Health Care on the Ballot 2024

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What the Election Could Mean for Reproductive Justice

Reproductive justice will be front and center on the ballot next week. Some choices, like state ballot initiatives offering constitutional protections for abortion rights, have a clear impact. Others are more indirect, arising not from a direct vote, but from candidates' competing approaches to governing and legislating. In this issue of Health Care on the Ballot, we will review—at a high level—key reproductive rights issues that lean heavily on the results of next week's election. While abortion rights feature prominently in these debates, many other reproductive rights issues are also at stake, demonstrating the potentially huge impact of this year's election on many facets of health care access. The below review is only a sampling, and we encourage all readers to reflect on how the questions before you and your loved ones next week might impact reproductive justice.

Abortion Rights on the Ballot & in Federal Courtrooms

Abortion continues to be a battleground issue in the upcoming election. Several states have banned abortion with even more restricting abortion by gestational duration. These bans disproportionately affect vulnerable groups, such as immigrant communities, and even when bans have exceptions, a wide variety of barriers can make these exceptions unrealistic.

This November, many voters will have the opportunity to plot the course of abortion rights in our states. Ballot initiatives responsive to the Supreme Court's blockbuster decision abound, with ten states (AZ, CO, FL, MD, MO, MT, NE, NV, NY, SD) featuring questions that could establish rights and shore up access to abortion and other reproductive-related care. The rules around ballot initiatives vary by state, with some states needing a simple majority to win and other states needing a higher threshold. In all, over 16.5 million women[1] of reproductive age could be impacted by abortion-related ballot initiatives in their states.

This issue also features prominently in the presidential election. At the September 10th presidential debate, voters saw a division between the candidates as to how they would approach abortion rights. Former President Trump has been historically vague and contradictory concerning his views on abortion, having at times celebrated his role in appointing judges that overturned *Roe v. Wade*, but stating during the debate he would not sign a federal abortion ban, preferring to leave the question of abortion access up to the states. Vice President Harris said she planned to reintroduce the protections of *Roe v. Wade* via federal legislation.

[1] Persons of all genders need access to the care and services described in this issue of Health Care in Motion. Where we use the term "women", we do so to reflect official terminology or to reflect the language used in research cited.

But their policy platforms are not the only relevant consideration. Basic access to medication and emergency abortion remains vulnerable to challenges in federal courts, and the next president will likely hold the power to appoint new Supreme Court Justices who may hear these future cases. Twice this term, the Court decided critical abortion rights cases without reaching their merits, meaning that similar challenges can still be brought. As CHLPI recently explained, the Court's decision not to hear an appeal in *Moyle v. United States* left intact a lower court ruling that prevented Idaho from criminalizing health care providers who performed abortions to save women's lives. This ruling was possible because the Biden-Harris administration interprets the underlying federal law, EMTALA, to protect emergency abortion – but a second Trump administration could change course. In another recent article, we explained that the Court's decision in *FDA v. Alliance* merely delayed a ruling on whether the FDA's approval of mifepristone, a drug used in most medication abortions, was valid.

Assisted Reproduction: Congress is Currently Stalled, but Elections Empower Voters

While abortion access often dominates headlines, assisted reproduction is also on the ballot in the states and at the federal level. This underscores the importance of state elections and ensuring that state judges and lawmakers are committed to maintaining and expanding access to a range of important services, including for marginalized communities, who often experience stark inequities in access to this type of healthcare. Fevered debate has centered around in vitro fertilization (IVF), which accordingly dominates this section.

Judicial officials have a substantial impact on access to reproductive care, and in many states, voters directly elect state judges. For example, earlier this year, the Supreme Court of Alabama issued its opinion in *LePage v. Center for Reproductive Medicine*, where the court held that embryos were "minors" for purposes of Alabama's wrongful death statute. This decision caused medical providers to pause their offering of IVF treatment and related services and was unpopular among voters. (The legislature swiftly passed a reactionary law extending immunity to patients and care providers for embryo destruction during IVF.) This year alone, thirty three states will have held elections for judges on their highest state courts.

Section 1557 of the ACA and Assisted Reproduction

While Section 1557 regulations have been tied up in the courts, some people have been able to leverage the law to address discrimination in access to assisted reproduction. CHLPI recently co-authored an amici brief in *Kulwicki v. Aetna Life Insurance*, in support of a group suing their insurance administrator (Aetna), which requires them to prove infertility in order to access IVF coverage. Heterosexual people can do so through a year of unprotected intercourse, but people in non-heterosexual relationships must undergo multiple cycles of donor insemination at their own cost. The suit is ongoing.

At the federal level, voters' power to affect change is even more palpable. Tension exists between former President Trump's promise to deliver free IVF nationwide and his running mate's anti-IVF credentials. In June 2024, Republican senators blocked the House's Right to IVF Act, which would have secured a federally-protected right to IVF. The Senate reconsidered the bill in September, with the same result. Vice Presidential candidate Senator J.D. Vance voted against the bill in June and was not present for the second vote. Vice President Harris, meanwhile, condemned those who opposed the bill and has campaigned in support for more secure access to IVF services.

Contraception Access at Risk

The U.S. Supreme Court's decision in *Dobbs* disrupted the foundation of contraceptive rights by calling into question whether an important line of Supreme Court cases, which have long-protected contraceptive access, are still good law. The Court therefore has considerable leeway to either protect or dissolve contraceptive rights, and the presidency – carrying with it the power to appoint new justices – will have significant influence over how that leeway is exercised. Republican Senators have been unreceptive to new protections and Trump's commitment to maintaining, let alone broadening, access is uncertain. In June 2024, Republican Senators blocked the Right to Contraception Act, which would have resecured the protections afforded by Supreme Court case law.

Like assisted reproductive technology, the right to use contraception also hinges on the ability to affordably access it. Section 2713 of the Affordable Care Act mandates most private insurance plans and many Medicaid programs to provide no-cost coverage for certain preventive services, including all FDA-approved contraceptives (for more about the importance of this provision, read CHLPI's most recent Supreme Court amicus brief here). However, Project 2025 calls for a ban on emergency contraception and the reinvigoration of the Trump administration's blanket "religious and moral exemptions" for employers who don't want to cover contraception. Harris, on the contrary, has explicitly supported efforts to protect access to contraception. To date, the Biden administration has signed at least three executive orders to strengthen national access, and it recently proposed a new rule that would improve access to over-the-counter contraception.

Reproductive Rights and Improving Maternal Health Outcomes

The U.S. still has the highest maternal mortality rate of any high-income nation, and that rate is rising. Mortality among Black women doubles the overall rate. Other racial minority groups are also disproportionately affected. Maternal health outcomes are tied firmly to the security of other reproductive rights, like abortion access. In 2020, before the U.S. Supreme Court decided *Dobbs*, maternal death rates were 62% higher in abortion-restrictive states than in states with broad access; post-*Dobbs*, the number and severity of state-level restrictions markedly increased.

While *Dobbs* brought state-by-state inequities into focus, other forces were already contributing to disparate maternal health outcomes. Federal law mandates Medicaid coverage for pregnancy-related care for a minimum of sixty days postpartum, but this results in disruptions and losses of health care coverage during a critical time for parent and child health. In 2021, Congress introduced an optional extension providing for up to twelve months of postpartum coverage. While many states have opted to extend their postpartum Medicaid coverage (and thereby attempt to achieve many of the positive health trends that occur when people have access to extended Medicaid coverage), some states still haven't implemented this expansion. Idaho and Iowa have passed laws directing the state to seek an extension, but have not implemented them yet. Wisconsin is seeking approval for a limited ninety-day extension instead, and Arkansas has taken no steps towards extending the window for postpartum care. Both states have legislative elections next week.

Maternal health inequities have received less political attention than other reproductive rights issues leading up to the election. But encouragingly, this is one area that presents opportunities for bipartisan support. During Trump's presidency, Congress expanded support for maternal mortality review committees, and HHS released an Action Plan to Improve Maternal Health in America. With that said, both Trump and Project 2025 aim to cut federal Medicaid funding, some of which is earmarked for postpartum and perinatal care. As Vice President, Harris championed a Blueprint for Addressing the Maternal Health Crisis, which created the first-ever federal safety requirements for

maternal emergency and obstetrical care, funded specialized training for care providers, and invested in maternal health research.

Gender Affirming Care Faces Direct Legislative Threats

Access to gender affirming care is another form of reproductive justice that is at stake in this election. Many states are whittling away at access, Congress is divided, and Trump has been openly hostile to gender affirming care and the transgender and gender diverse community. Minors are especially at-risk, with 39.4% of transgender youth living in states that have passed bans on gender affirming care.

Federal legislators are currently competing, on a partisan basis, to affect this care on a national scale. Congress introduced two contradictory bills in 2023: the Gender-Affirming Care Access Research for Equity Act, which aimed to appropriate funding to the CDC for research about gender affirming care equity, and the Protect Children's Innocence Act, which would have withdrawn all federal funding for gender affirming care and made it a felony to administer such care to a minor.

Our presidential candidates have also communicated very different visions for the future of gender affirming care, and are therefore likely to inspire very different administrative responses to Congress's actions. Trump's Agenda 47 promises to outlaw gender affirming care at the federal level and to pass a law stating unequivocally that only "male" and "female" genders are recognized and that each is assigned at birth. As a Senator, Harris supported the Equality Act, a stalled bill that sought to amend the Civil Rights Act to explicitly prohibit discrimination on the basis of sex, sexual orientation, and gender identity. The Biden administration has also broadly opposed state efforts to restrict access to gender affirming care.

What's Next?

As election day approaches, voters should consider the following questions:

1. Does this candidate champion equitable and inclusive access to reproductive health care, both today and during their tenure in a previous position?
2. Will this candidate's approach to reproductive health care improve access and outcomes for *everyone* in need of services, or will it leave some groups vulnerable to reduced access?

Finally and critically, voters should bear in mind that restrictions on access to reproductive health care cut broadly and deeply – well beyond the boundaries of contentious debates about abortion rights. Consider a candidate's comments on a wide range of reproductive health issues and cast a ballot that reflects your values.

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