

LEGISLATIVE STRATEGIES FOR REGULATING ABORTION (AMIDST A RADICAL BALLOT INITIATIVE AND COURT CHAOS)

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BACKGROUND: 15-WEEK LAW VS. PRE-ROE LAW

- 2022 → Legislature passed 15-week law (A.R.S. § 36-2322)
 - 11,530 abortions in 2022 (decreased from 13,998 in 2021)
 - More than 96% of abortions in Arizona took place in the first 15 weeks of pregnancy
 - 93% of abortions were performed under 14 weeks
 - 7 babies born alive during an abortion
 - 250 abortions were done on minors under 18 years old
 - 37 were authorized by court order instead of parental consent

Source: <https://www.azdhs.gov/documents/preparedness/public-health-statistics/abortions/2022-arizona-abortion-report.pdf>

PRE-ROE LAW (A.R.S. 13-3603) – UNDER INJUNCTION SINCE *ROE V. WADE*

A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless it is necessary to save her life, shall be punished by imprisonment in the state prison for not less than two years nor more than five years.

A.R.S. § 13-3603.

PLANNED PARENTHOOD V. MAYES

ARIZONA SUPREME COURT OPINION (APRIL 9, 2024)

- Former AG Brnovich sought to lift injunction; court upheld validity of pre-Roe law that criminalizes nearly all abortions unless necessary to save mother's life
- AZ Supreme Court stayed enforcement of pre-Roe law for 14 calendar days
 - + 45 days in another case, where former AG Brnovich agreed not to enforce pre-Roe law after the AZ Supreme Court's decision
- Case was remanded to trial court, where Planned Parenthood will argue the pre-Roe law is unconstitutional
 - AG Mayes will agree
 - Case will continue to linger in state courts – very likely through the General Election

GOVERNOR HOBBS' EXECUTIVE ORDER 2023-11

WHEREAS, pursuant to A.R.S. § 41-193(A)(2), the Governor may direct the Attorney General to prosecute and defend in a State court other than the Supreme Court any proceeding in which the State or an officer of the State is a party or has an interest, including criminal prosecutions; and

WHEREAS, pursuant to A.R.S. § 41-193(A)(5), the Governor may direct the Attorney General to assist the county attorney of any county in the discharge of the county attorney's duties.

NOW, THEREFORE, I, Katie Hobbs, Governor of the State of Arizona, by virtue of the power vested in me by the Arizona Constitution and the laws of this State, hereby order and direct as follows:

1. ***Centralizing Authority over Abortion-Related Criminal Prosecutions.*** To the extent permissible under Arizona law, the Attorney General shall assume all duties with regard to any criminal prosecution of a medical provider or other entity or individual that is pending or brought in the future by the county attorney of any county in this State for violation of any State law restricting or prohibiting abortion care including, without limitation, A.R.S. § 13-3603 and provisions in Title 36, Chapter 23.
2. ***Restrictions on Investigative Assistance.*** Unless required pursuant to a court order or Arizona or federal law, no State Agency shall provide information, data, or investigative assistance or otherwise use any State resources in furtherance of an investigation or proceeding initiated in or by another state that seeks to impose criminal or civil liability or professional sanction upon a person or entity for conduct related to providing, assisting, seeking, or obtaining reproductive healthcare that would not be punishable under Arizona law.

GOVERNOR HOBBS' EXECUTIVE ORDER 2023-11

- No county attorney has sued over the validity of the EO, although many believe the EO unlawfully strips county attorneys of their authority to prosecute abortion offenses
- Governor Hobbs and Mayes are insisting that the EO is valid and that no one will be prosecuted for violating the pre-*Roe* law

ARIZONA ABORTION ACCESS (AAA) INITIATIVE

- July 3, 2024 – Filing Date
- Needs 383,923 signatures
 - Reportedly, already has over 500,000 signatures

ARIZONA ABORTION ACCESS INITIATIVE

A CONSTITUTIONAL AMENDMENT

ARIZONA SECRETARY OF STATE

AMENDING ARTICLE II, CONSTITUTION OF ARIZONA, BY ADDING SECTION 8.1; RELATING TO THE
FUNDAMENTAL RIGHT TO ABORTION.

TEXT OF PROPOSED AMENDMENT

Be it enacted by the People of the State of Arizona:

Sec. 1. Short title

This constitutional amendment shall be known as, and may be referred to as, the “Arizona Abortion Access Act”.

Sec. 2. Findings and declaration of purpose

The People of the State of Arizona find and declare as follows:

- A. Arizonans believe strongly in individual autonomy, which includes the right of each individual to make personal decisions about their own health care without overbearing and unnecessary government interference.
- B. When the United States Supreme Court overturned *Roe v. Wade* and deprived Arizonans of their longstanding individual right to abortion, Arizonans’ autonomy over their own health care decisions was immediately threatened by efforts to enforce a law first enacted in the 19th Century that made almost all abortions illegal.
- C. To protect Arizonans’ rights and ensure access to reproductive health care, the Arizona Constitution must be amended to establish a fundamental right to abortion as provided in this act.
- D. This act should be liberally construed in furtherance of the fundamental right it establishes.

ARIZONA ABORTION ACCESS INITIATIVE

Sec. 3. Article II, Constitution of Arizona, is amended by adding section 8.1, to read:

8.1. Fundamental right to abortion; definitions

A. EVERY INDIVIDUAL HAS A FUNDAMENTAL RIGHT TO ABORTION, AND THE STATE SHALL NOT ENACT, ADOPT OR ENFORCE ANY LAW, REGULATION, POLICY OR PRACTICE THAT DOES ANY OF THE FOLLOWING:

1. DENIES, RESTRICTS OR INTERFERES WITH THAT RIGHT BEFORE FETAL VIABILITY UNLESS JUSTIFIED BY A COMPELLING STATE INTEREST THAT IS ACHIEVED BY THE LEAST RESTRICTIVE MEANS.
2. DENIES, RESTRICTS OR INTERFERES WITH AN ABORTION AFTER FETAL VIABILITY THAT, IN THE GOOD FAITH JUDGMENT OF A TREATING HEALTH CARE PROFESSIONAL, IS NECESSARY TO PROTECT THE LIFE OR PHYSICAL OR MENTAL HEALTH OF THE PREGNANT INDIVIDUAL.
3. PENALIZES ANY INDIVIDUAL OR ENTITY FOR AIDING OR ASSISTING A PREGNANT INDIVIDUAL IN EXERCISING THE INDIVIDUAL'S RIGHT TO ABORTION AS PROVIDED IN THIS SECTION.

B. FOR THE PURPOSES OF THIS SECTION:

1. "COMPELLING STATE INTEREST" MEANS A LAW, REGULATION, POLICY OR PRACTICE THAT MEETS BOTH OF THE FOLLOWING:
 - (a) IS ENACTED OR ADOPTED FOR THE LIMITED PURPOSE OF IMPROVING OR MAINTAINING THE HEALTH OF AN INDIVIDUAL SEEKING ABORTION CARE, CONSISTENT WITH ACCEPTED CLINICAL STANDARDS OF PRACTICE AND EVIDENCE-BASED MEDICINE.
 - (b) DOES NOT INFRINGE ON THAT INDIVIDUAL'S AUTONOMOUS DECISION MAKING.
2. "FETAL VIABILITY" MEANS THE POINT IN PREGNANCY WHEN, IN THE GOOD FAITH JUDGMENT OF A TREATING HEALTH CARE PROFESSIONAL AND BASED ON THE PARTICULAR FACTS OF THE CASE, THERE IS A SIGNIFICANT LIKELIHOOD OF THE FETUS'S SUSTAINED SURVIVAL OUTSIDE THE UTERUS WITHOUT THE APPLICATION OF EXTRAORDINARY MEDICAL MEASURES.
3. "STATE" MEANS THIS STATE, ANY AGENCY OF THIS STATE OR ANY POLITICAL SUBDIVISION OF THIS STATE.

DOBBS V. JACKSON WOMEN'S HEALTH (JUNE 2022)

= RATIONAL BASIS STANDARD

A law regulating abortion, like other health and welfare laws, is entitled to a “strong presumption of validity.” ... It must be sustained if there is a **rational basis on which the legislature** could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

AAA INITIATIVE – LEGAL STANDARDS CONTRARY TO *DOBBS* = STRICT SCRUTINY PRE-VIABILITY + PROHIBITION POST-VIABILITY IF A HEALTH CARE PROFESSIONAL RECOMMENDS ABORTION

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ABORTION ON THE BALLOT IN THE STATES

Arizona is one of several states where abortion might be on the ballot this year.

Across the country, there have been increased efforts to put [abortion rights questions](#) to voters since the U.S. Supreme Court [overturned Roe v. Wade](#) and removed the nationwide right to abortion.

Since that 2022 decision, most Republican-controlled states have new abortion restrictions in effect, including 14 that ban it at every stage of pregnancy. Most Democrat-dominated states have laws or executive orders to protect access.

Additionally, voters in seven states — California, Kansas, Kentucky, Michigan, Montana, Ohio and Vermont — have sided with abortion rights supporters on ballot measures.

FLORIDA

The state Supreme Court ruled on April 1 that a ballot measure to legalize abortion until viability could go on the ballot despite a legal challenge from state Attorney General Ashley Moody, who argued that there are differing views on the meaning of “viability” and that some key terms in the proposed measure are not properly defined.

COLORADO

There are dueling efforts on abortion in Colorado. One measure would create a voter-initiated law to ban access throughout pregnancy and the other would amend the state constitution to protect it. The abortion rights amendment would also require Medicaid and private health insurance to cover abortion.

Supporters on each side have to submit more than 124,000 signatures to get a measure on the ballot. The deadlines to submit them are April 15 for the ban measure and April 26 for the one to ensure access. Amending the constitution in Colorado requires the support of 55% of voters. But the ban could be passed with a simple majority. Abortion is legal at all stages of pregnancy in Colorado.

ARKANSAS

Proponents of an amendment to allow abortion in many cases have until July 5 to gather nearly 91,000 valid signatures to get it on the Nov. 5 ballot. The measure would bar laws banning abortion in the first 20 weeks of gestation and allow abortion later in pregnancy in cases of rape, incest, threats to the woman's health or life, or if the fetus would be unlikely to survive birth. Because it allows limits as soon as 20 weeks, the proposal does not have the support of Planned Parenthood Great Plains, which includes Arkansas. The state has a ban on abortion at all stages of pregnancy with narrow exceptions.

MARYLAND

[Maryland voters](#) this year will also be asked whether to enshrine the right for women to end their pregnancies in the state's constitution in a ballot question put before them by lawmakers last year. The state already protects the right to abortion under state law and Democrats outnumber Republicans 2-1. Abortion is allowed in Maryland until viability.

ABORTION ON THE BALLOT IN THE STATES



ABORTION ON THE BALLOT IN THE STATES

MONTANA

Abortion rights proponents in Montana have proposed a constitutional amendment that would bar the government from denying the right to abortion before viability or when it's necessary to protect the life or health of the pregnant person. After a legal battle over the ballot language, the Montana Supreme Court on April 1 wrote its version of the language that would appear on the ballot if supporters gather more than 60,000 signatures by June 21. Abortion is legal until viability in Montana under a 1999 Montana Supreme Court opinion.

NEBRASKA

[Advocates are trying to collect](#) about 125,000 signatures needed by July 5 to put a constitutional amendment before voters to protect abortion rights until fetal viability. Under a law adopted last year, abortion is [banned after 12 weeks](#), with some exceptions.

NEVADA

Signatures are being gathered to place an abortion access amendment on [Nevada's ballot](#) in November. Under the amendment, abortion access for the first 24 weeks of pregnancy or later to protect the health of the pregnant person, which is already assured under a 1990 law, would be enshrined in the constitution. It requires more than 102,000 valid signatures by June 26 to place the measure on the ballot. Voters would need to approve it in both 2024 and 2026 to change the constitution.

The measure is one of several attempts by Nevada abortion rights groups to get a ballot question before voters in 2024 or 2026.

MISSOURI

[Pushes are underway](#) to get multiple abortion-related ballot measures before Missouri voters in 2024. Abortion rights advocates in Missouri for Constitutional Freedom are pushing for one that would guarantee abortion is legal until viability.

A group of moderate Republicans are taking a different approach and calling for an amendment that would allow abortion up to 12 weeks, and after that only under limited exceptions.

Supporters of each measure must submit more than 171,000 valid signatures by May 5 to get them on the ballot.

And some Republican lawmakers have launched a legislative process to put before voters a measure to enshrine a ban on abortion in the state constitution. It would expand provide an exception to allow for immediate abortion to save the life of the woman or in cases "for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function." Further exceptions would have to be approved by voters.

Abortion is currently banned in Missouri at all stages of pregnancy with limited exceptions.

SOUTH DAKOTA

[South Dakota](#) advocates are attempting to gather more than 35,000 signatures by May 7 to get a measure on the ballot that would loosen restrictions but does not go as far as many abortion rights advocates would like. It would ban any restrictions on abortion in the first trimester of pregnancy. It would allow the state in the second trimester to "regulate the pregnant woman's abortion decision and its effectuation only in ways that are reasonably related to the physical health of the pregnant woman." An abortion ban would be allowed in the third trimester, as long as it included exceptions for the life and health of the woman. Planned Parenthood is not supporting the measure.

Abortion in the state is now banned at all stages of pregnancy with narrow exceptions.

1 Be it resolved by the House of Representatives of the State of Arizona,
2 the Senate concurring:
3 1. Article XXVII, Constitution of Arizona, is proposed to be
4 amended by adding section 3 as follows if approved by the voters and on
5 proclamation of the Governor:
6 3. Pregnant women; physicians; abortion
7 SECTION 3. A. TO PROMOTE AND PRESERVE LIFE AND TO
8 PROTECT THE HEALTH AND SAFETY OF WOMEN SEEKING MEDICAL AND
9 REPRODUCTIVE CARE DURING PREGNANCY, THE FOLLOWING PROTECTIONS
10 APPLY TO THE EXTENT ABORTION IS AUTHORIZED BY THE LAWS OF THIS
11 STATE:
12 1. ONLY A PHYSICIAN WHO IS LICENSED IN THIS STATE MAY
13 PERFORM AN ABORTION.
14 2. A PHYSICIAN SHALL OBTAIN INFORMED CONSENT BEFORE
15 PERFORMING AN ABORTION.
16 3. A PHYSICIAN MAY NOT PERFORM AN ABORTION ON A MINOR
17 WITHOUT PARENTAL OR GUARDIAN CONSENT OR A COURT ORDER.
18 4. A PHYSICIAN MAY NOT PERFORM AN ABORTION IF THE SOLE
19 REASON FOR THE ABORTION IS TO DISCRIMINATE BASED ON RACE OR
20 SEX.
21 5. A PHYSICIAN MAY NOT PERFORM A PARTIAL-BIRTH
22 ABORTION.
23 6. A PERSON MAY NOT PURCHASE OR SELL AN ABORTED FETUS
24 OR ITS PARTS.
25 B. THE LEGISLATURE, OR THE PEOPLE BY INITIATIVE OR
26 REFERENDUM, MAY ENACT LAWS RATIONALLY RELATED TO PROMOTING OR
27 PRESERVING LIFE AND TO PROTECTING THE HEALTH AND SAFETY OF
28 PREGNANT WOMEN.
29 Sec. 2. Short title
30 This act may be cited as the "Arizona Abortion
31 Protection Act".
32 2. The Secretary of State shall submit this proposition to the
33 voters at the next general election as provided by article XXI,
34 Constitution of Arizona.

PHASE I: REFER REASONABLE PROTECTIONS TO VOTERS

- MOST IMPORTANT:
protects Legislature's
authority to "enact laws
rationally related to
promoting and preserving
life and to protecting the
health and safety of
pregnant women"
- Does not force voters to
pick 8, 12, or 15 weeks,
etc.

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PHASE I: REFER REASONABLE PROTECTIONS TO VOTERS

- Need to give voters something other than the extreme abortion-on-demand AAA Initiative
- Does not create a right to abortion
- Codifies widely supported protections/restrictions on abortion

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PHASE I: REFER REASONABLE PROTECTIONS TO VOTERS

- Complimentary (not conflicting) measure to the AAA Initiative (courts would consider both when interpreting the constitutional right to abortion in the AAA)
- Choose any short title (“Protecting Pregnant Women and Safe Abortions Act,” or “Arizona Abortion and Reproductive Care Act” or “Arizona Abortion Protection Act”)

PHASE I: REFER REASONABLE PROTECTIONS TO VOTERS – CONSTITUTIONALIZE EXISTING LAWS

Reasonable Protections in Potential Ballot Referral

- Licensed Physician
 - A.R.S. 36-2155 (forbidding anyone who is not a licensed physician from performing an abortion).
- Informed Consent
 - A.R.S. § 36-2153(A) (requiring voluntary and informed consent before an abortion can be performed and describing what informed consent entails).
- Abortions for Minors Need Parental Consent or Court Order
 - A.R.S. § 36-2152(A) (requiring parental consent or judicial authorization for abortions on minors);
- No Discriminatory Abortions
 - A.R.S. § 13-3603.02(A)(1) (prohibiting physicians from performing an abortion when a physician knows the purpose is based on genetic abnormality or race or gender).
- No Partial-Birth Abortions
 - A.R.S. § 13-3603.01 (making it a class 6 felony to perform a partial-birth abortion and creating a civil right of action for the father of the aborted fetus).
- Prohibition on Selling or Purchasing Aborted Fetus or its Parts
 - Gov. Ducey Executive Order directed ADHS to create emergency rule prohibiting this
 - Reporting requirement for disposition of fetal remains are in statute

PHASE 2: SEND VOTERS TWO OTHER OPTIONS THAT CONFLICT WITH AAA INITIATIVE

Requires Two Referrals: 15-week Reproductive Care and Abortion Act and Heartbeat Protection Act

PROS:

- allows voters to decide the abortion issue
- could scale back 15-week law to 14-week law
 - in reality, it's a 14-week law disguised as a 15-week law because it would only allow abortion until the beginning of the 15th week
- more likely that the AAA Initiative will fail if vote is split (dilutes vote)
- If any of them pass with more than a majority of the vote, the one with the most votes will prevail

CONS:

- Transfers regulation of abortion from the Legislature to voters
- solidifies an arbitrary number of weeks in the AZ Constitution



PHASE 2: SEND VOTERS TWO OTHER OPTIONS THAT CONFLICT WITH AAA INITIATIVE

THE FIFTEEN WEEK REPRODUCTIVE CARE AND ABORTION ACT

SUBJECT TO RATIONAL PROTECTIONS AND RESTRICTIONS AS MAY BE PRESCRIBED BY LAW,

(A) A WOMAN HAS A RIGHT TO OBTAIN AN ABORTION UNTIL THE FIFTEENTH WEEK OF PREGNANCY.

(B) AFTER THE FIFTEENTH WEEK OF PREGNANCY BEGINS, A WOMAN MAY ONLY OBTAIN AN ABORTION IF:

- (1) MEDICALLY NECESSARY TO SAVE THE LIFE OF THE WOMAN;
- (2) MEDICALLY NECESSARY TO PREVENT SERIOUS RISK OF SUBSTANTIAL AND IRREVERSIBLE IMPAIRMENT OF A MAJOR BODILY FUNCTION OF THE WOMAN; OR
- (3) THE FETUS HAS A FATAL ABNORMALITY.



PHASE 2: SEND VOTERS TWO OTHER OPTIONS THAT CONFLICT WITH AAA INITIATIVE

THE HEARTBEAT PROTECTION ACT

SUBJECT TO RATIONAL PROTECTIONS AND RESTRICTIONS AS MAY BE PRESCRIBED BY LAW,

(A) A WOMAN HAS A RIGHT TO OBTAIN AN ABORTION UNTIL THE SIXTH WEEK OF PREGNANCY;

(B) AFTER THE SIXTH WEEK OF PREGNANCY BEGINS, A WOMAN MAY ONLY OBTAIN AN ABORTION IF:

(1) MEDICALLY NECESSARY TO SAVE THE LIFE OF THE WOMAN;

(2) MEDICALLY NECESSARY TO PREVENT SERIOUS RISK OF SUBSTANTIAL AND IRREVERSIBLE IMPAIRMENT OF A MAJOR BODILY FUNCTION OF THE WOMAN;

(3) THE FETUS HAS A FATAL ABNORMALITY; OR

(4) THE PREGNANCY IS THE RESULT OF RAPE, INCEST, OR HUMAN TRAFFICKING AND THE ABORTION IS PERFORMED BEFORE THE FOURTEENTH WEEK OF PREGNANCY.



ALTERNATIVE TO PHASE 2: REFER CONDITIONAL ENACTMENT (ONLY TAKES EFFECT IF AAA PASSES)

1. Article II, Constitution of Arizona, is proposed to be amended by adding section 8.2 as follows if approved by the voters and on proclamation of the Governor:

8.2 Limited right to abortion; reasonable regulations

SECTION 8.2.

- A. The right granted under article II, section 8.1 is not absolute and shall not be interpreted to prevent the Legislature from reasonably regulating abortion consistent with binding authority from the Supreme Court of the United States.
- B. Notwithstanding article II, section 8.1, laws regulating abortion shall be rationally related to legitimate state interests, including but not limited to:
 - 1. respect for and preservation of prenatal life at all stages of development
 - 2. the protection of maternal health and safety
 - 3. the elimination of particularly gruesome or barbaric medical procedures
 - 4. the preservation of the integrity of the medical profession
 - 5. the mitigation of fetal pain
 - 6. the prevention of discrimination on the basis of race, sex or disability.
- C. The people of Arizona intend to modify the Arizona Abortion Access Act by placing reasonable limits on the right to abortion recognized in section 8.1. To the extent this section conflicts with the Arizona Abortion Access Act, this section controls.

Sec. 2. Conditional effective date

This section does not become effective unless the Arizona Abortion Access Act is adopted at the 2024 General Election.

Sec. 3. Short title

This act may be cited as the "Reasonable Limits on Arizona Abortion Access Act."

REASONS TO PROCEED WITH PHASE I, THEN CONSIDER PHASE 2 OR CONDITIONAL ENACTMENT

- Changes narrative – Republicans have a plan! And it's much more reasonable than the AAA Initiative
- Plan A could potentially pull votes from AAA Initiative
 - Voters would read Legislature's referral first on the ballot if the HCR/SCR is transmitted to Sec of State before AAA is filed
- Puts Democrats in a defensive position to argue against partial birth abortions, discriminatory abortions, and other basic protections

THAT'S IT!

