

Reproductive Health Care
*Litigation, Privacy and Public Health: Updates
Post-Dobbs*
October 25, 2023

Introductions

- Moderator:

Ashleigh Dennis, Staff Attorney, Harm Reduction Legal Project, Network for Public Health Law

- Presenters:

Kathi Hoke, Director, Eastern Region, Network for Public Health Law; Professor at Maryland Carey School of Law

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State Litigation on Abortion Post-*Dobbs*

Kathi Hoke

Director, Eastern Region of the Network for Public Health Law

Professor, University of Maryland Carey School of Law

October 25, 2023

Roe v. Wade (1972)

Supreme Court Holding:

Due Process Clause of the Fourteenth Amendment implicitly includes a fundamental ***“right to privacy”*** that encompasses a pregnant person’s choice to have an abortion.

The right was not absolute but balanced against the government’s interests in ***protecting the health of pregnant people*** and ***protecting “the potentiality of human life.”***

Set up nearly 5 decades of a right to abortion protected by the federal constitution.

Dobbs (Health Officer, Mississippi) v. Jackson Women's Health Organization
June 2022

Facts:

Mississippi passed 15-week abortion ban with exceptions for medical emergency and severe fetal abnormality in clear violation of *Roe*.

The Disappearing Act

Supreme Court Holding:

The federal constitution does not confer a right to abortion, overturning *Roe*.

Litigation Applying State Constitutions Post-Dobbs

Two Type of Cases:

- ✓ Pre-*Dobbs* case law finding right to abortion in state constitution
- ✓ Post-*Dobbs* challenges to abortion bans based on state constitution

State Constitutions: Pre-Dobbs Case Law

State Supreme Courts found the right to abortion protected in the state constitution—all post-*Roe*

Montana

Minnesota

Florida

Tennessee?
Iowa?

New Jersey

Alaska

Kansas

California

Massachusetts⁷

South Carolina

State Constitutions: Post-Dobbs Case Law

Abortion ban challenges based on state constitutional protections have been filed in at least 10 states—some still pending

Post-Dobbs Case Law: North Dakota Constitution

North Dakota passed a near-total ban (2007) with a *triggering provision*; *Dobbs* triggered

ND Supremes Upheld Preliminary Injunction

- State constitution and ND's history/traditions include fundamental right to an abortion *when necessary to preserve the life or health of the patient.*
- Ban not narrowly tailored to achieve a *compelling state interest.*
- Did NOT decide whether state constitution protects abortion beyond risk to pregnant person's life or health.

Post-Dobbs Case Law: Indiana Constitution

Indiana was the first state to pass a near-total ban after the *Dobbs* decision.

State Supreme Court upheld the ban against a challenge based on the state constitution; law went into effect in September and all 6 abortion clinics in the state closed.*

Post-Dobbs Case Law: South Carolina Constitution

→ South Carolina passed a 6-week abortion ban with extremely limited exceptions

SC Constitution: Specific Reference to Right to Privacy

→ Supremes found the ban to violate the state constitution in January 2023

And then . . .

Post-Dobbs Case Law: South Carolina Constitution

SC Supremes August 2023 found constitutional a bill almost identical to the one struck down in January.

What the heck happened?

- ✓ Change in composition of the court
- ✓ Slight modifications to the bill
- ✓ Swing vote (J. Few) satisfied

And then . . .

New challenge on vagueness filed September 14 so stay tuned!



Post-Dobbs Case Law—Montana Constitution

Post-Dobbs state law that prohibits APRNs from providing abortion care was struck down!

The Court found that the state constitution guarantees the right to seek abortion care from a qualified healthcare provider of their choice.

“Abortions remain one of the safest procedures when performed collectively by health care providers, including APRNs.”

State Constitutions: Pending Post-Dobbs Case Law*

Cases pending on state constitutional grounds in many states ***with temporary injunction against enforcing the ban*** (Utah; Ohio; Wyoming)

Cases pending on state constitutional grounds in many states with ***courts allowing law to remain in effect*** (Kentucky; Oklahoma; Florida; Idaho*)

What about Michigan?



Other Post-Dobbs Challenges: State Religious Freedom and Restoration Act (State RFRAs) and State Constitution Religious Freedom

Challengers are members of various religions and allege that their ***religion requires abortion in certain circumstances*** that go beyond the life-threatening emergency most statutes cover.

Example: Indiana Case (Judaism, Islam, and Unitarian Universalism):

Religions require abortion care if pregnancy jeopardizes mental or physical health of the pregnant person, without necessarily causing serious risk of substantial and irreversible physical impairment of a major bodily function, as the ban's health exception would require.

Indiana Supreme Court has allowed injunction to remain while case proceeds to trial; class certification appealed

New Wave of Cases: Patients (with medical professionals)

- ✓ People who were denied **LAWFUL** necessary and potentially life-saving medical care because physicians fear the penalties imposed by abortion bans (Texas, Idaho, Oklahoma, Tennessee);
 - These patients have been joined by medical professionals in some states (Tennessee and Idaho);
- ✓ Patient who was denied stabilizing medical care by way of abortion when she presented at hospital emergency room, alleging a violation of the Emergency Medical Treatment and Labor Act (EMTALA) (Oklahoma)

New Wave of Cases: Providers

- ✓ Challenges for vagueness (typically of what qualifies as life-threatening or emergency that allows for abortion);
- ✓ Challenge to Alabama's de facto ban on birthing centers by permitting care to be provided only in a hospital (*injunction issued October 3*) and similar provision in North Carolina (*enjoined*);
- ✓ Challenge to NC's requirement that doctor certify where fetus was evident in uterus before providing medication abortion (*enjoined*).

New Wave of Cases: Providers

- ✓ Challenge to Guam's 1990 law that prohibits medical professionals from advising clients on seeking abortion care that is unlawful in Guam, raising 1st Amendment *(remains under decades-old injunction despite AG's request to remove injunction due to Dobbs);*
- ✓ Challenging prohibition on use of Medicaid to cover abortion care as an equal protection challenge

Litigation is a public health tool . . .

THANK YOU

States As Laboratories Of Democracy: Reproductive Healthcare in Local Health Departments *Post-Dobbs*

Joanna S. Suder, JD
Senior Attorney
Network for Public Health Law

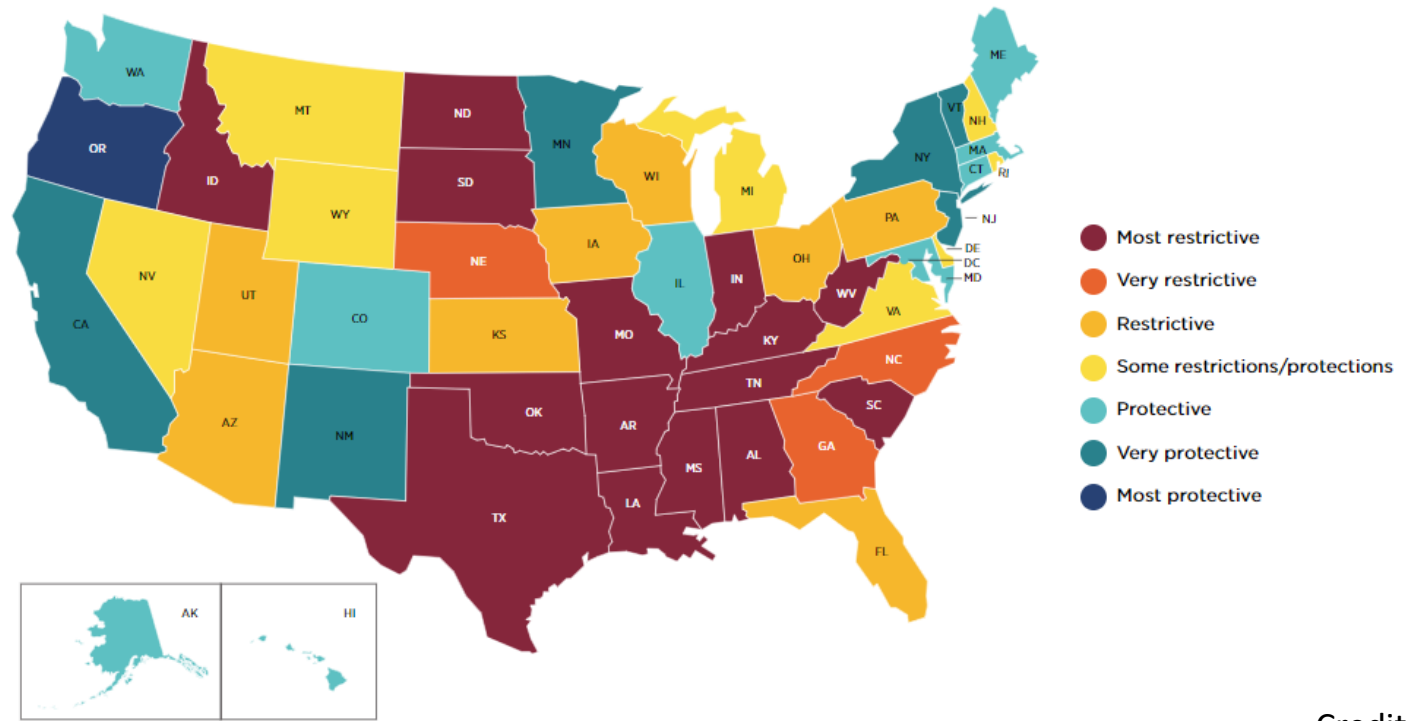
Interactive Map: US Abortion Policies and Access After Roe

The abortion landscape is fragmented and increasingly polarized. Many states have abortion restrictions or bans in place that make it difficult, if not impossible, for people to get care. Other states have taken steps to protect abortion rights and access. Our interactive map groups states into one of seven categories based on abortion policies they currently have in effect. Users can select any state to see details about abortion policies, characteristics of state residents and key abortion statistics.

Note: You may need to clear your browser's cache or open this page in an incognito window to ensure you are viewing the most recent version.

October 10, 2023 (policies are current as of this date)

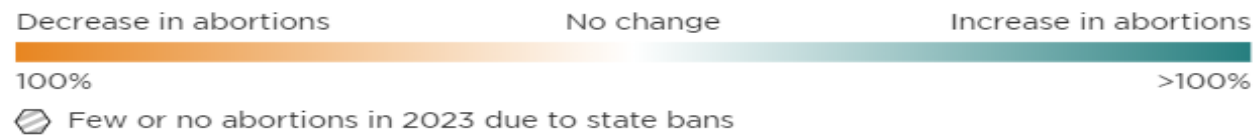
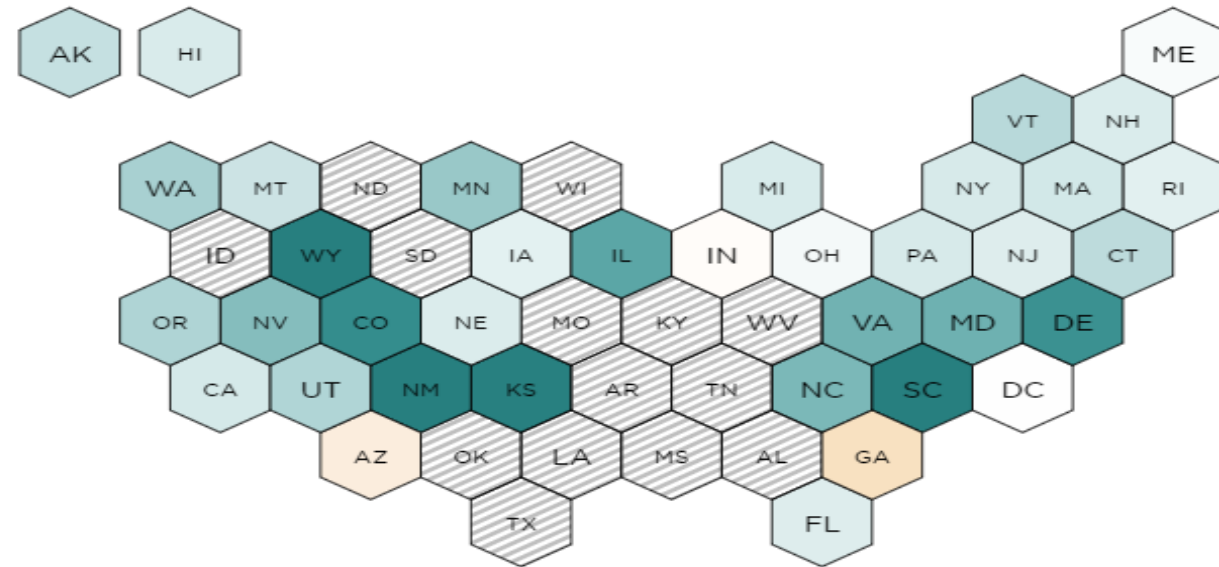
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Estimated change in the number of abortions provided by the formal US health care system, 2020 to January-June 2023

Hover over any state to display change.

Toggle to see % change








2020 abortion counts are divided by two to represent a six-month period. This graphic will be updated with a full-year comparison once data are available.

Credit: Guttmacher Institute

Jurisdictions

- Chicago Department of Public Health
 - abortion legal in Illinois
- New York City Department of Health and Mental Hygiene
 - abortion legal in New York
- Tribal Nation with members in multiple states
 - some where abortion is legal, some where it is not
- Mid-size city
 - state where abortion is illegal
- Public Health department serving over one million residents
 - state where abortion is legal

Services Offered Before After Dobbs

- New York
 - Very little focus on reproductive health  free, walk-in, access to medication abortion in almost every borough.
- Chicago
 - Very little focus on reproductive health  office of reproductive health; city funding to PPIL and Chicago Abortion Fund, training providers, offering more services at CDPH clinics
- Tribal Nation
 - Comprehensive family planning services  increased community discussions; advance practice pharmacists can dispense MA.
- Mid-size city
 - No family planning services at clinics  hiring APRNs and providing contraceptive care.
- Public Health Department
 - Comprehensive family planning services  no real change; hiring more APRNs to provide services.

Major Themes

- Polarity
- Support for and from the community
- Access → Care and Information
- Preventive services
- Optimism

“We take care of ourselves and that’s the purview of local health departments”

“We stay the course. Make sure our communities know
That they can access resources.
Getting people to primary prevention point
so they don’t get to a point where they have an unwanted pregnancy.”

“This is the purview of
local health departments.”

“[We] saw that there was a threat to a basic form of care. We felt very strongly that everyone, not just [our constituents] should have access to that care...[there’s] a strong belief in reproductive justice framework.”

“We’re not alone in the struggles we are facing. I’m not a tiptoe kind of person.”

“I feel like if I get shut down, no one else will offer the services we offer.”

“This is work I thought I would have to leave the government to do.”

“It made me proud to be a government employee that day.”

“If we don’t talk about it and what we’re doing, we’ll never see change.”

“You can do a lot of work behind the scenes, and that’s not a weakness. You don’t have to be the one speaking out if that’s going to hurt your position...but you can support those who are.”

Spotlight: LHD Abortion Campaigns

- nyc.gov/abortion
 - Abortion Access Hub (live chat option)
 - Information on funding abortion care
 - Information on access to abortions and funding for immigrants
 - Avoiding fake clinics
- [Chicago.gov/abortioncare](https://chicago.gov/abortioncare)
 - “The City of Chicago, acting through the Chicago Department of Public Health (CDPH), has identified the need for support related to reproductive healthcare, including abortion access. Chicago has served as a haven for abortion care in the Midwest, due to a lack of abortion providers and restrictive laws in surrounding states. CDPH’s mission is to work with communities and partners to create an equitable, safe, resilient, and Healthy Chicago. CDPH’s work is guided by its community health improvement plan, Healthy Chicago 2025, which is focused on racial and health equity. This includes ensuring that all individuals have control over their own reproductive healthcare and decide if, when, and how to become a parent.”

Joanna S. Suder

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After Dobbs: Data Privacy & Reproductive Health Records

Stephen Murphy, JD, Deputy
Director, Mid States, Network
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Overview

Privacy of Reproductive Health
Records Post Dobbs

State actions



Doctor says she shouldn't have to turn over patients' abortion records

 By [Kim Bellware](#)

November 19, 2022 at 9:27 p.m. EST

Judge denies emergency motion to block Indiana AG from accessing medical records in investigation of abortion services provided to 10-year-old

 By [Artemis Moshtaghian, CNN](#)

Updated 10:54 PM EST, Sun December 4, 2022

California

AB 2091 (September 27, 2022) Disclosure of information: reproductive health and foreign penal civil actions

Provider or health care service plan shall not release identifiable medical information to law enforcement to enforce another state's law that would interfere with a person's rights to an abortion under CA law

California

AB 1242 (Sept 27, 2022) Reproductive rights

No magistrate shall enter an ex parte order authorizing interception of wire or electronic communications to investigate abortion legal in California

Communication services or remote computing services may not produce customer records in response to a out-of-state warrant that relates to investigation of an abortion legally performed in CA

California

- AB 254 (September 27, 2023)
 - Subjects mobile Apps and websites that collect reproductive or sexual health App information from consumer to the California Medical Information Act

California

- AB 352 (September 27, 2023)
- Requires businesses that maintain e health information on provision of repro health and gender affirming care, on behalf of health care provider and others, by July 1, 2024, to enable features to:
 - Limit access to abortion, contraception and gender affirming care information to authorized persons
 - Prevent disclosure of or access outside CA
 - Segregate such info in health record
 - Auto disable access to such segregated info by persons outside CA

California

- AB 352 (September 27, 2023) (Cont'd)
- Health care provider, health services plan shall not cooperate with investigation by out-of-state agency or federal law enforcement related to an individual seeking or obtaining a lawful



Connecticut

Connecticut (Connecticut Public Act No. 22-19 (2022)).

No judge shall issue a summons in criminal case involving violation of another state's abortion law, except if the act also violates CT law

Health care providers may not disclose information received from a patient or physical exam relating to reproductive health permitted under the laws of Conn. in any proceeding without a patient's written consent

Contains exceptions

Illinois

HB 4664

Prohibits court clerks from issuing subpoenas based on a subpoena from outside Illinois that

- (1) requests information relating to abortions lawfully carried out in Illinois or
- (2) relates to enforcement of another jurisdiction's laws that would infringe upon an individual's right to abortion under Illinois law.



Maryland

Maryland H 812 (May 3, 2023)

HIE or e health network may not disclose mifepristone data or dx, procedure, rx for abortion care to a treating provider, HIE, or EHN unless:

For adjudication of claims

To a provider with written consent of patient

Massachusetts

HB 5090 (July 2022)

Prohibits in-state law enforcement agencies from providing information to federal agencies, law enforcement agencies from outside the state, and any private citizen in relation to reproductive health services provided legally in Massachusetts

New York



N.Y. C.P.L.R. 3119 (McKinney) (Uniform Interstate Depositions and Discovery) (June 13, 2022)

(g) No court shall issue subpoena in connection with out-of-state proceeding relating to abortion services legally performed in NY, unless the out-of-state proceeding is brought by patient

New York

N.Y. Exec. Law § 837-w (June 13, 2022)

No state or local law enforcement agency shall cooperate with individual or out-of-state agency regarding the provision of lawful abortion performed in NY

...no information relating to a medical procedure may be shared with out-of-state agency or any other individual.

Exceptions for valid, court-issued subpoena or warrant

New York

N.Y. C.P.L.R. 3102 (June 13, 2022)

(e) Supreme court shall issue no order in aid of a deposition in connection with an out-of-state proceeding relating to abortion services legally performed in NY

New Jersey

New Jersey A-3975/S-2633 (July 1, 2022)

No public entity or employee shall provide any information in furtherance of interstate investigation or proceeding seeking to impose civil or criminal liability upon a person or entity for:

- (1) the provision, receipt, or seeking of, reproductive health care services that are legal in NJ; or
- (2) assisting, advising any person or entity providing, receiving, or inquiring about, reproductive health care services

Vermont

S 37 (May 10, 2023)

Covered entity or business associate shall not disclose PHI related to Legally Protected Health Care Activity, inc. reproductive health, for use in civil or criminal actions, probate, legislative, or admin proceedings, except where:

Authorized by patient

Required by law

Ordered by a court

Used solely for defense of covered entity or business associate

New Mexico

SB 13

Bars state agencies and employees from cooperating with out-of-state investigations concerning lawful reproductive health care

Bars submission of out-of-state subpoenas relating to repro, unless accompanied by attestation that claim would be recognized in NM

Prohibits any person from requesting from third party, and third parties from providing, repro info with intent to harass

Washington



HB 1155 (My Health, My Data Act) (April 27, 2023)

Bans regulated entities from sharing consumer health data, including repro, without consent of consumer, except where necessary to provide services requested by consumer

Requires appropriate privacy policies

Provides consumer right to have data deleted

Conclusion

Post Dobbs, risk of harm from sharing of personal reproductive health data ever present

Several states have taken action prohibiting:

Cooperating with out-of-state prosecutors

Issuing subpoenas in out-of-state actions

Handing over reproductive health information to out-of-state prosecutors and law enforcement





Thank you

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