

Ohio AG Yost says Issue 1 overrides abortion ban, but appeal should continue

Attorneys representing Ohio's abortion clinics are asking the court to dismiss Yost's appeal, citing the attorney general's own legal analysis as proof that the abortion ban was now unconstitutional

Jessie Balmert
Cincinnati Enquirer

Ohio's new constitutional right to reproductive decisions overrides the state's ban on most abortions, Ohio Attorney General Dave Yost's office said in a legal brief Thursday.

But Yost doesn't want to drop an appeal before the Ohio Supreme Court.

"The core prohibition of the heartbeat act – the prohibition on performing an abortion after a fetal heartbeat is detected – is overridden by the new amendment," Yost's office told the Ohio Supreme Court. "This dramatic legal change does not affect this appeal, which does not deal with the underlying heartbeat act, but rather critical procedural issues that do not turn on the substantive regulation of abortion at all."

The Ohio law in question, which is currently on hold, bans doctors from performing abortions after embryonic cardiac activity is detected, which is about six weeks gestation. The law took effect for 82 days after the U.S. Supreme Court overturned Roe v. Wade, sending decisions about abortion policy back to the states. A Hamilton County judge blocked it temporarily, and Yost appealed.

The Ohio Supreme Court agreed to review a few aspects of the case but did not wade into whether abortion was a constitutional right. Instead, the justices were deciding whether abortion clinics could sue on behalf of their patients and whether Yost could appeal at this point.

Attorneys for Ohio abortion clinics want to dismiss the appeal

Yost, a Republican, campaigned against Issue 1. He made clear that several laws would be blocked if the abortion rights amendment passed, including the state's ban on most abortions: "Some of Ohio's laws may be defensible, but the heartbeat act would not exist if Issue 1 passes," according to Yost's analysis.

Now, attorneys representing Ohio's abortion clinics are asking the court to dismiss Yost's appeal, citing the attorney general's own legal analysis as proof that the abortion ban was now unconstitutional.

"It is beyond question that S.B. 23 (the 2019 abortion ban) does precisely what the amendment forbids, and accordingly, it cannot survive the amendment's passage. The Attorney General has publicly conceded that the amendment would have such an impact," wrote attorney Jessie Hill with the American Civil Liberties Union of Ohio and her colleagues.

But Yost said those underlying issues are important to review.

"As to abortion in Ohio, the People have made their decision. The Ohio Constitution has been amended to protect a right to abortion," Yost's office wrote in its Thursday filing, while saying a trial court should invalidate the 2019 law.

This lawsuit is the first of many abortion rights proponents will fight to repeal restrictions and bans in state law. After the U.S. Supreme Court overturned Roe v. Wade in June 2022, these lawsuits shifted from federal to state courts.

Other parties also weighed in. Phyllis Schlafly Eagles, Ohio Value Voters and current and former lawmakers argued in a court filing that "a ballot initiative that attempts to make infanticide a constitutional right, as Issue 1 does, is invalid and unenforceable." They contend that a change that sweeping required a constitutional convention, not a vote on a ballot measure.

Reproductive rights amendment went into effect Thursday

Last month, Ohio voters approved Issue 1, 57-43%, to protect access to abortion and other reproductive decisions. Turnout for the election was 49.6% of registered voters. The new standard in the Ohio Constitution took effect Thursday.

However, abortion providers and doctors are waiting on legal guidance before dropping Ohio's many abortion restrictions and regulations. That means, as a practical matter, rules like waiting 24 hours after an initial appointment to have an abortion are still in effect.

"We don't want to become felons and end up in jail and lose our medical licenses, so we will continue to follow all the rules and laws that we have always followed," Dr. Jeanne Corwin said during a news conference celebrating Issue 1's enactment.

Dr. Amy Burkett, an OB-GYN and abortion provider, agreed with the need for caution until the rules are clear: "I really don't want to find an overzealous prosecutor who decides to make an example of me or at least use it as a way to draw attention."

The Ohio Supreme Court will decide what happens next.