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If Roe Falls, States Can Protect Abortion Access

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For nearly 50 years, the Supreme Court has upheld the right to abortion, which has broad support among Americans. Yet access to reproductive healthcare remains uneven and fragmented, with states enacting 106 abortion restrictions in 2021, the highest number of restrictions passed in a single year since the *Roe v. Wade* decision.¹

In light of the unprecedented number of legislative attacks on reproductive access and recent appeals to the Supreme Court that could narrow abortion rights across the country, states have an important role to play in protecting access to abortion. While abortion remains legal, a shocking and unprecedented [draft majority opinion](#) from the Supreme Court that leaked on May 2, 2022 indicates the potential for the Court to overturn *Roe*. With the federal constitutional right to abortion under threat in over half of states in the country, state officials can step up to provide [clear state protections for abortion](#).

Background

The landmark 1973 abortion case—*Roe v. Wade*—affirmed the constitutional right to abortion. In *Roe v. Wade*, the Supreme Court held that every pregnant person has the right to decide whether to continue their pregnancy prior to viability, known as the point at which a fetus can survive outside of the womb. Nearly thirty years ago, in [Planned Parenthood v. Casey](#), the Supreme Court carefully examined arguments to revisit this landmark precedent and upheld the central principle that states cannot prohibit abortion until viability, but acknowledged that states may impose a range of limitations throughout the duration of a pregnancy, as long as the restrictions did not impose an “[undue burden](#)” on access to abortion. While the decision upheld the constitutionality of *Roe*, it opened the door for states to pass additional restrictions on abortion. In attempts to provoke Supreme Court challenges to further restrict abortion rights, many states have begun to enact legislation that bans abortion before this fetal viability standard, generally considered to be 24-28 weeks.

State-Level Attacks

¹ Guttmacher Institute. [For the First Time Ever, U.S. States Enacted More Than 100 Abortion Restrictions in a Single Year](#). October 2021.

Several state legislatures have either enacted legislation to facilitate *Roe* being overturned by the Supreme Court or to maximize the impact of *Roe* being potentially overruled. States have enacted previability bans to provoke legal challenges to *Roe*, “[trigger laws](#)” that would automatically outlaw abortion if *Roe* is overturned or weakened (currently in 13 states), laws declaring a state’s intent to ban abortion to the extent permitted by the U.S. Constitution, and amendments to state constitutions declaring that there is no protection for abortion rights under state law.

Additional [major threats at the state level](#) include:

- **Unconstitutional Abortion Bans** prohibit abortion based on gestational age, reason, or fetal diagnosis.
- **Non-surgical Abortion Restrictions** limit the provision of medication abortion as a safe and effective method to terminate a pregnancy.
- **Biased Counseling, Mandatory Ultrasounds, and Waiting Periods** force providers to communicate medically inaccurate information designed to dissuade patients from having an abortion, provide medically unnecessary procedures, and delay access to care.
- **Targeted Restrictions on Abortion Providers (TRAP) laws** impose medically unnecessary and onerous regulations regarding facilities, equipment and staffing requirements, and providers.
- **“Personhood” Amendments** attempt to change the legal definition of the word “person” to include a fertilized egg for the purpose of criminalizing abortion.
- **Attacks on Family Planning Providers Who Provide Abortion** including Planned Parenthood, by eliminating funding for family planning or blocking their participation in public health programs, including Medicaid.

State-Level Attacks and SCOTUS: Texas and Mississippi Cases

In addition to these political maneuvers by state lawmakers, there are two major abortion lawsuits involving pre-viability bans that have recently been appealed to the Supreme Court— [Whole Woman’s Health v Jackson](#) and [Dobbs v. Jackson Women’s Health Organization](#).

Last November, the Supreme Court heard arguments in *Whole Woman’s Health v. Jackson* on the threshold issue of whether or not federal courts have the power to preemptively block blatantly unconstitutional laws. The Texas law, known as SB 8, deputizes private individuals, rather than state officials, to sue abortion providers and anyone who helps a person obtain an abortion after six weeks of pregnancy in order to evade judicial review. Anyone who successfully sues another person or provider would be entitled to at least \$10,000 in damages.

On December 10, 2021 the Supreme Court held in *Whole Woman's Health v. Jackson* that abortion providers may proceed with legal challenges to a near-total ban on abortions in Texas—against certain state licensing officials— but did not block enforcement of the law in question. The ruling also held that abortion providers may not sue state court judges, court clerks, or the state's Attorney General, [key parties responsible for moving cases forward](#) whom abortion providers were seeking to block from enforcing the unconstitutional law. Given the Supreme Court's decision, the vast majority of abortion access in Texas has been eliminated ([medication abortion has been restricted](#) but is still available), effectively making most abortion care unavailable to the large number of people who cannot overcome the logistical, financial, and discriminatory obstacles of traveling out of state to access care. SB 8 is the first unconstitutional, pre-viability abortion ban to go into effect.

Separately, the Supreme Court heard oral arguments last December on *Dobbs v. Jackson Women's Health Organization*. This case involves a Mississippi law HB 1510, the Gestational Age Act, that was enacted in 2018 and bans all abortions after 15 weeks of pregnancy except in medical emergencies and in cases of severe fetal diagnosis. The Mississippi ban has been blocked since 2018 and is not currently in effect. The state's [sole remaining abortion clinic](#), Jackson Women's Health Organization, challenged the law, which has been appealed by the state up to the Supreme Court, marking the first time in 50 years that the Supreme Court agreed to hear a case on the constitutionality of a pre-viability abortion ban. The *Dobbs v. Jackson Women's Health* case is arguably one of the most important abortion cases to be litigated in recent decades due the state of Mississippi directly asking the Supreme Court to overturn *Roe v. Wade* and *Planned Parenthood v. Casey*. There is no path for the Supreme Court to uphold Mississippi's ban without overturning *Roe's* central holding regarding individuals' rights to make fundamental decisions about their lives, their families, and their futures.

On May 2, 2022, *Politico* published the leaked draft majority opinion on the *Dobbs vs. Jackson* case, written by Justice Samuel Alito. The draft opinion states:

“We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.”

Copycat Legislation—States to Watch

There are a number of states that have begun to craft legislation that mimics Texas's private right of action provision, which "deputizes" citizens, or have expressed interest in such a law: [Alabama](#), [Arizona](#), [Arkansas](#), [Florida](#), Georgia, Idaho, [Indiana](#), Iowa, Kentucky, Louisiana, Michigan, [Mississippi](#), [Missouri](#), North Dakota, Pennsylvania, [Ohio](#), [Oklahoma](#), South Carolina, [South Dakota](#), and Tennessee.

The emergence of abortion private right of action provisions and the increased interest by state lawmakers in replicating them is particularly alarming, given that these laws could be used as a tool to reward vigilante action to [surveil and threaten certain groups vulnerable to disproportionate punishment](#).

Broader Implications of Abortion Restrictions

[If Roe is overturned](#), abortion would remain legal in 22 states and the District of Columbia based on existing state laws, while 25 states and three territories would either immediately ban or likely move to enact legislation to ban abortion. The remaining three states (NH, NM, VA) and territories (PR and USVI) have yet to codify the right to abortion, leaving access to abortion care in these states tenuous should *Roe* fall.

The people hurt most by abortion restrictions are those who already face barriers to accessing health care—including women, Black, Indigenous, and People of Color, those working to make ends meet, LGBTQ+ people, immigrants, young people, those living in rural communities, and people with disabilities. As abortion restrictions continue to expand in scope and become more repressive, the effect on marginalized communities may be felt most heavily because restricted abortion access can exacerbate existing social inequalities and disparities in maternal health equity.² States with more abortion restrictions have higher rates of maternal and infant mortality, which are particularly pronounced in Black women. In 2019, the National Black maternal mortality rate was 44 deaths per 100,000 live births compared to a rate of 17.9 white deaths. Additionally, limiting abortion through various restrictions—such as waiting periods, mandatory ultrasounds, and parental consent—has been shown to *increase* rates of unsafe abortion. Barriers to abortion access also delay critical prenatal care, further contributing to poor maternal health outcomes.³

The current web of restrictions creates significant and sometimes insurmountable barriers for people seeking abortion care. People seeking care must often [travel long distances](#), take unpaid time off from work, and find and pay for child care due to state-mandated waiting periods, medically unnecessary repeat visits where doctors

² Commonwealth Fund. [Texas's New Abortion Law Will Harm People of Color Further](#). September 2021.

³ Center for American Progress. [Limiting Abortion Access Contributes to Poor Maternal Health Outcomes](#). June 2018.

must provide patients false information, and a lack of providers due to clinics being forced to close.

Moreover, if the Supreme Court's final decision in *Dobbs v. Jackson Women's Health* relies on the same reasoning in the draft leaked opinion and reaches the same conclusion, it may be the precursor to future legal challenges to other fundamental rights and liberties Americans currently have.

Protection of Abortion Rights

In light of these attacks on abortion, states can enact legislation to protect and expand abortion access. Some states have already taken proactive steps to protect abortion by codifying it into state statutes and state constitutions, and repealing pre-*Roe* laws criminalizing abortion. Lawmakers and advocates in support of abortion rights can work together to counter the barrage of attacks on reproductive rights by strengthening abortion laws in their respective states. Strategies to strengthen the legal and policy framework of state abortion laws can be found below:

- Ensure insurance coverage of abortion for Medicaid enrollees using state dollars.
- Require private insurers to include abortion as a covered service.
- Affirm the right of adolescents to receive abortion services by eliminating parental involvement requirements.
- Pass measures to prevent harassment, vandalism, and violence against abortion clinics and providers.
- Repeal TRAP laws and other regulations that impose medically unnecessary and costly burdens on reproductive healthcare facilities.
- Expand the pool of abortion care providers to non-obstetrician-gynecologist providers to allow additional qualified medical professionals to perform procedures.
- Expand online and telehealth consultations for medication abortions.
- Promote policies and practices that support individuals who self-manage their abortion (medication abortion).

The state of California has announced plans to directly allocate funding to provide abortions to those seeking care from out of state if *Roe* is overturned, which could serve as a useful blueprint for other states to follow. California lawmakers recently introduced a [legislative proposal](#) to direct investments in abortion funds and “practical support needs,” like abortion doulas and translation services for those requiring additional assistance. The proposal calls for the creation of an “uncompensated care program” to reimburse abortion providers for services rendered to individuals without the means to pay for care, including low-income

individuals traveling from out-of-state. The New York Attorney General has called for the state of New York to take [similar actions](#) to provide resources to people seeking care from out-of-state.