

State Protection for Reproductive Freedom

A Toolkit for Establishing a State Constitutional Right

Created by



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The National Institute for Reproductive Health is an advocacy organization that fights for just and equitable access to reproductive health care in states and cities nationwide.

For more than 40 years, NIRH has been partnering with communities to build coalitions, launch campaigns, and successfully advocate for policy change. NIRH's strategy is to go on the offensive and focus on communities where change is needed and where we can make a difference.

NIRH's approach to advocacy, policy, and politics strives to center the people most impacted by barriers to care, historically underserved, and often under-represented – Black women and Black communities, Indigenous and other communities of color, low-income people, and immigrants.

NIRH doesn't just push back against restrictions on reproductive autonomy; they fight for a society in which everyone has the freedom and ability to control their reproductive and sexual lives.

Thank you to the Learning and Accountability Project Advisory Committee for their guidance in drafting this toolkit.

The Learning and Accountability Project (LAP) is a project of the National Institute for Reproductive Health, which includes organizations and advocates across the reproductive health, rights, and justice spaces. LAP focuses on creating culture change in our movement, education for the public and movement advocates, and building strategies that support a landscape that centers marginalized communities who have historically – and currently – been left out of reproductive rights policies.

LAP members include advocates, providers, scientists, and allies who are working towards policies that will let us achieve true reproductive freedom. This project is an opportunity to equip those who represent and come from communities most affected by abortion restrictions with the research and tools to empower them to wage a campaign against compromise while bringing expert voices across the country to hold the movement accountable.

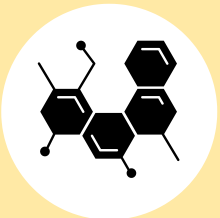
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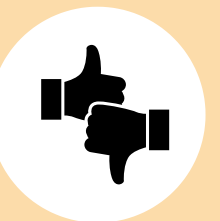
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State Protection for Reproductive Freedom: Establishing a State Constitutional Right

In the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, states must protect abortion care access and pregnancy outcomes and make clear that every individual has the fundamental and affirmative right to reproductive freedom. This must include the right to make decisions about one's own pregnancy and other reproductive health care without interference or discrimination, free from fear of persecution or prosecution. A state constitutional amendment is a powerful and effective path available to many states to re-establish, protect, and expand these rights.

Overview of the Process for Establishing a State Constitutional Right to Reproductive Freedom in Your State

To ensure true reproductive freedom, the substance and reach of a state constitutional right should not vary. This guide will help inform that content and aid in the legal and substantive issues of drafting the amendment. However, the critical work of establishing a constitutional right to reproductive freedom in your state will require several stages of work: planning, drafting, campaigning, and implementation. Below, we briefly discuss the steps that you must take to create a meaningful and effective constitutional right to reproductive freedom in your state. We do not focus on the campaigning and passage aspects of the constitutional amendment process which are inherently political, state-specific, and outside the scope of this resource.

Pre-Work: Getting to Know Your State Law

The work of creating a state constitutional right varies from state to state. Before you begin you will want to familiarize yourself with the options available to you and the process and requirements of your state.

How can the constitution be amended in your state?

Each state lays out a process for establishing a right. See the table starting on page 7 for state-by-state processes.

This can include:

- **Citizen Initiated Ballot Measures.** Some states allow for citizen initiated constitutional amendments. This means the advocates or other interested parties draft the ballot amendment language and then must collect a certain number of signatures from state citizens to qualify for the ballot.
- **Legislatively Referred.** In other states, the legislature must introduce and pass the constitutional amendment for it to go before the citizens for a vote.
- **Legislature Approved.** Delaware is the only state in which the legislature can amend the constitution directly – there is no need for the state's citizens to vote on a proposed amendment.

Each state will also have specific process requirements, including how many signatures are needed for a citizen initiated measure to qualify for the ballot or the percentage of votes necessary for a constitutional amendment to pass and become law.



What other requirements does your state have for drafting a constitutional amendment?

States may have other rules or requirements for drafting a constitutional amendment. For example, several states have a “single-subject rule” requiring that legislation or a constitutional amendment only address one main issue. This does not prevent a state constitutional amendment that protects reproductive freedom but will inform how the amendment can be drafted.



What is needed in your state to advance reproductive freedom?

It is critical to know the existing barriers to reproductive freedom in state law to ensure that the constitutional right can meaningfully address them.

For these reasons, it is important to fully understand state law before moving forward with a state constitutional amendment. The most important first step is to work with attorneys with expertise in the state’s constitutional law, reproductive rights and justice advocates, and Black, Indigenous, and other communities of color directly impacted at the state level. You will also want to review your state’s legal code for language that could interact with the constitutional amendment, such as language that treats a fetus as a person in the criminal code, creates criminal penalties for people who perform abortions, or prohibits public funding of abortions. Depending on what you find, you may want to speak with additional stakeholders with expertise in those areas of law about how best to ensure the constitutional amendment language will address those areas and ensure there will be no unintended consequences.

Determining the Substance and Strategy for a Constitutional Amendment

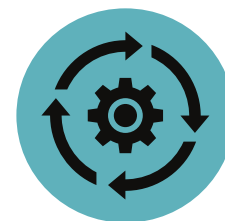
It is not enough to simply reinstate the protections established under *Roe v. Wade*. For too many people, *Roe v. Wade* was never enough, and from the very beginning anti-abortion politicians worked to undermine the scope of the federal right. To ensure a state constitutional amendment provides meaningful protection, it must look beyond *Roe v. Wade* and include protections against these attacks by closing gaps that allow for state interference. This guide is dedicated to helping draft a strong constitutional amendment that will help ensure access to reproductive health care despite attacks by anti-abortion politicians and conservative courts. Work with impacted communities on the ground and advocacy experts, including advocates at the National Institute for Reproductive Health, to draft the state constitutional right.

Campaigning and Passage

The process for passing a state constitutional amendment varies from state to state. In some states, there are multiple methods available, and you will need to consider the political realities in your state to determine the best path forward. In many states, gerrymandering and voter suppression mean that the state legislature does not represent voters’ stance on abortion care access. In these circumstances, if allowed under state law, a referendum or ballot initiative will be more feasible.



Decisions about what approach to take and how to ensure the campaign is successful – whether the target is the legislature, voters, or both – should be made by folks with state-specific expertise. The path from idea to constitutional amendment can be long, particularly if your state requires action by both voters and the legislature. Even so, it’s important to make these decisions in service to directly impacted communities and to ensure the approach you choose does not undermine the same groups that suffered the most under *Roe v. Wade*.



Implementation

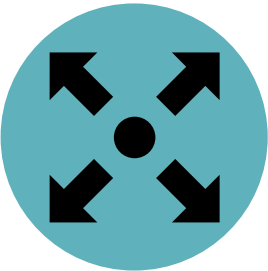
The final step to meaningfully protecting abortion access is implementation. You must have a strategy to remove existing state restrictions on reproductive health care and provide proactive protections under the newly enacted constitutional right. The implementation details will depend on the method used to pass the constitutional amendment and vary from state to state. In many cases, you will want to move separate legislation alongside the text of the constitutional amendment. This legislation, typically called a “companion bill,” should contain detailed statutory provisions necessary to execute the constitutional amendment. If legislation is not an option because of the political reality in the state, you will need to pursue a litigation strategy. Under the new constitutional amendment, the litigation strategy will challenge the existing state restrictions in court.

What If Amending Your State Constitution is Not an Option?


Other options exist if working on a constitutional amendment is not appropriate for you now. You can work on expansive state legislation using the principles laid out in this toolkit for constitutional amendments. Even if passing a bill may not be possible in the short term, building the foundations now can help you create the political realities that will make passage possible in the future. In addition, municipalities and counties can pass resolutions, ordinances, or allocate funding toward reproductive health care. If you are considering local work, you should review your state’s laws regarding local government authority.



Dos and Don'ts for a Constitutional Amendment


Constitutional Amendment Must...	Constitutional Amendment Must Not...	Why This Matters
<p>Protect reproductive freedom by reaching all reproductive health care, from abortion care to postpartum care.</p> <p>Explicitly name abortion in the types of care protected.</p>	<p>Silo reproductive health care by seeking to protect only abortion access or birth control or allow courts to narrow the scope of the amendment by failing to explicitly name abortion care.*</p>	<p>All reproductive health care from abortion care to prenatal care is connected and critical to protecting people's dignity and well-being. Because abortion care is often siloed from other care, it is important to use language that is explicit while being inclusive of all forms of reproductive health care.</p>
<p>Be expansive.</p> 	<p>Include or permit exclusions by including arbitrary restrictions like a viability line or limit or restrictions on young people's access to reproductive health care.</p>	<p>People need abortion care throughout pregnancy. Viability lines impose arbitrary legal restrictions on certain types of medical care while also having a chilling effect on all types of abortion care. They also lead to criminalization of pregnant people and have enabled hospitals to force medical treatments upon pregnant people without their consent.</p>
<p>Ensure meaningful access for everyone.</p>	<p>Seek to "codify" or recreate the framework created by <i>Roe</i>.</p>	<p><i>Roe v. Wade</i> was never enough for too many people in this country. While it created a legal right to abortion, millions lacked adequate access because <i>Roe v. Wade</i> and <i>Planned Parenthood v. Casey</i> opened the door to government interference.</p>
<p>Protect abortion care no matter the reason a person is seeking abortion care.</p>	<p>Limit abortion access to certain "exceptions."</p>	<p>So-called exceptions entrench the stigmatized prioritization of some abortion patients over others and leave behind most abortion seekers.</p>

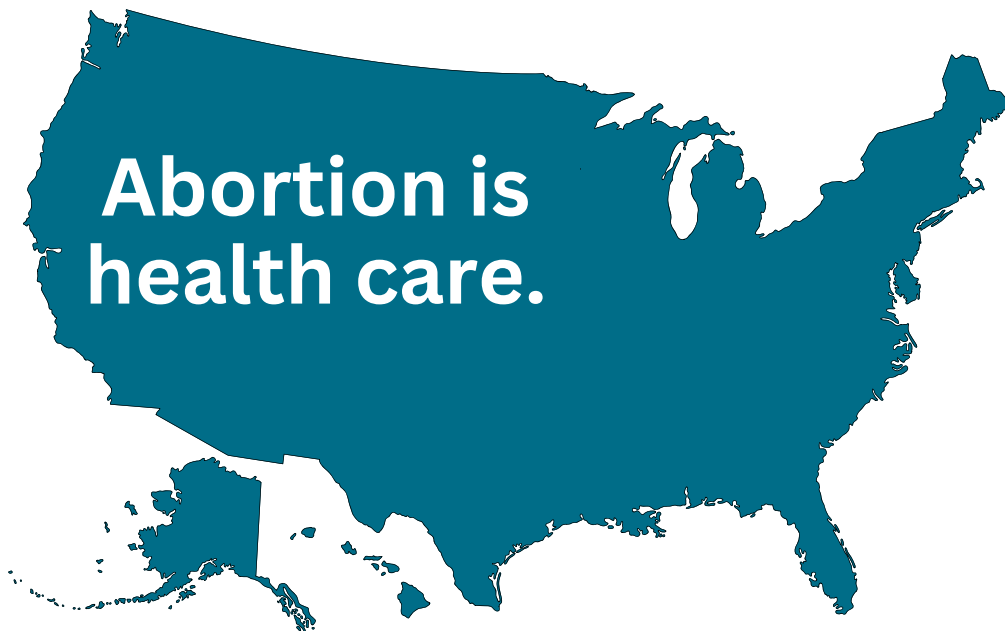
*States with a single-subject rule may limit how expansive you can be. However, careful drafting with experts in your state laws can help ensure that the protections are as broad as possible while still being acceptable under your state laws.

Constitutional Amendment Must...	Constitutional Amendment Must Not...	Why This Matters
Provide explicit protections for the right to reproductive freedom.	Focus on a right to privacy.**	Access to reproductive health care is about so much more than privacy – it impacts our freedom, our equality, and our dignity. Moreover, situating our right to health care within another right makes it more vulnerable. Many conservative courts are hostile to recognizing any right to privacy, especially after the <i>Dobbs v. Jackson</i> decision.
Provide explicit protection from all adverse state actions because of reproductive health care or pregnancy outcomes, including civil penalties against and prosecution of individuals seeking reproductive care and those aiding them.	Remain silent on pregnancy outcomes, omit protections from government action, or exclude providers and people helping from constitutional protections.	This ensures that the government cannot impose penalties for seeking reproductive care. It is not sufficient to prevent government from interfering with a right to access; meaningful access means access without adverse consequences or fear. Additional, explicit protections for people with all pregnancy outcomes will prevent the criminalization of self-managed abortion or miscarriage management.***
Ensure courts apply strict scrutiny to any laws or policies that impact the provision of or access to reproductive health care. 	Remain silent on a legal standard or reinstate the vague and arbitrary “undue burden” standard created by <i>Planned Parenthood v. Casey</i> .	This ensures any attempt to restrict reproductive health care in the states will be subject to strict scrutiny by the courts. Without this clear legal standard, conservative courts may claim restrictions do not violate the constitutional right just as they did for decades after the decision in <i>Planned Parenthood v. Casey</i> .
















**In some states, case law interprets the state's right to privacy expansively. While we typically suggest moving away from a right to privacy, there may be limited, state-specific circumstances in which the right to privacy is a strategic approach.










*** Consider explicitly including gender-affirming care language in your amendment. You should work with transgender advocacy groups to draft the language.













Constitutional Amendment Must...	Constitutional Amendment Must Not...	Why This Matters
<p>Make clear that the only compelling government interest in regulating reproductive health care is to protect the health of the individual seeking reproductive health care.</p>	<p>Set forth a vague legal standard or fail to make clear what is and is not a permissible compelling government interest.</p>	<p>This ensures extreme anti-abortion arguments, such as so-called “personhood” arguments, cannot be used to justify restrictions and therefore undermine the right to reproductive freedom. It also inoculates against the possibility of anti-abortion definitions of when a pregnancy is viable.</p>
<p>Must protect patients, providers, and anyone who assists a person in accessing reproductive health care.</p> 	<p>Only protect people who need reproductive health care.</p>	<p>In recent years, anti-abortion advocates and courts have attempted to undermine access to care by targeting reproductive health care providers, funds, and even patients’ loved ones. This language is critical to ensure that state laws do not criminalize or impose civil fines on anyone helping to provide or support a person seeking reproductive health care.</p>






























State Processes★






State	Legislature Only	Legislatively Referred	Voter Initiated	Constitutional Protections
AL				None. The State Constitution includes a provision stating that nothing within it secures or protects a right to abortion.
AK				The State Supreme Court recognized a right to abortion under the right to privacy and equal protection.
AZ				None.
AR				None. The State Constitution includes a provision stating it is the “policy of Arkansas” to protect the life of “every unborn child from conception until birth.”
CA				The State Constitution includes reproductive rights amendment with a fundamental right to abortion and contraception.
CO				None.
CT				None.
DE				None.
FL				None. The State Supreme Court held that the right to privacy does not protect a right to abortion.

State	Legislature Only	Legislatively Referred	Voter Initiated	Constitutional Protections
GA				A lower State court is currently reviewing whether the State Constitution's due process, equal protection, or inherent rights provisions protect a right to abortion.
HI				None.
ID				None. The State Supreme Court held that the Constitution does not protect a right to abortion.
IL				The State Supreme Court recognized a right to abortion under the due process and equal protection clauses.
IN				The State Supreme Court held that the Constitution does not protect a right to abortion except to save a life or address a serious health risk.
IA				None. The State Supreme Court held that the Constitution does not protect a right to abortion.
KS				The State Supreme Court recognized a right to make decisions about whether to continue a pregnancy under the equal and inalienable rights provision.
KY				None.

State	Legislature Only	Legislatively Referred	Voter Initiated	Constitutional Protections
LA				None. The State Constitution includes a provision stating that nothing within it secures or protects a right to abortion or requires funding abortion.
ME				None.
MD				None.
MA				The State Supreme Court recognized adults' fundamental right to abortion under due process.
MI				The State Constitution includes a fundamental right to reproductive freedom, which entails the right to make and carry out decisions about all matters relating to pregnancy, including prenatal care, childbirth, postpartum care, contraception, sterilization, miscarriage management, infertility care, and abortion care until viability.
MN				The State Supreme Court recognized a fundamental right to abortion before fetal viability as a privacy right.
MS				The State Supreme Court recognized an implied right to choose whether or not to have an abortion as a privacy right.
MO				None.

State	Legislature Only	Legislatively Referred	Voter Initiated	Constitutional Protections
MT				The State Supreme Court recognized a right to abortion pre-viability as a privacy right.
NE				None.
NV				None.
NH				None.
NJ				The State Supreme Court recognized a fundamental right to terminate a pregnancy or bear a child as an inalienable right.
NM				None.
NY				None.
NC				None.
ND				The State Supreme Court recognized a right to abortion to preserve life or health under inherent rights and due process clauses.
OH				The State Constitution includes an amendment protecting reproductive decisions, including contraception, fertility treatment, continuing one's own pregnancy, miscarriage care, and abortion until fetal viability.

State	Legislature Only	Legislatively Referred	Voter Initiated	Constitutional Protections
OK				The State Supreme Court recognized a right to abortion to preserve life or health under inherent rights and due process clauses.
OR				None.
PA				None.
RI				None. The State Constitution includes a provision stating that nothing within it grants a right to abortion or funding for abortion.
SC				None.
SD				None.
TN				None. The State Constitution includes a provision stating that nothing within it secures or protects a right to abortion or requires funding for abortion, and that the legislature has the power to regulate abortion.
TX				None.
UT				None.
VT				The State Constitution includes an Amendment protecting an individual right to personal reproductive autonomy.

State	Legislature Only	Legislatively Referred	Voter Initiated	Constitutional Protections
VA				None.
WA				None.
WV				None. The State Constitution includes a provision stating that nothing within it secures or protects a right to abortion or requires funding abortion.
WI				None.
WY				None.

★Information is current as of the date of publication.

NIRH can provide technical assistance and guidance to advocates and legislators working on expansive reproductive health care policies. Please contact us at partnerships@nirhealth.org for more information or if you would like to speak to our policy experts.