



State Actions Undermining Abortion Rights in 2020

Nora Ellmann August 27, 2020

So far in 2020, there have been a number of important wins for abortion rights in the courts. In the U.S. Supreme Court, Louisiana's unconstitutional admitting privileges law was struck down in *June Medical Services v. Russo*.¹ In the lower courts, a federal district court in Maryland ruled that the U.S. Food and Drug Administration must suspend enforcement of a medically unnecessary restriction on access to medication abortion until 30 days after the end of the COVID-19 public health emergency.² Also in Maryland, a district court vacated and enjoined a Trump administration rule that would have required separate insurance payments for abortion care and all other health care for people insured by certain plans under the Affordable Care Act.³ And a district court in Georgia struck down the state's six-week abortion ban, which would have banned abortion at a point before most people even know they are pregnant.⁴

Despite these important victories, the right to access abortion established in *Roe v. Wade*⁵ is still under attack. Moreover, meaningful access to abortion has never been a reality for many people in the United States, especially women of color. The courts are by no means saviors of reproductive rights; the *June Medical* decision preserved a status quo in which hundreds of abortion restrictions remain in place across the country.⁶ In Louisiana alone, laws that are still in effect restrict insurance coverage for abortion care, impose medically unnecessary waiting period and biased counseling requirements to access abortion, require parental consent for minors, and more; as a result, abortion access remains out of reach for many state residents.⁷ Furthermore, in his *June Medical* concurrence, Chief Justice John Roberts left the door open to upholding future abortion restrictions that come before the court. Conservative courts are already capitalizing on his opinion: On August 7, the 8th U.S. Circuit Court of Appeals cited Roberts' concurrence as justification to lift an injunction on multiple abortion restrictions in Arkansas.⁸ The laws ban the most common procedure for second-trimester abortions, require clinics to report to law enforcement the names of minors who have abortions, and treat fetal tissue as criminal evidence. They also require providers to attempt to obtain patients' full pregnancy-related medical records before providing care and grant rights over fetal remains to both parents of the fetus as well as to the pregnant person's parents if the patient is a minor. This final law essentially bans

abortion outside of a clinic setting and forces patients to notify the other parent of the fetus before an abortion, including in cases of rape.⁹ The court's ruling sends the case back to the lower courts and, in the meantime, allows the laws to go into effect.¹⁰

As the conservative justices of the Supreme Court lay the groundwork to undermine abortion rights, and as President Donald Trump and Senate Majority Leader Mitch McConnell stack the courts with political ideologues,¹¹ anti-abortion legislators at the state level continue to advance dangerous, medically unnecessary abortion restrictions. These laws disproportionately affect those whose access to abortion care is already most limited, including people of color, young people, people with disabilities, people with low incomes, LGBTQ people, and people in rural areas, among others.¹² What's more, many of these laws were passed and signed during the coronavirus pandemic—a public health crisis that is disproportionately harming many of the same communities whose access to comprehensive reproductive health care, including abortion care, is most threatened, particularly Black, Latinx, and Native American communities, as well as people with disabilities.¹³

These unrelenting state actions demonstrate the need to move beyond reliance on the courts and to advance proactive policies at the state and federal level that ensure true access to abortion rights. This issue brief breaks down the bans and restrictions that state legislatures have passed this year in their ongoing attempts to undermine or eliminate outright the right to access abortion care. It then highlights efforts to protect and advance abortion rights.

Bans and restrictions

Restrictive abortion laws are nothing new. For decades, states have been passing laws designed to limit access to abortion care in an effort to make the right to abortion virtually meaningless.¹⁴ Since 2011 alone, state legislatures have passed more than 400 restrictive laws.¹⁵ These relentless efforts to undermine access to essential reproductive health care are especially egregious in the midst of a global public health emergency, when states should have prioritized controlling the coronavirus pandemic—not restricting access to critical health care services.

Governors have manipulated the pandemic response to restrict abortion

At the outset of the coronavirus crisis in the United States, 11 governors explicitly excluded abortion care from the essential services that were allowed to operate amid shutdowns, essentially manipulating the pandemic response to ban abortion care from being provided in their states.¹⁶ These state leaders ignored what medical and public health experts such as the American College of Obstetricians and Gynecologists and the World Health Organization recognize—that abortion is essential, time-sensitive health care.¹⁷ While courts prohibited most of these state executive actions from going into effect, abortion care services were temporarily interrupted in Arkansas, Ohio, Tennessee, and Texas, forcing people to delay or forgo abortion care or travel out of state to access it, increasing their risk of coronavirus exposure.¹⁸

Since the *Roe v. Wade* decision, anti-abortion policymakers have used a variety of types of laws to limit access to abortion care.¹⁹ Among the restrictive laws passed this year are:

- **Gestational bans**, which ban abortion after a certain point in pregnancy such as at six or 22 weeks.²⁰ These laws are frequently unconstitutional when they 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.²¹ Pre-viability bans are prohibited by *Roe v. Wade*²² and often mean that a person would be banned from receiving an abortion before they even know they are pregnant.
- **Method bans**, which ban particular methods of abortion care.²³ These laws most often impose a ban on dilation and evacuation (D&E) procedures, the safest and most common method of abortion care in the second trimester.²⁴ Method bans interfere with evidence-based medical decisions and further limit options for abortion care.
- **Medically unnecessary requirements**, including waiting periods and biased counseling requirements, which place additional burdens on people seeking abortion care such as added costs, time, and intentionally misleading information.²⁵
- **Parental involvement laws**, which require parental consent or notification or judicial approval for minors seeking abortion care.²⁶ These laws limit young people's bodily autonomy and access to abortion care, and they especially harm immigrants and people of color.²⁷
- **Reason bans**, which ostensibly restrict abortion if the pregnant person's decision is based on a fetus's sex or race or on fetal diagnosis.²⁸ In reality, these laws are part of the strategy to restrict abortion access and stigmatize abortion decisions, particularly for women of color.²⁹ They allow politicians to interfere with health decisions that should be made between a pregnant person and their provider, while doing nothing to actually promote gender, racial, or disability justice.³⁰
- **So-called "born-alive" laws**, which require medical care for a fetus after an unsuccessful abortion. Such legislation is unnecessary, as denying care to fetuses is already illegal.³¹ These laws intentionally perpetuate false narratives about abortion later in pregnancy and seek to stigmatize abortion and interfere with evidence-based patient care.³²
- **Targeted Restriction of Abortion Provider (TRAP) laws**, which place medically unnecessary requirements on clinics and providers designed to force them to stop providing abortion care.³³

- **Trigger bans**, which put laws on the books in states to ban abortion if *Roe* is overturned.³⁴

Laws that are currently in effect

Among the state bills passed this year that are already in effect is Florida's parental consent law, which was signed by Gov. Ron DeSantis (R) in June and took effect in July.³⁵ The law requires that a minor—someone under the age of 18—receive written consent from their parent or guardian, or that the minor receive a judicial bypass, in order to access abortion care. Parental consent laws such as Florida's put young people's health and safety at risk and disproportionately affect young people of color, who are more likely to have an unintended pregnancy as a minor and more likely to live in a state with a parental involvement law in effect, as well as immigrant youth, who may lack necessary documentation and/or be put at risk of immigration enforcement due to parental involvement requirements.³⁶

Another restrictive action is Mississippi's reason ban, which was passed by the legislature in June and took effect in July.³⁷ It bans abortion based on sex, race, and genetic abnormality, and it requires providers to report to the state confirming that these were not a person's reason for seeking abortion care. The law, similar to other reason bans, uses feigned concern for gender, racial, and disability justice to interfere with private decisions between patients and providers, drawing on racist stereotypes and harming people of color and people with disabilities by restricting their access to reproductive health care.

Also in effect are TRAP laws in Utah and Indiana, both enacted in March, that impose medically unnecessarily and restrictive requirements around the disposition of fetal remains after abortion, as well as West Virginia's "born-alive" law.³⁸ Oklahoma enacted a TRAP law in May that allows the parent of a fetus or the parent of a pregnant person to sue providers for wrongful death after abortion in certain circumstances, including if the pregnant person is a minor or if the pregnant person experiences "physical or psychological harm" from the abortion.³⁹ The law seeks to criminalize providers, relying on the dangerous concept of fetal personhood as well as false narratives around the safety and mental health impacts of abortion.⁴⁰ That law is scheduled to take effect in November. Most recently, Nebraska's legislature passed a D&E ban on August 13 that Gov. Pete Ricketts (R) quickly signed into law.⁴¹ Restricting access to this safe and common method of abortion care in the second trimester disproportionately harms women of color, young women, and low-income women, who are more likely to face barriers that cause delays in accessing abortion care.⁴²

Laws that have been blocked by the courts

In Tennessee, a law passed by the General Assembly in June and signed by Gov. Bill Lee (R) in July includes sweeping restrictions on abortion access.⁴³ The law includes gestational bans at six, eight, 10, 12, 15, 18, 20, 21, 22, 23, and 24 weeks;

recognizing that the pieces banning abortion extremely early in pregnancy are more likely to be struck down in the courts, the legislature included the later options in an effort to ensure that some form of gestational ban takes effect.⁴⁴ In addition, the law includes reason bans based on sex, race, and Down syndrome diagnosis as well as requirements before a person can access abortion care, including false counseling about medically unsupported “abortion reversal.”⁴⁵ Finally, the law allows for the parent of a fetus—or the pregnant person’s parents if the person is a minor—to sue providers if they provide abortion care in violation of the law. The law was blocked by a federal district court just hours after being signed.⁴⁶ Also stopped by the courts was Iowa’s 24-hour waiting period law, which was passed and signed into law in June but blocked before it could take effect in July.⁴⁷ Waiting period laws such as Iowa’s require people to make two trips to their abortion provider, particularly harming people with low incomes and those who have no nearby provider by adding financial and logistical burdens such as travel, child care, and time off work.⁴⁸

Both Idaho and Utah passed trigger bans that would ban abortion with extremely limited exceptions.⁴⁹ The laws are designed to go into effect immediately if *Roe* is overturned or if a constitutional amendment is passed that allows states to outlaw abortion. Abortion would immediately become illegal in all states that have these trigger bans if constitutional protections for abortion rights are removed.

Laws that have been vetoed by governors

Legislatures in Kentucky and Wyoming each passed “born-alive” bills this year, but both bills were vetoed by the states’ respective governors.⁵⁰ Wyoming, however, already has a law in effect that gives legal protections to a fetus that is delivered after an unsuccessful abortion.⁵¹

Proactive efforts to protect and expand abortion rights

Although many states have worked this year to restrict access to abortion care, there has also been action to protect abortion rights and undo restrictive laws.⁵² The necessary focus on responding to the coronavirus pandemic has slowed proactive action around abortion rights compared with last year, when more states than ever before passed proactive abortion legislation.⁵³ Yet Virginia and Washington, D.C., have still made notable progressive changes.

Virginia’s Reproductive Health Protection Act (RHPA), which was signed into law in April and took effect in July, removes restrictions and expands access to abortion care.⁵⁴ In particular, the RHPA eliminates barriers, including mandatory ultrasounds and a 24-hour waiting period, and expands which providers can provide abortion care in the first trimester to include nurse practitioners.

In Washington, D.C., the Strengthening Reproductive Health Protections Amendment

Act was signed by Mayor Muriel Bowser (D) in March and took effect in May.⁵⁵ The law prohibits government interference in reproductive health decisions, ensuring that decisions to access abortion care, as well as birth control and sterilization, remain between patients and their providers. It also prohibits punishing people who self-manage their abortions or experience miscarriage or adverse pregnancy outcomes and prevents employment discrimination against abortion providers.

Finally, New Hampshire's legislature passed the Reproductive Health Parity Act in July, largely along party lines, which would require health insurance plans that cover maternity benefits to also cover abortion care.⁵⁶ However, Gov. Chris Sununu (R) vetoed the bill in August.⁵⁷

Conclusion

Many of the restrictive laws passed this year are already being challenged and blocked in the courts. Abortion remains legal in all 50 states, and the important victories in *June Medical* and in proactive legislation at the state level should not be discounted. However, abortion remains inaccessible for many people in the United States, especially for people experiencing intersecting forms of oppression and barriers to abortion access. Chief Justice Roberts' signaled willingness to uphold future restrictive laws that come before the Supreme Court is extremely worrisome and a stark reminder that reliance on the courts is not enough. Attacks on abortion rights are not slowing down—for example, Colorado will vote on a ballot initiative in November that would ban abortion after 22 weeks with extremely limited exceptions.⁵⁸ Anti-abortion politicians will continue to adapt their strategy to pursue the laws they think are most likely to hold up in court and successfully erode meaningful access to abortion rights.

States' ongoing pursuit of laws restricting access to reproductive health care—even in the midst of a global public health emergency—is a clear signal that the federal government needs to act. Congress should pass the Women's Health Protection Act, which would prohibit laws that ban abortion before viability and that impose medically unnecessary restrictions on abortion care.⁵⁹ And policymakers must do more than stop restrictions; they should take action to proactively ensure that access to abortion care is a reality for all—through insurance coverage, access to medication abortion, and more⁶⁰—to fulfill the promise of *Roe v. Wade*.

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