Planned Parenthood) successfully argued on behalf of providers that the rule violated the state's Equal Rights Amendment because it applied different standards of medical necessity to men and women.

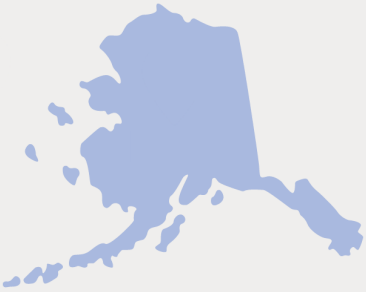
Agreeing that the funding restriction discriminated on the basis of sex, the New Mexico Supreme Court noted that "we can find no provision in the Department's regulations that disfavors any comparable, medically necessary procedure unique to the male anatomy,"[100] and stated that it would not ignore the fact that "[s]ince time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them."[101] It applied strict scrutiny to strike down the law.

SEX DISCRIMINATION AND REPRODUCTIVE RIGHTS

Bringing claims under a state's Equal Rights Amendment to secure abortion access is a unique approach that highlights the sex discrimination that underpins abortion restrictions. To date, a U.S. Supreme Court majority has not recognized that abortion restrictions discriminate on the basis of sex, both because they single out women and people who can become pregnant, and because access to abortion is essential for gender equality in all spheres of life. Courts interpreting state constitutions have the opportunity to develop case law that goes beyond liberty and privacy by focusing on the equality aspects of abortion access in ways that the federal courts have not.

ACCESS IN NEW MEXICO TODAY

The New Mexico Supreme Court has not yet determined whether the state constitution, and in particular the Equal Rights Amendment, protects abortion as a fundamental right. The state does not currently enforce common types of abortion restrictions (e.g., waiting periods, mandated parental involvement, limitations on publicly funded abortions, etc.).[102] Several restrictions on abortion were introduced in the state legislature over the past five years, but none have been enacted.[103]



ALASKA

As discussed above, the Alaska Supreme Court first held that the state constitution's right to privacy protects abortion. It later applied the constitution's equal protection clause to extend protection to minors and people who rely on Medicaid funding for health care.

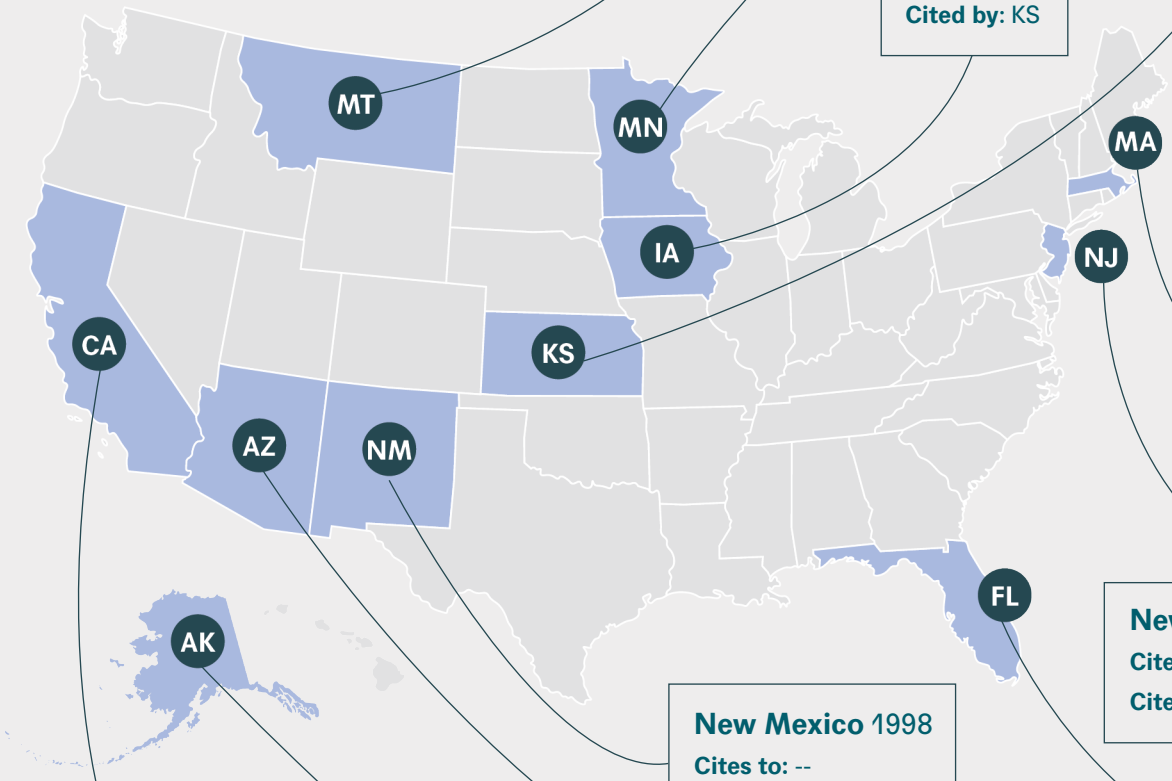
DECISIONS INFLUENCING POSITIVE OUTCOMES IN OTHER STATES

State high court decisions not only strengthen access to abortion within their state, but can also contribute to positive outcomes across the country. For example, the Florida Supreme Court opinion in *In re T.W.* functioned as a guide for numerous other state courts considering abortion rights and access under their respective constitutions, with five other state supreme courts citing it in striking down a range of restrictions.[104] Similarly, five other state supreme courts have favorably cited the Minnesota Supreme Court's *Women of Minnesota v. Gomez* decision in invalidating other restrictions.[105] And while the New Mexico Supreme Court's direct focus on gender equality in *New Mexico Right to Choose/NARAL v. Johnson* was unique, three other state supreme courts – in Arizona, Alaska, and Kansas – have cited it to support decisions finding certain restrictions on abortion access unconstitutional in their own states.[106] The body of precedent becomes increasingly influential and robust as more courts rely on it.

CENTER *for* REPRODUCTIVE RIGHTS

State high court decisions not only strengthen access to abortion within their state, but can also contribute to positive outcomes in other states.

The map below shows how major cases relied on ("cites to") rulings in other states, and in turn were relied on ("cited by") by later rulings.



Montana 1998, 2019
Cites to: FL, MN
Cited by: KS

Minnesota 1995
Cites to: CA, MA, NJ
Cited by: AK, AZ, KS, MA, MT

Iowa 2018
Cites to: FL
Cited by: KS

Kansas 2019
Cites to: AK, CA, FL, IA, MA, MN, MT, NM
Cited by: --

Massachusetts 1981, 1997
Cites to: CA, MN
Cited by: AK, AZ, CA, KS, MN, NJ

New Jersey 1982, 2000
Cites to: CA, MA
Cited by: AK, AZ, FL, MN

New Mexico 1998
Cites to: --
Cited by: AK, AZ, KS

Florida 1989, 2003, 2017
Cites to: CA, NJ
Cited by: AK, CA, IA, KS, MT

California 1981, 1997
Cites to: FL, MA
Cited by: AK, AZ, FL, KS, MA, MN, NJ

Alaska 1997, 2001 (2 cases), 2007, 2016, 2019
Cites to: CA, FL, NJ, MA, MN
Cited by: AZ, KS

Arizona 2002
Cites to: AK, CA, MA, MN, NJ, NM
Cited by: --

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Conclusion

As federal court protections for reproductive rights devolve, the states in which the Center and partners have secured rights in state constitutions offer an alternative vision. Over three decades, state courts have built a foundation of novel jurisprudence that recognizes strong personal privacy and autonomy rights, equality principles, and the deeply rooted nature of abortion protections in history and text. That foundation is only a start. State courts must now address the racism that undergirds abortion restrictions and extend protections for the full spectrum of rights – from becoming pregnant, to safe pregnancy and childbirth care, to security for families – that are key parts of reproductive autonomy and have never been given their due.

ENDNOTES

1 Justice Thurgood Marshall's dissent in *Harris v. McRae*, 448 U.S. 297, 337 (1980), and Judge Carlton Reeves' district court opinion in *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 540 (S.D. Miss. 2018), *aff'd sub nom*. *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), are notable exceptions that grapple with interconnected racism and restrictions on reproductive autonomy.

2 *Comm. To Defend Reprod. Rts. v. Myers*, 625 P.2d 779, 789-99 (Cal. 1981) (holding that the denial of public funding for most abortion care, but not pregnancy or childbirth, violates state constitutional rights to privacy, equal protection, and due process); *American Acad. of Pediatrics v. Lundgren*, 940 P.2d 797, 823-29 (Cal. 1997) (holding that requiring a minor to obtain parental consent for abortion violates the state constitutional right to privacy, because the requirement does not further the state's interests in protecting minors' wellness or preserving the parent-child relationship).

3 *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 246 (Iowa 2018) (holding that a 72-hour waiting period violates both the due process and equal protection clauses of the Iowa Constitution because it burdens the fundamental right to decide whether to continue or terminate a pregnancy and is not narrowly tailored to serve a compelling state interest).

4 *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 397-404 (Mass. 1981) (finding a right to abortion in the right to privacy guaranteed by the state constitution's due process provision and striking down a ban on Medicaid reimbursement for abortions except when necessary to prevent the death of a pregnant patient).

5 *Right to Choose v. Byrne*, 450 A.2d 925, 934-38 (N.J. 1982) (holding that the denial of public funding for most abortion care, but not pregnancy or childbirth, violates the state constitution's equal protection clause because the fundamental right to terminate a pregnancy outweighs the State's asserted interest in protecting potential life).

6 Brief of Appellees, *Hodes & Nauser v. Schmidt*, No. 15-114153-A, pg. 5; Kan. Dep't of Health & Env't, Abortions in Kansas, 2014 (Preliminary Report) 3 (March 2015), available at http://kdheks.gov/hci/abortion_sum/2014_Preliminary_Abortion_Report.pdf.

7 Erik Eckholm & Frances Robles, *Kansas Limits Abortion Method, Opening a New Line of Attack,* New York Times (April 7, 2015), https://www.nytimes.com/2015/04/08/us/kansas-bans-common-second-trimester-abortion-procedure.html.

8 Dahlia Lithwick, *Jurisprudence Column*, Slate (April 15, 2015), https://slate.com/news-and-politics/2015/04/kansas-and-oklahoma-abortion-bans-second-trimester-abortions-will-be-more-dangerous-without-d-e.html.

9 Guttmacher Institute, *Bans on Specific Abortion Methods Used After the First Trimester* (January 2022), https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester; *Whole Woman's Health v. Paxton*, 10 F.4th 430 (5th Cir. 2021).

10 Center for Reproductive Rights, *Center for Reproductive Rights Challenges Kansas Law Criminalizing Doctors for Providing Safe, Common Abortion Method* (June 1, 2015), https://reproductiverights.org/%e2%80%8bcenter-for-reproductive-rights-challenges-kansas-law-criminalizing-doctors-for-providing-safe-common-abortion-method/.

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11 KAN. STAT. ANN. § 1.

12 Brief Amici Curiae of the Constitutional Accountability Center and the American Civil Liberties Union Foundation of Kansas in Support of Plaintiffs-Appellees and Affirmance, 2016 WL 5454901 (Kansas 2016).

13 *Hodes & Nauser v. Schmidt*, 440 P.3d 461, 497 (Kansas 2019).

14 *Id.* at 484.

15 *Id.* at 471.

16 *Id.* at 491.

17 *Id.* at 498.

18 Guttmacher Institute, *State Facts About Abortion: Kansas* (January 2022), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-kansas.

19 Center for Reproductive Rights, *What If Roe Fell? U.S. Abortion Laws Map: Kansas,* https://reproductiverights.org/maps/state/kansas/; *See also* Guttmacher Institute, *State Facts About Abortion: Kansas* (January 2022), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-kansas.

20 *Jeannette v. Ellery,* No. BDV-94-811, 1995 WL 17959705 (Mont. Dist. May 19, 1995).

21 *Id.*

22 Center for Reproductive Rights, *Armstrong v. Mazurek, Armstrong v. State* (July 31, 1995), https://www.reproductiverights.org/case/armstrong-v-mazurek-armstrong-v-state.

23 Corin Cates-Carney, *How Vandalism and Fear Ended Abortion in Northwest Montana,* NPR (July 21, 2015), https://www.npr.org/sections/health-shots/2015/07/21/424692243/how-vandalism-and-fear-ended-abortion-in-northwest-montana.

24 *Armstrong v. State*, 989 P.2d 364, 371 (Mont. 1999).

25 *Armstrong v. Mazurek*, 906 F. Supp. 561 (D. Mont. 1995).

26 *Mazurek v. Armstrong*, 520 U.S. 968 (1997).

27 MONT. CONST. Art. 2 § 10.

28 *Armstrong v. State*, 989 P.2d 364, 373 (Mont. 1999) (citing Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, p. 1681).

29 *Armstrong v. State*, 989 P.2d at 384.

30 *Id.* at 377.

31 *Id.* at 375.

32 *Id.* at 384.

33 Corin Cates-Carney, *How Vandalism and Fear Ended Abortion in Northwest Montana*, NPR (July 21, 2015), https://www.npr.org/sections/health-shots/2015/07/21/424692243/how-vandalism-and-fear-ended-abortion-in-northwest-montana.

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38 *Planned Parenthood of Mont. v. Montana*, No. DV 21-00999, Slip Op. (Mont. Thirteenth Jud. Dist. Ct. Oct. 7, 2021).

39 *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 233 (Iowa 2018).

40 *Id.* at 234.

41 *Id.* at 235.

42 ALASKA STAT. § 18.16.010(a).

43 *Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 965 (Alaska 1997).

44 U.S. Department of Commerce, *1990 Census of Population, General Population Characteristics, Alaska* (April 17, 1992), pg. 85, https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-3.pdf.

45 Brief of Amici Curiae American College of Obstetricians and Gynecologists and American Medical Women's Association, Inc. in Support of Appellees Mat-Su Coalition for Choice, *Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice*, 1996 WL 34392670, at 7; *Valley Hosp. Ass'n, Inc.*, 948 P.2d at 965.

46 *Valley Hosp. Ass'n, Inc.*, 948 P.2d at 968 (citing *Baker v. City of Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970)).

47 *Valley Hosp. Ass'n, Inc.*, 948 P.2d at 971.

48 ALASKA STAT. § 18.16.020.

49 *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 33 (Alaska 2001).

50 *Id.* at 45.

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53 *Planned Parenthood of the Great Northwest v. State*, 375 P.3d 1122, 1128 (Alaska 2016).

54 Complaint at 22, *Planned Parenthood of the Great Northwest v. State*, 375 P.3d 1122 (Alaska 2016).

55 *Planned Parenthood of the Great Northwest*, 375 P.3d at 1136, 1143.

56 *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 905 (Alaska 2001).

57 *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1002 (Alaska 2019)

58 *Hodes & Nauser v. Schmidt*, 440 P.3d 461, 504 (Kansas 2019); *Planned Parenthood of the Heartland, Inc. v. Iowa Board of Medicine*, 865 N.W.2d 252, 262 (Iowa 2015).

59 Guttmacher Institute, *Although Many U.S. Women of Reproductive Age Live Close to an Abortion Clinic, A Substantial Minority Would Need to Travel Far to Access Services* (October 3, 2017), https://www.guttmacher.org/news-release/2017/although-many-us-women-reproductive-age-live-close-abortion-clinic-substantial

60 Guttmacher Institute, *State Facts About Abortion: Alaska* (January 2022), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-alaska.

61 Center for Reproductive Rights, *What if Roe Fell? U.S. Abortion Laws Map: Alaska*, https://reproductiverights.org/maps/state/alaska/; *see also id*. In 2020, Alaska also became one of many states exploiting the COVID-19 pandemic to attempt to ban almost all procedural abortion care, issuing an executive order that purported to suspend procedures deemed "non-essential or elective." Less than a week after issuing the order, Governor Mike Dunleavy decided these medical procedures could resume.

62 *In re T.W.*, 551 So.2d 1186, 1188 (Fla. 1989); FLA. STAT. § 390.001(4)(a).

63 FLA. CONST. Art. § 23.

64 *In re T.W.*, 551 So.2d at 1192.

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66 *Id.* at 1194.

67 *N. Flor. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612, 632 (Fla. 2003).

68 *Id.* at 635.

69 *Id.* at 635-36.

70 *Gainesville Woman Care LLC v. State*, 210 So.3d 1243, 1251 (Fla. 2017).

71 *Id.* at 1256.

72 *State v. Gainesville Woman Care LLC*, 278 So.3d 216 (Fla. 2019).

73 *Presidential Women's Center v. State*, 937 So.2d 114 (Fla. 2006).

74 *Renee B. v. Florida Agency for Health Care Admin.*, 790 So. 2d 1036 (Fla. 2001) (holding that the state's Medicaid program did not violate privacy rights by denying funding for most medically-necessary abortions); *see also A Choice For Women, Inc. v. Fla. Agency For Health Care Admin.*, 872 So. 2d 970 (Fla. Dist. Ct. App. 2004) (holding the same under the state constitution's equal protection clause).

75 Center for Reproductive Rights, *What if Roe Fell? U.S. Abortion Laws Map: Florida*, https://reproductiverights.org/maps/state/florida/; *see also* Guttmacher Institute, *State Facts About Abortion: Florida* (January 2022), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-florida.

76 Guttmacher Institute, *State Facts About Abortion: Florida* (January 2022), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-florida.

77 NARAL Pro-Choice America, *Florida* (March 2021), https://www.prochoiceamerica.org/state/florida/.

78 Guttmacher Institute, *State Legislation Tracker* (December 31, 2021), https://www.guttmacher.org/state-policy.

79 *Women of Minn. v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995).

80 *Id.* at 23.

81 Under Minnesota Statutes section 256B.0625, subd. 16, MA funds could only be used if one of the following conditions was met: (a) the procedure was deemed medically necessary to prevent the death of the mother by two physicians; (b) the pregnancy was the result of criminal sexual conduct and the incident was reported within 48 hours after it occurred or after the victim became physically able to report the criminal sexual conduct; or (c) the pregnancy was the result of incest, but only if the incident and relative are reported to a valid law enforcement agency for investigation prior to the abortion.

82 *Women of Minn. v. Gomez*, 542 N.W.2d at 24.

83 Jess Braverman, *Doe v. Gomez: How the Women of Minnesota Sued for Abortion Access and Won*, Unrestrict Minnesota, https://unrestrictmn.org/community/doe-v-gomez-how-the-women-of-minnesota-sued-for-abortion-access-and-won/.

84 *Women of Minn.*, 542 N.W.2d at 27, 31.

85 *Id.* at 30.

86 *Id.* at 31.

87 Guttmacher Institute, *State Facts About Abortion: Minnesota* (January 2022), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-minnesota; *see also* Center for Reproductive Rights, *What If Roe Fell, U.S. Abortion Laws Map: Minnesota*, https://reproductiverights.org/maps/state/minnesota/.

88 Guttmacher Institute, *State Facts About Abortion: Minnesota* (January 2022), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-minnesota.

89 ARIZ. REV. STAT. § 35-196.02.

90 *Simat Corp. v. Arizona Health Care Cost Containment Sys.*, 56 P.3d 28, 29 (Ariz. 2002).

91 *Id.* at 32.

92 *Id.* at 35.

93 *Id.* at 32.

94 *Id.* at 34.

95 *Id.* at 37.

96 Center for Reproductive Rights, *What if Roe Fell? U.S. Abortion Laws Map: Arizona*, https://reproductiverights.org/maps/state/arizona/; *see also* Guttmacher Institute, *State Facts About Abortion: Arizona* (January 2022), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-arizona.

97 Guttmacher Institute, *State Legislation Tracker* (December 31, 2021), https://www.guttmacher.org/state-policy.

98 N.M. CONST. Art. 2, § 18; Leo Kanowitz, The New Mexico Equal Rights Amendment: Introduction and Overview, 3 N.M. L. Rev. 1 (January 1973), https://digitalrepository.unm.edu/nmlr/vol3/iss1/2/

99 *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 846 (N.M. 1998).

100 *Id.* at 856.

101 *Id.* at 854 (quoting *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986)).

102 Center for Reproductive Rights, *What if Roe Fell? U.S. Abortion Laws Map: New Mexico*, https://reproductiverights.org/maps/state/new-mexico/; Guttmacher Institute, *State Facts About Abortion: New Mexico* (January 2022), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-new-mexico.

103 Guttmacher Institute, *State Legislation Tracker* (December 31, 2021), https://www.guttmacher.org/state-policy.

104 *Hodes & Nauser v. Schmidt*, 440 P.3d 461, 496 (Kansas 2019); *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 915 N.W.2d 206, 237 (Iowa 2018); *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 40 (Alaska 2001); *Armstrong v. State*, 989 P.2d 364, 379 (Mont. 1999); *Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 967 (Alaska 1997); *American Acad. of Pediatrics v. Lundgren*, 940 P.2d 797, 800 (Cal. 1997).

105 *Hodes & Nauser*, 440 P.3d at 504; *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 1002 (Alaska 2019); *Simat Corp. v. Arizona Health Care Cost Containment Sys.*, 56 P.3d 28, 35 (Ariz. 2002); *Armstrong*, 989 P.2d at 381; *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 905 (Alaska 2001); *Planned Parenthood League of Massachusetts, Inc. v. Att'y Gen.*, 677 N.E.2d 101, 104 n.3 (1997).

106 *Hodes & Nauser*, 440 P.3d at 484; *Simat Corp.*, 56 P.3d at 35; *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d at 905.

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