

**MEMO** *Published March 3, 2023 · 17 minute read*

# **Abortion on the Ballot: Protecting Access in 2023 and 2024**

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## Takeaways

- Citizen-initiated ballot measures are the most viable strategy to protect access to abortion and enshrine this right into state constitutions for long-term security.
- There are ten states that allow for citizen-initiated ballot measures *and* where abortion is under threat—the three states where such a ballot measure would have the greatest likelihood of passage are Arizona, Florida, and Ohio.
- Of the 34 states that prevent citizens from initiating constitutional amendments via ballot initiative, 15 of those already have six-week or complete abortion bans currently on the books—the election of pro-choice state legislators, governors, and, in some states, judges are vital in these states.
- Gubernatorial races focused around protecting reproductive rights and serving as a bulwark against the GOP’s extreme abortion agenda will be salient and likely have down-ballot benefits for Democrats who are following the Democratic gubernatorial nominee’s lead.
- Twenty-two states select their jurists through either partisan or nonpartisan elections—Wisconsin has the first state supreme court election in April 2023, which will be crucial for the future of abortion access in the state.

The overturning of *Roe v. Wade* is a turning point in 21st century American life. Republican politicians and donors have worked carefully for decades behind the scenes to arrive at this moment. They cultivated the support of conservative judges and justices, funded the justices' lavish lifestyles, and bankrolled the campaigns of anti-choice state and federal representatives that have passed abortion bans in legislatures. These far-right activists haven't given a thought to the ramifications of their actions on women and families across the country, and we're seeing the consequences play out today. There were nearly 11,000 fewer abortions in the two months after the Dobbs decision compared to the prior two months. The most restrictive states have created onerous and heart wrenching journeys for

lower- and middle-income women seeking care, and this is unlikely to change any time in the near future.

The Dobbs ruling has put the fate of reproductive rights back into the hands of the states, and pro-choice advocates must employ state-by-state strategies to protect abortion access in the next election cycle and beyond. In some states, a ballot initiative can put the question directly to voters, but in others, there isn't a straightforward way to put a citizen-initiated amendment on the ballot. What follows is a roadmap for the most viable strategies that advocates can deploy to protecting reproductive rights based on differences in state procedures and law.

## Ballot Measures

**Ballot measures are the surest way to protect access to abortion and enshrine this right into state constitutions for long-term security.** There are 16 states that allow for citizen-initiated ballot measures to amend state constitutions that then go directly to the voters. In ten of these states, abortion rights are already under threat (Arizona, Arkansas, Florida, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, and South Dakota). We are going to focus on three of these states in particular: Arizona, Ohio, and Florida—these states have the most support for legal abortion among these ten states, according to Civiqs, and they are crucial presidential and senate battleground states, although pursuing ballot measures is equally as viable of a strategy in other non-swing states.

### Arizona

In Arizona, abortion is currently banned after 15 weeks of pregnancy with no exceptions for rape or incest, and an 1864 ban has been blocked by Arizona courts after they ruled that the newer law takes precedence. The election of pro-choice Democratic candidates to the governor's mansion and the attorney general's (A.G.) office provides an interim period of relief for Arizona constituents, but this is not a blanket protection for the long-term. An anti-choice nominee could certainly defeat the new Democratic incumbent when the A.G. is up for re-election in 2026, and that anti-choice A.G. could proceed to appeal and attempt to enforce the 1864 abortion ban. The most surefire way to protect abortion access and reproductive rights in the long-term is to put abortion on the ballot and enshrine this right into the state constitution.

### Ohio

In Ohio, abortion is currently banned after 22 weeks of pregnancy, although there is a 6-week abortion ban (signed into law in 2019 by Governor DeWine) that is currently blocked in the courts. There is nothing stopping the Ohio State Legislature and governor from

signing into law a complete ban should the 6-week ban not be upheld. With this ban in a state of limbo, Ohio is a very precarious state to be living in for abortion access. The most viable path to protect abortion access is to put the question to the voters and enshrine it into the state constitution. The only other likely path to protect abortion access would be to win a majority in the state legislature and retake the governor's mansion in 2026—but the governor's race is four years down the road and would be a long shot in even the most favorable of political environments for pro-choice advocates, as the Democratic nominee lost the gubernatorial race by 3.7 points in the blue wave of 2018. A coalition of reproductive rights groups have already begun organizing an effort to get abortion on the ballot in November 2023, but Republicans in the Ohio state legislature and their anti-abortion allies have issued calls to make it more difficult to amend the constitution by raising the threshold to 60 percent of the statewide vote.

## **Florida**

In Florida, abortion is currently banned after 15 weeks of pregnancy. And there are onerous restrictions on minors who must go to court to get permission for an abortion, known as a judicial bypass, if they have not received sign-off from a parent or guardian for their abortion. Similar to Ohio, there is nothing stopping Governor Ron DeSantis and the Florida State Legislature from passing and signing into law a complete ban. Members of the Florida Legislature, including the incoming Republican senate leader, have stated their intention to pass new abortion bans in the upcoming year. With presidential ambitions on the horizon for DeSantis, he may wish to appeal further to the GOP primary base of evangelical Christians and culturally conservative voters by passing a more restrictive ban. Floridians' most viable path to protect abortion access is to put the question on the ballot and enshrine it into the state constitution.

A ballot measure could be passed in each of these states similar to the measure just passed by voters in Michigan. The Michigan ballot measure passed by 13-points, enshrining a woman's constitutional right to make decisions about pregnancy, contraception, childbirth, and abortion, while still allowing the state to regulate reproductive care after 24 weeks of pregnancy. And abortion proved to be a salient issue in the Michigan governor's race and down-ballot races. With the issue literally on the ballot directly for voters, Democrats flipped both the Michigan State Senate and House, taking a two-seat pro-choice majority in both chambers.

## **State Supreme Courts**

Much like citizen-initiated ballot measures to amend state constitutions, state high court decisions can also serve as a check on state legislatures and governors that wish to pass

restrictive abortion bans that violate rights guaranteed under state constitutions. There are several state high courts that have recognized a right to abortion in their state's constitution, and as the Center for Reproductive Rights [has outlined](#), these decisions have come about through different interpretations of state constitutions:

- In some places, state supreme courts have recognized *a right to privacy* in their state constitution, including in Alaska, California, Florida, Massachusetts, Minnesota, Montana, and New Jersey;
- In others, state supreme courts have recognized *a right to personal autonomy* in a state constitution, including in Kansas and Montana; and,
- Finally, some state supreme courts have found that abortion bans violate their state constitution's *guarantee of equal protection under the law or prohibition of sex discrimination*, including in Alaska, Arizona, California, New Jersey, and New Mexico.

This is indeed a viable strategy to pursue, as was most recently demonstrated when pro-choice advocates successfully argued before the South Carolina Supreme Court, which struck down the state's six-week ban and ruled that the state constitution protected abortion under its right to privacy. The court [cited](#) other state constitutions and high court decisions that had similarly affirmed this right, demonstrating that as the Center for Reproductive Rights [has noted](#), these decisions can have ripple effects and “contribute to positive outcomes in other states.”

However, such protections are vulnerable to being challenged and defied by governors and state legislatures who are hostile to reproductive rights and will try to enact abortion bans that get around those decisions—as South Carolina's state legislature is [currently](#) undertaking.

## State Legislatures

In states that don't allow for constitutional amendments to be placed on the ballot and where state courts are hostile to reproductive rights, the next best viable option to prevent the criminalization of abortion is through electing pro-choice majorities in state legislatures. **There are 34 states that prevent citizens from initiating constitutional amendments via ballot initiative, and 15 of those already have six-week or complete abortion bans currently on the books (some pending court decisions).**

Since the *Dobbs v. Jackson Women's Health Organization* decision, an enhanced national spotlight has been placed on state legislatures. That outlook may look abysmal in those states where Republicans have historically maintained a supermajority in both legislative chambers, but if the 2022 midterms have taught us anything, it is that historical trends

aren't always an accurate predictor for future results, and there are indeed states that are viable to make ground up in over the coming years.

In the 2022 midterms, 46 states held elections for at least one chamber in their state legislature. Although Democrats were projected to lose hundreds of seats in statehouses nationwide in the anticipated red wave, they ended up flipping chambers in Michigan, Pennsylvania, and Minnesota, all key states where abortion rights were under constant attack in previous legislatures.

Below, we focus on two states that have state legislative elections in 2023 and 2024 that will be vital to the future of abortion access or criminalization in their respective states: Virginia and Georgia.

## Virginia

Both chambers in the Virginia State Legislature are up for election this year. Currently, the Virginia Legislature is divided with a two-seat Democratic margin in the Senate and a four-seat Republican margin in the House of Delegates. In 2019, Democrats won control of both chambers for the first time since 1995. But Republicans took back control of both the House and the governor's mansion in 2021. While abortion is currently legal in Virginia up to viability, efforts are already underway to further restrict abortion access in the commonwealth. Republican lawmakers have even proposed a "life at conception" bill, which would ban all abortions with no exceptions. Aside from an "informed written consent bill," none of the abortion bans have been brought up in the GOP House of Delegates this year, because, as one Virginia representative aptly put it, Republicans would "rather not be on the record on abortion. Not in an election year." Despite the slim likelihood of an abortion ban passing through both chambers when there is split control of government, as it is today, it is a grim preview of what Virginians can expect with a Republican trifecta. Both parties hold the respective chamber majorities by the thinnest of margins, which means that each seat could be decisive in 2023.

## Georgia

In 2024, both houses in the Georgia General Assembly will be up for election. Georgia was one of the few states where a GOP state legislature saw seats flip from red to blue in the 2022 midterms, but those Democratic gains were not enough to take control of either chamber. Republicans have maintained control of the Senate and the House of Representatives in the state since 2005, but their majorities have been shrinking incrementally since 2014—today the GOP holds a 26-seat margin in the House and a 12-seat margin in the Senate. Georgia Republicans used redistricting to marginally shore up their majority by reducing the number of competitive seats in both chambers. However, with

increased momentum building off successful U.S. Senate campaigns, Democrats have a viable opportunity to potentially take control of at least one chamber in the General Assembly in the near future—or at least to continue to make up significant ground. The stakes couldn't be higher in Georgia, where a six-week abortion ban is already in effect.

## Executive Branch Elections

In states that don't allow for constitutional amendments to be put on the ballot, don't have a viable route through the courts, and see Democrats as far from retaking power in state legislatures, the next best viable option to protect reproductive rights and prevent the criminalization of abortion is through the election of pro-choice governors who will veto anti-choice legislation, as well as through the election of pro-choice attorneys general who will decline to prosecute providers and enforce the most onerous bans.

We are going to focus on one state in particular where a Democratic governor is leaving office and where abortion rights are at stake: North Carolina.

### North Carolina

In North Carolina, abortion is currently legal up to 20 weeks of pregnancy. Republicans managed to flip two seats in the State Senate and House, but the GOP fell one seat short of a majority in the House and a veto-proof supermajority. Members of the state legislature are up for re-election in 2024, but Democrats would need a wave election to retake either chamber and stymie the GOP from passing more restrictive abortion bans. Preventing the GOP from gaining a supermajority is essential in 2024, but if Democrats lose the governor's mansion, currently held by a term-limited Governor Roy Cooper, then the GOP will be primed to ban abortion in the state. The Democratic incumbent A.G. Josh Stein has announced his candidacy for North Carolina Governor, which means that pro-choice advocates will need to field a strong candidate for the A.G.'s office in 2024 as well. Democrats should still remain heavily invested in state legislative races to prevent a GOP supermajority, but **a gubernatorial race focused around protecting reproductive rights and serving as a bulwark against the GOP's extreme abortion agenda will likely have down-ballot benefits for Democrats who are following the Democratic gubernatorial nominee's lead.**

Wisconsin is a great example of a similar scenario that took place in 2022. Wisconsin currently bans abortion in almost every case since an 1849 law took effect after *Dobbs*. The Democratic attorney general filed a lawsuit to challenge that 1849 law, and a favorable decision in that case would eventually restore access to abortion in the state. It was essential for Democrats to win the attorney general race in 2022, which they did, to ensure that the law continued to be challenged in the courts. The next defense mechanism had to be a

combination of Democratic Governor Tony Evers winning re-election—to veto abortion legislation passed by the Republican-majority legislature—and Democrats also retaining enough seats in one of the chambers of the state legislature to prevent the GOP from gaining a supermajority. Democrats managed to accomplish both. While Democrats did lose seats in both state legislative chambers, had Governor Evers not campaigned on the threats at stake to abortion access, he may have lost, and Democrats may have lost some coattail effect in critical down-ballot seats in the Assembly. Governor Evers has promised to veto any bills passed by the GOP state legislature that further restricts abortion access in the state or affirms the 1849 abortion ban.

## Judicial Elections

In the last few years, a myriad of consequential landmark decisions and substantiated ethical concerns has brought intensified scrutiny to the conservative majority Supreme Court. However, now that the *Dobbs* decision has punted the freedom of reproductive rights to the states to decide, voters should also keep an eye on their state's supreme and lower courts. Currently, state courts are blocking restrictive abortion bans from being enforced in 9 states, allowing pre-*Dobbs* regulations to remain in effect while legal challenges are ongoing. State judges have presented an unexpected roadblock, albeit temporary, to anti-abortion efforts across the country. Twenty-two states select their jurists through either partisan or nonpartisan elections, allowing the people to decide the arbiters of law in their state. Here, we look at the judicial climate in three key states where the future of abortion access rests in the court's hands: Wisconsin, Kentucky, and Texas.

### Wisconsin

Wisconsin selects their state court judges with nonpartisan elections. In the 2022 midterm, election, as we noted earlier, Democrats were able to maintain control of the governor's mansion and prevent a Republican supermajority in the state legislature, which means the state of abortion rights is exactly as it was before the election. This has led pro-choice advocates to take up their fight in the courts, where Attorney General Josh Kaul has been leading the charge against a 173-year-old pre-Roe “zombie” law that bans most abortions with no exceptions for rape or incest. Kaul's legal challenges are currently making their way through the lower courts and will ultimately end up with the seven justices sitting on the state's Supreme Court. In the meantime, one of the court's conservative justices is retiring from the bench, opening a seat that will be up for election in early 2023. The outcome of that election could ultimately shift the court's current 4-3 conservative majority to a 4-3 liberal majority and alter the outlook for abortion access in the state.

### Kentucky

Kentucky also holds nonpartisan elections to select their state court judges, including the seven justices that sit on the Supreme Court. One of the court's more conservative justices will be up for re-election in 2024. As nonpartisan candidates, judicial contenders are not permitted to identify a party affiliation in their campaigns, yet their political ideology can often be discerned from their careers and judicial record if they have one. Kentucky's Supreme Court recently declined to block a total abortion ban that went into effect when *Roe* was overturned—four of the court's justices ran for election in the 2022 midterms. Among those who claimed victory was Justice Michelle Keller, who ran a close, heavily funded race against the anti-abortion state representative who authored the total abortion ban currently before the court. Justice Keller's extreme opponent fell short of victory, as did a state ballot initiative that sought to amend the state constitution to include language denouncing the right to an abortion.

## **Texas**

Unlike in Kentucky and Wisconsin, Texas selects their state court judges through partisan elections, which allow judicial candidates to have their political party affiliation listed alongside their name on the ballot. This method casts judges in the same light as politicians, even though their role is to remain impartial and interpret the law without political bias. In Texas, a solidly red state, all nine justices sitting in the state's Supreme Court are Republican. Three Supreme Court seats were up for election in the 2022 midterms, and four more will be on the ballot in 2024. While abortion access in Texas has essentially been halted since the state legislature passed the infamous SB 8 law, which allows anyone to bring suit against a doctor or an individual who performed or aided an abortion, there are three abortion bans in effect that are currently being litigated in the state courts. In December, a lower court judge dismissed a suit brought by an Illinois attorney against a Texas doctor for performing an abortion after the six-week threshold permitted by SB 8. While the decision does not invalidate the law, abortion rights advocates consider it a major legal victory against one of the most extreme laws in the country.

## **Conclusion**

Access to abortion services in this country are rapidly changing, and although *Dobbs* was a mammoth blow, there are still glimmers of hope in this fight. These state-by-state strategies are only a starting point in what will inevitably be a multi-decade battle for reproductive rights, but pro-choice Americans must use all means availed through the American political and legal systems to reinstate these rights under the law.

