



## MECHANISMS FOR ADVANCING HEALTH EQUITY

# Fact Sheet

## Ballot Measures on Abortion Access

### Current Legal Context

In 1973, the Supreme Court in *Roe v. Wade* recognized a fundamental right to privacy in abortions and established that a state cannot regulate abortions in the first trimester of pregnancy. In 1992, the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* reaffirmed *Roe* but imposed a new standard to determine the validity of state abortion laws by asking whether the regulation has the purpose or effect of imposing an “undue burden”. Despite this precedent, on June 24, 2022, the Supreme Court completely overturned *Roe* and *Casey* in *Dobbs v. Jackson Women’s Health Organization*, returning the decision on abortion to “the people and their elected representatives.”<sup>1</sup>

### Ballot Measures

In the wake of *Dobbs*, state action becomes all the more important for those seeking access to abortion or other types of reproductive health care. While there are existing abortion protections in state statutes and in state constitutions as interpreted by state courts, these protections are being litigated and decided via ballot measures.<sup>2</sup> Ballot measures are one way that states pass new laws. These measures are especially relevant as at least five states will vote on ballot measures regarding abortion access in 2022 and three states already approved ballot measures in 2018 and 2020. In 2022, Kansas and Kentucky will vote to restrict access to abortions, while Vermont will vote to protect access. In 2020, Louisiana voted to restrict access to abortions. Alabama and West Virginia did the same in 2018. These ballot measures are described in further detail below. But what exactly are ballot measures?

A ballot measure is a law, issue, or question that is placed on a statewide or local ballot for voters to decide. There are various ways that ballot measures can be placed on the ballot: citizen initiative petitions, referred by the state legislature or local government, and automatically placed on the ballot via a state law or constitutional provision that requires the ballot measure. In 26 states, citizens can place laws or constitutional amendments on the ballot via a petition. In order to place a measure on the ballot, a petition must garner enough signatures from registered voters. Then, the measure can take one of two directions. If the initiative is a direct initiative, it is automatically placed on the ballot once enough signatures are submitted. If the initiative is an indirect initiative, the measure is first referred to the state legislature once enough signatures are submitted and then only placed on the ballot if it is not enacted by the legislature. In all 50 states, state legislatures have the power to refer measures to the ballot.<sup>3</sup>



## Abortion-Related Ballot Measures in 2022

The following measures are all legislatively referred statutes or constitutional amendments, meaning that they have been passed by the state's legislature and are on an upcoming ballot for voter ratification or rejection.

### **Vermont**

Vermont will vote on Vermont Proposal 5, the Right to Personal Reproductive Autonomy Amendment. If the proposed constitutional amendment is approved by voters, it will add language to the Vermont Constitution stating that “an individual’s right to personal reproductive autonomy is central to the liberty and dignity to determine one’s own life course.”<sup>4</sup> This would provide a right to abortion in the Vermont Constitution and would prohibit the right from being denied or infringed in the absence of a compelling state interest.

### **Kentucky**

Kentucky will vote on the Kentucky No Right to Abortion in Constitution Amendment. If the proposed constitutional amendment is approved by voters, it would add a new section to the Kentucky Constitution’s Bill of Rights to state that: “To protect human life, nothing in this Constitution shall be construed to secure or protect a right to abortion or require the funding of abortion.”<sup>5</sup> This will allow the state legislature, in the absence of *Roe v. Wade*, to further restrict access to abortion in the state. After the release of the opinion in *Dobbs*, abortion automatically became illegal in Kentucky in almost all situations, with exceptions only when there is a substantial risk of death to or permanent impairment of a life sustaining organ of the pregnant person.<sup>6</sup>

### **Kansas**

Kansas will vote on the Kansas No State Constitutional Right to Abortion and Legislative Power to Regulate Abortion Amendment. If the proposed constitutional amendment is approved by voters, it would add a new section to the Bill of Rights in the Kansas Constitution to state that: “Because Kansans value both women and children, the constitution of the state of Kansas does not require government funding of abortion and does not create or secure a right to abortion. To the extent permitted by the constitution of the United States, the people, through their elected state representatives and state senators, may pass laws regarding abortion, including, but not limited to, laws that account for circumstances of pregnancy resulting from rape or incest, or circumstances of necessity to save the life of the mother.”<sup>7</sup> While the Kansas Supreme Court has found a constitutional right to abortion, if passed, this measure would allow the state legislature to restrict access to abortion.<sup>8</sup>

### **Montana**

Montana will vote on Montana LR-131, the Medical Care Requirements for Born-Alive Infants Measure. This measure would require medical care to be provided to infants born alive by classifying a born-alive infant as “a legal person for all purposes under the laws of the state... entitled to the protections of the laws, including the right to appropriate and reasonable medical care and treatment.”<sup>9</sup> This includes infants that were born alive after an attempted abortion. It would also establish that a healthcare provider that “purposely, knowingly, or negligently violates” this requirement by not providing care would be convicted of a felony punishable by a fine and/or up to 20 years in prison.<sup>9</sup> Current Montana law states that a person commits an offense only if they “purposely, knowingly, or negligently *cause the death* of a premature infant born alive, *if the infant is viable*”<sup>10</sup>

### **California**

California will vote on the California Right to Reproductive Freedom Amendment. If approved by voters, this measure would amend the California Constitution to establish a right to reproductive freedom, including a right to an abortion and to choose or refuse contraceptives.<sup>11</sup> Under current law, abortion rights are protected under the Reproductive Privacy Act and the Supreme Court of California has recognized a constitutional right to abortion.<sup>12, 13</sup>



## Potential Abortion-Related Ballot Measures in 2022

Michigan may place on the ballot the Michigan Right to Reproductive Freedom Initiative as an initiated constitutional amendment. This would create a state constitutional right to reproductive freedom defined as “the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.”<sup>14</sup> Currently in Michigan there is ongoing litigation to establish a constitutional right to abortion under Michigan’s Due Process Clause. Planned Parenthood and Governor Gretchen Whitmer separately brought actions seeking a preliminary injunction against Michigan’s pre-*Roe* abortion ban, which has been granted.<sup>2</sup>

Colorado may place on the ballot the Unlawful Murder of a Child Initiative as an initiated state statute. This would ban abortion in Colorado by prohibiting intentionally causing the death of a living human being “at any time prior to, during, or after birth” except when necessary to save the life of the pregnant person, to remove or relocate an ectopic pregnancy, or to remove a fetus that is no longer alive.<sup>15</sup> Abortion is currently protected under Colorado law by the Reproductive Health Equity Act.<sup>16</sup>

Arizona had an effort to place on the ballot the Right to Reproductive Freedom Initiative as an initiated constitutional amendment. This would provide a state constitutional right to reproductive freedom, which includes the right to make decisions regarding “prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.”<sup>17</sup> As of July 7, 2022, the initiative did not collect enough signatures to appear on the ballot in the 2022 election<sup>18</sup>. Currently in Arizona, abortions are allowed up to the point of viability after state-directed counseling and a waiting period.<sup>19</sup>

## Past Approved Ballot Measures

In 2020, voters in Louisiana approved the No Right to Abortion in Constitution Amendment as a legislatively referred constitutional amendment. This measure added a sentence to the Louisiana Declaration of Rights that states: “To protect human life, nothing in this constitution shall be construed to secure or protect a right to abortion or require the funding of abortion.”<sup>20</sup> Currently, abortion is illegal in Louisiana as the result of a trigger law that went into effect immediately after the release of the *Dobbs* opinion.<sup>21</sup>

In 2018, voters in Alabama approved Alabama Amendment 2, the State Abortion Policy Amendment as a legislatively referred constitutional amendment. This measure amended the state constitution to declare that the state’s policy is to recognize and support the “sanctity of unborn life and the rights of unborn children, including the right to life,” “ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate,” and state that “nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion.”<sup>22</sup>

In 2018, voters in West Virginia approved West Virginia Amendment 1, the No Right to Abortion in Constitution Measure as a legislatively referred constitutional amendment. This measure added a section to the West Virginia Constitution which states: “Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion.”<sup>23</sup>

Post *Dobbs*, these measures will allow legislatures in these states to pass laws restricting access to abortion because they explicitly state that abortion is not a protected right.

## What does this mean for abortion access?

*Dobbs* has upended the reproductive healthcare landscape. In the absence of *Roe* and *Casey*, we will have a state-by-state approach to laws restricting or ensuring access to abortion and potentially other types of reproductive healthcare. The good news is that many states have actual or potential measures that would protect rights to access reproductive healthcare.<sup>2</sup> The bad news is that many other states have actual or potential measures that would do the exact opposite.

Access to a full range of reproductive health services, including abortion, has tangible economic and social benefits that cross generations.<sup>24</sup> Ballot measures are one way that voters can make their voices heard on this issue. Going forward, pay attention to what your state is putting on the ballot and what that might mean for abortion access in your state.

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## SUPPORTERS



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