

# Gov. Evers, AG Kaul: File new brief in direct challenge to Wisconsin's 1800s-era criminal abortion ban

Posted on Tuesday, Jan 17, 2023

>> **WisPolitics is now on the State Affairs network. Get custom keyword notifications, bill tracking and all WisPolitics content. [Get the app or access via desktop.](#)**

MADISON — Gov. Tony Evers and Wisconsin Attorney General Josh Kaul today filed a new brief in their direct challenge to Wisconsin's criminal abortion ban. The lawsuit, [originally filed by Gov. Evers and Attorney General Kaul in June](#), came only days after the U.S. Supreme Court released its decision in *Dobbs v. Jackson Women's Health Organization* overturning *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*, upending the constitutional right to an abortion that Wisconsinites and Americans had relied on for nearly 50 years.

At the crux of the governor's and attorney general's challenge is Wisconsin's existing 1800s-era criminal statute that bans nearly all abortions, even in cases of rape and incest. The statute, which originated in 1849 before the Civil War and at a time when women in Wisconsin did not have the right to vote, was never removed from the books even as U.S. Supreme Court decisions superseded the law by affirming the right to an abortion in the United States for almost five decades.

In the wake of the *Dobbs* decision by the U.S. Supreme Court to reverse course on their nearly 50 years of jurisprudence and the resulting potential for the ban to go into effect, Wisconsin's 1800s-era criminal abortion ban that remains on the books has thrown reproductive healthcare access into chaos in the ensuing months. Healthcare providers have [already begun halting abortion procedures](#) across Wisconsin. The lawsuit filed by Gov. Evers and Attorney General Kaul argues Wisconsin's 19th century criminal abortion ban, [Wis. Stat. § 940.04](#), has been superseded by more and cannot be enforced. Specifically, the lawsuit asks the courts to clarify that Wis. Stat. § 940.04 was impliedly repealed by subsequently passed abortion restrictions that conflict with it and it is therefore unenforceable.

Wisconsin Republicans have repeatedly refused to protect reproductive rights and repeal the state's criminal abortion ban despite safe, legal access to abortion having broad, bipartisan support in Wisconsin. According to the Marquette Law School Poll, nearly 60 percent of Wisconsin voters support safe, legal access to abortion and more than 60 percent oppose the decision to overturn *Roe*.

**“We shouldn’t be beholden to a law from the 1800s passed well before Wisconsin women had the right to vote,”** said Gov. Evers. **“We’ve said all along that we’d never stop fighting to ensure every Wisconsinite has the freedom to make their own reproductive healthcare decisions without interference from politicians, and that fight continues today. It’s time for the courts to provide clarity on this issue so that we can restore the reproductive freedom and the rights Wisconsinites relied on right up until the Supreme Court reversed *Roe* and turned back the clock on reproductive freedom by 50 years last summer.”**

**“Access to safe and legal abortion directly impacts the health and freedom of women in Wisconsin,”** said Attorney General Kaul. **“Today’s filing continues our fight to obtain a definitive ruling that Wisconsin’s 19th century abortion ban with no exceptions for rape or incest has not gone back into effect.”**

In the brief filed today, Gov. Evers and Attorney General Kaul argue against a motion for the case to be dismissed. They argue in the brief that Wis. Stat. § 940.04(1) cannot be enforced as applied to abortion because it has been impliedly repealed by Wisconsin’s later-enacted abortion statutes. Specifically, they argue, Wisconsin law recognizes that an earlier statute has been impliedly repealed by later statute when irreconcilable conflict exists. Furthermore, because Wisconsin’s criminal abortion ban was not meaningfully enforced in the 100 years before *Roe* or the nearly 50 years after *Roe*, it is now unenforceable.

The filing by Gov. Evers and Attorney General Kaul today is just the latest in Democrats’ continued efforts to restore access to reproductive healthcare, including abortion, in Wisconsin.

A year ago now, Gov. Evers joined legislative Democrats and Attorney General Kaul in [calling on the Legislature](#) to repeal Wisconsin’s archaic criminal abortion ban. After Republican legislators concluded their regular session work without taking action on the proposal, Gov. Evers called the Legislature into a [special session](#) to

press legislative action to protect reproductive freedom. Only days after Republican legislators [gaveled in and out of the special session](#) in moments without any discussion or debate, and despite broad public concern about the topic, the U.S. Supreme Court released their decision in *Dobbs*, throwing reproductive healthcare access in Wisconsin into near-immediate chaos.

Then, last fall, after U.S. Sen. Ron Johnson (R-Wisconsin) erroneously [suggested](#) Wisconsin voters could challenge the state's 1800s-era criminal abortion ban directly through a binding statewide referendum—something that is allowable in more than 20 other states but not permissible in Wisconsin—Gov. Evers' again [called the Legislature into a special session](#) to create a pathway for Wisconsinites to directly challenge the state's criminal abortion ban and repeal the archaic law. Republicans in the Legislature gaveled out of the special session without consideration or debate.

Over the course of the past four years, the governor has vetoed several bills passed by the Legislature, including [several in the most recent biennium](#), that would have further restricted access to abortion, further inserted politics into the personal and private conversations between patients and their healthcare providers and made it harder for doctors to provide medically accurate information and treatment. Many of these bills also sought to limit healthcare options for people seeking other necessary care, such as pregnancy care, cancer screening and prevention, sexually transmitted disease screening and treatment, and wellness exams.

The brief filing also comes as earlier today Gov. Evers and Democrats announced a new effort to put an advisory referendum on the April 2023 ballot asking whether Wisconsin's criminal abortion ban should be repealed to restore the basic rights afforded to Wisconsinites under *Roe*.

A copy of the brief filed today is available [here](#).

A copy of the original complaint filed on June 28, 2022, in Dane County Circuit Court is available [here](#).

An online version of this release is available [here](#).