

Issue: Reproductive Health

## AZ Reproductive Health

### *Roe v. Wade* is Overturned – Now What in Arizona?

Since 1973 individuals in Arizona and every other U.S. state have had the right to control their own bodies, including the right to terminate a pregnancy until viability, when a fetus can survive outside the womb, pursuant to *Roe v. Wade (Roe)*.<sup>1</sup> That radically changed on June 24, 2022, when the U.S. Supreme Court overturned *Roe* in *Dobbs v. Jackson Women’s Health Organization (Dobbs)*.<sup>2</sup> The 1973 decision was based on the substantive due process clause of the Fourteenth Amendment of the U.S. Constitution. But now, pursuant to *Dobbs*, states with pre-*Roe* bans can immediately ban abortion. See the map<sup>3</sup> below of the 22 states with abortion bans on their books prior to the overturn of *Roe*. These bans include both laws in place before *Roe* and “trigger” laws enacted to spring into place if the case was overturned.



Arizona’s pre-statehood abortion ban has not been enforceable since 1973. But Arizona Republicans have been working for years to undermine an individual’s right to choose. In 1992, the U.S. Supreme Court upheld *Roe* in *Planned Parenthood v. Casey*,<sup>4</sup> but found that states had the right to restrict abortion so long as an “undue burden” is not placed on an individual seeking an abortion. The *Casey* ruling paved the way for Republican controlled legislatures, including Arizona’s, to enact laws that restrict abortion. The Arizona

anti-choice laws passed since *Casey* cover health insurance, funding, providers, facilities, medically unnecessary ultrasounds, waiting periods, mandatory counseling, and consent. More recently, gambling on the new conservative majority on the U.S. Supreme Court, the Arizona Republican-controlled legislature has passed laws limiting an individual’s right to abortion and criminalizing providers. That gamble seems to have paid off.

The run up to the overturning of *Roe* brought with it increasing concern regarding access to contraceptive care as well. Following *Dobbs*, that fear has significantly increased. Although Justice Alito’s majority opinion in *Dobbs* offers some hollow reassurances that contraception and marriage equality are not at risk, the rulings enshrining those rights were based on the same substantive due process precedents as *Roe*, which found a constitutional right to privacy. Justice Thomas’s concurring opinion describes what we can reasonably expect in this arena in the near future. Thomas wrote, “In future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold* (contraception), *Lawrence* (same-sex sexual interaction), and *Obergefell* (marriage equality).”<sup>5</sup> Interestingly (and perhaps based upon his personal marital circumstances), Thomas failed

to include *Loving v. Virginia*,<sup>6</sup> which was tailored from the same due process Constitutional fabric as *Roe*. Even without a future overturning of *Griswold*, access to contraception is currently under attack across the U.S. in state legislatures including in Arizona and at the national level in the U.S. Congress.

## Almost All Abortions Are Likely Illegal in Arizona Following the End of *Roe v. Wade*

A pre-statehood law (First Territory Legislative Assembly, Howell Code 1864)<sup>7</sup> still on the books in Arizona (ARS § 13-3603) and in effect until *Roe* in 1973, prohibits performing or helping to perform an abortion unless necessary to save a woman's life.<sup>8</sup> The law requires mandatory prison time and calls for a minimum of two years and a maximum of five years of prison time for violations of this law. It was amended in 2021 by SB 1457<sup>9</sup> to no longer include prosecution of the woman seeking the abortion, as it did when enacted in 1864.<sup>10</sup> See Box 1 for clarification on the dates of the pre-statehood abortion ban in AZ.<sup>11,12</sup>

Then, in April 2022, the Arizona legislature passed along party lines and Governor Ducey signed SB 1164,<sup>13</sup> banning abortion after 15 weeks. The law does not include exceptions for rape or incest. It prohibits a physician from performing an abortion after 15 weeks except in the case of medical emergency. A physician's intentional or knowing violation of the prohibition on abortions past 15 weeks gestational age is classified as a class 6 felony. It should be noted that this law calculates weeks of pregnancy as "gestational age" or "probable gestational age," which means that the age of a fetus is calculated from the first day of the last menstrual period of the pregnant person.<sup>14</sup> Given that method of gestational age, SB 1164<sup>15</sup> is effectively a 13-week abortion ban. The law is scheduled to go into effect late summer 2022, now that *Roe* has been overturned.

The new SB 1164 and the pre-statehood abortion laws thus conflict—is abortion completely banned in Arizona? Or only after 15 weeks gestation (effectively 13 weeks)? There is an important section in SB 1164 that specifically refers to the pre-statehood law (1864 ARS 13-3603, Revised Criminal Code § 13-3603). It states that this act does not:

1. Create or recognize a right to abortion or alter generally accepted medical standards. The Legislature does not intend this act to make lawful an abortion that is currently unlawful.

2. Repeal, by implication or otherwise, section 13-3603, Arizona 19 Revised Statutes, or any other applicable state law regulating or restricting abortion.<sup>16</sup>

Arizona's SB 1164 law was very well crafted. It served two purposes prior to the overturn of *Roe*: (1) It mirrored the 15-week abortion ban in *Dobbs* in the event that the Court ruled in favor of *Dobbs*, but did not overturn *Roe*; and (2) It specifically refers to the pre-statehood law banning abortion, making

### A note regarding dates of the pre-statehood abortion ban

Both 1864 and 1901 are frequently reported in the media as the date of Arizona's pre-statehood ban. In 1864, the First Legislative Assembly of the Territory of Arizona met. The laws published from the First Legislative Assembly, referred to as the Howell Code, include the abortion ban. This is the abortion ban that remains on the books to this day in Arizona as ARS § 13-3603. Often the media uses 1901 as the date of the Arizona abortion ban. The 1901 law is the Arizona Comstock Law (ARS §13-213). The Arizona Comstock Law was modelled on the Federal Comstock Act of 1873, which stated that advertising or distributing information about abortion or contraception was considered obscene and thus illegal.

it absolutely clear the intent of the Republican-controlled Arizona legislature was to ban and criminalize abortion in Arizona if *Roe v. Wade* was overturned in the *Dobbs* ruling.

On July 13, 2022, Arizona Attorney General Brnovich filed a motion in Pima County to lift the 50-year-old injunction on ARS§ 13-3603 (revised code of the pre-statehood abortion ban from 1864).<sup>17</sup> Once this injunction is lifted as expected, abortion will be officially illegal in Arizona unless, it is necessary to save a woman's life, with no exceptions for rape or incest.

## Arizonans Support a Women's Right to Choose

The current abortion ban in Arizona does not reflect the preferences of Arizona voters. The majority of Arizonans, both female and male, support access to abortion. Recent polling data from Change Research of Arizona voters in 2022 found 71% opposed making abortion illegal. An overwhelming majority of 90% agree that "each of us should have the freedom to decide how and when we start or grow a family, free from political interference" (100% Democrats, 89% of Independents, and 82% of Republicans). An 80% majority agrees that medical professionals should never be threatened with fines or jail time for providing healthcare services their patients request. Arizona voters do not want Texas's extreme six-week abortion ban in Arizona; 58% oppose banning abortion at six weeks. A strong majority of 72% opposes Texas's enforcement mechanism of allowing any private individual, including strangers, to sue people who provide abortion care or help people seek abortion care—including clinic workers, clergy, or a ride share driver—for \$10,000.<sup>18</sup>

## Fetal Personhood: Granting an Embryo Rights and Privileges while Denying the Rights of Arizona Women

In 2021, the Arizona state legislature passed SB 1457 along partisan lines,<sup>19</sup> which was then signed by Republican Gov. Ducey. Among other provisions, this bill banned all abortions in the case of genetic abnormalities and made it a Class 3 felony for a physician to perform an abortion knowing that the abortion is sought because of a genetic abnormality. Because in 2021 a woman's right to abortion for any reason prior to viability was protected under the U.S. Constitution, SB 1457 was immediately challenged in court and U.S. District Court Judge Douglas Rayes blocked key criminal provisions of the law as unconstitutionally vague. However, on June 30, 2022 (immediately after the *Dobbs* decision), the U.S. Supreme Court vacated that preliminary injunction and remanded to the Ninth Circuit for further proceedings consistent with *Dobbs*, and the Ninth Circuit remanded the case to Judge Rayes. The plaintiffs then renewed their request for preliminary injunction, but now no longer challenged the fetal genetic abnormality restrictions.<sup>20</sup> Instead, they focused solely on the language in SB 1457 concerning fetal personhood.

Specifically, the law states:

"The laws of the state shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state."<sup>21</sup>

(The initial draft of the bill characterized embryos fertilized in vitro as having fetal personhood. The signed law excludes in vitro embryos from its reach.) On July 11, 2022, Judge Rayes issued a preliminary injunction barring enforcement of SB 1457, finding that this "Interpretation Policy" is

unconstitutionally vague. The opinion refers to the two conflicting abortion bans (described above), neither of which are absolute bans. The pre-statehood law permits abortion if necessary to save the life of the mother. The 2022 abortion ban permits abortion until 15 weeks gestation. His opinion states:

“If Arizona wants to extend legal protections to the unborn—including, it seems, before medically recognized conception—nothing in this order precludes it from doing so clearly and explicitly, by amending the definition of ‘person’ in those discrete statutes where Arizona wants the change to operate, and by clearly and explicitly stating whether those applications exempt otherwise lawful abortion care.”<sup>22</sup>

Without such clarification “abortion providers do not have fair notice of whether, if they conform their conduct to these laws, they nonetheless may face criminal, civil, or professional liability under *other* statutes based solely on what licensing, law enforcement, or judicial officials think it means to ‘acknowledge’ the equal rights of the unborn.”<sup>23</sup>

## Republicans are Gunning to Ban Contraception – *Roe* is Overturned, Contraception Moves to the Forefront

In 1965, the U.S. Supreme Court found in *Griswold v. Connecticut*<sup>24</sup> that a married woman has the right to contraception under the U.S. Constitution. In *Eisenstadt v. Baird* (1972)<sup>25</sup> the court further found that unmarried couples have the same right to birth control as married couples, and the court expanded access to birth control to persons under the age of 16 in *Carey v. Population Services, Int’l* (1977).<sup>26</sup> However, as noted above, the opinion in *Dobbs* and Justice Thomas’s concurring opinion have caused grave concern that access to contraceptive care, pursuant to *Griswold*, is at risk.

Even without the overturning of *Griswold*, access to contraception is already under attack by Republican legislators. Both fetal personhood laws and laws that conflate emergency contraception with abortifacients intentionally disregard medically established knowledge and make room for legislators to restrict access to contraceptive care. According to the medical community and long-standing Federal policy, pregnancy is established at *implantation*, when a fertilized egg implants into the uterine wall.<sup>27</sup> But Republicans in Arizona have shifted the definition of pregnancy from *implantation* back to the *moment of fertilization* in recent bills, including the fetal personhood provision in SB 1457 described earlier in this paper as well as SB 1362 described below.

By applying the *moment of fertilization* definition as the event that establishes pregnancy, Republicans also seek to ban specific forms of contraception by erroneously classifying them as abortifacients. Emergency contraception, which consists of the same hormone found in oral birth control pills, a synthetic form of progesterone, works by preventing ovulation and fertilization. Defining pregnancy as the *moment of fertilization* has also been applied to limit access to IUDs in several red states. This is entirely incorrect and based on the mistaken belief that IUDs block implantation in the uterus. Hormonal IUDs function in the same manner as oral contraceptives. Copper IUDs release copper ions that create a hostile environment to sperm, thus blocking fertilization.<sup>28</sup> There is no medical data that either type of IUD blocks implantation.

On the national level, efforts have been made in the U.S. Congress to conflate emergency contraception with abortifacients. In June 2021, when the U.S. House of Representatives considered

the Equal Access to Contraception for Veterans Act, a bill that would allow veterans access to no-cost contraception, Rep. Greene (R, Georgia) stated “Contraception stops a woman from becoming pregnant. The Plan B pill kills a baby in the womb once a woman is already pregnant.” Rep. Rosendale (R, Montana) went on record stating, “Let me be clear, drugs like Plan B and Ella are not contraception, they are abortifacients.”<sup>29</sup>

Emergency contraception such as Plan B-One Step and Ella (also known as the morning after pill and not to be confused with RU 486, a medication used for nonsurgical abortion) are legal in Arizona. At the moment anyone can purchase emergency contraception over the counter in Arizona.<sup>30</sup> However, it’s already the case that a pharmacist, an individual provider, or an institution may refuse to dispense emergency contraception, IUDs, and oral birth control pills in Arizona.<sup>31</sup>

In addition to changing the medical definition of pregnancy, Republicans are also erroneously conflating emergency contraception with abortifacients in legislation. This approach is intended to not only confuse the public, but also limit access to contraception. This is an approach that has been used across the U.S. by anti-choice advocates. Republican legislators in Missouri tried to ban their state’s Medicaid program from paying for emergency contraception and IUDs. Idaho is holding hearings on banning emergency contraception and IUDs.<sup>32</sup> Anti-choice groups have used the conflation of emergency contraception and abortifacients to fight legislation that increases access to contraception. In Illinois an anti-choice organization, Students for Life, has worked to defeat a bill that provides emergency contraception in vending machines on university campuses.<sup>33</sup>

In 2021, the Arizona Legislature in SB 1362 erroneously conflated emergency contraception with abortion.<sup>34</sup> This was an amendment to statutes 36-1321, 36-1322 and 36-2154 that prohibit discrimination against health care entities that refuse to assist in “causing the death of any individual” including “assisted suicide, euthanasia, or mercy killing.” The amendment introduced to the statutes included “means of abortion” and “emergency contraception” in the list of actions causing the death of an individual.<sup>35</sup>

Contraception in Arizona has been increasingly restricted by Republican legislators. Their end game, regardless of approach, is to ban several forms of contraception, including emergency contraception, IUDs, and oral birth control pills. With the overturning of *Roe*, the ability of legislators to blur the lines of conception and abortifacients, confuse the public, and limit access to contraception has been expanded.

## Conclusion

“We will continue to prioritize protecting life in our preborn children, and this legislation goes a long way in protecting real human lives,” stated Governor Ducey while signing SB 1457 in 2021.<sup>36</sup> Gov. Ducey’s use of the words “real human lives” raises the question: What about protecting the lives of individuals wanting access to reproductive care in Arizona?

If Republicans continue to control the Arizona legislature, access to reproductive healthcare will be increasingly limited. As it stands, the Republicans have banned abortion in Arizona unless the life of the mother is at risk. Republicans will continue to propose bills that restrict and criminalize a woman’s access to reproductive healthcare. The 2022 Arizona Legislative session included bills such as HB 2483,<sup>37</sup> introduced two days before the close of the legislative session. The bill, modelled on the Texas law criminalizing abortion, monetizes abortion vigilantism with a \$10,000 bounty for suing

providers or anyone else (conceivably bus and Uber drivers) assisting a woman in accessing an abortion after six weeks. Fetal personhood laws may well be further expanded to provide embryos with the full panoply of personhood rights and privileges, from the point of conception onward. The application of fetal personhood laws and laws that erroneously conflate contraception with abortifacients could result in bans of several forms of contraception including birth control pills, Depo-Provera injections, IUDs, and emergency contraception such as Plan B One-Step. One can look for increased state surveillance of women, including their access to abortion and contraception and incidences of miscarriage and stillborn births, as well as subpoenas to access the data collected by apps tracking menstruation.

On July 21, 2022, the U.S. Congress voted on the Right to Contraception Act (HR 8373).<sup>38</sup> One hundred ninety-five Republicans including four Arizona members of the U.S. House of Representatives voted against the bill. Contraceptive care is under attack at every level in Arizona.

Quite simply—after banning abortion—the Republican endgame is now to ban contraception, which is contrary to the desires and needs of the residents and voters of Arizona.

## Appendix A

### Arizona Laws Related Abortion

#### Onerous TRAP Laws Regulating Providers and Facilities

Arizona's targeted regulation of abortion providers (TRAP laws)<sup>39</sup> include requirements related to facilities, admitting privileges, and reporting. These rules put excessive requirements on abortion providers. Providers who violate Arizona's abortion restrictions may face civil and criminal penalties. Provisions of these laws will:

- Restrict the provision of surgical abortion care to licensed physicians.
- Consider medicated abortion to be a "surgical" procedure, placing unnecessary requirements on both patients and providers.
- Restrict providers from using telemedicine for the provision of abortion care.
- Requires all abortion counseling to come from a medical doctor.
- Prohibit medicated abortion from being prescribed through telemedicine, requiring patients in the vast rural areas of Arizona to travel to Phoenix or Tucson, where they must attend two appointments no closer than 24 hours apart.<sup>40</sup>
- Require providers to use a reporting portal that includes 17 reporting fields.<sup>41</sup>

#### Medically Unnecessary Ultrasounds

Arizona requires fetal ultrasound imaging and auscultation of fetal heart tones<sup>42</sup> on the woman undergoing the abortion. The Arizona ultrasound law requires the following:

- Offer to provide the woman with an opportunity to view the active ultrasound image of the embryo/fetus (called an "unborn child" in the law) and hear the heartbeat of the embryo/fetus if the heartbeat is audible. The active ultrasound image must be of a quality consistent with standard medical practice in the community, contain the dimensions of the embryo/fetus and accurately portray the presence of external members and internal organs, if present or viewable, of the embryo/fetus.
- Offer to provide the woman with a simultaneous explanation of what the ultrasound is depicting, including the presence and location of the embryo/fetus within the uterus, the number of embryo/fetuses depicted, the dimensions of the embryo/fetus and the presence of any external members and internal organs, if present or viewable.
- Offer to provide the patient with a physical picture of the ultrasound image of the embryo/fetus.

## **Mandatory Waiting Period and Counseling**

Arizona has a mandatory 24-hour waiting period before an abortion can be performed. This requires two visits to the clinic where the abortion is to be performed. During the first visit, the patient is required to have an ultrasound (see above). Patients are required to listen to a physician read a state mandated script. The patient then waits 24 hours before returning to the clinic for the abortion.<sup>43</sup>

Mandatory waiting periods place an undue financial and logistical burden on patients in missed time from work, travel, and the need to stay in a hotel overnight between appointments.

## **Parental Consent**

Arizona prohibits any physician from performing an abortion on an unemancipated minor without the written consent of one of the minor's parents or her guardian or conservator, or unless a Superior Court judge authorizes the physician to perform the abortion.<sup>44</sup>

## **Right to Refuse Law**

Arizona has laws governing the right of abortion providers and healthcare institutions to refuse to provide abortions to patients.<sup>45</sup>

## **Health Insurance**

Currently there are no restrictions on abortion coverage for private health insurance in Arizona. However, there are restrictions on abortion insurance coverage on the ACA marketplace health insurance plans in Arizona and on the public employee health insurance plans. There is an exception that permits coverage for abortion for both the ACA marketplace and public employee health insurance plans limited to life endangerment or severe health impairment of the mother. The health impairment exception is defined as a "substantial and irreversible impairment of a major bodily function."<sup>46</sup>

## **Medicaid**

Medicaid coverage of abortions in Arizona is limited. The Hyde Amendment forbids federal funding for abortion services and Medicaid (Arizona Health Cost Containment System, AHCCS) does not cover most abortions. The exceptions that allow for use of federal funds for abortion services are rape, incest, and life endangerment. Arizona also permits abortions covered by Medicaid and uses state funds when the abortion is considered medically necessary in the judgment of a licensed physician.<sup>47</sup>

Very few abortions have been covered by AHCCS. In 2020 only three abortions were covered by AHCCS. Both of these abortions fell under the exceptions in the Hyde Amendment and state funds were not used. By comparison, there were 13,003 abortions performed in Arizona in 2019.<sup>48</sup>

## **Services for homeless pregnant women**

No state funds appropriated to services for homeless pregnant women may be used for abortion referral services or distributed to an entity that promotes, refers for, or performs abortion services. S.B. 1520, 53rd Leg., 2d reg. Sess. (Ariz. 2018). H.B. 2747, 54th Leg., 1st Reg. Sess. (Ariz. 2019).<sup>49</sup>

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- <sup>2</sup> [https://www.supremecourt.gov/opinions/21pdf/19-1392\\_6j37.pdf](https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf)
- <sup>3</sup> <https://www.vox.com/2022/6/24/23181720/supreme-court-dobbs-jackson-womens-health-samuel-alito-roe-wade-abortion-marriage-contraception>
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- <sup>5</sup> [https://www.supremecourt.gov/opinions/21pdf/19-1392\\_6j37.pdf](https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf)
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- <sup>11</sup> <https://babel.hathitrust.org/cgi/pt?id=mdp.35112105057998&view=lup&seq=55>
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- <sup>14</sup> <https://www.azleg.gov/legtext/55leg/2R/bills/sb1164p.pdf>
- <sup>15</sup> <https://www.guttmacher.org/state-policy>
- <sup>16</sup> <https://www.azleg.gov/legtext/55leg/2R/bills/sb1164p.pdf>
- <sup>17</sup> <https://www.azag.gov/press-release/ag-brnovich-files-motion-seeking-clarity-arizonas-abortion-law>
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- <sup>19</sup> <https://www.azleg.gov/legtext/55leg/1R/bills/SB1457P.pdf>
- <sup>20</sup> <https://apnews.com/article/abortion-business-health-arizona-us-supreme-court-ed8133637e92bd1be872aled5583a66b>
- <sup>21</sup> <https://www.azleg.gov/legtext/55leg/1R/bills/SB1457P.pdf>
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- <sup>37</sup> <https://legiscan.com/AZ/text/HB2483/id/2478218>
- <sup>38</sup> <https://clerk.house.gov/Votes/2022385>
- <sup>39</sup> <https://reproductiverights.org/maps/state/arizona/>
- <sup>40</sup> [https://www.abortionfundofaz.org/abortion-in-arizonaRequires physicians extensive reporting](https://www.abortionfundofaz.org/abortion-in-arizonaRequires%20physicians%20extensive%20reporting)
- <sup>41</sup> <https://directorsblog.health.azdhs.gov/abortion-reporting/>
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- <sup>43</sup> <https://www.plannedparenthood.org/planned-parenthood-arizona/get-care/abortion-services#:~:text=Abortion%20Visits&text=Those%20seeking%20abortion%20are%20first,well%20as%20have%20an%20ultrasound>
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