

An act relating to civil and criminal procedures concerning legally protected health care activity

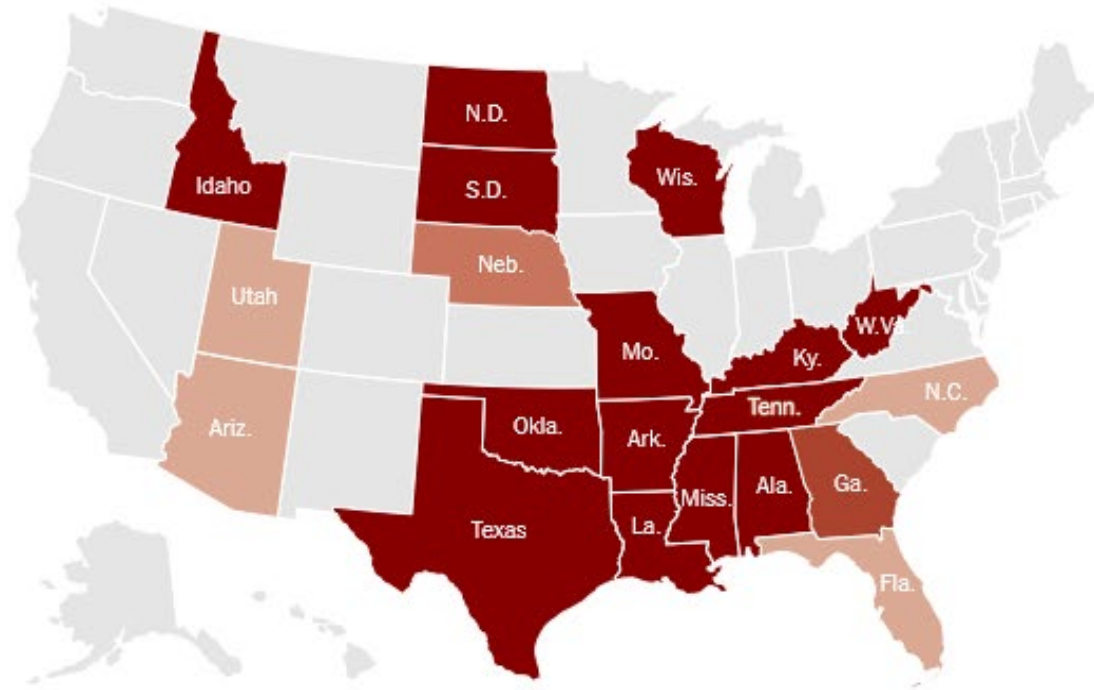
ACT NO. 14, H.89

MICHELE CHILDS, ESQ.

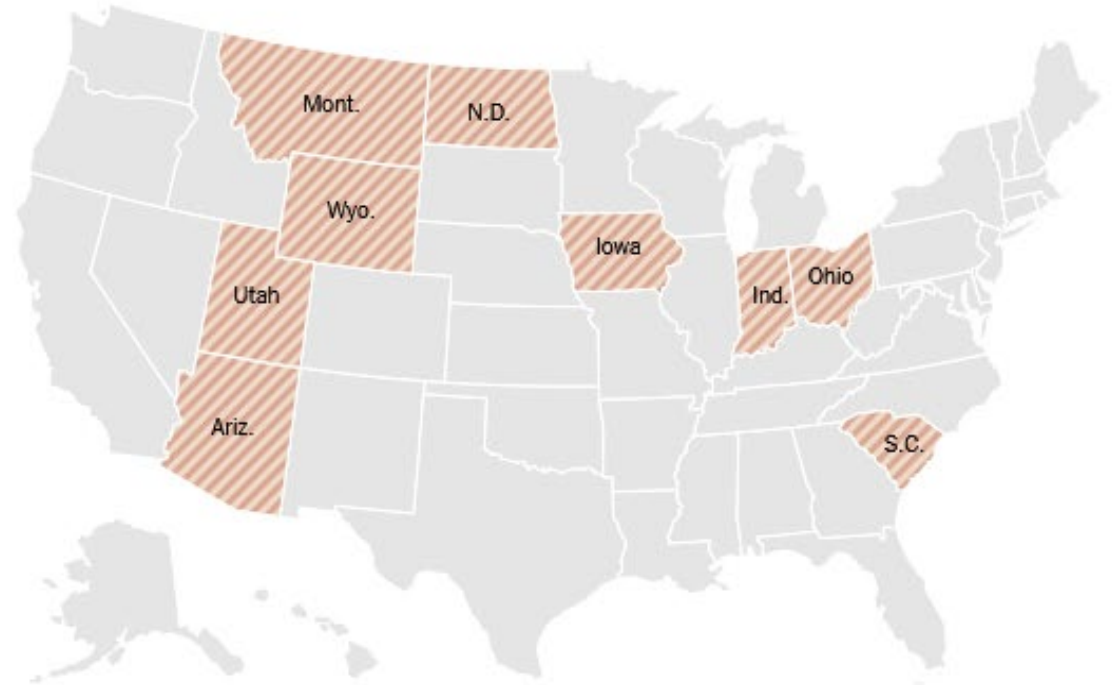
JUNE 14TH, 2023

Banned

■ Full ban ■ Six weeks ■ 12 weeks ■ 15-20 weeks

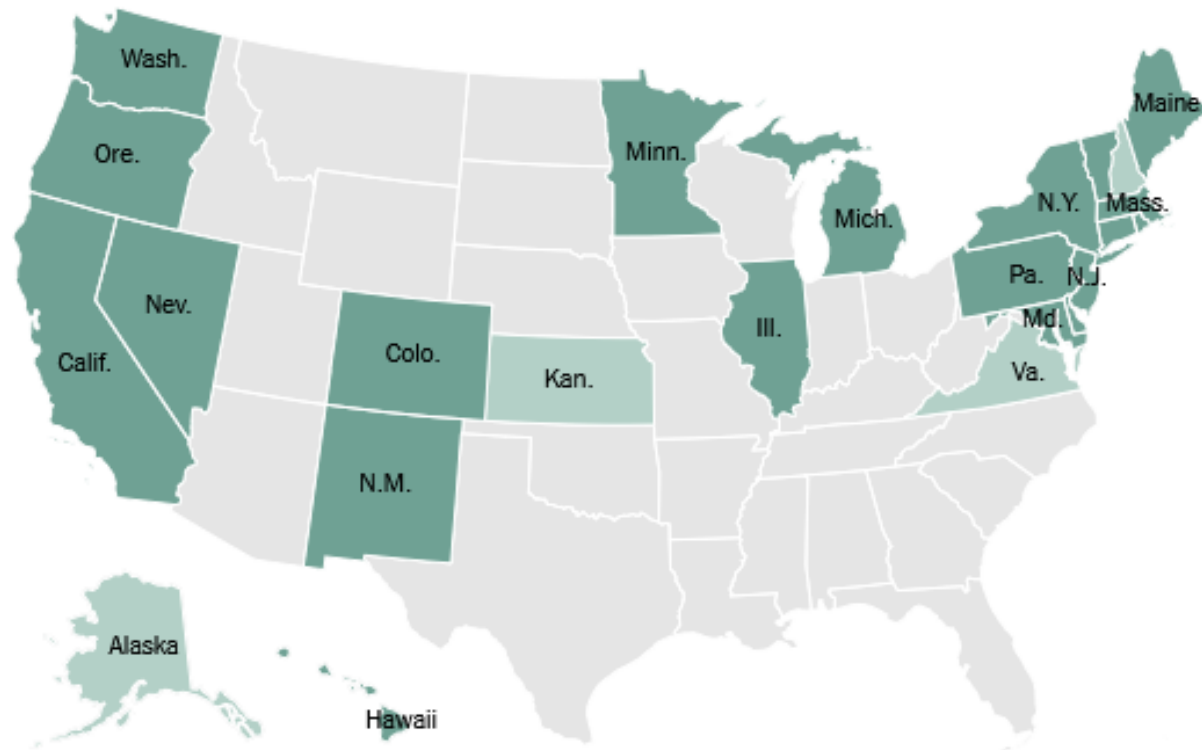


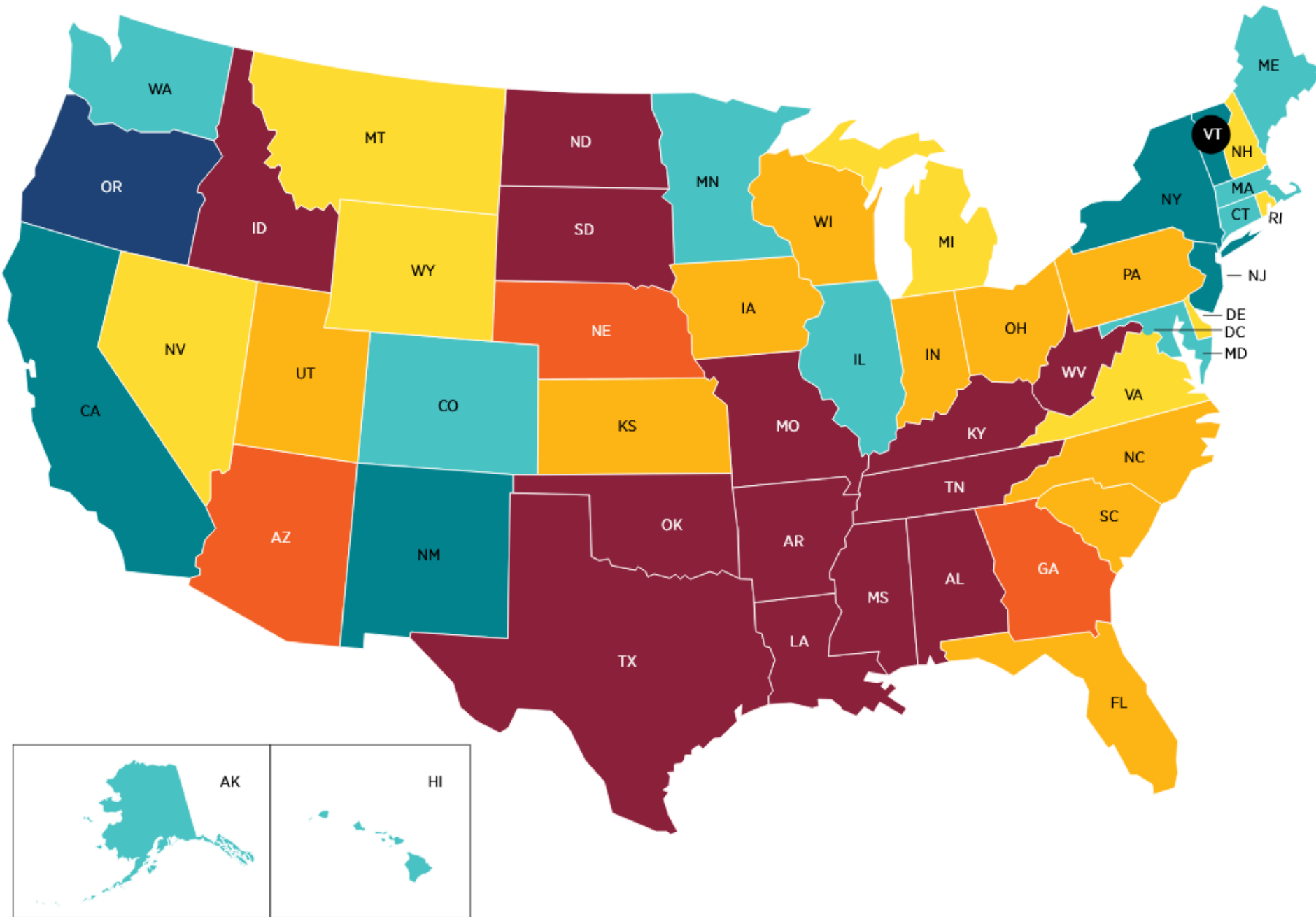
Ban blocked



Legal

Legal with new protections Legal





- Most restrictive
- Very restrictive
- Restrictive
- Some restrictions/protections
- Protective
- Very protective
- Most protective



Understanding Abortion Bans

Pre-Roe bans

Trigger bans

Abortion bans passed since Roe was decided that are intended to ban abortion entirely if the Supreme Court limited or overturned Roe or if a federal Constitutional amendment prohibited abortion.

Pre-viability gestational bans

Laws that prohibit abortion before viability; these laws were unconstitutional under Roe. Gestational age is counted in weeks either from the last menstrual cycle (LMP) or from fertilization.

Method bans

Laws that prohibit a specific method of abortion care, most commonly dilation and extraction (D&X) procedures and dilation and evacuation (D&E) procedures.



Reason bans

Laws that prohibit abortion if sought or potentially sought for a particular reason. These bans typically name sex, race, and genetic anomaly as prohibited reasons. However, there is no evidence that pregnant people are seeking abortion care because of the sex or race of their fetus.

Criminalization of self-managed abortion (SMA)

Some states criminalize people who self-manage their abortion, i.e., end their pregnancies outside of a health care setting.

SB-8 Copycats

Laws that are modeled after Texas SB 8, the vigilante law that took effect in September 2021. These laws ban abortion at an early gestational age and are enforced through private rights of action, which authorizes members of the public to sue abortion providers and people who help others access abortion care.

Texas S.B. 8 – Bounty Law

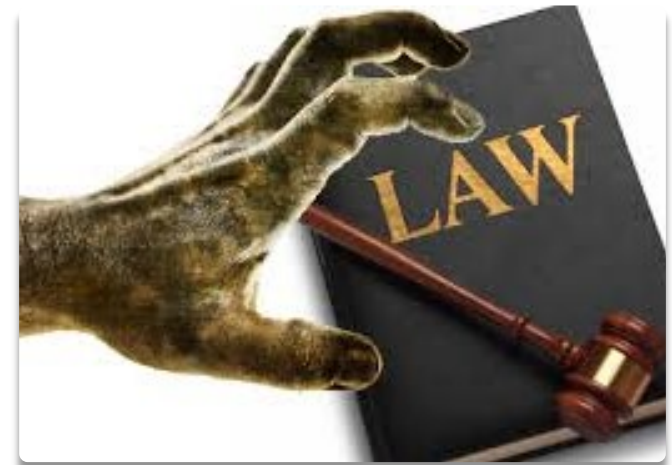
Prohibits abortion at around six weeks of gestation with no exceptions for rape or incest and narrow exceptions for a “medical emergency.” The law places enforcement in the hands of citizens by authorizing civil suits against any person who aids or abets another in obtaining an abortion.

(Effective September 1, 2021.)



Texas pre-Roe ban - “zombie statute”

1857 law criminalizing performance of an abortion after “quickening” and providing for a 2-5 year term of imprisonment. Blocked by Roe in 1973 and declared repealed by implication by the 5th U.S. Circuit Court of Appeals in 2004, Texas has asserted that the law has been resurrected after *Roe* was overruled.



Texas Trigger Ban and Gestational Limits in Other States

- ▶ HB1280 took effect 30 days after *Roe* was overturned, the law bans abortion after fertilization and makes performing or aiding in an abortion a felony offense with a term of imprisonment of up to 99 years. There are no exceptions for rape or incest, and a narrow exemption for the life of the mother.
- ▶ 44 states have some kind of gestational limit for abortion, with 13 complete bans.
- ▶ Vermont does not have a gestational limit. Provision of abortion care is between the patient and the provider. In 2020, first trimester abortions (less than or equal to 12 weeks) accounted for 92.2 percent of all Vermont abortions, and 78.2 percent of all Vermont abortions were for pregnancies of less than 9 weeks duration. Abortions performed over 20 weeks accounted for 0.01% of all abortions performed in Vermont.

FUND TEXAS CHOICE v. KEN PAXTON (2023)

United States District Court, W.D. Texas, Austin Division.

FUND TEXAS CHOICE, et al., Plaintiffs, v. KEN PAXTON, in his official capacity of Attorney General, et al.,
Defendants.

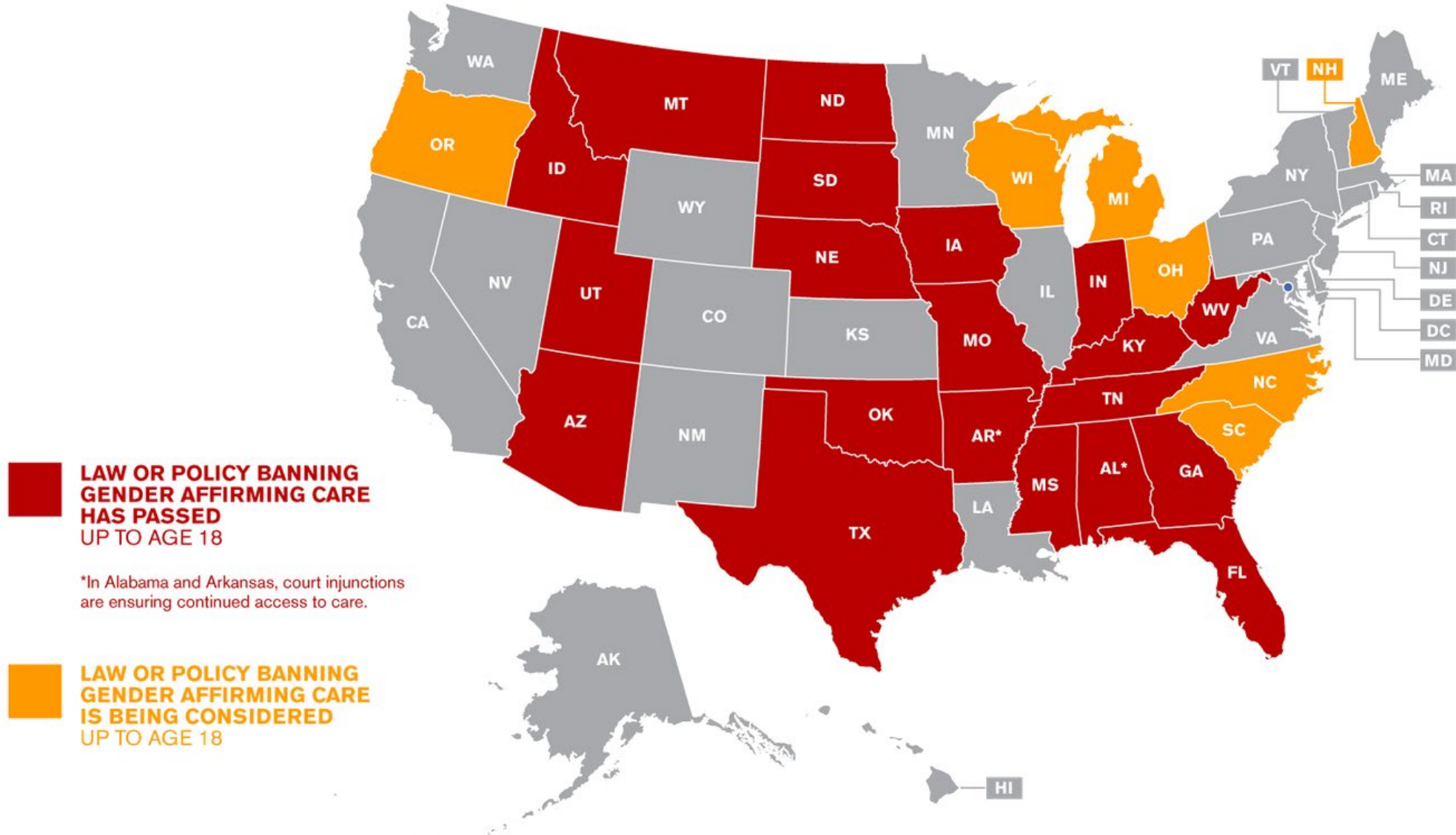
1:22-CV-859-RP

Decided: February 24, 2023

ORDER

Before the Court is a motion for a preliminary injunction brought by Plaintiffs Fund Texas Choice, et al. (“Plaintiffs”), (Mot. Prelim. Inj., Dkt. 6), and a motion to dismiss brought by Defendant Ken Paxton (“Paxton”). (Mot. Dismiss, Dkt. 110). Having considered the parties' briefs, the record, and the relevant law, the Court will grant Paxton's motion to dismiss and grant the preliminary injunction in part. Specifically, the Court finds that while Paxton has enforcement authority under H.B. 1280, the statute does not regulate abortions that take place outside the State of Texas and cannot even be arguably read to do so. By contrast, the pre-Roe laws do arguably proscribe Plaintiffs' desired conduct, and the Court finds that Plaintiffs have standing to sue the local prosecutors tasked with enforcing those laws. However, turning to the preliminary injunction, the Court finds that the pre-Roe laws have been repealed by implication and will grant the motion in part to enjoin the named local prosecutors from enforcing the pre-Roe laws.

Gender-Affirming Care Bans Impacting Youth



Restrictions on gender-affirming care for youth

- ▶ Restrictions on the provision of gender-affirming care for youth under 18. May include a range of services including counseling, hormone therapy, and surgery.
- ▶ Potential State child abuse investigation against parents and guardians who assist youth in obtaining these services.
- ▶ Threat of criminal prosecution for provision of these services or aiding a youth in obtaining the services. A federal court has blocked an Alabama law that establishes a 10-year felony for providing or recommending puberty blockers, hormone therapy or other gender-affirming interventions to patients younger than 19 years old.

Jurisdictions with health care shield laws

Currently, 15 states and the District of Columbia have some type of shield law regarding reproductive rights or gender-affirming care, or both.

Vermont, Massachusetts, Colorado, and Washington are the only states that protect telehealth across state lines.

Components of shield laws

Prohibition of non-fugitive extradition

Interstate witness protection

Recognition of out-of-state judgments concerning legally protected health only when constitutionally required

Clawback lawsuits

Prohibiting the use of state resources on another state's investigations

Caring for patients across state lines

Limiting adverse professional licensure consequences

Medical malpractice protections

Prohibiting disclosure of patients' confidential information

Definition of Legally Protected Health Care Activity 1 VSA 150

[T]he exercise and enjoyment, or attempted exercise and enjoyment, by any person of rights to reproductive health care services or gender-affirming health care services secured by this State.

[A]ny act or omission undertaken to aid or encourage, or attempt to aid or encourage, any person in the exercise and enjoyment, or attempted exercise and enjoyment, of rights to reproductive health care services or gender-affirming health care services secured by this State, provided that the provision of such a health care service by a person duly licensed under the laws of this State and physically present in this State shall be legally protected if the service is permitted under the laws of this State, regardless of the patient's location.

[T]he provision, issuance, or use of, or enrollment in, insurance or other health coverage for reproductive health care services or gender-affirming health care services that are legal in this State, or any act to aid or encourage, or attempt to aid or encourage, any person in the provision, issuance, or use of, or enrollment in, insurance or other health coverage for those services, regardless of the location of the insured or individual seeking insurance or health coverage, if the insurance or health coverage is permitted under the laws of this State.

Legally protected health care activity continued...

[T]he protections applicable to “legally protected health care activity” shall not apply to a lawsuit; judgment; or civil, criminal, or administrative action that is based on conduct for which an action would exist under the laws of this State if the course of conduct that forms the basis for liability had occurred entirely in this State.

However, the provision of a health care service by a person duly licensed under the laws of this State and physically present in this State shall be legally protected if the service is permitted under the laws of this State, regardless of the patient’s location or whether the health care provider is licensed in the state where the patient is located at the time the service is rendered.

Definition of Gender- Affirming Health Care Services

“Gender-affirming health care services” means all supplies, care, and services of a medical, behavioral health, mental health, surgical, psychiatric, therapeutic, diagnostic, preventative, rehabilitative, or supportive nature, including medication, relating to the treatment of gender dysphoria and gender incongruence. “Gender-affirming health care services” does not include conversion therapy as defined by 18 V.S.A. § 8351.

Definition of Reproductive Health Care Services

“Reproductive health care services” means all supplies, care, and services of a medical, behavioral health, mental health, surgical, psychiatric, therapeutic, diagnostic, preventative, rehabilitative, or supportive nature, including medication, relating to pregnancy, contraception, assisted reproduction, pregnancy loss management, or the termination of a pregnancy.

“Reproductive health care services” includes medication that was approved by the U.S. Food and Drug Administration (FDA) for termination of a pregnancy as of January 1, 2023, regardless of the medication’s current FDA approval status:

(A) when such medication is procured, ordered, stored, distributed, prescribed, dispensed, or administered, or a combination thereof, by a person duly licensed under the laws of this State, as long as the licensee’s actions conform to the essential standards of acceptable and prevailing practice for the licensee’s profession; or

(B) when such medication is used by an individual.

Abusive
litigation
concerning
legally
protected
health care

Access to reproductive health care services and gender-affirming health care services is a legal right in this State. Interference with legally protected health care activity, whether or not under the color of law, is against the public policy of this State.

“Abusive litigation” means litigation or other legal action to deter, prevent, sanction, or punish any person engaging in legally protected health care activity by filing or prosecuting any action in any other state where liability, in whole or part, directly or indirectly, is based on legally protected health care activity that occurred in this State...; or attempting to enforce any order or judgment issued in connection with any such action by any party to the action, or any person acting on behalf of a party to the action.
12 VSA § 7301.

Extradition of non-fugitives

13 VSA § 4970. LEGALLY PROTECTED HEALTH CARE ACTIVITY EXCEPTION

Notwithstanding any other provision in this chapter to the contrary, except as required by federal law, the Governor shall not surrender a person charged in another state as a result of engaging in legally protected health care activity as defined in 1 V.S.A. § 150 unless the executive authority of the demanding state alleges in writing that *the accused was physically present in the demanding state at the time of the commission of the alleged offense and that thereafter the accused fled from the demanding state.*



Interstate witness protection

12 VSA § 7304. Testimony and documents

Prohibits a Vermont court from ordering a person who is domiciled or found within Vermont to give testimony or a statement or produce documents or other things in connection with any proceeding in another state concerning abusive litigation involving legally protected health care activity.

13 V.S.A. § 6650. Legally protected health care activity exception

Prohibits a Vermont court from issuing a summons where a prosecution is pending in another state concerning legally protected health care activity or where a grand jury investigation concerning legally protected health care activity has commenced for a criminal violation of a law of the other state unless the acts forming the basis of the prosecution or investigation would also constitute an offense if occurring entirely in Vermont.

Recognition of out-of-state judgments



- ▶ The Full Faith and Credit Clause of the U.S. Constitution requires states to give recognition to out-of-state judgements except in limited circumstances.
- ▶ Vermont adopted these exceptions and prohibits Vermont courts from enforcing a foreign judgment issued in connection with abusive litigation concerning legally protected health care activity if the judgment was issued without jurisdiction or without due process or if the judgment is penal in nature. 12 VSA § 7303

Tortious interference with legally protected health care activity

Any public act or record of a foreign jurisdiction that prohibits, criminalizes, sanctions, or authorizes a person to bring a civil action against or otherwise interferes with a person, provider, payer, or other entity in this State that seeks, receives, causes, aids in access to, aids or abets, or provides, or attempts or intends to seek, receive, cause, aid in access to, aid or abet, or provide, legally protected health care services shall be an interference with the exercise and enjoyment of the rights secured by this State and shall be a violation of the public policy of this State.

Tortious interference cont...

If a person, whether or not acting under color of law, engages or attempts to engage in abusive litigation that infringes on or interferes with, or attempts to infringe on or interfere with, legally protected health care activity, any aggrieved person, provider, payer, or other entity, including any defendant in such abusive litigation, may initiate a civil action for injunctive, monetary, or other appropriate relief within six years after the cause of action accrues.

If the court finds for the petitioner, recovery may include damages for the amount of any judgment issued in connection with any abusive litigation, and any and all other expenses, costs, or reasonable attorney's fees incurred in connection with the abusive litigation and with the tortious interference action.

12 VSA § 7302

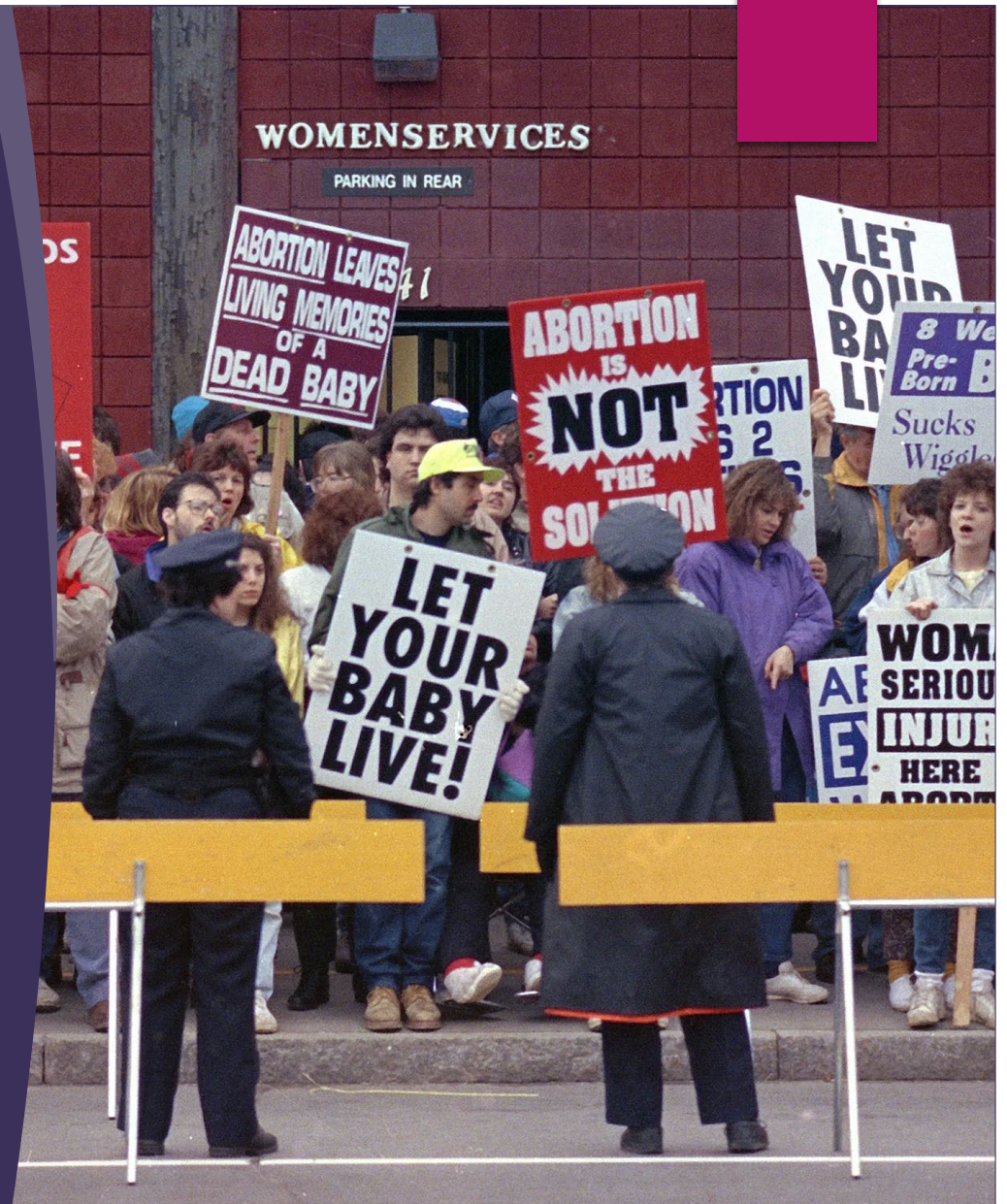
Policy of noncooperation

Prohibits a public agency or employee, appointee, officer or official, or any other person acting on behalf of a public agency from *knowingly* providing any information or expending or using time, money, facilities, property, equipment, personnel, or other resources in furtherance of any interstate investigation or proceeding seeking to impose civil or criminal liability upon a person or entity for the provision, seeking or receipt of, or inquiring about legally protected health care activity that is legal in Vermont or assisting any person or entity providing, seeking, receiving, or responding to an inquiry about legally protected health care activity that is legal in Vermont.

12 VSA § 7306

Interference with access to a health care facility

Modeled after the federal Freedom of Access to Clinics Act (18 U.S. Code § 248), 13 V.S.A. § 1033 provides that no person may, by force or threat of force or by physical obstruction, knowingly injure, intimidate, or interfere with, or attempt to injure, intimidate, or interfere with, another person because such other person was or is obtaining or providing legally protected health care activity. Additionally, no person shall knowingly damage the property of a health care facility, or attempt to do so, because such facility provides legally protected health care activity. A violation of this section is a civil penalty of not more than \$300.00.



Safe at Home Address Confidentiality Program



15 V.S.A. chapter 21, subchapter 3 has been amended to allow persons who provide reproductive health care services or gender-affirming health care services, persons who assist others in obtaining reproductive health care services or gender-affirming health care services, and persons who exercise their legal right to obtain reproductive health care services or gender-affirming health care services to participate in the Safe at Home Address Confidentiality program that is currently available to victims of domestic violence, stalking, sexual assault or human trafficking.

Sources

- ▶ Slides 2 and 3, *The New York Times*, June 5, 2023.
- ▶ Slides 4 - 6, Center for Reproductive Rights.
- ▶ Slide 11, Human Rights Campaign Foundation.
- ▶ Slides 13 and 14, courtesy of David S. Cohen, Drexel Kline School of Law.