



State Abortion Legislation in 2021

A Review of Positive and Negative Actions

By Elyssa Spitzer and Nora Ellmann | September 21, 2021

Numerous states have passed legislation this year designed to undermine or completely block access to abortion care, as they have since the U.S. Supreme Court decided *Roe v. Wade* in 1973. But these legislative efforts are distinct from those of previous years in two ways. First is the difference in sheer quantity: In 2021, the United States has already seen the highest number of abortion restrictions enacted in a single year, according to the Guttmacher Institute.¹ Second is the legal context: The constitutional and judicial landscape in which this newly enacted legislation will operate, under a majority-conservative Supreme Court, is particularly tenuous.

In May 2021, the Supreme Court announced that it would hear *Dobbs v. Jackson Women's Health Organization*, a case challenging Mississippi's 15-week abortion ban.² And in September 2021, the Supreme Court allowed a Texas law, S.B. 8, to take effect. S.B. 8 effectively prohibits abortion after six weeks and creates a private right of action that allows "any person" to sue anyone who helps a person access abortion care, including abortion providers, abortion funds, family members, or friends.³ Both of these laws directly contradict *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which guarantee the right to abortion and prohibit states from barring it before the point of viability.

This issue brief breaks down the abortion bans and restrictions that state legislatures have passed this year, such as the most recent law in Texas, as well as highlights states that have protected and expanded abortion rights.

Landscape and implications of state abortion restrictions

Abortion is essential health care, critical to health equity, reproductive autonomy, and racial, gender, and economic justice; it also helps ensure that people can control their own bodies, lives, and futures. The restrictions that some states are enacting disproportionately harm Black, Indigenous, and Latino individuals; people with low incomes; LGBTQ people; young people; people with disabilities; immigrants;

and people in rural areas, for whom legal and systemic barriers frequently already put abortion care out of reach.⁴ Although some of the newly enacted state statutes described in this issue brief will—like Texas’ S.B. 8—be challenged in court, there remains the looming threat that the governing law might change and that certain abortion-restrictive statutes that historically would have been found unconstitutional could take effect. This onslaught of restrictive state laws and the upcoming arguments in *Dobbs v. Jackson Women’s Health Organization* are part of the anti-abortion movement’s efforts to legislate and litigate abortion access out of existence.⁵ Abortion rights are by no means secure throughout the United States.

While some states are attempting to restrict bodily autonomy and eliminate abortion rights entirely, others are working to protect and expand them. These efforts are particularly important because they take steps toward safeguarding abortion access in the states that enact them, even if the Supreme Court does gut long-standing abortion-rights precedent with *Dobbs v. Jackson Women’s Health Organization*. For example, New Mexico repealed a criminal abortion statute this year that had been on the books since 1969, paving the way for abortion access in the state.⁶ However, a large increase in the number of people seeking to travel from a hostile state to abortion-supportive states may undermine the accessibility of abortion in states that have taken proactive measures, as providers in those places may become overwhelmed.

At the federal level, the Biden administration has fortunately taken some important steps to undo the harms of the Trump administration and protect access to reproductive health care, including by pausing the U.S. Federal Drug Administration’s restrictions on medication abortion access for the duration of the COVID-19 public health emergency,⁷ moving to restore the Title X family planning program, and removing the Hyde Amendment from the president’s budget proposal. More recently, the U.S. Department of Justice filed its first suit against a state in defense of abortion rights, asserting in a federal district court that Texas’ S.B. 8 violates the supremacy clause, among other constitutional provisions, and deprives individuals of their constitutional rights.⁸ However, more action is urgently needed to ensure that the right to abortion meaningfully exists for everyone regardless of their income, insurance coverage, geographic location, employer, or any other factor.

Bans and restrictions to constrict or eliminate abortion access

Amid the COVID-19 pandemic, which presented the greatest public health threat in generations and exposed long-present systemic inequities in the U.S. healthcare system, legislators in nearly every state introduced bills that would undermine access to a form of essential health care: the ability to get a safe abortion. The Guttmacher Institute, which tracks state-level abortion legislation, has marked 2021 as the most devastating state legislative session for abortion rights in history.⁹ Guttmacher reports that as of early June 2021, 561 abortion restrictions have been introduced this year in all but three states.¹⁰

And as of early August, states had enacted 97 of those introduced abortion-restrictive statutes into law, bringing the total number of state abortion restrictions enacted since *Roe v. Wade* to 1,327.¹¹

These newly enacted restrictions compound the harms of abortion-restrictive laws that preceded them. Of the 97 new measures, more than 80 were signed into law in states that already have onerous abortion restrictions, making abortion even harder to access. Mississippi, for example, whose 15-week ban is at the center of *Dobbs v. Jackson Women's Health Organization*, already has laws requiring a 24-hour waiting period and multiple trips to the clinic, a biased counseling requirement, and provisions targeting abortion providers.¹² The state's one remaining clinic is a party to the pending Supreme Court case.

The abortion restrictions and bans that have passed in states this year come in a range of forms, all of which have the ultimate goal of ending access to legal abortion care in the United States. They include both established tactics and some new and incredibly extreme provisions designed to make abortion care inaccessible, including the following:

- **Coverage restrictions** limit the public and/or private insurance coverage of abortion care and restrict public funding for abortion.
- **Gestational bans** ban abortion after a certain point in pregnancy—such as at six, 15, or 22 weeks after the pregnant person's last menstrual period (LMP). Laws that ban abortion before viability—the point at which a fetus has the capacity for survival outside the uterus, something that must be determined medically and that varies with each pregnancy—are unconstitutional and prohibited by *Roe v. Wade*. They often mean that a person would be banned from receiving an abortion before they even know they are pregnant. The 15-week ban in the Mississippi statute at issue in *Dobbs v. Jackson Women's Health Organization* is an example of a gestational ban, and the continued legal validity of the viability line is at stake in that case.
- **Medically unnecessary requirements**, including waiting periods and biased counseling requirements, place additional burdens on people seeking abortion care. These can include added costs and time, as well as intentionally misleading or medically inaccurate information, such as requirements to provide false information about medically disproven “abortion reversal” for medication abortion.
- **Method bans** prohibit particular methods of abortion care, such as dilation and evacuation (D&E) procedures, the safest and most common method of abortion care in the second trimester. Method bans interfere with evidence-based medical decisions and further limit options for abortion care.
- **Parental involvement laws** require parental consent, parental notification, or judicial approval for minors seeking abortion care. These laws limit young people's bodily autonomy and access to abortion care, and they especially harm immigrants and people of color.¹³

- **Reason bans** ostensibly restrict abortion if the pregnant person's decision is based on a fetus' sex, race, or fetal diagnosis, purporting to promote gender, racial, or disability justice. In reality, these laws are part of a strategy to restrict abortion access and stigmatize abortion decisions, particularly for women of color. They allow politicians to interfere with health decisions that should be made between a pregnant person and their provider, while doing nothing to advance equity or justice.
- **So-called born-alive laws** require medical care for a fetus after the rare instance of an unsuccessful abortion. Such legislation is unnecessary, as denying care to fetuses is already illegal. These laws intentionally perpetuate false narratives about abortion later in pregnancy and seek to stigmatize abortion and interfere with evidence-based patient care.
- **Targeted restriction of abortion provider (TRAP) laws** place medically unnecessary requirements on clinics and providers that are designed to force them to stop providing abortion care.
- **Trigger bans** put laws on the state books to ban abortion if *Roe* is overturned.

Texas' S.B. 8 and 'bounty hunter' abortion bans

A new type of abortion restriction debuted this year in Texas as part of the state's six-week ban: S.B. 8 contains a cause of action provision, which creates a path of civil litigation for civilians, not state officials, to file suit against abortion providers or anyone else who helps a person obtain an abortion. Under the statute, any person who brings a successful suit will be awarded \$10,000 or more. This bounty hunter scheme was designed to thwart judicial intervention to protect abortion access before the law could take effect, and it has succeeded in that objective. Although a federal district court scheduled a hearing to consider whether the law should be enjoined, the Fifth Circuit intervened before the hearing took place and concluded that the law could go into effect.¹⁴ Over four dissents, the Supreme Court agreed.¹⁵ As a result, abortion after six weeks is, at the time of publication, unavailable in Texas, and other states—including Arkansas, Florida, Kentucky, Louisiana, Ohio, Oklahoma, South Carolina, and South Dakota—are reportedly looking to adopt similar statutes.¹⁶

States with 2021 abortion bans or restrictions

Certain state legislatures have stood out this year as particularly hostile to abortion care. Arkansas has enacted 10 restrictive abortion bills so far in 2021.¹⁷ The policies include a near-total ban on abortion, restrictions on access to medication abortion, TRAP laws targeting abortion providers, an ultrasound requirement, a ban prohibiting the use of public funds for abortion, and more.¹⁸ Arizona passed a wide-reaching bill with multiple abortion restrictions, including a reason ban based on genetic anomaly; medication abortion restrictions; a TRAP law; restrictions on funding for research using fetal tissue; and a ban on providing abortion care at facilities that are part of public educational institutions.¹⁹ These restrictions compound the existing barriers to abortion care and will push abortion access completely out of reach for many in these states.

Of the new restrictions enacted this year, 12 fall under the category of an abortion ban, including near-total bans, trigger bans, reason bans, and gestational bans.²⁰ Under its new law, Arkansas prohibits abortion in any instance, with an exception only for endangerment of the pregnant person's life.²¹ Oklahoma permits abortion only where it is "necessary to prevent the death of the mother or to prevent substantial or irreversible physical impairment of the mother that substantially increases the risk of death."²²

Idaho, Texas, Oklahoma, and South Carolina enacted bans that take effect when a fetal "heartbeat" is detectable in an ultrasound, before most people even know they are pregnant.²³ These so-called heartbeat laws are clearly unconstitutional because of how early in a pregnancy they fall—typically six weeks after a pregnant person's LMP—and will almost certainly continue to be challenged in the courts. Even if the Supreme Court finds that Mississippi's 15-week ban is constitutionally permissible, it could construct the finding in such a way that determines six-week bans are not. However, with the fate of constitutional abortion protections resting with the Supreme Court—and given the court's recent failure to intervene on Texas' S.B. 8—these laws are all the more alarming.

Additional broadly restrictive bills enacted this year include trigger bans passed in Oklahoma and Texas that would ban abortion if *Roe* is overturned or gutted,²⁴ joining 10 other states that have already passed such bans.²⁵ In addition to passing both a trigger ban and a near-total ban this year, Oklahoma enacted a bill that would take away medical licenses from people who provide abortion care, with limited exceptions.²⁶ Finally, Kansas, Kentucky (for the second year in a row), and Iowa's legislatures approved adding language to their constitutions stating that the state does not recognize or provide a right to abortion.²⁷ The Kansas and Kentucky bills have been enacted, but these measures would need to be approved by ballot initiative before the state constitutions are amended.²⁸ Although they have a limited immediate effect, they reflect the legislatures' opposition to the right to abortion.

The coronavirus pandemic showed the importance of telehealth in expanding access to health care and ensuring continuity of care, as well as the critical role of medication abortion in expanding safe options for abortion. Yet while many states acted to expand access to telehealth, some explicitly excluded abortion from their expansions and enacted further restrictions on medication abortion. Arizona, Indiana, Montana, Ohio, and Oklahoma all enacted laws requiring medication abortion care to be provided in person, thereby banning telemedicine for abortion care.²⁹ An additional restriction passed this year includes the requirement that only physicians who are board-certified in obstetrics and gynecology may provide medication abortion in Oklahoma—a limitation on access that has been found not to improve safety or quality of care.³⁰ Moreover, Arkansas, Indiana, Louisiana, Montana, South Dakota, West Virginia, and Oklahoma enacted "abortion reversal" laws that require providers to falsely counsel patients that a person can "reverse" an abortion after taking the first of two pills in the medication abortion regimen.³¹

In a year when policymakers have a particular responsibility to act to protect and expand access to quality, comprehensive health care, many have done just the opposite. Courts' ability to act as a stopgap has already been eroded. If the Supreme Court undermines abortion rights in *Dobbs v. Jackson Women's Health Organization*, that limited protection will be nearly decimated, making access to abortion care even more dependent than it already is on where a person lives and their income. These impacts would disproportionately harm people of color, people with low incomes, young people, people with disabilities, transgender and nonbinary people, immigrants, and people living in the South and Midwest.

Dobbs v. Jackson Women's Health Organization

The Supreme Court's decision to hear *Dobbs v. Jackson Women's Health Organization* is extremely concerning, particularly given the court's 6-3 conservative majority. The district court's and Fifth Circuit's findings clearly stated that the law is unconstitutional: "States may regulate abortion procedures prior to viability so long as they do not impose an undue burden on the woman's right, but they may not ban abortions. The law at issue is a ban." But rather than allow that finding to be the final word on the Mississippi statute, the Supreme Court decided to consider the matter itself.³² In theory, the case should be an easy one for the court, requiring the straightforward application of nearly a half-century of precedent to strike down Mississippi's blatantly unconstitutional law. But with the Supreme Court's impending ruling, the case presents the disconcerting possibility that the justices will choose to overturn *Roe* and *Casey*, or gut them, and consequently upend abortion's constitutional protections.³³ In its opening brief to the Supreme Court, Mississippi argued directly for overturning those long-standing and deeply established precedents.³⁴

Proactive efforts to protect and expand abortion rights

Relying on courts is insufficient protection, and proactive action is necessary to stop the harms of these state laws and safeguard and expand access to abortion care. In the midst of this onslaught of bans and restrictions, some states have taken important steps to advance legislation that protects and expands access to abortion care:

- **New Mexico:** In February, New Mexico repealed its pre-*Roe* abortion ban.³⁵
- **California:** California passed a resolution in April urging the federal government to support reproductive rights such as the fundamental right to an abortion and access to comprehensive reproductive health care, including the services provided at Planned Parenthood health centers.³⁶
- **Hawaii:** Also in April, Hawaii enacted a law to allow advanced practice nurses to provide abortion care, which will expand access to abortion by allowing additional qualified providers to provide care.³⁷

In addition to expanding providers, states have also acted to expand insurance coverage for abortion and undo restrictions on coverage:

- **Virginia:** Virginia enacted a bill in March that removes a prohibition on abortion coverage in health insurance plans through Virginia’s insurance marketplace.³⁸
- **Washington state:** Washington enacted a law in April that requires any student health plan that covers maternity services to also cover abortion care.³⁹ This law builds on the state’s requirement that any state-regulated health plan that covers maternity services also must cover abortion services.⁴⁰
- **Colorado:** In May, Colorado enacted a law that eases restrictions for abortion care in cases of rape or incest that is covered by public funds.⁴¹ It removes requirements that these abortion services must be performed by physicians and only in certain facilities, allowing a wider number of providers—such as nurse practitioners and physician assistants, who are licensed and acting within their scope of practice—to provide medically necessary abortion care.⁴²
- **Connecticut:** Connecticut’s governor signed a bill in May that prevents deceptive practices by crisis pregnancy centers—anti-choice fake clinics that do not provide comprehensive reproductive health care and that frequently attempt to prevent people from accessing abortion care. These centers often provide misleading information about abortion, such as claims that they can provide abortion reversals, which are medically impossible.⁴³

Virginia’s proactive measures

As a Southern state, Virginia’s support of abortion is particularly notable. Virginia’s removal, in March 2021, of a previous prohibition on abortion coverage in health insurance plans throughout the state’s insurance marketplace⁴⁴ builds on other proactive steps that Virginia has taken recently, including enacting the Reproductive Health Protection Act in 2020. That act expanded who can perform abortions and eliminated onerous and medically unnecessary restrictions, including a mandatory 24-hour waiting period, forced ultrasounds, mandatory biased counseling, and a requirement for abortion providers to meet unnecessary building requirements.⁴⁵

Even with these proactive measures in place, in practice, other states’ abortion restrictions may impede abortion availability across state lines. For example, in some states where abortion is recognized as essential health care, some providers are already experiencing an influx of patients as a result of the six-week ban in Texas.⁴⁶ One clinic in Oklahoma City has seen the number of calls it receives from Texas residents seeking abortion increase from approximately five per day before the ban to approximately 55 per day since S.B. 8 took effect.⁴⁷ Planned Parenthood clinics in Colorado, New Mexico, Arkansas, Kansas, and Oklahoma are also working to provide care to a surge in patients.⁴⁸

The increased number of people seeking care risks overwhelming clinics' capacity and prolonging wait times. So far, only Texas has been able to give effect to a six-week ban, but clinics in abortion-supportive states are bracing for other states' anticipated copycat bans. The more proactive measures that states can take to increase access, the better able they will be to serve people seeking abortion care both locally and from across state lines.

Conclusion

Ultimately, the continued state-level legislative efforts this year to erode abortion rights and rising threats in the courts make clear the need for a proactive abortion agenda at the federal and state level that moves beyond reliance on the judiciary and ensures meaningful access to abortion care for all.⁴⁹ In particular, these attacks show the need for federal legislation, such as the Women's Health Protection Act, that prevents restrictive laws and codifies meaningful abortion rights free from government interference. At the state and federal level, legislators and administrations can and should act to protect and expand abortion access and ensure that regardless of what happens in the courts, access to abortion is not dependent on a person's ZIP code, identity, or income.

Policymakers must continue to support and follow the lead of activists, organizers, and advocates on the ground who are working to ensure true access to abortion care and build a society that values and recognizes abortion as essential health care.

Elyssa Spitzer is a policy analyst with the Women's Initiative at the Center for American Progress. Nora Ellmann is a former research associate for women's health and rights with the Women's Initiative at the Center.

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TABLE 1
States that have enacted abortion-supportive
or abortion-restrictive laws in 2021

State	Enacted abortion-restrictive laws	Enacted abortion-supportive laws
Alabama	●	
Alaska	●	
Arizona	●	
Arkansas	●	
California		●
Colorado		●
Connecticut		●
Delaware		
Florida	●	
Georgia		
Hawaii		●
Idaho	●	
Illinois		
Indiana	●	
Iowa		
Kansas	●	
Kentucky	●	
Louisiana	●	
Maine		
Maryland		
Massachusetts		
Michigan		
Minnesota		
Mississippi		
Missouri		
Montana	●	
Nebraska		
Nevada		
New Hampshire	●	
New Jersey		
New Mexico		●
New York		
North Carolina		
North Dakota		
Ohio	●	
Oklahoma	●	

continues

State	Enacted abortion-restrictive laws	Enacted abortion-supportive laws
Oregon		
Pennsylvania		
Rhode Island		
South Carolina	●	
South Dakota	●	
Tennessee	●	
Texas	●	
Utah	●	
Vermont		
Virginia		●
Washington		●
West Virginia	●	
Wisconsin		
Wyoming	●	

Note: Data in this figure are current as of September 1, 2021.

Source: Author's calculation based on data compiled by the Guttmacher Institute. See Guttmacher Institute, "State Legislation Tracker: Major Developments in Sexual and Reproductive Health," available at <https://www.guttmacher.org/state-policy> (last accessed September 2021).

Endnotes

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