

Issue: Abortion

# Arizona’s Republicans Overwhelmingly Support the 1864 Pre-Statehood Abortion Ban


The Republican members of Arizona’s state legislature overwhelmingly support the 1864 pre-statehood, near-total abortion ban law. The law only permits abortion to save the life of the patient. The 1864 law criminalizes abortion with a mandatory 2 to 5 year prison sentence for anyone providing an abortion. This law (ARS § 13-3603) was written in 1864, decades before women had the right to vote and before Arizona was a state.<sup>1</sup> The 1864 law has not been enforced since 1973, before the United States Supreme Court ruled in *Roe v. Wade* that access to an abortion was a constitutionally protected right.<sup>2</sup> With the overturn of *Roe v. Wade* on June 24, 2022, in the *Dobbs v. Jackson Women’s Health Organization* decision Arizona has been in a state of chaos with respect to abortion.<sup>3</sup> Prior to the announcement of the United States Supreme Court *Dobbs* ruling, the Arizona Legislature in the 2022 regular session passed a bill that bans abortion after 15 weeks. This bill, SB 1164, was passed along party lines and then signed by Gov. Ducey.<sup>4</sup> Like the pre-statehood law, SB 1164 does not include exceptions for rape or incest. It prohibits anyone from providing an abortion after 15 weeks except in the case of a medical emergency. Arizona’s SB 1164 law was crafted while the United States Supreme Court ruling on *Dobbs v. Jackson Women’s Health Organization* was pending. 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 1864 pre-statehood law, making it absolutely clear the intent of the Republican-controlled Arizona legislature was to completely ban and criminalize abortion in Arizona if *Roe v. Wade* was overturned

### Arizona Abortion Timeline

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1864


Pre-Statehood law; bans all abortions except to save the life of the mother\*; mandatory 2 to 5 year prison sentence for anyone providing an abortion.



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1920


19th Amendment to the US Constitution ratified, giving women the right to vote.



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1973

*Roe v. Wade*, a landmark decision by the US Supreme Court, ruled that the US Constitution protects the right to abortion.




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2022

AZ legislature passes 15-week abortion law; bans all abortions after 15 weeks except to save the life of the mother\*; Gov. Ducey signs it.

*Dobbs* ruling by the US Supreme Court overturns *Roe v. Wade*, allowing states to ban abortion.

After *Dobbs*, it is unclear which abortion law is in effect in AZ—the 1864 law or the 15-week abortion law signed in 2022.



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2024

AZ Supreme Court rules in favor of the 1864 pre-statehood law over the 15-week law signed in 2022; 1864 law will be in effect starting in June 2024.

Arizona Abortion Access Act (a ballot initiative to amend the AZ Constitution to enshrine abortion rights) exceeds the number of signatures required to be on the Nov 5, 2024 ballot.

AZ Legislature votes to repeal the 1864 pre-statehood law; GOP leadership block 2 attempts to bring the repeal to a vote. On the 3rd attempt, all Democrats in the State House and Senate vote to repeal the 1864 pre-statehood law. All but 3 GOP in the House and 2 GOP in the Senate vote to keep the 1864 pre-statehood near-total ban on abortion the law of the land in AZ. Repeal goes into effect fall 2024 (90 days after end of legislative session).

\*Law does not include a description.



in the *Dobbs* ruling. It should be noted that at any time during the 2023 Arizona legislative session the Arizona legislature could have repealed the 1864 law. Arizona Republican legislators, in their fanatical support for the 1864 abortion ban, chose not to bring a vote to repeal the law to the Arizona House floor. Fast-forward to December 2023 when oral arguments were heard in the Arizona Supreme Court to determine which law would be enforced—the 1864 pre-statehood law or the 15-week ban (SB 1164, 2022). On April 9, 2024, the Arizona Supreme Court ruled that the 1864 abortion law was enforceable.<sup>5</sup>

## Summer 2024: Abortion enforcement woes—chaos in Arizona continues

When the Arizona Supreme Court ruled to uphold the 1864 law in April 2024, enforcement was set to begin in June 2024.<sup>6</sup> Democrats attempted to bring a repeal vote to the House floor and were twice blocked by Republicans.<sup>7</sup> On the third attempt and with the help of only a few Republicans, Democrats voted to repeal the 1864 pre-statehood law in May 2024. The repeal does not go into effect until fall 2024 (ninety days after the last day of the legislative session).<sup>8</sup> This means that a near-total abortion ban is officially the law until sometime fall 2024. Meanwhile on May 13, the Arizona Supreme Court issued a ruling that the 1864 law cannot be enforced until September 26, 2024 (August 12 plus 45 days).<sup>9</sup> The repeal of the 1864 law should go into effect prior to that date. See Table 1 for a detailed enforcement timeline. Once the 15-week abortion ban is in effect this fall, abortion access will continue to be unduly restricted for Arizonians. See [Appendix A](#) for a review of the current regulations placed on “legal” abortions in Arizona. To further endanger women’s rights to have an abortion, the United States Supreme Court ruling on the use of Mifepristone in medication abortions is expected in June. This is the first ruling on abortion since *Dobbs*. Given the conservative court there is grave concern that Mifepristone will be banned.

**Enforcement Timeline**

<i>Date</i>	<i>1864 till Jan. 22, 1973</i>	<i>Jan. 22, 1973 – June 24, 2022</i>	<i>June 24, 2022</i>	<i>April 9, 2024</i>	<i>May 2, 2024</i>	<i>May 13, 2024</i>	<i>Fall 2024</i>
		<i>Roe in effect</i>	<i>Dobbs ruling; two conflicting laws on the books in AZ; abortion laws in chaos</i>	<i>AZ Supreme Court rules on the two conflicting laws</i>	<i>Repeal of 1864 law</i>	<i>AZ Supreme Court rules enforcement of 1864 law delayed till Sept. 26, 2024</i>	
<b>Pre-Statehood 1864 Abortion Ban Law</b>	<i>1864 law in force</i>	<i>Abortion legal in US</i> <i>1864 law cannot be enforced</i>	<i>1864 law could be enforced following Dobbs</i>	<i>1864 law upheld but enforcement starts June, 2024</i>	<i>Repeal of 1864 law in effect 90 days after close of 2024 AZ leg. session</i>	<i>1864 law repeal not in effect till fall 2024 but enforcement is stayed</i>	<i>1864 law repeal in effect</i>
<b>15-Week Abortion Ban Law</b>			<i>15-week law could be enforced following Dobbs</i>		<i>15-week law will be enforced after 1864 law repeal in effect</i>		<i>15-week law can be enforced.</i>

Table 1 Data Source Arizona Attorney General [website](#)

## Abortion is on the 2024 Ballot: Inside Arizona’s abortion initiative wars

The Arizona for Abortion Access (AAA) citizen-led ballot initiative was drafted in September 2023 by a coalition of organizations in support of abortion rights, including Planned Parenthood Advocates of Arizona, the ACLU of Arizona, Indivisible Project, and several others. The AAA initiative amends the Arizona

constitution to protect abortion rights in Arizona. It provides abortion rights that are similar to *Roe v. Wade* protections: the state cannot limit access to abortion prior to fetal viability (approximately 24 weeks); protects the right to an abortion after fetal viability if a licensed healthcare clinician determines that the life, physical health or mental health of the patient is at risk; and prevents the state from penalizing anyone who assists another person in exercising their right to an abortion.<sup>10</sup>

Republicans have been fighting back against the AAA initiative by interfering with signature collection. Groups such as Decline to Sign have been appearing at AAA initiative signature events to prevent individuals from signing. They are described as intimidating to those considering signing the AAA initiative. In addition, anti-choice organizations have been falsely stating that the amendment to the Arizona constitution will allow veterinarians, chiropractors, and dentists to perform abortions.<sup>11</sup> Nevertheless, Arizona for Abortion Access (PAC) announced in April that it had surpassed the threshold number of signatures required for inclusion on the November 5, 2024, election ballot earlier than anticipated.

Abortion rights have become a major issue in this year's election. Polling data regarding abortion rights and influence on voting suggests the AAA initiative could help turn out the vote for Democrats. About 64% of voters polled said abortion rights will influence their vote this year. Also, 76% of voters ages 18-35 years old responded that a candidate's position on abortion would influence their vote.<sup>12</sup>

## The Republican playbook includes competing ballot initiatives intended to confuse voters

Republicans in the Arizona House are deeply concerned that the Arizona for Abortion Access initiative will enshrine abortion rights in the Arizona constitution. To take away votes from the AAA measure, Republican legislators are strategizing and considering various proposed ballot measures to intentionally confuse voters in November.<sup>13</sup> Republicans could successfully add their confusing initiatives to the ballot because legislatively referred constitutional amendments only require a simple majority vote to be placed on the ballot. Recently leaked documents including a power point presentation drafted by Republican leadership in the House contain various options for competing measures to confuse voters. Included in the leaked documents was Phase 1 of the plan, shown in Box 1, with the suggested initiative titles "Protecting Pregnant Women and Safe Abortions Act," "Arizona Abortion and Reproductive Care Act," and "Arizona Abortion Protection Act."<sup>14</sup> Note that the slide states "complimentary [*sic*] (not conflicting)" meaning the Republican initiative is complementary to the AAA initiative, which is intentionally false. Box 2 is additional leaked information from the Republican power point.<sup>15</sup> Note the language "in reality it is a 14-week law disguised as a 15-week law" included on the Republican slide. The

### 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")

Box 1 Republican slide #17

Republican proposals for initiatives in no way complement the AAA initiative. None of the proposals actually protect access to abortion. Instead, they serve to strip away abortion rights provided in the AAA initiative. Republicans also plan to submit their initiative before the AAA initiative is submitted to the Secretary of State so that the

**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 15<sup>th</sup> 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



#### Box 2 Republican Slide #19

Republican measure appears above the AAA initiative on the ballot this November, to further confuse voters. To view the entire leaked Republican presentation document click [here](#).

## Arizonans support a woman's right to choose

The current abortion ban in Arizona does not reflect the preferences of Arizona voters. Most Arizonans, both female and male, support access to abortion. The results of the 2022 Change Research poll of Arizona voters found the following:

- 71% Oppose making abortion illegal
- 80% Agree that medical professionals should never be threatened with fines or jail time
- 58% Oppose the ban on abortion at 6 weeks
- 72% Oppose the Texas abortion law enforcement mechanism of allowing any private individuals to sue people who provide abortion care or help those who seek abortion care for \$10,000. including clergy, clinic workers or ride share drivers.<sup>16</sup>

## That was then -- this is now: messaging by prominent AZ Republicans

In 2022, while Arizona Republicans were celebrating the *Dobbs* ruling, they were also giving full support to the 1864 law. Suddenly with the Arizona Supreme Court's April 9, 2024, ruling that the 1864 law is enforceable, Arizona Republicans are now attempting to walk back their earlier statements.

Gov. Ducey, in his 2022 signing letter<sup>17</sup> for SB 1164 (15-week abortion ban) wrote, "In Arizona, we know there is immeasurable value in every life – including preborn life," and "I believe it is each state's responsibility to protect them."

Then, on April 9, 2024, Gov. Ducey stated<sup>18</sup> “The ruling today is not the outcome I would have preferred, and I call on our elected leaders to heed the will of the people and address this issue with a policy that is workable and reflective of our electorate.”

Yet, Gov. Ducey is responsible for signing SB 1164 in 2022, which explicitly states that it does not repeal nor replace the 1864 law. Also, Gov. Ducey was hardly listening to his electorate in 2022, when 71% of respondents in Change Research poll<sup>19</sup> reported not wanting to make abortion illegal. So why would Gov. Ducey suddenly start listening to his electorate in 2024, unless of course he realized that taking away women’s rights is bad politics.

Kari Lake, while running for governor of Arizona, gave an interview on June 24, 2022, on "The Conservative Circus with James T. Harris," a radio show and podcast. At 3:48 into the interview, Lake reacted to the U.S. Supreme Court decision to overturn *Roe*. "I'm incredibly thrilled that we are going to have a great law that's already on the books," Lake said. "I believe it's ARS 13-3603, so it will prohibit abortion in Arizona except to save the life of a mother. And I think we're going to be paving the way and setting course for other states to follow."<sup>20</sup>

In 2024, Kari Lake, now an election denier and running for U.S. Senator, tried to distance herself from her 2022 comments by saying “I oppose today’s ruling and I am calling on Katie Hobbs and the legislature to come up with an immediate commonsense solution that Arizonans can support.”<sup>21</sup>

On May 23, 2023, Speaker of the Arizona House Rep. Ben Toma and President of the Arizona Senate Sen. Warren Petersen submitted an Amicus Brief to the Arizona Supreme Court in full support of the 1864 law.<sup>22</sup>

Following the ruling by the Arizona Supreme Court on April 9, 2024, Petersen and Toma released a joint statement stating<sup>23</sup> “during this time we will be closely reviewing the court’s ruling, talking to our members, and listening to constituents to determine the best course of action for our legislature.”

Well, they did not listen to their constituents for very long because not 24 hours later, two efforts to repeal the 1864 law were blocked from a vote in the Arizona legislature.<sup>24</sup>

## Conclusion

Republican state legislators overwhelmingly supported the 1864 abortion ban in Arizona, but Democrats were able to successfully repeal it. Later this fall, once the repeal of the 1864 law is in effect and until Republicans gain a larger majority in the legislature, the 15-week abortion ban will be enforceable law in Arizona. The 15-week abortion ban does not prevent Republicans from continuing to further undermine access to reproductive healthcare. These efforts are not new as Arizona Republicans have been working for years to undermine an individual’s right to reproductive healthcare. The Arizona anti-choice laws that have been passed include health insurance coverage, funding, providers, facilities, medically unnecessary ultrasounds, waiting periods, mandatory counseling, and consent.<sup>25</sup> After having placed excessive restrictions on access to abortion care, the Republican-controlled legislature has turned its attention to passing fetal personhood laws. In addition, Arizona Republicans support laws redefining the very definition of pregnancy from the moment of *fertilization* to the moment of *conception*. These next level Republican efforts not only further restrict access to abortion but also place access to contraception in jeopardy as the Arizona legislature blurs the lines between abortifacients (which means cause an abortion — which contraception does not do—in fact, this keeps pregnancy from happening) and contraception.



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 such as Ella and Plan B (often referred to as the “morning after pill”), IUDs, and oral birth control pills. With the overturning of *Roe*, the ability of legislators to blur the lines between contraception and abortifacients, confuse the public, and limit access to contraception has been expanded.

For more on contraception in Arizona see Local Majority’s paper **Arizona Republicans claim they do not have banning contraception in their sights -- that’s a lie.**

Twice while Democrats moved to introduce a repeal of the near-total ban on abortion (1864 law) an overwhelming majority of Republicans blocked the effort. The repeal of the 1864 law required three Arizona House Representatives and two Arizona State Senators to cross over and support the Democrats’ bill. Arizona Republicans hold narrow margins in both chambers with 16 (R) – 14 (D) in the State Senate and 31 (R) - 29 (D) in the State House. Given that the repeal of the 1864 law and subsequent 15-week ban are both in effect fall 2024 after the close of the legislative session, Republicans will have to wait until the 2025 legislative session to further strip away Arizonians’ access to abortion and contraception. They can be stopped if Democrats are elected to a majority in either chamber of the legislature.

*For talking points and messaging resources see [Arizona’s Republicans Overwhelmingly Support the 1864 Pre-Statehood Abortion Ban: Talking Points](#)*

## Appendix A: Regulation of abortion in Arizona

The following are verbatim from AZ Attorney General Kris Mayes' website.<sup>26</sup>

For the most part, these laws impose obligations on medical providers, not patients. But having some awareness of what to expect when you seek care may give you some peace of mind, or help you think about what questions you want to ask to providers as you consider the options available to you. Here are some examples of how Arizona law regulates abortion as of today.

**In-person notices.** At least twenty-four hours before the abortion, a medical provider (as specified under the statute) must tell the patient certain information in person. A.R.S. § 36-2153. Some, but not all, of the information the provider is legally required to tell the patient includes:

“The probable anatomical and physiological characteristics” of the fetus when the abortion is scheduled to be performed.

“The nature of the proposed procedure or treatment.”

“The immediate and long-term medical risks associated with the procedure that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.”

The medical risks of continuing with the pregnancy.

And that the biological father of the fetus “is liable to assist in the support of the child, even if he has offered to pay for the abortion.”

**Ultrasound.** At least twenty-four hours before the abortion, the patient must undergo an ultrasound and be offered the opportunity to view the active ultrasound image and hear an explanation of what the ultrasound shows. A.R.S. § 36-2156.

**Physician-only requirement.** Only licensed physicians can perform surgical abortions. A.R.S. §§ 36-2153, 36-2155, 32-2531.

**Medication abortion restrictions.** Medication abortion may be provided only by a qualified physician. And it cannot be provided through a courier, delivery or mail service. A.R.S. § 36-2160.

**Parental consent requirements.** A physician cannot perform an abortion for a minor without either (1) the written and notarized consent of one of the minor's parents or the minor's guardian, or (2) authorization from a judge on the Arizona Superior Court (through a process called “judicial bypass”). A.R.S. § 36-2152.

**Licensure and reporting requirements.** Abortion providers and clinics are subject to a number of requirements, including that providers must have admitting privileges, and they must record and report certain information about the abortions they perform. A.R.S. §§ 36-449.02, 36-449.03, 36-2161, 36-2162.

Importantly, although the hospital or facility that performed the abortion is required to report certain information, the hospital or facility is legally prohibited from identifying the patient's name or any other information that would make it possible to identify the patient who sought or obtained an abortion.

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- <sup>1</sup> <https://arizona.app.box.com/v/CLL-Howell-Code-1964>
  - <sup>2</sup> <https://supreme.justia.com/cases/federal/us/410/113/>
  - <sup>3</sup> [https://www.supremecourt.gov/opinions/21pdf/19-1392\\_6j37.pdf](https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf)
  - <sup>4</sup> <https://www.azleg.gov/legtext/55leg/2R/bills/sb1164p.pdf>
  - <sup>5</sup> <https://www.azag.gov/issues/reproductive-rights/litigation#:~:text=The%20Arizona%20Supreme%20Court%20decided,be%20updated%20as%20information%20changes>
  - <sup>6</sup> <https://azmirror.com/2024/04/09/abortions-are-banned-in-arizona-after-the-supreme-court-upholds-an-1864-law/>
  - <sup>7</sup> [https://www.myheraldreview.com/news/state/arizona-democrats-consider-3rd-attempt-to-repeal-1864-abortion-law/article\\_8d4a4212-0272-11ef-8850-a3978f2c0c4f.html](https://www.myheraldreview.com/news/state/arizona-democrats-consider-3rd-attempt-to-repeal-1864-abortion-law/article_8d4a4212-0272-11ef-8850-a3978f2c0c4f.html)
  - <sup>8</sup> <https://www.kold.com/2024/05/13/arizonas-civil-war-era-abortion-law-wont-be-enforceable-until-september-ag-says/>
  - <sup>9</sup> <https://www.azag.gov/sites/default/files/docs/press-releases/2024/OrderGrantingMotionToStayTheMandate%205136231%200.PDF>
  - <sup>10</sup> <https://www.arizonaforabortionaccess.org/what-is-the-aaa/>
  - <sup>11</sup> <https://www.politico.com/news/2024/03/06/arizona-abortion-referendum-battle-00145089>
  - <sup>12</sup> <https://www.knau.org/knau-and-arizona-news/2022-09-28/new-data-shows-arizona-voter-sentiment-on-abortion-does-not-align-with-recent-scotus-ruling>
  - <sup>13</sup> <https://azmirror.com/2024/04/15/leaked-documents-detail-house-gop-strategy-to-send-competing-abortion-measures-to-the-2024-ballot/>
  - <sup>14</sup> <https://s3.documentcloud.org/documents/24548794/legislative-strategies-on-abortion-powerpoint.pdf>
  - <sup>15</sup> <https://s3.documentcloud.org/documents/24548794/legislative-strategies-on-abortion-powerpoint.pdf>
  - <sup>16</sup> <https://www.prochoiceamerica.org/wp-content/uploads/2022/02/Arizona-NARAL-Memo-1.pdf>
  - <sup>17</sup> [https://azgovernor.gov/sites/default/files/sb1164\\_signing\\_letter.pdf](https://azgovernor.gov/sites/default/files/sb1164_signing_letter.pdf)
  - <sup>18</sup> [https://x.com/dougducey/status/1777749104589930838?s=61&t=9pdsHYvI1\\_-v2HpkcI7yKQ](https://x.com/dougducey/status/1777749104589930838?s=61&t=9pdsHYvI1_-v2HpkcI7yKQ)
  - <sup>19</sup> <https://www.prochoiceamerica.org/wp-content/uploads/2022/02/Arizona-NARAL-Memo-1.pdf>
  - <sup>20</sup> <https://www.politifact.com/factchecks/2022/oct/12/katie-hobbs/az-gop-governor-hopeful-lake-called-near-total-abo/>
  - <sup>21</sup> <https://karilake.com/kari-lake-releases-statement-on-arizona-supreme-court-abortion-ruling/>
  - <sup>22</sup> <https://adfmmedialegalfiles.blob.core.windows.net/files/MayesPetersenTomaAmicusBrief.pdf>
  - <sup>23</sup> [https://x.com/azsenategop/status/1777771918105731586?s=61&t=9pdsHYvI1\\_-v2HpkcI7yKQ](https://x.com/azsenategop/status/1777771918105731586?s=61&t=9pdsHYvI1_-v2HpkcI7yKQ)
  - <sup>24</sup> <https://cronkitenews.azpbs.org/2024/04/10/attempt-to-repeal-abortion-ban-fails-as-house-devolves-into-raucous-shouting/>
  - <sup>25</sup> <https://www.azag.gov/issues/reproductive-rights/laws#:~:text=That%20means%20if%20you%20become,medical%20emergency%2C%20as%20explained%20above>
  - <sup>26</sup> <https://www.azag.gov/issues/reproductive-rights/laws#:~:text=That%20means%20if%20you%20become,medical%20emergency%2C%20as%20explained%20above>