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State-Level Legal and Political Strategies Following the Repeal of Roe v. Wade: Proceedings of a Workshop in Brief (2024)

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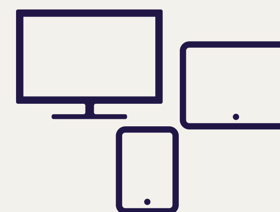

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NATIONAL ACADEMIES Sciences Engineering Medicine

Proceedings of a Workshop—in Brief

State-Level Legal and Political Strategies Following the Repeal of *Roe v. Wade*

Proceedings of a Workshop—in Brief

OVERVIEW

On October 27, 2023, the National Academies of Sciences, Engineering, and Medicine (the National Academies) Standing Committee on Reproductive Health, Equity, and Society held a virtual public webinar to explore state-level legal and political strategies related to access to reproductive health care services, including abortion care, following the *Dobbs v. Jackson Women's Health Organization* ruling, which overturned the 1972 *Roe v. Wade* decision. This workshop was the third in the "After *Roe*" webinar series organized by the standing committee.[1] The series is designed to consider the effects on society of limits on access to reproductive health care in order to elevate challenges and strategies to protect health and well-being.

During the webinar, panelists examined several key areas: updates on state and federal legal challenges to abortion bans, state level strategies to increase access to reproductive health care, the role of ballot initiatives in reproductive rights, additional strategic avenues such as legislative advocacy, inequities and systemic barriers to accessing reproductive health care, and how the legal landscape affects the science of reproductive health care.

[1] For more information see https://www.nationalacademies.org/our-work/standing-committee-on-reproductive-health-equity-and-society#sectionWebFriendly (accessed February 17, 2024).

This Proceedings of a Workshop—in Brief is a high-level summary of the topics and discussions that occurred during the workshop. It should not be viewed as providing consensus conclusions or recommendations of the National Academies. It is important to note that speakers discussed the status of state and federal laws and litigation at the time of the event. Given the changing legal landscape around these issues, these statements may be out of date by the time this proceedings in brief is published.

THE LEGAL FRAMEWORK FOR ABORTION AT THE STATE LEVEL

Moderator Ellen Wright Clayton (Vanderbilt University) opened by acknowledging the "tremendous amount" of legal activity at the state level following the *Dobbs* decision and turned to Laurie Sobel (KFF) for an overview of state policies on abortion access.

Sobel began with a presentation on the status of abortion laws and ongoing litigation in the United States, including abortion bans, restrictions, and protections, as well as litigation in the federal court system. She shared a map illustrating that 14 states have abortion bans in effect, 4 states have enacted bans on abortion from 6–12 weeks following the last menstrual period (LMP), 3 states have enacted bans on abortion from 15–18

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weeks since LMP, and 8 states have enacted bans after 22–24 weeks since LMP (see Figure 1). Sobel added that 21 states and the District of Columbia have either no gestational limit on abortion access or a third-trimester limit. Sobel also noted that 18 states have restrictions on access to abortion, such as waiting periods, ultrasound requirements, or restrictions on access to medication abortion (e.g., a ban on telehealth access for medication). She pointed out that some states with either no gestational limit or with a third-trimester limit have other abortion restrictions that limit access. "Michigan, which has a constitutional amendment now protecting abortion, still has some of these restrictions in place," she said.

Sobel then walked through the legal challenges to state-level abortion bans and gestational limits. She said that 15 states have ongoing litigation. One state, Michigan, has concluded litigation and permanently blocked an abortion ban, and 3 states have concluded litigation and preserved a ban or gestational limit.[2] Sobel explained that 10 states have constitutional protections for abortion care, either through a constitutional amendment or a court decision. Sobel added that in Florida, there is ongoing litigation although a previous Supreme Court of Florida decision determined the right to abortion is protected within the state's constitution. "We're looking to see whether that state Supreme Court is going to overturn that decision," she said.

Turning to legal efforts to clarify the scope of exceptions included in state abortion bans, Sobel identified three states where litigation is ongoing. These cases do not challenge the ban or gestational limit itself, rather they seek to clarify the medical exceptions referenced in the language of the bans and seek to address issues like pregnant patients who may be concerned about seeking care and physicians who may be "fearful of giving care due to the potential of criminal prosecution."

Sobel described four categories of legal bases for challenges to state-enacted abortion bans and restrictions:

- *Broad constitutional challenges* assert that state constitutional protections encompass a right to abortion.
- *Health care amendment challenges* argue that health care amendments adopted in state constitutions following the passage of the Affordable Care Act give individuals the right to make health care decisions which include abortion.

FIGURE 1 State abortion policies: bans, restrictions, and protections.
NOTE: LMP = last menstrual period.
SOURCE: Presented by Laurie Sobel on October 27, 2023, at the webinar After *Roe*: Legal Aftermath at the State Level; KFF. 2024. Abortion in the United States Dashboard. KFF analysis of state policies and court decisions, as of January 9, 2024. https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard (acessed February 17, 2024).

[2] For more information see https://www.kff.org/womens-health-policy/report/state-and-federal-reproductive-rights-and-abortion-litigation-tracker (accessed February 17, 2024).

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- *Religious freedom challenges* assert that bans or restrictions unduly infringe on "religious exercise" or violate state constitutional protections against the establishment of religion.
- *Health exception challenges* argue that the limited scope of the health exceptions to abortion bans and restrictions violates state constitutional guarantees to equal rights and fundamental rights.

In addition to state-level litigation, Sobel discussed litigation in federal courts that relates to the Emergency Medical Treatment and Labor Act (EMTALA). Following *Dobbs*, the U.S. Department of Health and Human Services issued guidance reinforcing that EMTALA requires physicians to provide stabilizing care, which may include abortion care, to emergency room patients. Sobel discussed *United States v. Idaho*, in which the federal government argued that Idaho's ban on abortion care with no exceptions for life-threatening circumstances violates EMTALA. In this case, the court blocked enforcement of the ban when in conflict with EMTALA. In *Texas v. Becerra*, Texas argued that the federal government cannot compel clinicians to provide abortion care under EMTALA. The court found in favor of the state's argument. Sobel added that these two cases are continuing to move through the federal court system.

Sobel ended her presentation with an overview of federal court cases related to one of the medications used in medication abortions, interstate travel to seek abortion care, and criminalization related to referring patients to out-of-state abortion care. She described the *Alliance for Hippocratic Medicine v. Food and Drug Administration* (FDA) case in which the FDA's approval of mifepristone has been questioned. The Supreme Court of the United States is currently considering whether or not to hear the case. In the *Yellowhammer Fund v. Marshall* case, providers of abortion care and abortion funds have challenged the Alabama Attorney General's interpretation that state criminal statutes allow prosecution of a person helping a pregnant individual seek out-of-state abortion care. Finally, Sobel described *Planned Parenthood Great Northwest v. Labrador,* in which providers have challenged the Idaho Attorney General's interpretation that the state's abortion ban criminalizes medical providers who refer patients for out-of-state abortion care. Sobel explained that the last two cases call into consideration the ability of a state to legislate outside of its borders.

THE ROLE OF BALLOT INITIATIVES IN REPRODUCTIVE RIGHTS

Jessie Hill (Case Western Reserve University School of Law) gave an overview of ballot initiatives focused on reproductive health. Hill explained that "a ballot initiative is when citizens propose a new measure to put on the ballot and then it can be adopted by a popular vote." She noted that states can use this process in the case of laws or statutes, constitutional amendments, or both. Hill also explained that a referendum, another type of measure, is an "up or down vote on a measure that the legislature has put forward." She added that in every state there is also a process in which the state legislature can propose an amendment to the state's constitution.

There were six ballot measures related to reproductive health and abortion in the states in the 2022 elections, Hill said. In California, Michigan, and Vermont, constitutional amendments recognizing a right to abortion were passed. In Kansas and Kentucky, there were ballot measures seeking to amend the state constitutions. Hill explained that "the legislature had proposed these amendments to try to amend the state constitution to say that there is no right to abortion" and that the measures failed in both states. She added that an "anti-abortion statutory referendum" failed in Montana. Hill noted the 26 states where these measures—ballot initiative, referendum, or both—exist. She explained that "for the purposes of expanding and protecting abortion access, particularly in states where it's currently not accessible, the most important thing is for citizens to be able to amend their own constitution." Hill pointed out that in 13 states with abortion bans or early gestational limits in place there are no processes for citizen-referred ballot measures (see Figure 2). She added that, in Wisconsin and Iowa, bans are not currently in effect owing to ongoing litigation.

Ballot measures related to abortion access are upcoming in several states, Hill shared. Measures will be on the ballot in Ohio in November 2023 and in Maryland and New York in November 2024. She explained that ballot

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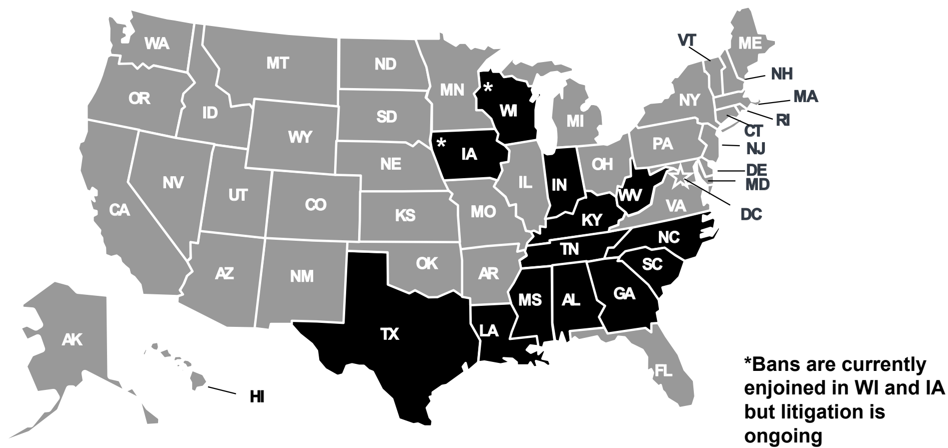

FIGURE 2 States with abortion bans and early gestational limits and no process for citizen-referred ballot measures in black.
SOURCES: Presented by Jessie Hill on October 27, 2023, at the webinar After *Roe*: Legal Aftermath at the State Level; KFF. 2024. Abortion in the United States Dashboard. KFF analysis of state policies and court decisions, as of January 9, 2024. https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard (accessed February 17, 2024).

measures related to abortion care are in process and may appear on the ballot in 2024 in several other states: in Arizona, Colorado, Florida, Montana, Nebraska, Nevada, and South Dakota potential measures are focused on establishing a right to abortion, and, in Iowa and Pennsylvania, potential measures are focused on declaring that there is no constitutional right abortion.

Hill discussed the ballot measure in Ohio in greater detail. She explained the state has geographic importance in terms of abortion access because it is an access point for people from restrictive states in the Midwest, South, and Southeast. The ballot measure in Ohio would "codify the right to reproductive freedom, including abortion, in the Ohio constitution" and Hill said it is of particular interest because, if passed, it will be the "first affirmative pro-choice ballot initiative post-*Dobbs*" in a state where "the legislature, executive branch, and state supreme court are all 'hostile' to abortion." Hill described the process for ensuring the measure would be on the ballot, explaining that requirements included gathering over 400,000 valid signatures from at least 44 of the state's 88 counties and meeting certain signatory thresholds for those counties.

Hill described several current abortion restrictions and litigation in Ohio. She noted that abortion access was available up to 22 weeks since LMP and a 2019 6-weeks since LMP ban was blocked and is pending on appeal in the Supreme Court of Ohio.

Hill closed by explaining that there are various abortion restrictions that can significantly affect access to abortion even in the absence of a ban. For example, she noted a 2019 ban on the dilation and evacuation method of abortion that has been in effect post-*Dobbs* and a fetal or embryonic tissue burial or cremation restriction that has been blocked and is pending in court.

CONNECTING STATE LEGISLATORS TO SCIENTIFIC RESEARCH AROUND REPRODUCTIVE HEALTH

Fran Linkin of the State Innovation Exchange (SiX) spoke about the role of state legislators and the importance of building awareness about the range of research available to them. She introduced the organization's Reproductive Freedom Leadership Council, "a cohort of 636 state legislators in all 50 states ... committed to championing reproductive health rights and justice." She explained that SiX provides training, technical assistance, and other types of support to state legislators, working in partnership with local and state-level health, rights, and justice advocates and researchers. Linkin explained that state legislators often work with limited resources and "in 40 states, state legislators work in part time or hybrid legislative roles" where they may have a salary range of "$18,000 to $41,000 a year" or no salary. She added, "Most legislators have access to little or no paid staff to support them in navigating the complex and urgent demands of running an office." Because of these circumstances, Linkin said that state legislatures are often made up of people who are "far from being representative

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of their state by almost every measure, whether it be race, gender identity and expression, class, age, sexual orientation, immigration, status, or occupation."

Linkin emphasized the importance of connecting state legislators with reliable sources of data and research. She explained that, in addition to research about their own states, legislators are eager to learn from their regions, other states with similar political environments, and international contexts. Linkin noted that state legislators have been using abortion volume tracking data to develop a better understanding of what services are needed in their states and how to better support their constituents. She emphasized that what happens in one state has a significant effect on what happens in neighboring states. Access to research can support proactive policy efforts to protect reproductive health care access or with defensive efforts in states where restrictions are in place, she said. Linkin added that implementation research is also critical in order to understand how laws that are passed are supporting people.

State legislators have expressed interest in a range of reproductive health-related topics since the *Dobbs* decision, Linkin said, including the regional effects of abortion bans, criminalization related to pregnancy outcomes, and medication abortion. These topics can provide guidance on the types of research that could be compiled for state legislators, Linkin stated. She added that state legislators who have made connections with researchers and health care providers report feeling more confident discussing abortion.

Linkin closed with a recent example of "the collective power of state legislators" in which more than 600 legislators submitted an amicus brief asking the Supreme Court of the United States to review the *Alliance for Hippocratic Medicine v. Food and Drug Administration* case regarding mifepristone. She said this example illustrates that state legislators understand the need for medication abortion and that it "transcends state borders."

ADVOCACY TO INCREASE ACCESS TO REPRODUCTIVE HEALTH CARE

Joia A. Crear-Perry (National Birth Equity Collaborative [NBEC]) discussed the importance of advocacy to advance reproductive health access and health equity. She explained that the conversation regarding reproductive health access has been "fraught for Black, Brown, and Indigenous people" and individuals with limited resources. Leading up to the 49th anniversary of *Roe v. Wade* in 2022, Crear-Perry explained that NBEC worked with Donna Brazile, Black Mamas Matter Alliance, SisterSong Women of Color Reproductive Justice Coalition, Black Women's Health Imperative, and In Our Own Voice: National Black Women's Reproductive Justice Agenda to place a full-page ad in the *New York Times* emphasizing that reproductive justice is an issue affecting Black families and communities. She said that this effort built on a 1989 letter titled, "We Remember: African American Women for Reproductive Freedom," that included Shirley Chisholm and Rosa Parks as signatories. Crear-Perry noted that the 2022 *New York Times* ad garnered support from the Congressional Black Caucus, the National Association for the Advancement of Colored People, and the Urban League.

Crear-Perry examined the concept of reproductive justice. She explained that the term, developed by U.S. Black women in 1994, refers to the "human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities" and that it is "rooted in our experiences with and resistance to reproductive oppression." Crear-Perry emphasized that policies jeopardizing reproductive justice, like involuntary sterilization, are still happening today and that "equitable access to safe and legal abortion is a reproductive justice issue for all people."

She referred to a definition of *reproductive freedom* included in the 1989 letter and noted that the "right to safe, legal, affordable abortion" is necessary to achieve reproductive freedom. Crear-Perry explained that birth equity describes "the assurance of the conditions of optimal births and well-being for all people combined with a willingness of systems to address racial and social inequities." She added that "assurance" refers to a range of policies, from legal and legislative action to the policies in place at health care facilities, such as hours of operation.

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Highlighting the role of states, Crear-Perry described an amicus brief NBEC prepared alongside the Center for Reproductive Rights that focused on tying maternal health care to abortion care. The brief, she said, focused on the state of Mississippi's "failure to protect maternal health as a pattern." She stated that "women's health outcomes tend to be worse in states that have enacted a greater number of abortion restrictions" and that, to prioritize maternal health, states should put in place policies that "support pregnant persons and their families, including expanding insurance, having community-based prenatal care, and paid family leave." Crear-Perry referenced a *New England Journal of Medicine* article, "The End of *Roe v. Wade*—States' Power over Health and Well-Being," and noted that it is necessary for state legislators to "understand the importance of well-being and privacy" in the wake of the *Dobbs* decision.

In closing, Crear-Perry outlined several potential strategies to support reproductive justice. She emphasized exploring "Medicaid expansion, paid family leave, telehealth, and ensuring optimal prenatal mental health." She also referred to a potential federal solution for increasing access to reproductive health care, noting that, in 2021, a letter called for the creation of a White House Office of Sexual and Reproductive Health and Well-Being under the Domestic Policy Council to "develop a federal strategy for promoting equitable sexual reproductive health and well-being through a human rights, gender and racial equity lens."

DISCUSSION

To close the workshop, speakers responded to questions posed by audience members.

The moderator asked speakers to comment further on additional possible constitutional strategies to protect access to abortion care. Hill noted that many advocates suggest that abortion restrictions are in violation of sex equality owing to women being uniquely affected. Sobel highlighted that many advocates have posited that working to preserve abortion access under the equal rights protection may be an avenue to explore and that there may be legal bases to consider to preserve a right to contraception.

The speakers commented on trends and the effectiveness of advocacy and other efforts in states where abortion access is restricted. Crear-Perry explained that the effects of abortion restrictions on communities in the southern United States have led to an increase in allies for organizations working to enhance access to reproductive health services. Linkin said that there are state legislators in these states working to address issues related to the loss of abortion access and she noted efforts to address misinformation. Clayton said that rising rates of maternal mortality in the United States, particularly among Black women, is an area relevant for advocacy across states.

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For additional information regarding the workshop, visit http://www.nationalacademies.org/our-work/standing-committee-on-reproductive-health-equity-and-society.

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Health and Medicine Division

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