ABORTION

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I. INTRODUCTION

A myriad of institutional motivations for change on abortion policies transpired during the 1960s leading up to *Roe v. Wade*, including heightened concern regarding the health impact of illegal abortions and population growth, the women's movement, and pressure from the Catholic Church and political parties.[1]

1. *See* Stephanie Schorow, *Setting the Stage for Roe v. Wade*, THE HARVARD GAZETTE (Nov. 5, 2010), https://news.harvard.edu/gazette/story/2010/11/setting-the-stage-for-roe-v-wade/.

Roe v. Wade established the right to abortion in the United States.[2] However, since the landmark 1973 *Roe* decision, anti-abortion activism has created a complex legal landscape surrounding the constitutional right to abortion. The Supreme Court retreated from the broad protection of abortion within the first trimester under *Roe*'s framework in the early 1990s, establishing an "undue burden" standard in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[3]

As lower courts struggled to implement the *Casey* standard, anti-abortion activists flooded state and federal legislatures with laws to test the constitutional limits of abortion regulation. As of October 1, 2018, at least twenty-four states have imposed stringent standards on abortion clinics,[4] including mandated counseling designed to dissuade a woman from obtaining an abortion,[5] required waiting periods before an abortion,[6] required parental involvement before a minor obtains an abortion,[7] and limited use of state Medicaid funds to pay for medically necessary abortions,[8] all of which narrow the protections of abortion rights under the *Casey* standard.[9]

Twenty-four years after *Casey*, in *Whole Women's Health v. Hellerstedt* the Court upheld the undue burden standard[10] and used it to strike down a stringent Texas state law that required abortion providers to obtain admitting privileges at a local hospital[11] and abortion clinics to make significant structural modifications to meet the standards of an ambulatory surgical center.[12] It is still unclear whether harsher abortion regulations will decrease in light of the *Hellerstedt* decision.

This article examines various developments in abortion law between 1973 and 2018 and explores the current state of abortion law in the United States. Part II looks at the development of the federal constitutional right to abortion from *Roe v. Wade* through *Hellerstedt*. Part II also describes the current state of state constitutional abortion rights. Part III discusses legal regulation of abortion, including actual bans on particular procedures and *de facto* bans on abortion that make performing the procedure so onerous that physicians may be unwilling to incur the extra liability. Part IV examines the continued impact made by cutting public funding for abortions pursuant to the now forty-year-old Hyde amendment. Part

2. *See* Roe v. Wade, 410 U.S. 113, 123 (1973).

3. 505 U.S. 833, 837 (1992).

4. *See* State Laws and Policies: Targeted Regulation of Abortion Providers, GUTTMACHER INST. (Jan. 1, 2019), https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers.

5. *See* State Laws and Policies: Counseling and Waiting Periods for Abortion, GUTTMACHER INST. (Jan. 1, 2019), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion.

6. *See id.*

7. *See* State Laws and Policies: Parental Involvement in Minors' Abortions, GUTTMACHER INST. (Jan. 1, 2019), https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions.

8. *See* State Laws and Policies: State Funding of Abortion Under Medicaid, GUTTMACHER INST. (Jan. 1, 2019), https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid.

9. *See Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2314–18 (2016).

10. *Id.* at 2300.

11. *Id.* at 2310–14.

12. *Id.* at 2314–18.

V addresses the state restrictions on private insurance coverage for abortion, and the trend towards these restrictive policies following the passage of the Patient Protection and Affordable Care Act ("PPACA"). Part VI examines requirements and laws that reflect a growing trend toward fetal personhood despite the Court's holding in *Roe v. Wade* that, under the Fourteenth Amendment, a fetus is not a "person."[13] Finally, in Part VII, this article reflects on the importance of the Supreme Court's *Hellerstedt* decision and what the case means for the aforementioned trends moving forward.

Supreme Court Justice Anthony Kennedy played a key role in the expansion of abortion laws in the United States, particularly in the creation of the undue burden test. In June 2018, Justice Kennedy announced his retirement from the Supreme Court. His announcement spurred debate regarding the future of abortion laws due to President Trump's promise that he would only nominate pro-life judges to the Supreme Court.[14] This promise troubles pro-choice advocates, especially in states with "trigger laws" that ban abortion immediately if *Roe v. Wade* is overturned.[15] Both supporters and opponents of abortion rights can agree that Justice Kennedy's retirement signals a potential shift in the future of abortion law.

II. CONSTITUTIONAL ABORTION RIGHTS

In *Roe v. Wade*, the Supreme Court held that the right to personal privacy, guaranteed by the Constitution, included a woman's right to choose to terminate her pregnancy via abortion.[16] *Roe* grounded the right to abortion in the right to privacy found in the penumbras of the Bill of Rights and first recognized in *Griswold v. Connecticut*[17] and *Eisenstadt v. Baird*.[18] However, the Court also recognized that the right to abortion is not an absolute right and that certain compelling state interests—primarily protecting women's health and the potential life of fetuses—justify the regulation of abortion.[19] These interests influenced the development of the trimester framework—based on the development stage of the fetus—for determining whether state regulation was permissible.[20] Under this framework,

13. Roe v. Wade, 410 U.S. 113, 123 (1973).

14. *See, e.g.*, Sarah McCammon, *What Justice Kennedy's Retirement Means for Abortion Rights*, NPR (June 28, 2018), https://www.npr.org/2018/06/28/624319208/what-justice-kennedy-s-retirement-means-for-abortion-rights; *see also, e.g.*, Peter Sullivan, *Trump Promises to Appoint Anti-Abortion Supreme Court Justices*, THE HILL (May 11, 2016), https://thehill.com/policy/healthcare/279535-trump-on-justices-they-will-be-pro-life.

15. *See* Abortion Policy in the Absence of Roe, GUTTMACHER INST. (Jan. 1, 2019), https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe.

16. *Roe*, 410 U.S. at 153.

17. 381 U.S. 479, 483 (1965).

18. 405 U.S. 438, 472 (1972).

19. *Roe*, 410 U.S. at 154.

20. The *Roe* Court held that during the first trimester, the state could not interfere with a woman's right to choose to terminate her pregnancy. *Id.* at 164. During the second trimester, state regulations "reasonably related to maternal health" were permissible, but the state still could not prohibit a woman from obtaining an abortion. *Id.* Once the fetus reached viability at the end of the second trimester, the

states gain more regulatory authority as the woman's pregnancy progresses.[21]

The Court next addressed abortion in *Planned Parenthood v. Danforth*,[22] in which it unanimously upheld an informed consent provision that applied to all abortions, including those performed in the first trimester.[23] The Court determined that it was "desirable and imperative" for women to make the grave decision to terminate a pregnancy "with full knowledge of its nature and consequences."[24] Therefore, the state had a legitimate and constitutional interest in requiring written consent, provided that the consent requirement did not eviscerate the woman's right to choose.[25]

The written consent requirement in *Danforth* was followed by a legislative trend towards additional barriers to abortion access. The greatest barrier to access implemented in this period was the Hyde Amendment, which limited the use of Medicaid funds to reimburse women for the cost of abortion care.[26]

The Court upheld the Hyde Amendment in *Harris v. McRae*.[27] A group of indigent pregnant women suing on behalf of similarly situated women argued for enjoinment of the Amendment because it violated the Due Process Clause of the Fifth Amendment and the Religious Clauses of the First Amendment and because Title XIX obligated Medicaid-receiving states to provide funding for all medically necessary abortions.[28] The Court rejected these arguments.[29] Notably, the Court did not find that indigent women or minors should be treated as a suspect class or that the Amendment's unequal subsidization eliminated women's right to choose.[30] Rather, the subsidization encouraged alternative activity deemed to be in the best public interest.[31] Though the funding restrictions of the Amendment aligned with religious tenets of the Roman Catholic Church, this was not, in and of itself, enough to show that the Amendment contravened the Establishment Clause of the First Amendment.[32] Therefore, the Hyde Amendment's prohibition against the use of federal Medicaid distributions to fund most abortion procedures was found constitutional.

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state's interest in the potential human life permitted outlawing abortions except when the abortion was necessary to preserve the life or health of the mother. *Id*. at 164–65.

21. *See id*.

22. 428 U.S. 52 (1976).

23. *Id*. at 53–54 (noting that a woman's right to terminate her pregnancy had to yield to the state health interest in requiring physicians to maintain medical records of abortions).

24. *Id*. at 67.

25. *Id*. at 66–67 (relying on the proposition that the decision to terminate a pregnancy is a stressful one, and that the consent requirement "insures that the pregnant woman retains control over the discretion of her consulting physician").

26. Hyde Amendment, Pub. L. No. 94–439, § 209, 90 Stat. 1434 (1976).

27. 448 U.S. 297 (1980).

28. *Id*. at 305–06.

29. *Id*. at 305.

30. *Id*. at 317.

31. *Id*. at 322–23.

32. *Id*. at 298–99.

In the decade following *Roe*, *Danforth* and *McRae*, the Supreme Court invalidated multiple state restrictions on abortion. The Court found the following restrictions unconstitutional: (1) a mandatory waiting period before receiving an abortion;[33] (2) a hospitalization requirement for all second- and third-trimester abortions;[34] (3) a state requirement mandating that doctors report medical information, identifying information, and reasons for performing all post-viability abortions;[35] (4) sections of a state ordinance requiring clinics to provide women with information about pregnancy before giving consent;[36] and (5) a statute requiring all post-viability abortions to be performed in a manner that would give the fetus the best opportunity to be aborted alive unless there was "a significantly greater medical risk to the life or health of the pregnant woman."[37]

A turning point in abortion jurisprudence occurred in 1992 when the Court reversed its position on several of these issues and developed a new standard of review for determining whether a regulation impermissibly interferes with a woman's right to an abortion.[38] In the seminal case *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, the Court again affirmed the right to abortion. Nonetheless, it discarded *Roe*'s trimester framework holding that it "misconceive[d] the nature of the woman's interest [and] undervalue[d] the State's interest in potential life."[39] The Court adopted the new "undue burden test."[40]

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33. *See* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 449–50 (1983) (stating that no "legitimate state interest [was] furthered by an arbitrary and inflexible waiting period"), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

34. *City of Akron*, 462 U.S. at 438–39 (noting that hospitalization was an unreasonable burden to access because it was a significant obstacle for women seeking an abortion and was unnecessary to ensure a safe abortion).

35. *See* Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 765–68 (1986) (determining that the requirement was aimed at exposing the woman publicly, which was not a legitimate state interest), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

36. *City of Akron*, 462 U.S. at 443–49 (finding three informed consent requirements unconstitutional: (1) the requirement that the physician provide the woman with information about pregnancy before obtaining informed consent because, despite the existence of a state interest in ensuring that a woman makes an informed choice, it was "unreasonable for a state to insist that only a physician is competent to provide the information and counseling"; (2) the requirement that physicians read an exact text without deviation because it intruded on the doctor's discretion and was designed to dissuade women from getting an abortion; and (3) the requirement that women receive materials produced by the state describing the fetus, the availability of medical assistance benefits, and the legal responsibility of the father for child support because it used the mother's health as a pretext to intimidate women into choosing to continue their pregnancies).

37. *Thornburgh*, 476 U.S. at 768.

38. *See Casey*, 505 U.S. at 873–79.

39. *Id*. at 873.

40. While the undue burden test was itself new, the shift to the undue burden test was foreshadowed in earlier appearances of the term and the concept of "undue burden" itself. In 1977, the Supreme Court wrote in *Maher v. Roe* that the right in *Roe* "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." 432 U.S. 464, 473–74 (1977). Two years later, in *Bellotti v. Baird* (Bellotti II), the Court determined that statutes requiring parental consent for minors seeking abortions do not unduly burden a minor's constitutional rights. 443 U.S. 622, 640 (1979). Further bolstering this standard of review, Justice O'Connor's dissenting opinion in *City of Akron* supported the application of an "unduly burdensome" standard for all challenges to abortion

Only state regulations that imposed an undue burden on a woman's ability to obtain an abortion encroached "into the heart of the liberty protected by the Due Process Clause."[41] Basing this decision in the Due Process Clause's guarantee of liberty marked a shift away from the fundamental right-to-privacy framework the Court established in *Roe*.[42]

With this new understanding, the Court sought to balance a woman's constitutionally protected liberty against the state's interest in women's health and the potential life of the unborn fetus.[43] *Casey* defined an undue burden as "a state regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[44] In applying the new undue burden test, the Court first upheld a twenty-four hour waiting period, a parental consent requirement for minors, definitions of medical emergencies that would excuse compliance with other provisions, and a reporting requirement imposed on abortion clinics and their physicians; it then invalidated a spousal consent requirement.[45]

The undue burden test permitted government regulation of pre-viability abortions that *Roe* had held to be outside a state's authority or otherwise unconstitutional.[46] The Court explained that the decision to have an abortion would be "more informed and deliberate" after a period of reflection.[47] The Court did not

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statutes, regardless of the pregnancy's stage. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting) *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

41. *Casey*, 505 U.S. at 874.

42. *See id.* at 846 (discussing how the shift in focus to substantive due process was part of a "modern" trend resurrecting *Meyer v. Nebraska*, 262 U.S. 390 (1923)). *See generally* Erin Daly, *The New Liberty*, 11 WIDENER L. REV. 221 (2005); Andrew T. Hyman, *The Little Word "Due,"* 38 AKRON L. REV. 1 (2005); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85 (2000); Peter Preiser, *Rediscovering a Coherent Rationale for Substantive Due Process*, 87 MARQ. L. REV. 1 (2003); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833 (2003). *But see* Lawrence v. Texas, 539 U.S. 558, 592–94 (2003) (Scalia, J., dissenting) (stating that the Due Process Clause only protects against state infringement of fundamental rights, which are necessarily deeply rooted rights in the nation's history and tradition, and the right to choose an abortion, like the right to engage in sodomy, is not so rooted); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1032 (2003) (asserting that reaffirming and extending substantive due process jurisprudence is misguided).

43. *See Casey*, 505 U.S. at 872 (addressing the three trimester framework created in *Roe* governing abortion regulations: almost no regulations on abortions are permitted in the first trimester, regulations in the interest of furthering the woman's health, but not furthering the state's interest in potential life, are permitted in the second trimester, and abortion is prohibited in the third trimester unless the health of the mother is at stake).

44. *Id.* at 877.

45. *Id.* at 887, 898.

46. *Compare id.* at 887 (upholding twenty-four-hour waiting period), *with* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 449–50 (1983) (holding that twenty-four-hour waiting period is unconstitutional).

47. *Casey*, 505 U.S. at 885.

address the potential negative consequences that additional requirements such as a waiting period would create for some women.[48]

In addition to the Court's new undue burden test, the *Casey* Court partially reaffirmed *Danforth* by striking down the spousal notification requirement.[49] The Court held that the requirement was facially unconstitutional because it imposed a substantial obstacle for the "significant number"[50] of women who chose not to inform their husbands regarding their decision to terminate a pregnancy.[51] A husband's right to be notified of his wife's choice to have an abortion might result in a slippery slope toward required spousal notification for all personal choices.[52] *Casey* affirmed that the right to have an abortion is an individual right a woman may exercise without another's consent.

Abortion remained legal after *Casey*, but the Court's shift from a viability framework to an undue burden standard rendered abortion more susceptible to state restrictions.[53] As Chief Justice Rehnquist noted in his concurring opinion, by giving greater weight to states' interests, *Casey*'s undue burden standard conflicted with *Roe*'s central holding that a woman had a fundamental right to an abortion.[54] The *Casey* decision disappointed many reproductive rights supporters.[55]

On the heels of *Casey*, Congress passed the Partial-Birth Abortion Ban Act of 2003 ("PBABA"), which prohibited the intentional performance of partial-birth abortions that are not necessary to save the life of the mother.[56] Abortion

48. For example, a waiting period requires women to visit an abortion clinic on two subsequent days and, in doing so, the waiting period creates a substantial obstacle to obtaining an abortion. *See* Theodore Joyce et al., The Impact of State Mandatory Counseling and Waiting Period Laws On Abortion: A Literature Review 11, GUTTMACHER INST. (Apr. 2009), https://www.guttmacher.org/report/impact-state-mandatory-counseling-and-waiting-period-laws-abortion-literature-review (reviewing twelve reports of the twenty-four states with mandated waiting periods to determine the aggregate effect; the clearest documented impact was found in Mississippi, where there was also a mandated in-person visit.). Waiting periods increase the overall cost of an abortion by compelling women to miss additional days of work, arrange for childcare and—for women in rural areas or areas without readily accessible abortion facilities—drive long distances twice. *Id.* The *Casey* Court did recognize that, following enforcement of the Pennsylvania law, the overall abortion rate fell while the number of women going out of state to obtain abortions and second-trimester abortions increased. *Casey*, 505 U.S. at 886–87. Though the Court recognized that a waiting period would increase the cost of and potentially delay an abortion, it concluded that the wait did not unduly burden or create a substantial obstacle to a woman's right to have an abortion. *Id.* at 887.

49. 505 U.S. at 898.

50. *Id.* at 837.

51. *See id.* at 893–94.

52. *See id.* at 898.

53. *See* Roy G. Spece, Jr., *The Purpose Prong of Casey's Undue Burden Test and Its Impact on the Constitutionality of Abortion Insurance Restrictions in the Affordable Care Act or Its Progeny*, 33 WHITTIER L. REV. 77, 79 (2011) (explaining that *Casey* constituted a demotion of the right to have an abortion).

54. *See* Casey, 505 U.S. at 954 (Rehnquist, J., concurring in part and dissenting in part).

55. *See* Laurence H. Tribe, *Write Roe Into Law*, N.Y. TIMES (July 27, 1992), http://www.nytimes.com/1992/07/27/opinion/write-roe-into-law.html.

56. *See* 18 U.S.C.A. § 1531(a) (West, Westlaw through P.L. 114-327, including P.L. 114-329 and 115-1 to 115-8, title 26 current through 115-8).

providers challenged this act as facially unconstitutional for vagueness because it was unclear what the law banned in *Gonzales v. Carhart*.[57] The challengers argued that the risk of prosecution violated the substantive due process rights of women seeking abortion care by creating an undue burden on abortion access in the second trimester.[58] They also claimed that the PBABA violated women's substantive due process rights because it lacked a health exception that would permit doctors to perform the procedure if it was necessary to save the mother's life.[59]

The Supreme Court found the PBABA constitutional with Justice Kennedy writing for the *Gonzales* majority.[60] The court relied on the government's ability to restrict abortions once the fetus obtains viability, as well as the government's interest in the life of the fetus.[61] The government's "legitimate and substantial interest in preserving and promoting fetal life" was elucidated in *Casey*: the government had an interest in distinguishing between the potential undue burden on the woman's ability to have an abortion and the State's interest in expressing profound respect for the life of the unborn.[62] The Court's primary focus in upholding the PBABA was on the State's interest in protecting the potential life of the fetus.

Twenty-four years after *Casey*, the Court revisited the "undue burden" standard in *Whole Woman's Health v. Hellerstedt*.[63] The petitioners in *Hellerstedt* challenged a Texas statute requiring abortion providers to have admitting privileges at a hospital within thirty miles of the clinic and requiring abortion clinics to adhere to the state's facility-structural requirements for ambulatory surgical centers.[64] The State argued that the regulations were in the best interest of women's health and necessary to ensure quick transfer from a clinic in the event of an emergency.[65]

The *Hellerstedt* Court found Texas' regulations to be undue burdens that created a barrier to a woman's right to an abortion by forcing a significant number of Texas abortion clinics that could not adhere to the new requirements to close their doors.[66] Although the statute echoed the language of *Casey* stating that increased driving distance for patients was not an "undue burden,"[67] the Court found that the combination of increased driving distances and mass clinic closures was an undue burden.[68] Furthermore, because the surgical center regulations provided no health benefits for women,[69] the Texas statutes

57. 550 U.S. 124, 147 (2007).
58. *Id*. at 125.
59. *Id*.
60. *Id*. at 167.
61. *Id*. at 186.
62. *Id*. at 145.
63. 136 S. Ct. 2292, 2298 (2016).
64. *Id*. at 2296, 2300.
65. *Id*.
66. *Id*. at 2313.
67. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 885–87 (1992).
68. *Hellerstedt*, 136 S. Ct. at 2313.
69. *Casey*, 505 U.S. at 895.

were unconstitutional. The Court, reframing the *Casey* standard, stated that if a state regulation placed a "substantial obstacle in the path of women seeking a previability abortion" without conferring "medical benefits sufficient to justify the burdens," the statute was impermissible.[70]

Hellerstedt illustrates the Court's willingness to look closely at abortion regulations to determine if the states' interests are truly being served.[71] This scrutiny is one means to stop a prevailing trend of abortion regulations passed in the wake of *Casey* and *Gonzales*.

III. Regulation of Abortion

Following *Roe's* establishment of the constitutional right to abortion and *Casey's* allowance of state abortion care regulations to protect women's health and promote fetal life, states passed a wave of regulations on abortion to push the boundaries of the Court's grant.[72] This section will examine state legislative bans on abortion and state legislation that regulates the provision of abortion care.

A. Legislative Bans on Abortion

The following section deals with what we will refer to as "bans in reality." Bans in reality are bans that explicitly forbid women from accessing abortion based on the stage of fetal development, the procedure used, or the woman's reason for obtaining an abortion. Such bans are distinguishable from regulations that make accessing abortion more difficult, including those that require counseling, waiting periods, or stringent requirements for abortion care providers. Regulations making abortion more difficult to access, if particularly onerous or considered cumulatively,[73] may ultimately have the same impact as "bans in reality" on women's ability to obtain abortion care.

1. Bans on Fetal Development

Later-term abortions are rare in part because of state prohibitions of the practice.[74] Seventeen states prohibit abortion post-viability and two states prohibit

70. *Hellerstedt*, 136 S. Ct. at 2300.

71. *Id*. at 2298.

72. *See* Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, 17 Guttmacher Pol'y Rev. 9, 9 (2014), https://www.guttmacher.org/gpr/2014/03/surge-state-abortion-restrictions-puts-providers-and-women-they-serve-crosshairs.

73. *See* Jenna Jerman et al., *Barriers to Abortion Care and Their Consequences for Patients Traveling for Services: Qualitative Findings from Two States*, 49 Persp. On Sexual & Reprod. Health (April 11, 2017), https://www.guttmacher.org/journals/psrh/2017/04/barriers-abortion-care-and-their-consequences-patients-traveling-services.

74. In 2014, 91.5% of abortions were performed in the first trimester, and 7.2% of abortions were performed at 14–20 weeks; thus, only 1.3% of abortions were "later-term" abortions. *Abortion Surveillance—United States 2014*, 66 Morbidity & Mortality Weekly Rep. 1, 86 (Nov. 2017), https://www.cdc.gov/mmwr/volumes/66/ss/pdfs/ss6624-H.PDF.

abortion in the third trimester.[75] Twenty-four states impose prohibitions on abortions even earlier in pregnancy.[76] Seventeen state legislatures have passed or introduced bills that ban abortions at twenty weeks based on purported evidence of fetal pain.[77] This cutoff presents challenges because most women cannot undergo certain forms of diagnosis and screening tests to determine if there are developmental issues until twenty weeks of gestation at the earliest.[78]

In 2012, the Arizona legislature passed a law making it a crime for a doctor to perform an abortion if the doctor determined that the probable gestational age was twenty weeks or later.[79] Although the ban allowed for exceptions in emergency situations, the Ninth Circuit Court of Appeals in *Isaacson v. Horne* nonetheless ruled the law "unconstitutional under an unbroken stream of Supreme Court authority, beginning with *Roe* and ending with *Gonzalez*," that forbade states from proscribing abortion care pre-viability.[80] Despite the Ninth Circuit's holding in *Isaacson*, seventeen states ban abortions measured twenty weeks after fertilization or a woman's last menstrual period ("LMP").[81] Mississippi and Louisiana have gone further and enacted legislation that prohibits abortion fifteen weeks after a woman's LMP.[82] Both statutes became effective immediately, quickly received constitutional challenges, and are currently blocked pending resolution of the cases in federal district court.[83]

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75. *State Policies on Later Abortions*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions (Jan. 1, 2019) [hereinafter *State Policies on Later Abortions*].

76. *See id.*

77. *See*, *e.g.*, Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J. L. & GENDER 377, 397 (2011) (citing Nebraska as an example of a state which uses its "compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain" to ban abortions after twenty weeks); *State Policies on Later Abortions*, *supra* note 70 (listing fifteen state prohibitions on later-term abortion which were passed based on the assertion that fetuses can feel pain at eighteen- or twenty-weeks post-fertilization).

78. *During Pregnancy: Prenatal Testing*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/birthdefects/diagnosis.html (last visited Jan. 20, 2019).

79. ARIZ. REV. STAT. ANN. § 36-2159 (West, Westlaw through the 2d Reg. Sess. of 52d Leg.) (prohibiting abortions after twenty weeks of gestational age except in cases of medical emergency).

80. Isaacson v. Horne, 716 F.3d 1213, 1231 (9th Cir. 2012). The plaintiffs in *Isaacson* only challenged the law as-applied to abortions provided after twenty-weeks gestation but before viability. *See id.* at 1229–30.

81. *See State Policies on Later Abortions*, *supra* note 71 (showing that seventeen states have twenty-week bans in effect). The Middle District of North Carolina recently distinguished *Isaacson* and dismissed for lack of standing a challenge to North Carolina's twenty week ban on abortions. The court held that the plaintiffs lacked standing because there was no threat of prosecution given that there had been no enforcement against a physician in the statute's forty-five-year history. *Id.*

82. Mississippi House Bill 1510; Louisiana Senate Bill 181.

83. Jackson Women's Health Org. v. Currier, 320 F. Supp. 3d 828 (S.D. Miss. 2018); June Medical Services LLC v. Gee, 280 F. Supp. 3d 849 (M.D. La. 2017), *motion to certify appeal denied*, No. CV 16-00444-BAJ-RLB, 2018 WL 1041301 (M.D. La. 2018); *Abortion at a Specific Point in Pregnancy Restricted*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions (last updated Jan. 1, 2019).

Other state legislatures have introduced or passed laws that use detection of a fetal heartbeat as a measure for gestational bans. These bans range from twelve[84] to six weeks.[85] In 2013, Arkansas passed Act 103, a ban on abortions at twelve weeks.[86] The ban was one of the strictest in the nation; many women may not even know they are pregnant after twelve-weeks of gestation.[87] The Eighth Circuit Court of Appeals permanently enjoined Arkansas' ban in *Edwards v. Beck*.[88]

Even earlier than Arkansas' Act 103 was North Dakota's six-week abortion ban, signed into law in March 2013.[89] The bill proscribed abortions after an infant heartbeat is detectable, typically at six-weeks gestation, making it the most extreme abortion ban in the country.[90] This ban was also permanently enjoined by the Eighth Circuit Court of Appeals in *MKB Management Corporation v. Stenehjem*.[91] Iowa enacted a similar statute that was to become effective July 1, 2018.[92] A federal district judge temporarily enjoined the statue, and the lawsuit is pending.[93] Courts overturned six, twelve, and twenty-week bans, but state legislatures continue to implement gestational age bans that increase regulation of and restrictions on abortion.[94]

2. Bans Based on the Reason for the Abortion

Bans based on the reason women seek abortion care are especially contentious in state legislatures across the country. This type of legislation typically places severe penalties on abortion providers unless they affirmatively question their

84. ARK. CODE ANN. § 20-16-1304 (West, Westlaw through 2016 Extra. Sess. of the 90th Ark. Gen. Assemb. and 2017 Reg. Sess. of 91st Ark. Gen. Assemb.) (prohibiting abortions after detection of fetal heartbeat or twelve weeks gestation), *invalidated by* Edwards v. Beck, 786 F.3d 1113 (8th Cir. 2015).

85. N.D. CENT. CODE § 14-02.1-05.2 (West, Westlaw through emergency effective laws from the 2017 Reg. Sess. of the 65th Leg. Assemb.) (prohibiting abortions after detection of fetal heartbeat, except to protect the life or health of the mother or the life of the child), *invalidated by* MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768 (8th Cir. 2015)

86. ARK. CODE ANN. § 20-16-1304 (West, Westlaw through 2016 3d Extra. Sess. of the 90th Ark. Gen. Assemb,).

87. *See U.S. Judge Strikes Arkansas' 12-week Abortion Ban*, USA TODAY (Mar. 15, 2014), http://www.usatoday.com/story/news/ nation/2014/03/15/arkansas-abortion-ban/6453807/.

88. 786 F.3d 1113 (8th Cir. 2015).

89. N.D. CENT. CODE §§ 14-02.1-05.2 (West, Westlaw through emergency effect laws of the 2017 Reg. Sess. of the 65th Leg. Assemb.).

90. *Id*.

91. MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768 (8th Cir. 2015).

92. IOWA CODE ANN. § 146C.2 (West, Westlaw current with Leg. from the 2018 Reg. Sess.).

93. Stephen Gruber-Miller, *Judge Temporarily Blocks Iowa's 'Fetal Heartbeat' Law While Lawsuit is Resolved*, DES MOINES REGISTER (June 1, 2018), https://www.desmoinesregister.com/story/news/crime-and-courts/2018/06/01/fetal-heartbeat-abortion-law-lawsuit-challenge-injunction-planned-parenthood-thomas-more-court/659529002/.

94. Elizabeth Nash et al., *Laws Affecting Reproductive Health and State Trends at Midyear, 2016*, GUTTMACHER INST. (Nov. 1, 2015), https://www.guttmacher.org/article/2016/07/laws-affecting-reproductive-health-and-rights-state-trends-midyear-2016.

patients' motivations for an abortion.[95]

In 2011, Arizona enacted legislation to prohibit a woman from obtaining an abortion if she was motivated to do so by the race or sex of the fetus.[96] Some legislators expressed concern that abortion providers were targeting African-American and Hispanic women based on statistics showing women of color had higher abortion rates than white women.[97] Another fear was that Asian immigrants would make the decision to obtain abortion care based on a strong preference for one sex over another.[98] The Maricopa County chapter of the NAACP and the National Asian Pacific American Women's Forum challenged the Arizona law.[99] The Ninth Circuit Court of Appeals held that the alleged injury—the stigmatizing effect of the legislation—was insufficient to support standing.[100] Although Arizona is the only state in the nation with a race-selection abortion ban in effect,[101] eight other states enforce a ban on sex-based abortions.[102]

In situations where a woman learns her fetus may have a genetic anomaly, she may abort the fetus in all states except North Dakota.[103] Louisiana[104] and Ohio[105] have similar prohibitions, but enforcement is temporarily enjoined as cases challenging the legislation proceed through the courts.[106] Indiana's prohibition on abortions sought based on the race, sex, or a genetic anomaly of the fetus was

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95. *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INST. (Oct. 1, 2018), https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly [hereinafter *Sex or Race Selection or Genetic Anomaly*].

96. ARIZ. REV. STAT. ANN. § 13-3603.02 (West, Westlaw through 1st Spec. and 2d Reg. Sess. of the 53d Leg.).

97. *Sex or Race Selection or Genetic Anomaly*, *supra* note 95.

98. *Id.*

99. NAACP v. Horne, 626 Fed. App'x 200, 201 (Mem.) (9th Cir. 2015).

100. *Id.*

101. Indiana passed a ban similar to Arizona's, but it is permanently enjoined by a federal district court. *See* Planned Parenthood of Ind. and Ky., Inc. v. Comm'r, Ind. State Dep't of Health, 888 F.3d 300 (7th Cir. 2018) (holding that prohibitions on abortions for certain reasons are unconstitutional).

102. *See Sex or Race Selection or Genetic Anomaly*, *supra* note 95. Indiana's sex-selection ban is permanently enjoined. *See Planned Parenthood of Ind. and Ky., Inc.*, 888 F.3d at 300.

103. *Sex or Race Selection or Genetic Anomaly*, *supra* note 95. N.D. CENT. CODE ANN. §§ 14-02.1–04.1 (West, Westlaw through the 2017 Reg. Sess. of the 65th Leg. Assembly). In the United States, approximately 75% of women terminate a pregnancy when they receive a prenatal diagnosis of Down syndrome. Ruth Graham, *Choosing Life With Down Syndrome*, SLATE (May 31, 2018, 5:57 AM), https://slate.com/human-interest/2018/05/how-down-syndrome-is-redefining-the-abortion-debate.html. In countries such as the United Kingdom, Denmark, and Iceland, Down syndrome has been nearly eradicated. *Id.*

104. *Sex or Race Selection or Genetic Anomaly*, *supra* note 95; *Louisiana Genetic Abnormalities Abortion Ban (H.B. 1019)*, LA. STAT. ANN. § 40:1061.1.2 (West, Westlaw through 2018 3d Extra. Sess.); June Medical Services LLC v. Gee, 280 F. Supp. 3d 849 (M.D. La. 2017).

105. OHIO REV. CODE ANN. § 2919.10 (West, Westlaw through 132d Gen. Assembly); Preterm-Cleveland v. Himes, 294 F.Supp.3d 746 (S.D. Ohio 2018) *appeal filed*, 6th Cir. (Apr. 12, 2018).

106. *See Louisiana Genetic Abnormalities Abortion Ban (HB 2019)*, REWIRE NEWS, https://rewire.news/legislative-tracker/law/louisiana-genetic-abnormalities-ban-hb-1019/ (last updated Feb. 27, 2017) (explaining that the State of Louisiana has agreed to delay enforcement of their law pending a suit filed by the Center for Reproductive Rights); Preterm-Cleveland v. Himes, 294 F.Supp.3d 746 (S.D. Ohio 2018) *appeal filed*, 6th Cir. (Apr. 12, 2018).

permanently enjoined in *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner, Indiana State Department of Health*.[107] While other states do not ban abortions based on genetic anomalies, Arizona, Kansas, and Oklahoma require that a woman undergo counseling prior to getting an abortion due to a lethal, incurable condition of the fetus.[108] Additional states are considering prohibitions or parameters on abortions sought because of a genetic anomaly.[109] Prohibitions based on the reason for an abortion continue to arise with various approaches amongst states despite their contentious nature.

3. Bans Based on Medical Procedures Used

Banning methods of abortion inhibits a woman's ability to terminate her pregnancy because methods are limited. There are two ways to perform an abortion: surgically or via medication.[110] Restrictions on surgical and medication methods of abortion vary based on state and trimester.[111] Additionally, some surgical procedures are specifically regulated, such as dilation and evacuation and dilation and extraction.[112]

The first section below addresses the surgical means of abortion, including the growing controversy surrounding second- and third-trimester surgical procedures. The second section addresses laws that regulate the medications that can be prescribed to induce an abortion.

a. Surgical Abortion Bans. Twenty states and the federal government have laws currently in effect that prohibit the use of certain surgical abortion procedures performed after the first trimester.[113] These laws target two surgical

107. Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Indiana State Dep't of Health, 265 F. Supp.3d 859 (S.D. Ind. 2017), *aff'd sub nom.* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Indiana State Dep't of Health, 888 F.3d 300 (7th Cir. 2018), *reh'g en banc granted*, 727 F. App'x 208 (7th Cir. 2018), *vacated*, No. 17-3163, 2018 WL 3655854 (7th Cir. June 25, 2018), *opinion reinstated*, No. 17-3163, 2018 WL 3655854 (7th Cir. June 25, 2018).

108. *Sex or Race Selection or Genetic Anomaly*, *supra* note 95. "[L]aws that require or encourage medical providers to supply patients with approved fact sheets and contact information for local support services . . . [have] garnered unified support from pro-life, pro-choice, and disability-rights groups. But the rise of anti-abortion bills like Ohio's has slowed the progress of the pro-information movement over the past few years." Ruth Graham, *Choosing Life with Down Syndrome*, SLATE (May 31, 2018, 5:57 AM), https://slate.com/human-interest/2018/05/how-down-syndrome-is-redefining-the-abortion-debate.html.

109. *Sex or Race Selection or Genetic Anomaly*, *supra* note 95.

110. *Abortion Procedures*, AM. PREGNANCY ASS'N. (Sept. 3, 2016), http://americanpregnancy.org/unplanned-pregnancy/abortion-procedures/.

111. *Id.*

112. *Id.*

113. These states are Arizona, Arkansas, Georgia, Indiana, Kansas, Louisiana, Michigan, Mississippi, Montana, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Virginia. *State Policies in Brief: Bans on "Partial-Birth" Abortions*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester (last updated Nov. 1, 2018) [hereinafter *State Policies in Brief*].

procedures in particular: standard dilation and evacuation ("D&E")[114] and dilation and extraction ("D&X"), also referred to as intact dilation and evacuation.[115]

The Supreme Court holds that a federal ban on D&X procedures—commonly referred to as "partial-birth abortion bans"—is constitutionally permissible.[116] The Supreme Court initially addressed the constitutionality of partial-birth abortion bans in *Stenberg v. Carhart*.[117] The Court invalidated a Nebraska statute which forbade "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child."[118] The Nebraska statute banned the D&X procedure, despite members' of the medical community belief that it was the safest procedure in certain circumstances.[119] Citing *Casey*'s requirement that abortion restrictions must contain exceptions necessary for the preservation of the life or health of the mother, the Court held that abortion statutes without health exceptions are *per se* unconstitutional if "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health."[120] The Court invalidated the statute for its potential to create an undue burden and for fear that the statute's broad language would lead to a ban of all late-term abortions.[121]

President George W. Bush signed the PBABA, a federal prohibition on D&X, into law in 2003.[122] In passing the PBABA, federal legislators echoed the

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114. D&E is a generic term used to describe "procedures performed at 13 weeks gestation or later." Stenberg v. Carhart, 530 U.S. 914, 924 (2000). The procedure is similar to vacuum aspiration, used in earlier stages of pregnancy, which involves insertion of a vacuum tube into the uterus to evacuate its contents. *See id*. at 923. In D&E, however, "the cervix must be dilated more widely because surgical instruments are used to remove larger pieces of tissue." *Id*. at 925. The procedure varies depending on the stage of fetal development. *Id*. After the fifteenth week, there is a "potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus." *Id*.

115. D&X, or intact D&E, abortions involve "removing the fetus from the uterus through the cervix 'intact,' i.e., in one pass, rather than in several passes." *Id*. at 927. This surgical procedure is typically used at the earliest after sixteen weeks of pregnancy, as vacuum aspiration becomes ineffective and the fetal skull becomes too large to pass through the cervix. *Id*.

116. *See* Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (finding the federal ban on D&X procedures, which did not contain an exception for the health of the mother, constitutionally permissible).

117. *Stenberg*, 530 U.S. at 914.

118. *Id*. at 922 (quoting NEB. REV. STAT. ANN. § 28-326 (9) (Supp. 1999)).

119. *Id*. at 932.

120. *Id*. at 938. In her concurrence, Justice O'Connor wrote that Nebraska's partial-birth abortion ban *per se* violated the constitution "[b]ecause even a post-viability proscription of abortion would be invalid absent a health exception, Nebraska's ban on pre-viability partial-birth abortions, under the circumstances presented here, must include a health exception as well, since the State's interest in regulating abortions before viability is 'considerably weaker' than after viability." *Id*. at 948 (O'Connor, J., concurring).

121. *Id*. at 939.

122. *See* 18 U.S.C.A. § 1531 (West, Westlaw through P.L. 115-281). President Clinton vetoed similar legislation in 1996 (Partial Birth Abortion Ban Act of 1995, H.R. 1833, 104th Cong.) and 1997 (Partial Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong.). In both years, the House overrode the President's veto but the Senate did not have a two-thirds majority to complete the override. *See* H.R. Rep. No. 108-58, at 12–14 (2003).

Nebraska state legislators' position: a health exception for the ban on the D&X procedure was not required because such a procedure was not necessary for the mother's health, the procedure posed serious risks to the mother's health, and the procedure was not considered an accepted medical practice.[123] The Judiciary Committee Report accompanying the bill cited several Supreme Court decisions to show that the Court historically deferred to congressional findings.[124] Unlike the statute at issue in *Stenberg*, the PBABA's text explicitly included only D&X procedures.[125] However, the PBABA did not include a constitutionally required health exception.[126]

Originally, three federal courts reviewed the PBABA and found it unconstitutional.[127] The Supreme Court granted certiorari in two of the cases, *Carhart v. Gonzales* and *Planned Parenthood Federation of America v. Ashcroft*, and handed down its opinion in *Gonzales v. Carhart*.[128] The Eighth Circuit, in *Carhart v. Gonzales*, held that the PBABA was unconstitutional because it lacked a health exception to protect the life of the mother.[129] In *Planned Parenthood Federation of America v. Ashcroft*, the Northern District of California found that the PBABA encompassed and outlawed pre-viability D&E procedures and inductions, as well as D&X procedures.[130] The PBABA's language created a risk of criminal liability for virtually all abortions performed after the first trimester and

123. H.R. Rep. No. 108-58, at 14–15 (2003).

124. *See id*. at 9–12.

125. *See* 18 U.S.C.A. §§ 1531(b)(1)(A)–1531(b)(1)(B) (West, Westlaw through P.L. 115-281). A partial-birth abortion is defined in the PBABA as a surgical procedure during which the physician "deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the naval is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus and performs the overt act, other than completion of delivery, that kills the partially delivered living fetus." *Id*.

126. *Stenberg*, 530 U.S. at 936–38. Although a health exception is missing, the PBABA permits D&X abortions when "necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." 18 U.S.C.A. § 1531(a) (West, Westlaw through P.L. 115-281).

127. Carhart v. Gonzales, 413 F.3d 791, 803 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007); Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1034–35 (N.D. Cal. 2004), *aff'd sub nom.* Gonzales v. Planned Parenthood Fed'n of Am., 435 F.3d 1163, 1191 (9th Cir. 2006) (finding the ban unconstitutional because it lacked a health exception, imposed an undue burden, and was unconstitutionally vague, but upholding the permanent injunction because it was impossible to remedy the statute's constitutional flaws with a narrower injunction given Congress's express intent to exclude a health exception), *rev'd*, 550 U.S. 124 (2007); National Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 492 (S.D.N.Y. 2004), *aff'd in part sub nom.*, Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 290 (2d Cir. 2006) (affirming that the statute was unconstitutional because it lacked a health exception, but not ruling on the proper remedy in light of *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), nor on whether it imposed an undue burden or was constitutionally vague), *vacated*, 224 F. App'x 88 (2d Cir. 2007).

128. *See* Gonzales v. Carhart, 550 U.S. 124, 131 (2007).

129. *Carhart*, 413 F.3d at 803–04.

130. *Ashcroft*, 330 F. Supp. 2d at 440.

acted as a disincentive for physicians to perform abortions.[131] The district court held the statute was unconstitutional because it lacked a health exception required under *Stenberg* and placed an undue burden on women seeking to abort a nonviable fetus.[132]

In a five-to-four opinion, the Supreme Court upheld the constitutionality of the PBABA, finding it neither unconstitutionally vague nor a substantial obstacle to women seeking late-term pre-viability abortions.[133] The Court reasoned that the language in the PBABA only punished doctors who intended to perform D&X abortions and committed an overt act, separate from the abortion, that killed the fetus after it passed an anatomical landmark.[134] Therefore, according to the Court, a doctor who accidentally performed a D&X abortion would not face criminal penalties because he would not meet both elements of intent to perform a D&X procedure.[135]

The Court distinguished the PBABA from the statute at issue in *Stenberg*.[136] The Court determined that the statute in *Stenberg* prohibited delivering "a living unborn child,"[137] but the PBABA only prohibited delivering a living fetus by means of a D&X procedure.[138] The PBABA was sufficiently different from the *Stenberg* statute and not unconstitutionally broad[139] due to this difference in language, in conjunction with the intent and anatomical landmark requirements.[140]

Gonzales, for the first time since *Casey*, found the Court upholding a late-term abortion ban that did not contain an exception for the health of the mother.[141] The parties in *Gonzales* presented conflicting evidence regarding the necessity and safety of the D&X procedure.[142] The petitioner relied on congressional findings demonstrating that the D&X procedure was not necessary to preserve the health

131. *Id*. at 440–41.

132. *See id*. at 975. The Northern District of California also held the statute unconstitutional on the independent ground of vagueness. *See id*. at 975–78. Ambiguous terms included "partial-birth abortion," "living fetus," and "overt act." *Id*.

133. *Gonzales*, 550 U.S. at 147, 156.

134. *See id*. at 148. These anatomical landmarks vary based on the position of the fetus. *Id*. at 147–48. For a head-first presentation, the entire landmark is when the fetal head is outside the woman's body, for a breech presentation, any part of the fetal trunk past the navel outside the woman's body serves as the anatomical landmark. *Id*.

135. *See id*.

136. *See id*. at 151.

137. Stenberg v. Carhart, 530 U.S. 914, 921–22 (2000) (citing NEB. REV. STAT. § 28-326 (Supp. 1999)).

138. *See* Gonzales, 550 U.S. at 150–52.

139. *See id*. at 150–56.

140. *See id*. at 149 ("Unlike the statutory language in *Stenberg* that prohibited the delivery of a substantial portion of the fetus—where a doctor might question how much of the fetus is a substantial portion—the Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other . . . . Doctors performing D&E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability.") (internal citations omitted).

141. *Id*. at 171 (Ginsburg, J., dissenting).

142. *Id*. at 161–62.

of the mother.[143] Respondents submitted testimony from respected medical experts asserting that the D&X procedure was, in certain circumstances, necessary for the health of the mother, in addition to being the safest available procedure.[144] The Court emphasized that courts are generally required to give the legislature wide discretion where medical and scientific uncertainties exist, and the majority concurred with the Petitioner.[145]

Today, the PBABA is valid law and prohibits D&X abortions.[146] In addition to the federal law, twenty states have enacted their own partial-birth abortion laws.[147] However, it is unlikely that the number of late-term abortions has decreased substantially as a result of these laws because doctors may still perform D&E procedures.[148]

Anti-abortion advocates have begun to push for D&E abortion bans as a means of limiting abortions after the first trimester because D&E abortions are the most commonly performed method of abortion performed in the second trimester.[149] Nine states have enacted D&E abortion bans, which some state legislatures have named "Unborn Child Protection from Dismemberment Abortion" Acts.[150] Federal and state courts have enjoined seven of these laws.[151]

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143. *See Gonzales*, 550 U.S. at 161–62.

144. *See id*.

145. *See id*. at 163–64.

146. 18 U.S.C.A. § 1531 (West, Westlaw through P.L. 115-281).

147. *Bans on Specific Abortion Methods Used After the First Trimester*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester (last updated Jan. 1, 2019).

148. *See* Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L. J. 1318, 1350–54 (2009).

149. *See* Megan K. Donovan, *D&E Abortion Bans: The Implications of Banning the Most Common Second-Trimester Procedure*, 20 GUTTMACHER POL'Y REV. 35 (2017).

150. *See Dilation and Extraction Bans*, REWIRE, https://rewire.news/legislative-tracker/law-topic/dilation-and-evacuation-bans/ (last updated Mar. 16, 2017) [hereinafter *Dilation and Extraction Bans*]. These states are: Alabama, Arkansas, Kansas, Kentucky, Louisiana, Mississippi, Oklahoma, Texas, and West Virginia. *See* ALA. CODE § 26-23G-1, et seq. (West, Westlaw through Act 2018-579); KAN. STAT. ANN. § 65-6741, et seq. (West, Westlaw through laws enacted during the 2018 Reg. Sess. of the Kan. Legislature effective on or before July 1, 2018); LA. STAT. ANN. § 40:1061.1.1 (West, Westlaw through 2018 3d Extra. Sess.); MISS. CODE ANN. § 41-41-151 (West, Westlaw through 2018 Reg. and 1st Extra. Sess.); OKLA. STAT. ANN. tit. 63, § 1-737.7, *et seq*. (West, Westlaw through Ch. 12 of the 2d Reg. Sess. of the 56th Leg. (2018)); W. VA. CODE ANN. § 16-2O-1 (West, Westlaw through 2018 Reg. Sess.); ARK. CODE ANN. §§ 20-16-1801, *et seq*. (West, Westlaw through 2018 Fiscal and 2d Extra. Sess. of the 91st Ark. Gen. Assembly); 2018 KY H.B. 454; Tex. Health & Safety Code Ann. § 171.151 (West, Westlaw through 2017 Reg. and 1st Called Sess. of the 85th Leg.).

151. *See Bans on Specific Abortion Methods Used After the First Trimester*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester (last updated Nov. 1, 2018). These states are: Alabama, Arkansas, Kansas, Kentucky, Louisiana, Oklahoma and Texas. *See* W. Ala. Women's Ctr. v. Miller, 2016 WL 6395904 (M.D. Ala. Oct. 27, 2016), *aff'd*, W. Ala. Women's Ctr. v. Williamson, 900 F.3d 1310 (11th Cir. 2018); Hodes & Nauser, MDs, P.A. v. Schmidt, 368 P.3d 667 (Kan. Ct. App. 2016) (affirming the state district court's grant of a temporary injunction because the court was equally divided); Burns v. Kline, 382 P.3d 1048 (Okla. 2016) (holding that the D&E legislation was unconstitutional under the state constitution's single-subject rule); June Medical Services LLC v. Gee, 280 F.Supp.3d 849 (M.D. La. 2017); Hopkins v. Jegley, 267 F.Supp.3d 1024 (E.D. Ark. 2017); EMW Women's

b. Medication Abortion Bans and Restrictions. Medication or non-surgical abortions are frequently used during the early stages of pregnancy.[152] In the United States, mifepristone (RU-486, also known as Mifeprex) is used in combination with misoprostol to terminate a pregnancy in the first forty-nine days of gestation.[153] The Food and Drug Administration ("FDA") considers the use of mifepristone and misoprostol to be a safe, effective, and non-invasive alternative to surgical abortion during the first trimester.[154] In combination, the administration of mifepristone and misoprostol is considered to be 95% to 98% effective in terminating an early pregnancy.[155]

The FDA initially approved mifepristone in 2000.[156] The Final Printed Label ("FPL") directed the patient to take 600 mg of mifepristone before reaching seven weeks after a woman's LMP, return two days later to take a dose of misoprostol, and then return two weeks later to verify that the procedure was successful.[157] An FPL is not a legal requirement, medical professionals developed new protocols that improved the implementation of the medication in a variety of ways: (1) physicians can prescribe one-third the dosage; (2) women can self-administer misoprostol at home; and (3) the drug is effective for two additional weeks of pregnancy (up to sixty-three days).[158] In the United States, some studies report that at least 96% of all medication abortions involve a regimen that varies from the FPL.[159] In March 2016, the FDA updated the FPL with relaxed guidelines that closely resemble the physician-created protocols: the FPL now outlines that mifepristone and misoprostol be administered in a single doctor's visit rather than across two visits, that the mifepristone is 200 mg rather than 600 mg, and that the pill can be administered up to ten weeks into pregnancy.[160] Such changes to the FPL make medication abortions less burdensome for abortion-seekers.

Surgical Center, P.S.C. v. Beshear, 283 F.Supp.3d 629 (W.D. Ky. 2017); Whole Woman's Health v. Paxton, 280 F.Supp.3d 938 (W.D. Tex. 2017).

152. Associated Press, *Abortion Pill Used in 1 in 4 U.S. Terminations*, NBC NEWS (July 8, 2009, 4:59 PM), http://www.nbcnews.com/id/31804820/ns/health-womens_health/t/abortion-pill-used-us-terminations/#.WPIvU1MrJsM.

153. FOOD & DRUG ADMIN., Mifeprex (Mifepristone) Information (last updated Feb. 5, 2018), https://www.fda.gov/Drugs/DrugSafety/ucm111323.htm.

154. *Id.*

155. *See* Rebecca Allen & Barbara M. O'Brien, *Uses of Misoprostol in Obstetrics and Gynecology*, 2 REVS. OBSTETRICS & GYNECOLOGY 159, 161 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2760893/pdf/RIOG002003_0159.pdf.

156. *See* FOOD & DRUG ADMIN., *Highlights Of Prescribing Information: Mifeprex*, http://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf (last updated Mar. 2016) [hereinafter *Mifeprex FPL*].

157. FOOD & DRUG ADMIN., Mifeprex (Mifepristone) Tablets, 200 MG 5 (July 19, 2005), http://www.accessdata.fda.gov/drugsatfda_docs/label/2005/020687s013lbl.pdf.

158. Brief in Opposition, at 3–4, Cline v. Okla. Coal. for Reprod. Justice, 133 S. Ct. 2887 (2013) (No. 12-1094).

159. *Id.* at 4.

160. Mifeprex FPL, *supra* note 156; *see also* Sabrina Tavernise, *New FDA Guidelines Ease Access to Abortion Pill*, N.Y. TIMES (Mar. 30, 2016), http://www.nytimes.com/2016/03/31/health/abortion-pill-mifeprex-ru-486-fda.html?_r_0.

The full effect of the changed FPL remains to be seen. The relaxed standards could increase access to medication abortions by decreasing the cost of and barriers to the procedure.[161] However, states may use legislation to burdens access: North Dakota and Texas have laws in effect that prohibit "off-label" use of abortion-inducing pharmaceuticals, confining the administration of mifepristone and related medications to the FDA-approved protocol.[162] Nineteen states require the clinician to be in the physical presence of the patient when prescribing the regime, thus limiting rural women's ability to utilize telemedicine.[163] Four states require a physician to administer the medication abortion.[164] Despite the legislation imposed by various states, medication remains a safe and effective form of abortion early in pregnancy and is used in approximately one-third of all non-hospital abortions.

B. Legislative Restrictions on the Provision of Abortion

Opponents of abortion have shifted focus from overturning *Roe v. Wade* to passing strategic legislation that places strict requirements on the doctors and clinics that provide abortion care or on the people seeking an abortion.[165] *Planned Parenthood v. Casey* upheld such regulations, including waiting periods and mandatory counseling, because the regulations served a legitimate state interest and did not create an undue burden on a woman's right to abortion.[166] However, some advocates of the legal right to abortion argue that restrictions are slowly chipping away at the constitutional right to abortion established in *Roe v. Wade* by making it exceedingly difficult to provide and access.[167] Some of these

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161. *See* Rachel Jones & Heather Boonstra, *The Public Health Implications of the FDA's Update to the Medication Abortion Label*, HEALTH AFF. BLOG (June 30, 2016), http://healthaffairs.org/blog/2016/06/30/the-public-health-implications-of-the-fdas-update-to-the-medication-abortion-label/.

162. N.D. CENT. CODE ANN. § 14-02.1-02 (West, Westlaw through the 2017 Regular Session of the 65th Leg. Assemb. and results of the Nov. 6, 2018, election); TEX. HEALTH & SAFETY CODE ANN. § 171.063 (West, Westlaw through the end of the 2017 Regular and First Called Sessions of the 85th Leg.), upheld by Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583 (5th Cir. 2014). Oklahoma's off-label medication abortion ban was ruled unconstitutional by the Oklahoma Supreme Court. Okla. Coal. for Reprod. Justice v. Cline, 292 P.3d 27 (Okla. 2012), *cert. dismissing as improvidently granted*, 134 S. Ct. 550 (Mem.) (2013). Arkansas' off-label medication abortion ban is currently enjoined. *See* Planned Parenthood of Ark. & E. Okla. v. Jegley, No. 4:15-cv-00784-KGB, 2016 WL 6211310 (E.D. Ark. Mar. 14, 2016), *renewed TRO* Planned Parenthood Arkansas & E. Oklahoma v. Jegley for Pulaski Cty., No. 4:15-CV-00784-KGB, 2018 WL 3029104, at *47 (E.D. Ark. Jun. 18, 2018).

163. *See Medication Abortion*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/medication-abortion (last updated Apr. 1, 2017).

164. *Id.*

165. *See* Smith, *supra* note 77, at 390 ("Anti-abortion advocates, however, also designed an incremental strategy to proceed in tandem with efforts to alter the composition of the Supreme Court. This strategy was to weaken the right to abortion bit by bit by devaluing women's interests in abortion on the one hand while expanding the breadth of the legitimate state interests in regulating abortion on the other.").

166. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872–74 (1992).

167. *See* Smith, *supra* note 77, at 380 ("The danger is that those interests will become so broad that someday you will be able to drive an abortion ban truck right through them").

regulations may constitute "undue burdens" as defined by *Casey* and *Hellerstedt*.[168] These regulations may function as bans in reality for some women seeking an abortion because of the almost insurmountable barriers they create for women seeking an abortion.[169]

This section discusses three types of laws that restrict the provision of abortion care: (1) targeted regulations of abortion providers ("TRAP") laws, which place onerous requirements on abortion doctors and clinics; (2) counseling, waiting period, and ultrasound requirements, which can increase the cost and shame women who seek abortions must face; and (3) parental notification and consent requirements, which target minors who seek abortion care.

1. Targeted Regulations of Abortion Providers

TRAP laws impose restrictions or requirements on medical offices and practices of abortion providers that are not imposed on other medical professionals.[170] These laws are normally more burdensome than those regulating other medical procedures in an attempt to make abortion services more difficult to provide and to obtain.[171] Generally, TRAP laws fall into one of three categories: hospitalization requirements, facility licensing schemes, or ambulatory surgical center requirements.[172]

TRAP laws are typically enacted based on a stated desire to protect women's health and safety.[173] All iterations of TRAP laws function to reduce access to abortion.[174] Hospitalization requirements mandate that abortions performed after a certain gestational age must be performed in a hospital.[175] Licensing schemes vary widely, but usually require abortion facilities (but not other comparable offices or clinics) to meet certain construction, staffing, or procedural requirements, such as a requirement that doctors providing abortion care have admitting privileges at a local hospital.[176] Ambulatory surgical center laws require clinics to conform to facility requirements designed for the performance of outpatient surgeries that go beyond what is recommended by national health organizations for abortion care.[177]

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168. Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L. J. 1428, 1434 (2016).

169. *See Casey*, 505 U.S. at 893–94 (considering that "the spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion" before striking down that abortion regulation as an undue burden).

170. *See Targeted Regulation of Abortion Providers: Avoiding the "TRAP,"* CTR. FOR REPROD. RIGHTS (Nov. 1, 2007), http://www.reproductiverights.org/node/611.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Targeted Regulation of Abortion Providers: Avoiding the "TRAP,"* CTR. FOR REPROD. RIGHTS (Nov. 1, 2007), http://www.reproductiverights.org/node/611.

176. *Id.*

177. *Id.*

TRAP laws deter physicians from becoming or remaining providers of abortion by subjecting doctors who do provide abortions to a wide variety of potential civil and criminal penalties and intruding significantly into their practice of medicine.[178] TRAP laws also increase the cost of abortions and may put abortion clinics out of business by imposing burdensome construction regulations. Regulations frequently require clinic owners to choose between an expensive remodel or closing their practice and selling the facility to a medical professional who will not have to comply with the onerous requirements placed on abortion providers.[179]

The constitutionality of TRAP laws was the subject of one of 2016's most anticipated Supreme Court cases, *Whole Woman's Health v. Hellerstedt*.[180] As discussed above, in *Whole Woman's Health*, the Court considered Texas' H.B. 2 law, which required physicians providing abortions to obtain admitting privileges from a nearby hospital and forced clinics to meet the requirements of ambulatory surgical center regulations.[181] The Court held that H.B. 2 imposed an undue burden on a woman's constitutional right to choose an abortion because the admitting-privileges and ACS requirements provided few, if any, health benefits for women, and that it did provide were outweighed by the substantial obstacle to abortion access created by the law.[182]

The Supreme Court's ruling on the Texas law quickly moderated TRAP restrictions. Within twenty-four hours of the decision, courts denied previously enjoined appeals of nearly identical TRAP laws in Mississippi and Wisconsin,[183] and Alabama dropped its appeal of a TRAP law held unconstitutional in 2014.[184] Additionally, the Center for Reproductive Rights and Planned Parenthood announced legal campaigns to use *Whole Woman's Health* to challenge TRAP restrictions in Louisiana, Arizona, Florida, Michigan, Missouri, Pennsylvania, Tennessee, and Virginia.[185]

The deference given to the legislature within the *Whole Women's Health* balancing system is in question. Planned Parenthood recently brought action challenging the constitutionality of an Ohio statute prohibiting the state from entering into new contracts with or providing federal funding to entities that provide

178. *Id*.

179. B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 545–46 (2009).

180. *See* 136 S. Ct. 2292 (2016).

181. *Id*. at 2296.

182. *Id*. at 2318.

183. Irin Carmon, *Abortion Laws Tumble Across the Country*, NBC NEWS, (July 1, 2016), http://www.nbcnews.com/news/us-news/ abortion-laws-tumble-across-country-n602721.

184. Drew Galloway, *Ala. Attorney General Dismisses Appeal of 2014 Ruling Declaring State Abortion Clinic Law Unconstitutional*, WHNT NEWS 19 (June 27, 2016, 3:54 PM), https://whnt.com/2016/06/27/ala-attorney-general-dismisses-appeal-of-2014-ruling-declaring-state-abortion-clinic-law-unconstitutional/.

185. *What's Happened Since the Supreme Court Whole Woman's Health Decision?*, NAT'L ABORTION FEDERATION (July 6, 2016), https://prochoice.org/whats-happened-since-the-supreme-courts-whole-womans-health-decision/.

nontherapeutic abortions.[186] The district court and the Sixth Circuit both ruled that the statute was unduly burdensome; however, they declined to extend the balancing act provided by *Hellerstedt*, delineating between the undue burden test and the constitutional right to an abortion.[187] In June 2018, the Sixth Circuit granted a hearing *en banc* to vacate the previous opinion and judgment, and to restore Planned Parenthood's case on the docket sheet as a pending appeal.[188] The states' question of how much deference to apply to *Hellerstedt* is unresolved, leaving room to erode protections against the undue burdens on abortion providers from TRAP laws.

2. Counseling, Waiting Periods, and Ultrasound Requirements

The majority of states impose counseling and waiting periods on a patient before the patient is able to obtain an abortion.[189] Currently, thirty-three states require that patients receive counseling before an abortion is performed.[190]

186. *See* Planned Parenthood of Greater Ohio v. Himes, 888 F.3d 224, 244 (6th Cir. 2018).

187. *Id.*

188. *See* Planned Parenthood of Greater Ohio v. Himes, 892 F.3d 1283 (6th Cir. 2018).

189. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., (Sept. 1, 2016), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion.

190. *See* ALA. CODE § 26-23A-4 (West, Westlaw through Act 2018-579); ALASKA STAT. ANN. § 18.16.060 (West, Westlaw through 2018 2d Reg. Sess. of the 30th Leg.); ARIZ. REV. STAT. ANN. § 36-2153 (West, Westlaw through Leg. effective Jan. 31, 2019 of the 1st Reg. Sess. of the 54th Leg. (2019)); ARK. CODE ANN. § 20-16-805 (West, Westlaw through 2018 Fiscal Sess. and the 2d Extra. Sess. of the 91st Ark. Gen. Assemb., (2) ballot issues adopted at the November 6, 2018, Gen. Election, and (3) changes made by the Ark. Code Revision Comm'n. received through Oct. 31, 2018); FLA. STAT. ANN. § 390.025 (West, Westlaw through 2018 2d Reg. Sess. of the 25th Leg.); GA. CODE ANN. §31-9A-3 (West, Westlaw through 2018 Reg. and Spec. Leg. Sess.); IDAHO CODE ANN. § 18-609 (West, Westlaw through 2018 2d Reg. Sess. of the 64th Idaho Leg.); IND. CODE ANN. § 16-34-2-1.1 (West, Westlaw through Leg. and Ballot Issues of 2018 2d Reg. Sess. and 1st Spec. Sess. of the 120th Gen. Assemb.); KAN. STAT. ANN. § 65-6709 (West, Westlaw through laws effective on or before July 1, 2018, enacted during 2018 Reg. Sess. of the Kan. Leg.); KY. REV. STAT. ANN. § 311.725 (West, Westlaw through the end of the 2018 Reg. Sess.); LA. STAT. ANN. § 40:1061.10 (West, Westlaw through 2018 3d Extra. Sess.); MASS. GEN. LAWS ANN. 112 § 12S (West, Westlaw through Ch. 450, except Ch. 369, of the 2018 2d Ann. Sess.); MICH. COMP. LAWS § 333.17015 (West, Westlaw through P.A. 2018, No. 545, also 547–561, 563–573, 575–592, 594, 600, 602–608, 611, 615–617, 619, 620, 622, 623, 625, 627, 630, 632–642, 650, 652, 660, 661, 667, 674–676, and 682–685 of the 2018 Reg. Sess., 99th Mich. Leg.); MINN. STAT. ANN. § 145.4242 (West, Westlaw through the end of the 2018 Reg. Sess.); MISS. CODE ANN. § 41-41-33 (West, Westlaw through 2018 Reg. and 1st Extra. Sess.); MO. ANN. STAT. §§ 188.027, 188.039 (West, Westlaw through the end of the 2018 2d Reg. Sess. and 1st Extra. Sess. of the 99th Gen. Assemb.); MONT. CODE ANN. § 50-20-106 (West, Westlaw through Ch. effective, Oct. 1, 2017 Sess.); NEB. REV. STAT. ANN. § 28-327 (West, Westlaw through the end of the 2nd Reg. Sess. of the 105th Leg. (2018); N.C. GEN STAT. ANN. § 90-21.82 (West, Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess. of the Gen. Assemb.); N.D. CENT. CODE ANN. § 14-02.1-03 (West, Westlaw through 2017 Reg. Sess. of the 65th Leg. Assemb. and results of the Nov. 6, 2018, election); OHIO REV. CODE ANN. § 2317.56 (West, Westlaw through Files 115–117, 119, 120, 122–154, 156, 158, 159, 162–165, 167, 169, 170 and 172 of the 132nd Gen. Assemb. (2017-2018), 2017 State Issue 1, and 2018 State Issue 1); OKLA. STAT. ANN. tit. 63 § 1-738.2 (West, Westlaw through 2d Reg. Sess. of the 56th Leg. (2018)); 18 PA. STAT. AND CONS. STAT. ANN. § 3205 (West, Westlaw through 2018 Reg. Sess. Act 164 (End)); S.C. CODE ANN. § 44-41-330 (West, Westlaw through 2018 Act No. 292); TENN. CODE ANN. § 39-15-202 (West, Westlaw through end of the 2018 2d Reg. Sess. of the 110th Tenn. Gen. Assemb.); TEX. HEALTH & SAFETY STAT. CODE ANN. § 171.013 (West, Westlaw through end of the 2017 Reg. and 1st Called Sess. of the 85th Leg.);

Twenty-seven of those states require waiting a specified amount of time between the mandated counseling and the abortion procedure.[191]

States have also mandated that ultrasounds and fetal auscultation services be conducted or made available to women seeking abortion care.[192] Currently, twenty-six states have enacted statutes regulating ultrasound or fetal heartbeat services in some way, including by requiring abortion providers to: (1) conduct an ultrasound prior to treatment; (2) offer an ultrasound; (3) offer the opportunity to view ultrasound images in the event that an ultrasound is conducted; or (4) ensure that a woman receives written or verbal information about ultrasound services.[193] States have argued that these laws are justified by a state's interest in

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UTAH CODE ANN. § 76-7-305 (West, Westlaw through 2018 2d Spec. Sess.); VA. CODE ANN. § 18.2-76 (West, Westlaw through the end of the 2018 Reg. Sess. and the end of the 2018 Spec. Sess. I.); W. VA. CODE § 16-2I-2 (West, Westlaw through legislation of 2018 1st Extra. Sess.); WIS. STAT. ANN. § 253.10 (West, Westlaw through 2017 Act 370, published Dec. 15, 2018); *see also Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Jan. 1, 2019), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion.

191. ALA. CODE 1975 § 26-23A-4 (West, Westlaw through Act 2018-579); ARIZ. REV. STAT. ANN. § 36-2153 (West, Westlaw through Leg. effective Jan. 31, 2019 of the 1st Reg. Sess. of the 54th Leg. (2019)); ARK CODE ANN. § 20-16-805 (West, Westlaw through 2018 Fiscal Sess. and the 2d Extra. Sess. of the 91st Ark. Gen. Assemb., (2) ballot issues adopted at the November 6, 2018, Gen. Election, and (3) changes made by the Ark. Code Revision Comm'n. received through Oct. 31, 2018); GA. CODE ANN. §31-9A-3 (West, Westlaw through 2018 Reg. and Spec. Leg. Sess.); IDAHO CODE ANN. § 18-609 (West, Westlaw through 2018 2d Reg. Sess. of the 64th Idaho Leg.); IND. CODE ANN. § 16-34-2-1.1 (West, Westlaw through Leg. and Ballot Issues of 2018 2d Reg. Sess. and 1st Spec. Sess. of the 120th Gen. Assemb.); KAN. STAT. ANN. § 65-6709 (West, Westlaw through laws effective on or before July 1, 2018, enacted during 2018 Reg. Sess. of the Kan. Leg.); KY. REV. STAT. ANN. § 311.725 (West, Westlaw through the end of the 2018 Reg. Sess.); LA. STAT. ANN. § 40:1061.10 (West, Westlaw through 2018 3d Extra. Sess.); MICH. COMP. LAWS § 333.17015 (West, Westlaw through P.A. 2018, No. 545, also 547–561, 563–573, 575–592, 594, 600, 602–608, 611, 615–617, 619, 620, 622, 623, 625, 627, 630, 632–642, 650, 652, 660, 661, 667, 674–676, and 682–685 of the 2018 Reg. Sess., 99th Mich. Leg.); MINN. STAT. ANN. § 145.4242 (West, Westlaw through the end of the 2018 Reg. Sess.); MISS. CODE ANN. § 41-41-33 (West, Westlaw through 2018 Reg. and 1st Extra. Sess.); MO. ANN. STAT. §§ 188.027, 188.039 (West, Westlaw through the end of the 2018 2d Reg. Sess. and 1st Extra. Sess. of the 99th Gen. Assemb.); NEB. REV. STAT. ANN. § 28-327 (West, Westlaw through the end of the 2nd Reg. Sess. of the 105th Leg. (2018); N.C. GEN STAT. ANN. § 90-21.82 (West, Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess. of the Gen. Assemb.); N.D. CENT. CODE ANN. § 14-02.1-03 (West, Westlaw through 2017 Reg. Sess. of the 65th Leg. Assemb. and results of the Nov. 6, 2018, election); OHIO REV. CODE ANN. § 2317.56 (West, Westlaw through Files 115–117, 119, 120, 122–154, 156, 158, 159, 162–165, 167, 169, 170 and 172 of the 132nd Gen. Assemb. (2017–2018), 2017 State Issue 1, and 2018 State Issue 1); OKLA. STAT. ANN. tit. 63 § 1-738.2 (West, Westlaw through 2d Reg. Sess. of the 56th Leg. (2018)); 18 PA. STAT. AND CONS. STAT. ANN. § 3205 (West, Westlaw through 2018 Reg. Sess. Act 164 (End)); S.C. CODE ANN. § 44-41-330 (West, Westlaw through 2018 Act No. 292); TENN. CODE ANN. § 39-15-202 (West, Westlaw through end of the 2018 2d Reg. Sess. of the 110th Tenn. Gen. Assemb.); TEX. HEALTH & SAFETY STAT. CODE ANN. § 171.013 (West, Westlaw through end of the 2017 Reg. and 1st Called Sess. of the 85th Leg.); UTAH CODE ANN. § 76-7-305 (West, Westlaw through 2018 2d Spec. Sess.); VA. CODE ANN. § 18.2-76 (West, Westlaw through the end of the 2018 Reg. Sess. and the end of the 2018 Spec. Sess. I.); W. VA. CODE § 16-2I-2 (West, Westlaw through legislation of 2018 1st Extra. Sess.); WIS. STAT. ANN. § 253.10 (West, Westlaw through 2017 Act 370, published Dec. 15, 2018).

192. *See Requirements for Ultrasound*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/requirements-ultrasound (last updated Oct. 1, 2018).

193. *See* ALA. CODE § 26-23A-6 (West, Westlaw through Act 2018-579) (requiring that an ultrasound be conducted and that the provider offer the pregnant woman the opportunity to view); ARIZ.

guaranteeing fully informed consent; most of these statutes only require that

REV. STAT. ANN. § 36-2156 (West, Westlaw through Leg. effective Jan. 31, 2019 of the 1st Reg. Sess. of the 54th Leg. (2019)) (mandating that ultrasound and auscultation of fetal heart tone services be conducted, and that the provider offer the woman the opportunity to view or receive a verbal explanation); ARK. CODE ANN. § 20-16-602 (West, Westlaw through 2018 Fiscal Sess. and the 2d Extra. Sess. of the 91st Ark. Gen. Assemb., (2) ballot issues adopted at the November 6, 2018, Gen. Election, and (3) changes made by the Ark. Code Revision Comm'n. received through Oct. 31, 2018) (mandating that, if an ultrasound is performed, a woman be offered an opportunity to view the images); FLA. STAT. ANN. § 390.0111 (West, Westlaw through 2018 2d Reg. Sess. of the 25th Leg.), *aff'd*, State v. Presidential Women's Ctr., 937 So. 2d 114, 118 (Fla. 2006) (mandating that an ultrasound be conducted, and that the provider offer the woman the opportunity to view it); GA. CODE ANN. § 31-9A-3 (West, Westlaw through 2018 Reg. and Spec. Leg. Sess.) (mandating that a pregnant woman receive verbal information on accessing ultrasound services); IDAHO CODE ANN. § 18-609 (West, Westlaw through 2018 2d Reg. Sess. of the 64th Idaho Leg.) (mandating that, if an ultrasound is performed, a woman must be offered an opportunity to view the images); IND. CODE ANN. § 16-34-2-1.1 (West, Westlaw through Leg. and Ballot Issues of 2018 2d Reg. Sess. and 1st Spec. Sess. of the 120th Gen. Assemb.) (mandating that an ultrasound be conducted, and that the provider offer the woman the opportunity to view); IOWA CODE ANN. § 146A.1 (West, Westlaw through Leg. from the 2018 Reg. Sess.) (requiring the physician to give a woman seeking an abortion the opportunity to view an ultrasound image of the fetus); KAN. STAT. ANN. § 65-6709 (West, Westlaw through laws effective on or before July 1, 2018, enacted during 2018 Reg. Sess. of the Kan. Leg.); LA. STAT. ANN. § 40:1061.10 (West, Westlaw through 2018 3d Extra. Sess.), *amended by* La. Sess. Law Serv. Act 685 (S.B. 708) (2012), increasing ultrasound-related requirements, including an additional 24-hour waiting period and a requirement that an ultrasound be conducted and that a woman be offered the opportunity to view, and La. Sess. Law Serv. Act 259 (S.B. 90) (2013), adding a restriction on the use of abortifacient pharmaceuticals, discussed *supra* Part III, A, 3, b, MEDICATION ABORTION BANS AND RESTRICTIONS; MICH. COMP. LAWS ANN. § 333.17015 (West, Westlaw through P.A. 2018, No. 545, also 547–561, 563–573, 575–592, 594, 600, 602–608, 611, 615–617, 619, 620, 622, 623, 625, 627, 630, 632–642, 650, 652, 660, 661, 667, 674–676, and 682–685 of the 2018 Reg. Sess., 99th Mich. Leg.) (mandating that, if an ultrasound is performed, a woman be offered an opportunity to view the images); MISS. CODE ANN. § 41-41-34 (West, Westlaw through 2018 Reg. and 1st Extra. Sess.); MO. ANN. STAT. § 188.027 (West, Westlaw through the end of the 2018 2d Reg. Sess. and 1st Extra. Sess. of the 99th Gen. Assemb.) (mandating that a woman be provided with written information about ultrasound services); NEB. REV. STAT. ANN. § 28-327 (West, Westlaw through the end of the 2nd Reg. Sess. of the 105th Leg. (2018) (mandating that a woman be provided with verbal and written information about accessing ultrasound services); N.C. GEN. STAT. ANN. § 90-21.85 (West, Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess. of the Gen. Assemb.) (requiring a provider to conduct ultrasound and to display and describe the images), *invalidated by* Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014); N.D. CENT. CODE ANN. § 14-02.1-04 (West, Westlaw through 2017 Reg. Sess. of the 65th Leg. Assemb. and results of the Nov. 6, 2018, election) (requiring that the provider offer ultrasound services); OHIO REV. CODE ANN. § 2317.561 (West, Westlaw through Files 115–117, 119, 120, 122–154, 156, 158, 159, 162–165, 167, 169, 170 and 172 of the 132nd Gen. Assemb. (2017-2018), 2017 State Issue 1, and 2018 State Issue 1) (requiring that a provider offer the opportunity to view the images, if an ultrasound is performed); OKLA. STAT. ANN. tit. 63, § 1-738.2 (West, Westlaw through 2d Reg. Sess. of the 56th Leg. (2018)) (requiring that a woman seeking an abortion be informed of the availability of ultrasound imaging and heart tone monitoring), *permanently enjoined by* Nova Health Sys. v. Pruitt, No. 2:12-00395, 2012 WL 1034022 (Okl. Dist. Ct. Mar. 28, 2012); S.C. CODE ANN. § 44-41-330 (West, Westlaw through 2018 Act No. 292) (requiring that a woman receive written information about ultrasound services and that a provider offer the opportunity to view the images if an ultrasound is performed); S.D. CODIFIED LAWS § 34-23A-52 (West, Westlaw through 2018 Reg. and Spec. Sess., Sup. Ct. Rule 18-15 and Nov. 2018 election) (requiring that a woman be given the opportunity to view sonogram images prior to abortion); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West, Westlaw through end of the 2017 Reg. and 1st Called Sess. of the 85th Leg.) (requiring that an ultrasound be performed, and that the provider display and describe the images), upheld against constitutional challenge in Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012); UTAH CODE ANN. § 76-7-305 (West, Westlaw through 2018 2d Spec.

abortion providers offer information or the opportunity to conduct an ultrasound or to view the resulting images.[194] However, thirteen states currently have laws that mandate an ultrasound be conducted prior to treatment;[195] three states have more restrictive legislation mandating that the ultrasound be performed at least twenty-four hours before the abortion.[196] North Carolina and Oklahoma have mandatory ultrasound requirements that are currently unenforceable due to a temporary or permanent court injunction.[197] The most stringent of these statutes

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Sess.) (requiring that a woman be provided with written materials, including an informational video, and that a provider offer ultrasound services); VA. CODE ANN. § 18.2-76 (West, Westlaw through the end of the 2018 Reg. Sess. and the end of the 2018 Spec. Sess. I.) (requiring that a woman receive written information on ultrasound services, that a provider conduct an ultrasound, and that the woman be offered the opportunity to view the images); W. VA. CODE ANN. § 16-2I-2 (West, Westlaw through legislation of 2018 1st Extra. Sess.) (requiring that a provider offer a woman the opportunity to view the images if an ultrasound is performed); WIS. STAT. ANN. § 253.10 (West, Westlaw through 2017 Act 370, published Dec. 15, 2018) (requiring that a woman receive verbal and written information about ultrasound services, that a provider conduct an ultrasound prior to treatment, and that the provider display and describe the images); H.B. 2, 2017 Reg. Sess. (Ky. 2017) (to be codified as KY. REV. STAT. ANN. §§ 311.710-.820). At the federal level, a similar measure was unsuccessfully introduced in the House of Representatives. *See* H.R. 3130, 112th Cong. § 3402 (2011) (requiring health care providers, prior to receiving informed consent from a woman seeking an abortion, to perform an ultrasound, to make the ultrasound images visible to the woman, to provide a medical description of the ultrasound, and to make the heartbeat audible, with a general exception for the health of the woman).

194. *See, e.g.*, Tex. Med. Providers, 667 F.3d at 579 ("The point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances. Denying her up to date medical information is more of an abuse to her ability to decide than providing the information.").

195. These states are: Alabama, Arizona, Florida, Indiana, Kansas, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, Texas, Virginia, and Wisconsin. See ALA. CODE § 26-23A-6 (West, Westlaw through Act 2018-579); ARIZ. REV. STAT. ANN. § 36-2156 (West, Westlaw through Leg. effective Jan. 31, 2019 of the 1st Reg. Sess. of the 54th Leg. (2019)); FLA. STAT. ANN. § 390.0111 (West, Westlaw through 2018 2d Reg. Sess. of the 25th Leg.); IND. CODE ANN. § 16-34-2-1.1 (West, Westlaw through Leg. and Ballot Issues of 2018 2d Reg. Sess. and 1st Spec. Sess. of the 120th Gen. Assemb.); KAN. STAT. ANN. § 65-6709 (West, Westlaw through laws effective on or before July 1, 2018, enacted during 2018 Reg. Sess. of the Kan. Leg.); LA. STAT. ANN. § 40:1061.10 (West, Westlaw through 2018 3d Extra. Sess.); MISS. CODE. ANN. § 41-41-34 (West, Westlaw through 2018 Reg. and 1st Extra. Sess.); OHIO REV. CODE ANN. § 2317.561 (West, Westlaw through Files 115–117, 119, 120, 122–154, 156, 158, 159, 162–165, 167, 169, 170 and 172 of the 132nd Gen. Assemb. (2017-2018), 2017 State Issue 1, and 2018 State Issue 1); OKLA. STAT. ANN. tit. 63, § 1-738.3d (West, Westlaw through 2d Reg. Sess. of the 56th Leg. (2018)); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West, Westlaw through end of the 2017 Reg. and 1st Called Sess. of the 85th Leg.); VA. CODE ANN. § 18.2-76 (West, Westlaw through the end of the 2018 Reg. Sess. and the end of the 2018 Spec. Sess. I.); WIS. STAT. ANN. § 253.10 (West, Westlaw through 2017 Act 370, published Dec. 15, 2018).

196. These states are: Arizona, Louisiana, and North Dakota. See ARIZ. REV. STAT. ANN. § 36-2156 (West, Westlaw through Leg. effective Jan. 31, 2019 of the 1st Reg. Sess. of the 54th Leg. (2019)); LA. STAT. ANN. § 40:1061.10 (West, Westlaw through 2018 3d Extra. Sess.); N.D. CENT. CODE ANN. § 14-02.1-04 (West, Westlaw through 2017 Reg. Sess. of the 65th Leg. Assemb. and results of the Nov. 6, 2018, election).

197. *See* N.C. GEN. STAT. ANN. § 90-21.85 (West, Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess. of the Gen. Assemb.), *permanently enjoined by* Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014); OKLA. STAT. ANN. tit. 63, § 1-738.3d (West, Westlaw through 2d Reg. Sess. of the 56th Leg. (2018)), *permanently enjoined by* Nova Health Sys. v. Pruitt, No. 2:12-00395, 2012 WL 1034022 (Okl. Dist. Mar. 28, 2012).

mandates that the provider display the images to the woman and provide an accompanying verbal explanation.[198]

These restrictions have been met with controversy on both political[199] and constitutional bases.[200] In a challenge to the North Carolina Woman's Right to Know Act, which requires that abortion providers display real-time ultrasound images of the fetus to women seeking abortions, the Middle District of North Carolina held that the statute violated the First Amendment rights of both the physicians and the patients.[201] In evaluating the requirement that physicians be compelled to provide certain information, the court found the requirement was a content-based regulation of speech and applied strict scrutiny.[202] Notably, the court rejected arguments for lower levels of scrutiny by distinguishing this case from *Casey* on the grounds that the provision in *Casey* only required providers to "make available" informational materials.[203] The North Carolina statute compelled physicians "to physically speak and show the state's non-medical message to patients unwilling to hear or see."[204] The Fourth Circuit Court of Appeals affirmed the district court's decision and the level of scrutiny, finding that physicians maintained the right not to speak and that the regulation directly implicated physicians' First Amendment rights.[205]

The Fifth Circuit, however, upheld a similar statute requiring healthcare providers to display ultrasound images and make the fetal heartbeat audible before a woman may give informed consent to have an abortion.[206] The Fifth Circuit held

198. These states are: Louisiana, North Carolina (permanently enjoined), Oklahoma (permanently enjoined), Texas, and Wisconsin. *See* LA. STAT. ANN. § 40:1061.10 (West, Westlaw through 2018 3d Extra. Sess.); N.C. GEN. STAT. ANN. § 90-21.85 (West, Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess. of the Gen. Assemb.); OKLA. STAT. ANN. tit. 63, § 1-738.3d (West, Westlaw through 2d Reg. Sess. of the 56th Leg. (2018)); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West, Westlaw through end of the 2017 Reg. and 1st Called Sess. of the 85th Leg.); WIS. STAT. ANN. § 253.10 (West, Westlaw through 2017 Act 370, published Dec. 15, 2018). These statutes provide a woman who does not wish to undergo the procedure no alternative but to close her eyes or refuse to listen to the description. *See, e.g.*, N.C. GEN. STAT. ANN. § 90-21.85(b) (West, Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess. of the Gen. Assemb.) ("Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes from the displayed images or from refusing to hear the simultaneous explanation and medical description.").

199. *See, e.g.*, *The Rachel Maddow Show* (MSNBC broadcast Apr. 8, 2013) ("Just close your eyes . . . . How do you run against that? How do you run against, 'Don't worry, you can just shut your eyes?' What would a campaign against [Governor of Pennsylvania] Tom Corbett look like?"), http://www.msnbc.com/transcripts/rachel-maddow-show/2013-04-08.

200. *See, e.g.*, Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2348 (2013); Scott W. Gaylord & Thomas J. Molony, *Casey and A Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 613 (2012).

201. Stuart v. Huff, 834 F. Supp. 2d 424, 437 (M.D.N.C. 2011) (granting a preliminary injunction).

202. *Id.* at 432.

203. *Id.* at 431 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992)).

204. *Id.* at 432.

205. Stuart v. Camnitz, 774 F.3d 238, 246–47 (4th Cir. 2014).

206. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 977 (W.D. Tex. 2011), vacated in part, 667 F.3d 570 (5th Cir. 2012) (granting a preliminary injunction against a

that the statute did not compel the physician's speech in violation of the First Amendment because the information was not ideological but truthful, and it was "within the State's power to regulate the practice of medicine."[207] The Fifth Circuit also held that the statute was not an undue burden on a woman's constitutional right to an abortion under *Casey* because the statute furthered the state's interest in requiring a woman to give fully informed consent to have an abortion.[208]

The application of strict scrutiny to ultrasound requirements lies in tension with *Casey*, which upheld mandatory informational requirements that were "truthful and not misleading"[209] and stated openly that although "the physician's First Amendment rights not to speak are implicated . . . [w]e see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here."[210] The circuit court split over the constitutional implications of ultrasound requirements remains.

3. Parental Involvement Laws for Minors

Parental notification statutes require minors to notify either one or both parents of their decision to have an abortion.[211] Courts tend to uphold these statutes when they qualify parental notification with a judicial bypass provision.[212] Significantly, while parental consent statutes constitutionally require a judicial bypass provision—allowing a judge to excuse a minor from seeking parental consent when the judge determines obtaining an abortion is in the best interest of the minor[213]—the Supreme Court has not ruled on whether parental notification statutes must include a judicial bypass provision.[214] The judicial bypass provision strikes a compromise by serving the state interest in protecting the pregnant minor without interfering in the internal operation of the family.[215]

The Court first confronted a parental notification statute in the 1981 case *H.L. v. Matheson*.[216] There, an unemancipated minor made a facial challenge to Utah's parental consent law but failed to assert that she was sufficiently mature to obtain an abortion without parental involvement.[217] The Court held that Utah

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statute that requires an abortion provider to (1) perform an ultrasound and make it visible and (2) make the fetal heartbeat audible to the woman before she can give her informed consent to have an abortion).

207. Tex. Med. Providers Performing Abortion Services v. Lakey, 667 F.3d 570, 580 (5th Cir. 2012) [hereinafter *Lakey II*].

208. *Id.* at 584.

209. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992).

210. *Id.*

211. *Parental Involvement in Minors' Abortions*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions (last updated Jan. 1, 2019).

212. H.L. v. Matheson, 450 U.S. 398, 399 (1981) (upholding a Utah statute that required a physician to notify a minor's parents if possible).

213. Bellotti v. Baird, 443 U.S. 622, 630 (1979).

214. Ohio v. Akron Ctr. for Reprod. Health, Inc., 497 U.S. 502, 510 (1990).

215. *See* Hodgson v. Minnesota, 497 U.S. 417, 461 (1990) (O'Connor, J., concurring).

216. *See generally* Matheson, 450 U.S. at 398.

217. *Id.* at 407 (discussing how a statute asked physicians to notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is an unmarried minor).

could reasonably and constitutionally mandate parental involvement when a minor fails to assert and prove sufficient maturity.[218]

Because Utah's notification statute entitled a minor to still have an abortion over her parents' opposition, the Court expressed less concern for cases including a judicial bypass provision than for cases involving parental consent statutes.[219] The presence of a judicial bypass procedure has been a determining factor in subsequent cases concerning parental consent statutes.[220] While the Court has not decided whether a parental notification statute must contain a judicial bypass procedure to pass constitutional muster, courts have found a parental notification statute is constitutional when it met all the requirements for judicial bypass procedures established in *Bellotti*.[221]

Health and life of the mother exceptions to parental involvement laws are also necessary for constitutionality. In *Ayotte v. Planned Parenthood of Northern New England*, the Court addressed a constitutional challenge to a parental notification law that did not explicitly include an exception to allow a minor to obtain an abortion without parental notice in the case of medical emergencies.[222] The *Ayotte* Court reiterated that restricting access to abortions that are necessary for the health or life of the mother is unconstitutional, and in such cases the lower courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application.[223] While health and life cases are in the minority, those cases remain firmly unimpacted by parental consent laws.

Currently, twenty-two states have active parental consent laws.[224] Another two

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218. *Id*. at 409.

219. *See id*. at 411.

220. *See, e.g*., Lambert v. Wicklund, 520 U.S. 292, 293 (1997) (per curiam) (applying the four *Bellotti* criteria required for bypass provisions in parental consent statutes to parental notification statutes, thus finding a parental notification statute with a judicial bypass procedure constitutional because it permitted courts to waive the notification requirement if notification is not in the best interest of the minor); *Hodgson*, 497 U.S. at 457 (affirming the unconstitutionality of the two-parent notification requirement regardless of their involvement in the child's life, but finding the judicial bypass procedure conformed to Bellotti's standards and was constitutional); Ohio v. Akron Ctr. for Reprod. Health, Inc., 497 U.S. 502, 510-16 (1990) (noting that a statute with a judicial bypass procedure was found constitutional, despite slight deviations for the judicial bypass procedure in Bellotti: the requirement that the minor use and sign her real name; the clear and convincing evidence burden of proof for establishing the maturity necessary for a waiver; and the three-week waiting period for the judicial decision).

221. *See, e.g*., Zbaraz v. Madigan, 572 F.3d 370, 383 (7th Cir. 2009) (illustrating that circuit courts have adhered to the Court's line of reasoning, where the Seventh Circuit recently upheld the constitutionality of Illinois' Parental Notification Act because it provided judicial bypass procedures).

222. 546 U.S. 320, 320 (2006) (remanding the case to the First Circuit for a determination of whether a narrower remedy than permanent injunction could be devised).

223. *Id*. at 326-28.

224. These states are: Alabama, Arizona, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Wisconsin. *See* ALA. CODE § 26-21-3 (West, Westlaw through Act 2018-579 of the 2018 Reg. Sess.); ARIZ. REV. STAT. ANN. § 36-2152 (West, Westlaw through the 1st Sp. and 2d Reg. Sess. of the 53d Leg. (2018)); ARK. CODE ANN. §§ 20-16-801, 20-16-804 (West, Westlaw through the end of the 2018 Fiscal Sess. and the 2d. Extra. Sess. of

states have parental consent laws that are not actively enforced.[225] Eleven states have active parental notification laws;[226] three states have parental notification

the 91st Ark. Gen. Assemb. through effective July 1, 2018, and include changes made by the Ark. Code Rev. Comm'n. received through July 1, 2018); IDAHO CODE ANN. § 18-609A (West, Westlaw through 2018 2d Reg. Sess. of the 64th Idaho Leg.); IND. CODE. ANN. § 16-34-2-4 (West, Westlaw through 2018 2d Reg. and 1st Spec. Sess. of the 120th Gen. Assemb.); KY. REV. STAT. ANN. § 311.732 (West, Westlaw through the 2018 Reg. Sess.); LA. STAT. ANN. § 40:1061.14 (West, Westlaw through the 2018 1st Extra. Reg. on or before Dec. 31, 2018); ME. REV. STAT. ANN. tit. 22, § 1597-A (West, Westlaw current with legislation through Ch. 417 of the 2017 2d Reg. Sess. and emergency legislation through Chapter 460 of the 2d Sp. Sess. of the 128th Leg.); MASS. GEN. LAWS ANN. ch. 112, § 12S (West, Westlaw through Ch. 207, and sections 19 and 21 of Ch. 228 of the 2018 2nd Ann. Sess.); MICH. COMP. LAWS ANN. § 722.903 (West, Westlaw through P.A. 2018, No. 341 of the 2018 Reg. Sess., 99th Mich. Leg. P.A. 2017, No. 22 of the 2017 Reg. Sess., 99th Leg.); MINN. STAT. ANN. § 144.343 (subd. 2) (West, Westlaw through the 2018 Reg. Sess. and are subject to change as determined by the Minn. Revisor of Statutes); MISS. CODE ANN. § 41-41-53 (West, Westlaw Westlaw through laws from the 2018 Reg. and 1st Extra. Sess. and are subject to changes provided by the J. Leg. Comm. on Compilation, Rev. and Publication of Leg.); MO. REV. STAT. § 188.028 (West, Westlaw through the end of the 2016 Reg. Sess. and Veto Sess. of the 98th Gen. Assemb.); MONT. CODE ANN. § 50-20-504 (West, Westlaw through chs. effective Oct. 1, 2017 sess. Statutory changes are subject to classification and revision by the Code Comm'r); NEB. REV. STAT. ANN. §§ 71-6902 to -6905 (West, Westlaw Westlaw through the end of the 105th 2d Reg. Sess. (2018)); N.C. GEN. STAT. ANN. §§ 90-21.6, et seq. (West, Westlaw through the end of the 2018 Reg. Sess., and the 1st and 2d Extra Sess. of the Gen. Assemb.); N.D. CENT. CODE ANN. § 14-02.1-03.1 (West, Westlaw with emergency effective laws from the 2017 Reg. Sess. of the 65th Leg. Assemb. and initiatives on the Nov. 6, 2018, ballot); 18 PA. STAT. AND CONS. STAT. ANN. § 3206 (West, Westlaw through end of the 2016 Reg. Sess.); 23 R.I. GEN. LAWS ANN. § 23-4.7-6 (West, Westlaw through Ch. 542 of the Jan. 2016 Sess.); S.C. CODE ANN. §§ 44-41-31 to 44-41-37 (West, Westlaw through 2018 Act No. 263, subject to technical revisions by the Code Comm'r as authorized by law before official pub.); TENN. CODE ANN. §§ 37-10-303, 37-10-304 (West, Westlaw through end of the 2018 2d Reg. of the 110th Tenn. Gen. Assemb.); WIS. STAT. ANN. § 48.375 (West, Westlaw through 2017 Act 367, published April 18, 2018).

225. These states are: California and New Mexico. *See* CAL. HEALTH & SAFETY CODE § 123450 (West, Westlaw current with urgency legislation through Ch. 1016 of 2018 Reg. Sess., and all propositions on 2018 ballot), invalidated by, Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997) (holding that the parental consent statute violated the state's constitutional right of privacy); N.M. Opp. Att'y Gen. No. 90-19, 1990 WL 509590 (Oct. 3, 1990) (declaring the state's parental consent law unenforceable because it lacked a judicial bypass provision).

226. These states are: Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Maryland, Minnesota, New Hampshire, South Dakota, and West Virginia. *See* COLO. REV. STAT. ANN. §§ 12-37.5-101 (West, Westlaw current through the end of the 2d Reg. Sess. of the 71st Gen. Assemb. (2018)); DEL. CODE ANN. tit. 24, § 1783 (West, Westlaw current through 81 Laws 2018, chs. 200-450. Revisions to 2018 Acts by the Delaware Code Revisors were unavailable at the time of publication); FLA. STAT. ANN. § 390.01114 (West, Westlaw current through the 2018 2d Reg. Sess. of the 25th Leg.); 750 ILL. COMP. STAT. ANN. 70/1, et seq. (West, Westlaw current through Public Acts effective August 28, 2018, through P.A. 100-1114, of the 2018 Reg. Sess.); IOWA CODE ANN. §§ 135L.2, 135L.3 (West, Westlaw current with legislation from the 2018 Reg. Sess., subject to changes made by Iowa Code Editor for Code 2019); MD. CODE ANN., HEALTH—GEN. § 103 (West, Westlaw current through all legislation from the 2018 Reg. Sess. of the Gen. Assemb.); MINN. STAT. ANN. § 144.343 (West, Westlaw through the end of the 2018 Reg. Sess.); N.H. REV. STAT. ANN. § 132:33 (West, Westlaw through ch. 379 of the 2018 Reg. Sess., not including changes and corrections made by the State of New Hampshire, Office of Legislative Services); S.D. CODIFIED LAWS § 34-23A-7 (West, Westlaw through 2018 Reg. and Sp. Sess. Laws and Supreme Court Rule 18-15); W. VA. CODE ANN. §§ 16-2F-1–2F-9 (West, Westlaw through 2018 1st Extra. Sess.).

laws that are enjoined by a court order.[227] Maryland is the only state that has a statute requiring parental notification without a judicial bypass, but the parental notification statute includes an alternate bypass procedure.[228] The statute allows for the doctor performing the abortion to judge whether (1) the minor is mature and capable of giving her informed consent to the procedure, (2) notification would not be in the minor's best interest, (3) notice may lead to physical or emotional abuse of the minor, (4) the minor does not live with her parent or guardian, or (5) a reasonable effort to give notice has been unsuccessful.[229] Therefore, rather than requiring a judge to make the decision, a doctor has the ability to circumvent the parental notification requirement.[230]

Five states require both parental notification and parental consent.[231] In addition, one state, Ohio, requires notice twenty-four hours prior or written parental consent.[232]

IV. PUBLIC FUNDING AND ABORTION

Measures enacted to prevent public funding for abortion procedures are a major roadblock for women's access to abortion.[233] Passed in 1976, the Hyde Amendment bars the use of federal funds to pay for an abortion except in narrow circumstances.[234] Currently, the Hyde Amendment permits the contribution of federal funds to the cost of abortions for women enrolled in Medicaid only in cases of rape, incest, and life endangerment of the woman; however, the life endangerment exception must result from a "physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself."[235] The Hyde Amendment principally affects

227. These states are: Alaska, Nevada, and New Jersey. *See* ALASKA STAT. ANN. § 18.16.020 (West, Westlaw through 2018 2d Reg. Sess. of the 30th Leg.), *held unconstitutional by*, Planned Parenthood of the Greater N.W. v. Alaska, 375 P.3d 1122 (Alaska 2016); NEV. REV. STAT. § 442.255 (West, Westlaw current through the end of the 79th Reg. Sess. (2017) of the Nev. Leg. subject to change from the reviser of the Leg. Counsel Bureau), held unconstitutional by, Glick v. McKay, 937 F.2d 434 (9th Cir. 1991); N.J. STAT. ANN. § 9:17A-1.4 (West, Westlaw current with laws effective through L.2016), *held unconstitutional by*, Planned Parenthood of Cent. New Jersey v. Farmer, 762 A.2d 620 (2000).

228. MD. CODE ANN., HEALTH-GEN. § 20-103(c)(1) (West, Westlaw through all legislation from the 2018 Reg. Sess. of Gen. Assemb.).

229. *Id*.

230. *Id*.

231. *See* OKLA. STAT. ANN. tit. 63 § 1-744.2 (West, Westlaw legislation of the 2d Reg. Sess. of the 56th Leg. (2018) effective through Oct. 1, 2018); TEX. FAMILY CODE ANN. § 33.002 (West, Westlaw current through the end of the 2017 Reg. and 1st Called Sess. of the 85th Leg.); UTAH CODE ANN. § 76-7-304 (West, Westlaw current with the 2018 2d Sp. Sess.); VA. CODE ANN. § 18.2-76 (West, Westlaw current through end of the 2018 Reg. Sess. and end of the 2018 Sp. Sess. I.); WYO STAT. ANN. § 35-6-118 (West, Westlaw through the 2018 Budget Sess. of the Wyo. Leg.).

232. OHIO REV. CODE ANN. §§ 2151.85, 2919.12 (West, Westlaw through 2017 File 2 of the 132d Gen. Assemb. (2017-2018)).

233. *Hyde Amendment*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/hyde-amendment (last visited Jan. 9, 2019).

234. Hyde Amendment. Pub. L. No. 94-439, 90 Stat 1418 (1976).

235. Hyde Amendment. Pub. L. No. 94-439, § 302(b), 90 Stat 1418 (2013). This specification ensures that mental health risks to a woman's life may not be used to justify federal funding for abortion.

women who depend on Medicaid, creating obstacles for low-income women seeking to access their health care options.[236] Today, nearly 15.6 million women (ages nineteen to sixty-four) have Medicaid coverage; additionally, Medicaid provides coverage to 1 in 5 women of reproductive age (fifteen to forty-four).[237]

A. Federal Bans on Public Funding for Abortion

2017 marked the forty-first anniversary of the Hyde Amendment.[238] Although controversial, the Supreme Court upheld its constitutionality in the 1980 case, *Harris v. McRae*.[239] The Court found that the funding restriction did not violate the Due Process or Equal Protection clauses because "a woman's freedom of choice [does not carry] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[240] Specifically, the Court held that the Hyde Amendment's funding restrictions did not infringe upon the "liberty" protected by the Due Process Clause because forbidding public funding of abortion does not restrict "the freedom of a woman to decide whether to terminate a pregnancy."[241] Nor did the restrictions violate the Equal Protection Clause[242]. The Court applied a rational basis standard—because poverty is not a suspect class—to find that limiting public funding of abortion is rationally related to the legitimate government interest of "protecting potential life" by encouraging childbirth.[243] Finally, the Court rejected the argument that the funding restrictions informed by tenets of Catholicism constituted an establishment of religion.[244] Although it was ultimately held constitutional, the Hyde Amendment remains contentious, because it disproportionately burdens poor women and women of color.[245]

Today, congressional funding for Planned Parenthood is consistently the point of public and political debate.[246] Since 2011, Congress has pushed efforts to strip Planned Parenthood of the federal funding it receives through Title X.[247]

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236. *Whose Choice? How the Hyde Amendment Harms Poor Women*, Ctr. For Reprod. Rights, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Hyde_Report_FINAL_nospreads.pdf (last visited Jan. 9, 2019) [hereinafter *Whose Choice?*].

237. *Hyde Amendment*, Planned Parenthood Action Fund, https://www.plannedparenthoodaction.org/issues/abortion/hyde-amendment (last visited Jan. 9, 2019).

238. Hyde Amendment, Pub. L. No. 94-439, 90 Stat. 1418 (1976).

239. Harris v. McRae, 448 U.S. 297, 326 (1980).

240. *Id*. at 298.

241. *Id*. at 298.

242. *Id*. at 324–26.

243. *Id*. at 324–25.

244. *Id*. at 319–20.

245. 123 Cong. Rec. 19, 700 (1977); *see Whose Choice?, supra* note 236, at 12.

246. Planned Parenthood is a national family planning services and abortion provider that does not use the federal funds it receives for abortion services. *Hyde Amendment*, Planned Parenthood, https://www.plannedparenthoodaction.org/issues/abortion-access/hyde-amendment/ (last visited Jan. 11, 2019).

247. David Nather & Katie Nocera, *House Defunds Planned Parenthood*, Politico (Feb. 18, 2011), https://www.politico.com/story/2011/02/house-defunds-planned-parenthood-049830.

The Title X Family Planning Program was created in 1976 to provide family planning to primarily low-income individuals.[248] The program is administered through the Office of Population Affairs at the U.S. Department of Health and Human Services, and approximately 90% of the appropriated federal funds are used for family planning services.[249] Although Planned Parenthood receives funds through the Title X Family Planning Program, the Hyde Amendment prohibits Planned Parenthood from using these funds for abortions or abortion-related services.[250] In February 2011, the House passed an amendment that withdrew federal funds from Planned Parenthood.[251] However, the amendment did not pass in the Senate.[252]

Planned Parenthood's funding, and its connection to Title X, has become a vital focus of an increasingly polarized electoral system. Retracting federal funding from Planned Parenthood has gradually become synonymous with the Republican Party.[253] While conservatism is typically associated with a pro-life stance, the election of Donald Trump in 2016 solidified Planned Parenthood as a target for conservative rhetoric.[254] In television interviews on the campaign trail, Trump repeatedly answered in the affirmative when asked whether he would defund Planned Parenthood.[255] These interviews also referenced hidden-camera videos claiming that the organization profits from fetal tissue sales.[256] The allegations occurred during the congressional summer recess of 2015, and upon their discovery, some Republicans rushed to halt public funding for Planned Parenthood.[257] Planned Parenthood denied these allegations, and Democrats reinforced that it also provides crucial health care services to men and women.[258] A

248. Project Grants and Contracts for Family Planning Services, 42 U.S.C.A. § 300-300a-8 (West, Westlaw through P.L. 114-327, also including P.L. 114-329 and 115-1, to 115-8. Title 26 current through 115-8).

249. Angela Napili, *Title X (Public Health Service Act) Family Planning Program*, CONG. RESEARCH SERV. (Aug. 31, 2017), https://fas.org/sgp/crs/misc/RL33644.pdf; *Title X Family Planning*, U.S. DEP'T OF HEALTH & HUMANS SERVS., www.hhs.gov/opa/title-x-family-planning/ (last visited Jan. 11, 2019).

250. Nather & Nocera, *supra* note 247.

251. Kelly O'Donnell, *Senate Rejects Measure to Defund Planned Parenthood*, NBC NEWS (Apr. 14, 2011), http://firstread.nbcnews.com/_news/2011/04/14/6472644-senate-rejects-measure-to-defund-planned-parenthood.

252. *Id.*

253. Republican Views, *Republican Views on Planned Parenthood*, https://www.republicanviews.org/republican-views-on-planned-parenthood/ (last visited Jan. 12, 2019).

254. *Id.*

255. Pete Blakinski, *President Trump Takes Office: Here are Six Key Promises he Made on Abortion, Marriage, and Liberty*, LIFE SITE (Jan. 20, 2017), https://www.lifesitenews.com/news/watch-six-promises-on-life-family-and-religious-liberty-trump-made-that-rev.

256. David M. Herszenhorn, *House Republicans Vote to Stop Funding Planned Parenthood*, N.Y. TIMES (Sept. 18, 2015), http://www.nytimes.com/2015/09/19/us/planned-parenthood-government-funding.html.

257. *Id.*

258. *Id.*

Congressional committee later determined the undercover videos were manipulated and falsified by pro-life activists. [259]

The federal funding Planned Parenthood receives primarily covers services for contraception, wellness care, cancer screening, and the diagnosis and treatment of sexually transmitted diseases.[260] According to its latest annual report, only 3% of the medical services performed at Planned Parenthood affiliates were abortion services, while STI testing and treatment accounted for 41%.[261] Nonetheless, anti-abortion politicians and activists hope to permanently close Planned Parenthood's doors, using a rescission of Title X funding as a mechanism.[262] Planned Parenthood supporters claim that an amendment prohibiting Planned Parenthood in particular from receiving Title X funds would be an unconstitutional "bill of attainder."[263]

The Trump Administration and congressional Republicans have continued to push blocking federal funding for Planned Parenthood and abortions, both domestically and internationally. In 2017, Senate Republicans failed to pass a bill temporarily defunding Planned Parenthood.[264] The Senate Parliamentarian ruled that the part of the healthcare bill aimed at Planned Parenthood did not pertain directly the federal budget, and thus, did not satisfy the Byrd Rule.[265] Because the provision did not comply with the Byrd Rule, its passage required sixty votes in the Senate, which the Republicans did not secure.[266] Despite this legislative hiccup, the executive branch recently laid out proposals for "defunding" Planned Parenthood without specifically singling out the organization.[267] The proposals, which echo Reagan-era policies, would require facilities receiving federal family planning (Title X) funds to be physically separate from those that perform and promote abortions, thus essentially removing federal funding from Planned Parenthood facilities that offer abortion services.[268] In July of 2018, the

259. Jackie Calmes, *Planned Parenthood Videos Were Altered, Analysis Finds*, N.Y. TIMES (Aug. 27, 2015), http://www.nytimes.com/2015/08/28/us/abortion-planned-parenthood-videos.html.

260. *Services*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/files/4013/9611/7243/Planned_Parenthood_Services.pdf (last visited Mar. 25, 2017).

261. *2016-2017 Annual Report*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/uploads/filer_public/71/53/7153464c-8f5d-4a26-bead-2a0dfe2b32ec/20171229_ar16-17_p01_lowres.pdf (last visited Jan. 4, 2019).

262. Nather & Nocera, *supra* note 247.

263. *Id.*

264. Julie Rovner, *Senate Parliamentarian Upends GOP Hopes for Health Bill*, KAISER HEALTH NEWS (July 21, 2017), https://khn.org/news/ruling-by-senate-parliamentarian-upends-gop-hopes-for-health-care-bill/.

265. *Id.*

266. *Id.*

267. Julie Rovner, *Trump Proposes Cutting Planned Parenthood Funds: What Does That Mean?*, THE WASH. POST (May 22, 2018), https://www.washingtonpost.com/national/health-science/trump-proposes-cutting-planned-parenthood-funds-what-does-that-mean/2018/05/22/76a3a568-5ade-11e8-9889-07bcc1327f4b_story.html?utm_term=.4111f267e854.

268. *Id.*

Department of Health and Human Services announced that Planned Parenthood, and similar organizations, would continue to receive Title X funds.[269]

President Trump has regulated federal funding for abortions services in the international sphere. On his first full day in office, President Trump reinstated what was coined "The Mexico City Policy," which bars international non-governmental organizations that promote or perform abortions from receiving federal funding from the United States.[270] President Trump's reach in this area goes beyond domestic policies, threatening the ability and viability of the procedure globally. As the Trump Administration continues to introduce proposals threatening public funding to abortion, with the Hyde Amendment as a precedential basis, the landscape in this area will continue to develop, while the legal battles continue to intensify.

B. STATE BANS ON PUBLIC FUNDING FOR ABORTION

In addition to actions halting federal funding for abortion, states have enacted legislation restricting the public funding of abortions.[271] As of October 1, 2018, twenty-two states have implemented restrictions on coverage for abortions in insurance policies for public employees.[272]

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269. Associated Press, *HHS Says 96 Organizations Will Get Family Planning Funding Amid Battle Over Program's Future*, PBS (Aug. 2, 2018), https://www.pbs.org/newshour/nation/hhs-says-96-organizations-will-get-family-planning-funding-amid-battle-over-programs-future.

270. Laura Koran & James Masters, *Trump Reverses Abortion Policy for Aid to NGOs*, CNN (Jan. 24, 2017), https://www.cnn.com/2017/01/23/politics/trump-mexico-city-policy/index.html.

271. Jackie Calmes, *States Move to Cut Funds for Planned Parenthood*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/us/states-move-to-cut-funds-for-planned-parenthood.html?_r_0.

272. *Restricting Insurance Coverage of Abortion*, Guttmacher Inst., https://www.guttmacher.org/state-policy/explore/restricting-insurance-coverage-abortion (last visited Jan. 3, 2019). These states are Arizona, Colorado, Georgia, Idaho, Indiana, Kansas, Kentucky, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, and Wisconsin. *See* ARIZ. REV. STAT. ANN. § 35-196.02 (West, Westlaw through the 2d Reg. Sess. of the 53rd Legislature (2018)) (prohibiting the use of public funds for the performance of any abortion unless necessary to save the woman's life or to avert substantial and irreversible impairment of a major bodily function of the woman); COLO. REV. STAT. ANN. § 25.5-3-106 (West, Westlaw through 2d Reg. Sess. of 71st Gen. Assemb. (2018); GA. CODE ANN. § 33-24-59.17(a) (West, Westlaw through the 2018 Leg. Sess.); IDAHO CODE ANN. § 41-2142 (West, Westlaw through the 2018 2d Reg. Sess. of the 64th Idaho Leg.); IND. CODE ANN. § 27-8-13.4-2 (West, Westlaw through 2018 2d Reg. Sess. and 1st Spec. Sess. of the 120th Gen. Assemb.); KAN. STAT. ANN. § 40-2,190 (West, Westlaw through laws effective on or before July 1, 2018, enacted during the 2018 Reg. Sess. of Kan. Leg.); KY. REV. STAT. ANN. § 304.5-160 (West, Westlaw through the 2018 Reg. Sess.); MICH. COMP. LAWS ANN. § 400.109a (West, Westlaw through P.A.2018, No. 341 of the 2018 Reg. Sess., 99th Leg.); MISS. CODE ANN. § 41-41-91 (West, Westlaw current through the End of the 2018 1st Extra. Sess. and the 2018 Reg. Sess.); MO. ANN. STAT. § 376.805 (West, Westlaw through 2018 2d Reg. Sess. of the 99th Gen. Assemb., pending changes received from the Mo. Revisor of Statutes); NEB. REV. STAT. ANN. § 44-8403 (West, Westlaw through egis. effective July 1, 2018, of the 2d Reg. Sess. of the 105th Leg. (2018)); N.C. GEN. STAT. ANN. § 143C-6-5.5 (West, Westlaw through the end of the 2018 Reg. Sess. and 1st and 2d Extra. Sess. of the Gen. Assemb.); N.D. CENT. CODE ANN. § 14-02.3-03 (West, Westlaw, through the 2017 Reg. Sess. of the 65th Leg. Assemb. and initiatives on the Nov. 6, 2018 ballot); OHIO REV. CODE ANN. § 9.04 (West, Westlaw, through 132d Gen. Assemb. (2017-2018)); OKLA. STAT. ANN. tit. 63, § 1-741.3 (West, Westlaw with leg. of the 2d Reg. Sess. of the 56th Leg. (2018)); 18 PA. CONS.

The Supreme Court upheld state statutes that restricted "Medicaid-funded abortions" in both *Beal v. Doe*[273] and *Maher v. Roe*.[274] In *Beal v. Doe*, the Court addressed whether Title XIX of the Social Security Act required Pennsylvania to fund the cost of all abortions that are permissible under state law through its Medicaid program.[275] The Court held that the Social Security Act did not require state funding of nontherapeutic abortions as a condition of participation in the Medicaid program.[276] In *Maher v. Roe*, the Court addressed whether the Constitution's Equal Protection Clause requires a state participating in the Medicaid program to pay for nontherapeutic abortions when the state's policy includes payment for the cost of childbirth.[277] The Court reiterated that lack of public funding does not unduly burden the right to seek an abortion and therefore is not unconstitutional.[278] Citing *Beal v. Doe*, and applying rational basis review, the Court found Connecticut's regulation to be rationally related to and in furtherance of the state's strong and legitimate interest in encouraging childbirth.[279]

Following the 2015 release of falsified Planned Parenthood videos,[280] ten states moved to defund Planned Parenthood by cutting off the organization's access to Medicaid funding for the services, other than abortion, that the organization provides.[281] In response, Planned Parenthood challenged state defunding in court on federal law grounds, and a number of federal judges blocked the laws from taking effect in their respective states.[282]

STAT. ANN. § 3215 (West, Westlaw through end of the 2018 Reg. Sess.); R.I. GEN. LAWS ANN. § 27-18-28 (West, Westlaw through ch. 353 of the Jan. 2018 Sess.); S.C. CODE ANN. § 38-71-238 (West, Westlaw through 2018 Act No. 263); UTAH CODE ANN. § 31A-22-726 (West, Westlaw through 2018 2d Spec. Sess.). Additionally, Massachusetts prohibits coverage of post-viability "partial-birth" abortions." MASS. GEN. LAWS ANN. Ch. 32A § 10C (West, Westlaw through Ch. 207 of the 2018 2d Ann. Sess.); Va. Dep't of Human Resource Mgmt., Mem. No. 96-9 (May 31, 1996).

273. 432 U.S. 438, 447 (1977).

274. *See* 432 U.S. 464, 480 (1977).

275. 432 U.S. at 444.

276. *Id*.

277. *Id*. at 470.

278. *Id*. at 470–71.

279. *Id*. at 480.

280. Manny Fernandez, *2 Abortion Foes Behind Planned Parenthood Videos Are Indicted*, N.Y. TIMES (Jan. 25, 2016), https://www.nytimes.com/2016/01/26/us/2-abortion-foes-behind-planned-parenthood-videos-are-indicted.html (stating that a Texas grand jury investigating the video allegations against Planned Parenthood had cleared the organization of all wrongdoing).

281. Lena Sun, *Obama Officials Warn States About Cutting Medicaid Funds to Planned Parenthood*, WASH. POST (Apr. 19, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/04/19/obama-officials-warn-states-about-cutting-medicaid-funds-to-planned-parenthood/?utm_term=.bb4781b9e31c (stating that Alabama, Arkansas, Arizona, Florida, Louisiana, Kansas, Missouri, Oklahoma, Texas, and Wisconsin have moved to disqualify Planned Parenthood from receiving Medicaid funds).

282. Sarah Ferris, *Judge Orders Alabama to Resume Planned Parenthood Payments*, THE HILL (Oct. 28, 2015), https://thehill.com/policy/healthcare/258366-federal-judge-blocks-alabamas-efforts-to-defund-planned-parenthood; *see also* Planned Parenthood v. Strange, 172 F. Supp. 3d 1275, 1292 (M.D. Ala. 2016); Planned Parenthood v. Selig, 313 F.R.D. 81, 84 (E.D. Ark. 2016); Planned Parenthood v. Hodges, No. 1:16cv539, 2016 WL 4264341, at *1 (S.D. Ohio Aug. 12, 2016); Planned Parenthood v. Mosier, No. 16-2284-JAR-GLR, 2016 WL 3597457, at *1 (D. Kan. July 5, 2016); Planned Parenthood v. Philip, No. 4:16cv321-RH/CAS, 2016 WL 3556568, at *1 (N.D. Fla. June 30, 2016).

Litigation is still ongoing, with multiple states still working to defund abortion providers by targeting the Medicaid program.[283] The issue of whether, under the Medicaid Act, patients can sue their state in federal court to ensure receipt of Medicaid benefits from their preferred provider, Planned Parenthood, for example, could soon reach the Supreme Court.[284] Louisiana and Kansas both filed petitions of certiorari for cases asking this question.[285] *Andersen v. Planned Parenthood of Kansas and Mid-Missouri* and *Gee v. Planned Parenthood of Gulf Coast* were originally scheduled for the Justices' first conference in September 2018, but were rescheduled, presumably to wait for the confirmation of a ninth Justice.[286]

V. PRIVATE INSURANCE COVERAGE FOR ABORTION

The debate surrounding funding for abortion has proved just as contentious in the private insurance market as it has in the public market. Ten states prohibit all private insurance coverage of abortion.[287] Additionally, twenty-six states restrict abortion coverage in plans offered through health insurance exchanges.[288] The PPACA established these state healthcare exchanges to assist individuals and small businesses in obtaining health insurance.[289] After the enactment of the law, twenty-six states passed laws that restrict the use of the state health exchanges to receive an abortion.[290] Some states allow for exceptions for insurance coverage

283. Rachel Busick, *Justice Kavanaugh Gets his First Test on Abortion: Can States Defund Planned Parenthood?*, LIFE NEWS (Oct. 12, 2018), https://www.lifenews.com/2018/10/12/justice-kavanaughs-gets-his-first-test-on-abortion-can-states-defund-planned-parenthood/.

284. *Id.*

285. *Id.*

286. *Id.*; 882 F.3d 1205 (10th Cir. 2018); 862 F.3d 445 (5th Cir. 2017).

287. IDAHO CODE ANN. § 41-2142 (West, Westlaw through 2018 2d Reg. Sess. of 64th Idaho Leg.); IND. CODE ANN. § 27-8-33-4 (West, Westlaw through all legis. of the 2018 2d Reg. Sess. and 1st Sp. Sess. of the 120th Gen. Assemb.); KAN. STAT. ANN. § 40-2,190 (West, Westlaw through laws effective on or before July 1, 2018, enacted during the 2018 Reg. Sess. of the Kan. Leg.); KY. REV. STAT. ANN. § 304.5-160 (West, Westlaw through the 2018 Reg. Sess.); MICH. COMP. LAWS ANN. § 550.543 (West, Westlaw through P.A.2018, No.341 of the 2018 Reg. Sess., 99th Leg.); MO. ANN. STAT. § 376.805 (West, Westlaw through 2018 2d Reg. Sess. of 99th Gen. Assemb.); NEB. REV. STAT. ANN. § 44-8403 (West, Westlaw through 2d Reg. Sess. of 105th Leg. (2018)); N.D. CENT. CODE ANN. § 14-02.3-03 (West, Westlaw through the 2017 Reg. Sess. of the 65th Legislative Assemb. and initiatives on the Nov. 6, 2018, ballot); OKLA. STAT. ANN. tit. 63, § 1-741.3 (West, Westlaw with legislation of the 2d Reg.Sess. of the 56th Legislature (2018) effective through October 1, 2018); UTAH CODE ANN. § 31A-22-726 (West, Westlaw through 2018 2d Spec. Sess.).

288. *Restricting Insurance Coverage of Abortions supra* note 272.

289. *Id.*; *see also* Patient Protection and Affordable Care Act, 42 U.S.C.A. § 18001 *et seq.*, (West, Westlaw through Pub L. No. 115-231, including P.L. 115-233 to 115-244, 115-246 to 115-250 and 115-253, and Title 26 current through 115-253) [hereinafter PPACA].

290. ALA. CODE § 26-23C-3 (West, Westlaw through Act 2018-579 of the 2018 Reg. Sess.); ARIZ. REV. STAT. ANN. § 20-121 (West, Westlaw through the 1st Spec. and 2d Reg. Sess. of the 53rd Legislature (2018)); ARK. CODE ANN. § 23-79-156 (West, Westlaw through laws passed in the 2018 Fiscal Sess. and the 2d Extra. Sess. of the 91st Ark. Gen. Assemb. that are effective July 1, 2018, or earlier, and include changes made by the Ark. Code Rev. Comm'n received through July 1, 2018).); FLA. STAT. ANN. § 627.66996 (West, Westlaw through the 2018 2d Reg. Sess. of the 25th Leg.); GA. CODE ANN. § 33-24-59.17 (West, Westlaw through the 2018 Leg. Sess. and are subject to changes by the

of abortion in the case of life endangerment, rape, and incest;[291] only two states allow for no exceptions even in such cases.[292]

States without insurance policies that omit coverage for abortion on their state exchanges have faced litigation under the Religious Freedom Restoration Act (RFRA) for allegedly violating individuals' right to freedom of religious exercise.[293] Following RFRA suits, both Connecticut and Rhode Island began offering plans that did not include expanded abortion coverage.[294] The plans will be moot, however, because the PPACA stipulates that the marketplace must include at least one multi-state plan that limits abortion coverage to those permitted under current federal law.[295]

Ga. Code Comm'n); IDAHO CODE ANN. § 41-1848 (West, Westlaw through the 2018 2d Reg. Sess. of the 64th Idaho Leg.); IND. CODE ANN. § 27-8-33-4 (West, Westlaw through 2018 2d Reg. Sess. and 1st Spec. Sess. of the 120th Gen. Assemb.); KAN. STAT. ANN. § 40-2,190 (West, Westlaw through laws enacted during the 2018 Reg. Sess. of the Kan. Leg. on or before July 1, 2018); LA. STAT. ANN. § 22:1014 (West, Westlaw through the 2018 1st Extra. Sess.); MICH. COMP. LAWS ANN. § 550.542 (West, Westlaw through P.A. 2018, No. 341 of the 2018 Reg. Sess., 99th Leg.); MISS. CODE ANN. § 41-41-99 (West, Westlaw through with laws from the 2018 Reg. and 1st Extra. Sess. and are subject to changes provided by the Joint Leg. Comm. on Compilation, Rev. and Pub. of Legislation); MO. ANN. STAT. § 376.805 (West, Westlaw through the end of the 2018 2d Reg. Sess. of the 99th Gen. Assemb., pending changes received from the Mo. Revisor of Statutes); NEB. REV. STAT. ANN. § 44-8403 (West, Westlaw through the end of the 105th 2d Reg. Sess. (2018)); N.C. GEN. STAT. ANN. § 58-51-63 (West, Westlaw through the end of the 2018 Reg. Sess. and 1st and 2d Extra. Sess. of the Gen. Assemb.); N.D. CENT. CODE ANN. § 14-02.3-03 (West, Westlaw through the 2017 Reg. Sess. of the 65th Leg. Assemb. and initiatives on the Nov. 6, 2018, ballot); OHIO REV. CODE ANN. § 3901.87 (West, Westlaw through the 132d Gen. Assemb. (2017-2018)); OKLA. STAT. ANN. tit. 63, § 1-741.3 (West, Westlaw with leg. of the 2d Reg. Sess. of the 56th Leg. (2018)); 18 PA. CONS. STAT. ANN. § 3215 (West, Westlaw through the end of the 2018 Reg. Sess.); S.C. CODE ANN. § 38-71-238 (West, Westlaw through 2018 Act No. 263, subject to technical revisions by the Code Comm'r as authorized by law before official pub.); S.D. CODIFIED LAWS § 58-17-147 (West, Westlaw through 2018 Reg. and Spec. Sess. laws and Supreme Court Rule 18-15); TENN. CODE ANN. § 56-26-134 (West, Westlaw with laws from the 2018 2d Reg. Sess. of the 110th Tenn. Gen. Assemb.); UTAH CODE ANN. § 31A-22-726(4) (West, Westlaw through 2018 2d Spec. Sess.); VA. CODE ANN. § 38.2-3451 (West, Westlaw through 2018, Reg. Sess., 2018 1st Sp. Sess.,); WIS. STAT. ANN. § 632.8985 (West, Westlaw through 2017 Act 367, published April 18, 2018).

291. *See, e.g.*, ALA. CODE § 26-23C-3 (West, Westlaw through Act 2018-579) (providing an exception for an abortion performed when the life of the mother is endangered or when the pregnancy is the result of an act of rape or incest); S.C. CODE ANN. § 38-71-238 (West, Westlaw through 2018 Act No. 263, subject to technical revisions by the Code Comm'r as authorized by law before official pub.) (not applying the abortion coverage limitation in cases where the life of the mother is endangered or when the pregnancy is the result of rape or incest).

292. LA. STAT. ANN. § 22:1014 (West, Westlaw through the 2018 1st Extra. Sess.); TENN. CODE ANN. § 56-26-134 (West, Westlaw through end of the 2018 2d Reg. Sess. of the 110th Tenn. Gen. Assemb.).

293. Richard Salit, *Lawsuit Filed Over Abortion Services in Health Source RI Plans*, PROVIDENCE J. (Jan. 15, 2015), http://www.providencejournal.com/article/20150115/NEWS/301159984.

294. *Id.*

295. Alina Salganicof, Adara Beamesderfer, Nisha Kurani, and Laurie Sobel, *Coverage for Abortion Services and the ACA*, HENRY J. KAISER FAMILY FOUNDATION (Sept. 19, 2014), https://www.kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-and-the-aca/.

VI. TRENDS TOWARD FETAL PERSONHOOD

The *Roe* Court did not decide when life begins, but the Court held that an unborn fetus does not constitute a "person" under the Fourteenth Amendment.[296] In his majority opinion, Justice Blackmun explained that any different holding would directly conflict with the Court's "statutory interpretation favorable to abortion in specified circumstances."[297] Nevertheless, in recent years, some jurisdictions have decided to attribute personhood to fetuses in criminal law, tort law, and state constitutional law.[298]

A. FEDERAL AND STATE FETICIDE LAWS

In 2004, Congress amended federal criminal law, making it a crime to kill or injure a fetus during the commission of a federal crime against a pregnant woman.[299] The law, commonly referred to as Laci and Conner's Law, or The Unborn Victims of Violence Act (UVVA), creates a penalty separate from the crime perpetrated against the pregnant woman.[300] At the time of the federal UVVA's passage in 2004, twenty-six states had already passed homicide laws that recognized unborn victims.[301] Of these states, nineteen recognized unborn

296. Roe v. Wade, 410 U.S. 113, 158 (1973).

297. *Id.* at 159.

298. *See, e.g.*, 18 U.S.C.A. § 1841 (West, Westlaw through P.L. 114-316, including P.L. 114-318 to 114-327, and 115-1 to 115-3); Bonbrest v. Kotz, 65 F. Supp. 138, 140-43 (D.D.C 1946) (holding that a professional malpractice suit initiated on behalf of a viable fetus by his father was proper and the fetus constituted a person having standing in court); People v. Davis, 872 P.2d 591, 599 (Cal. 1994) (allowing for feticide without imposing a viability requirement); Commonwealth v. Cass, 467 N.E.2d 1324, 1326 (Mass. 1984) (holding that a fetus was considered a "person" with regard to a vehicular homicide statute); Hughes v. State, 868 P.2d 730, 736 (Okla. Crim. App. 1994) (abolishing the born alive rule and prospectively holding that defendants causing deadly injuries to fetuses may be convicted for homicide); State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984) ("[W]e hold an action for homicide may be maintained in the future when the state can prove beyond a reasonable doubt the fetus involved was viable.").

299. 18 U.S.C.A. § 1841 (West, Westlaw through P.L. 114-316) (including P.L. 114-318 to 114-327, and 115-1 to 115-3) ("Whoever . . . causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.").

300. *See id.*

301. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1103 (A)(5) (West, Westlaw through Leg. effective Jan. 31, 2019 of the 1st Reg. Sess. of the 54th Leg. (2019)); IDAHO CODE ANN. §§ 18-4001, 18-4016 (West, Westlaw through emergency effective and retroactive legis. through ch. 37 of the 1st Reg. Sess. of the 64th Idaho Leg.); 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West, Westlaw through P.A. 99-937 of the 2016 Reg. Sess.); IND. CODE ANN. § 35-42-1-6 (West, Westlaw through 2016 2d Reg. Sess. of the 119th Gen. Assemb.); IOWA CODE ANN. § 707.8 (West, Westlaw through 2016 Reg. Sess.); KY. REV. STAT. ANN. § 507A.010 (West, Westlaw through 2016 Reg. Sess.); LA. STAT. ANN. §14:2 (West, Westlaw through the 2016 1st Extra., Reg., and 2d Extra. Sess.); NEB. REV. STAT. ANN. §28-389 (West, Westlaw through the end of the 104th 2d Reg. Sess. (2016)); OHIO REV. CODE ANN. §§ 2903.01, 2903.09 (West, Westlaw through Files 115–117, 119, 120, 122–154, 156, 158, 159, 162–165, 167, 169, 170 and 172 of the 132nd Gen. Assemb. (2017-2018), 2017 State Issue 1, and 2018 State Issue 1); S.D. CODIFIED LAWS ANN. §§ 22-16-1.1, 22-1-2 (West, Westlaw through the laws of the 2017 Reg. Sess., effective through Mar. 6, 2017 Sup. Ct. Rule 17-06); TEX. PENAL CODE ANN. §§ 1.07, 19.01 (West, Westlaw through end of the 2017 Reg. and 1st Called Sess. of the 85th Leg); UTAH CODE ANN. § 76-5-201 (West, Westlaw through

children as victims regardless of the stage of prenatal development.[302] Another eleven states afforded partial coverage to unborn victims that applied to some stages of prenatal development.[303] Today, thirty states have homicide laws that

2016 4th Spec. Sess.); VA. CODE ANN. § 18.2-32.2 (West, Westlaw through end of the 2016 Reg. Sess. and includes 2017 Reg. Sess. c. 1).

302. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1103 (West, Westlaw through 2d Reg. Sess. of 52d Leg. (2016), and includes Election Results from the Nov. 8, 2016 Gen. Election) (establishing a penalty of manslaughter for killing of an "unborn child at any stage of its development"); IDAHO CODE ANN. § 18-4016 (West, Westlaw through emergency effective and retroactive legislation through ch. 37 of the 1st Reg. Sess. of the 64th Idaho Leg.) ("'[E]mbryo' or 'fetus' shall mean any human in utero."); 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West, Westlaw through P.A. 99-937 of the 2016 Reg. Sess.) ("'[U]nborn child' shall mean any individual of the human species from fertilization until birth."); KY. REV. STAT. ANN. § 507A.010 (West, Westlaw through 2016 Reg. Sess.) ("'Unborn child' means a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency."); LA. STAT. ANN. §14:2 (West, Westlaw through the 2016 1st Extra., Reg., and 2d Extra. Sess.) ("'Unborn child' means any individual of the human species from fertilization and implantation until birth."); NEB. REV. STAT. ANN. §28-389 ((West, Westlaw through the end of the 2nd Reg. Sess. of the 105th Leg. (2018)) ("'Unborn child' means an individual member of the species Homo sapiens, at any stage of development in utero . . . ."); OHIO REV. CODE ANN. §§ 2903.01, 2903.09 (West, Westlaw through Files 115–117, 119, 120, 122–154, 156, 158, 159, 162–165, 167, 169, 170 and 172 of the 132nd Gen. Assemb. (2017-2018), 2017 State Issue 1, and 2018 State Issue 1) (establishing that no person may unlawfully cause another person's termination of pregnancy and defining an "unlawful termination of another's pregnancy" as beginning at fertilization); S.D. CODIFIED LAWS §§ 22-16-1.1, 22-1-2 (West, Westlaw through the laws of the 2017 Reg. Sess., effective through Mar. 6, 2017 Sup. Ct. Rule 17-06) (establishing that the killing of an unborn child is homicide and defining an unborn child as "an individual organism of the species homo sapiens from fertilization until live birth"); TEX. PENAL CODE ANN. §§ 1.07, 19.01 (West, Westlaw through the end of the 2015 Reg. Sess. of 84th Leg.) (establishing that "caus[ing] the death" of a fetus at "every stage of gestation" constitutes homicide); UTAH CODE ANN. § 76-5-201 (West, Westlaw through 2018 2d Spec. Sess.).

303. *See* ARK. CODE ANN. § 5-1-102(13)(b)(i)(a) (West, Westlaw through 2018 Fiscal Sess. and the 2d Extra. Sess. of the 91st Ark. Gen. Assemb., (2) ballot issues adopted at the November 6, 2018, Gen. Election, and (3) changes made by the Ark. Code Revision Comm'n. received through Oct. 31, 2018) (establishing the criminal penalty for killing an unborn child of twelve or more weeks of gestation); CAL. PENAL CODE § 187(a) (West, Westlaw through all 2016 Reg. Sess. laws, ch.8 of 2015-16 2d Extra. Sess., and all propositions on 2016 ballot) (providing that "murder is the unlawful killing of ... a fetus, with malice aforethought," which was interpreted in People v. Taylor, 32 Cal. 4th 863, 867 (2004), as an embryonic stage of seven to eight weeks); FLA. STAT. ANN. § 782.09 (West, Westlaw through the 2016 2d Reg. Sess. of the 24th Leg.) (providing that the killing of an "unborn quick child . . . shall be deemed murder in the same degree as that which would have been committed against the mother"); FLA. STAT. ANN. § 782.071 West, Westlaw through the 2016 2d Reg. Sess. of the 24th Leg.) (providing that the killing of an unborn child after viability is vehicular homicide); IND. CODE ANN. § 35-42-1-1 (West, Westlaw through Leg. and Ballot Issues of 2018 2d Reg. Sess. and 1st Spec. Sess. of the 120th Gen. Assemb.) (establishing the killing of "a fetus that has attained viability" is murder); NEV. REV. STAT. ANN. § 200.210 (West, Westlaw through the end of the 78th Reg. Sess. (2015) and the 30th Spec. Sess. (2016) of the Nev. Leg. and all technical corrections received by the Legislative Counsel Bureau) (providing that the killing of an "unborn quick child" is manslaughter); OKLA. STAT. ANN. tit. 21, § 713 (West, Westlaw with emergency effective provisions through ch. 1 of the 1st Reg. Sess. of the 56th Leg. (2017)) (repealed by Laws 2006, c. 185, § 23, effective Nov. 1, 2006) (providing that the killing of an "unborn quick child" is manslaughter); R.I. GEN. LAWS ANN. § 11-23-5 (West, Westlaw through ch. 542 of the Jan. 2016 Sess.) (establishing that the penalty for killing of an unborn quick child is manslaughter); WASH. REV. CODE ANN. § 9A.32.060(1)(b) (West, Westlaw through amendments approved Nov. 8, 2016) (providing that the killing of an "unborn quick child" is manslaughter); *see also* Com. v. Lawrence, 536 N.E.2d 571, 575-76 (Mass. 1989) (holding that a viable fetus is a human being for the common law crime of murder); Hughes v. State, 868 P.2d 730, 736 (Okla. Crim. App. 1994)

fully cover fetuses, and eight states allow partial coverage.[304] Indiana has since broadened its statute to recognize any stage of development rather than only post viability.[305]

By declaring an unborn child a legal person, the UVVA departed from *Roe's* recognition of a fetus as "at most . . . only the potentiality of life."[306] The UVVA defines an unborn child as a child in utero, or a "member of the species homo sapiens, at any stage of development, who is carried in the womb."[307] Since *Roe*, the "fundamental premise of constitutional law" governing abortion is that fetuses are not entitled to the legal protections afforded persons.[308] The *Roe* Court rejected the State's argument that a fetus was a person under the meaning of the Fourteenth Amendment because the term person had only postnatal applications.[309] Under the Constitution a fetus is not entitled to a "right to life."[310] Thus, the termination of a pregnancy has never been treated as a termination of life entitled to Fourteenth Amendment protection.[311] As such, the UVVA proved controversial because it classified the fetus or embryo as a legal person deserving of criminal law protections.[312]

If the UVVA language recognizes a fetus as a person regardless of the stage of viability, then fetuses could enjoy a right to life under the Fourteenth Amendment—a proposition the Supreme Court has previously rejected.[313] Some believe that permitting the termination of a pregnancy by legalized abortion but outlawing infanticide and murder would deny equal protection of the law to fetuses.[314] If the law recognizes a fetus as a constitutional person, states could be required to outlaw abortion in some circumstances because it would be akin to murder.[315] When constitutional rights are in conflict or competition, "any power to increase the

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(holding that the killing of an unborn child after viability is homicide); State v. Ard, 505 S.E.2d 328, 376-77 (S.C. 1998) (holding that the killing of an unborn child after viability is homicide), *overruled by* Humphries v. State, 570 S.E.2d 160 (S.C. 2002).

304. NATIONAL RIGHT TO LIFE COMMITTEE, *State Homicide Laws that Recognize Unborn Victims*, https://www.nrlc.org/federal/unbornvictims/statehomicidelaws092302/ (last visited Jan. 3, 2019).

305. *Id*.

306. Roe v. Wade, 410 U.S. 113, 162 (1973).

307. 18 U.S.C.A. § 1841 (West, Westlaw through P.L. 114-115 (excluding 114-94 and 114-95)).

308. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 913-14 (1992) (Stevens, J. concurring in part and dissenting in part).

309. *See Roe*, 410 U.S. at 157-58. *But see* Webster v. Repro. Health Servs., 492 U.S. 490, 504-06 (1989) (upholding a Missouri statute whose preamble declared life begins at conception).

310. *See Roe*, 410 U.S. at 158.

311. *Casey*, 505 U.S. at 913-14 (Stevens, J., concurring in part and dissenting in part) (citing *Roe*, 410 U.S. at 158) ("From this holding, there was no dissent, indeed, no Member of the Court has ever questioned this fundamental proposition.").

312. *See, e.g*., Nora Christie Sandstad, *Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights During Pregnancy*, 26 L. & INEQ. 171, 172 (2008) (explaining that the UVVA could be used to further restrict women's access to abortion).

313. *See id*.

314. *See* Richard Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 399-402 (1992).

315. *See id*. at 398-99.

constitutional population by unilateral decision would be, in effect, a power to decrease rights the Constitution grants to others [such as women]."[316] A decision on the proper accommodation for the unborn child's rights and the woman's rights is left to the Supreme Court when, and if, the issue presents itself.

One case unsuccessfully attempted to challenge the constitutionality of the UVVA. In *United States v. Boie*, a defendant was convicted of the attempted killing of an unborn child and assault on the fetus's mother asserted that, among other things: (1) "the use of the phrase 'causing the death of an unborn child' in Article 119a is unconstitutionally vague; (2) . . . Article 119a violates the Equal Protection Clause of the United States Constitution because it adopts a gender-based classification; (3) . . . Article 119a violates the Eighth Amendment right against cruel and unusual punishment; [and] (4) . . . Article 119a is unconstitutional because it adopts a 'theory of life' that violates the Establishment Clause."[317] The Air Force Court of Criminal Appeals rejected the constitutional challenges to the UVVA.[318] The court addressed each in turn.

With regard to the defendant's first challenge, the court noted that a criminal statute is only unconstitutionally vague when the statute lacks sufficient definiteness such that ordinary people cannot understand "what conduct is prohibited" and encourages "arbitrary and discriminatory enforcement."[319] As such, the debate as to when human life begins does not render the UVVA unconstitutionally vague because Congress sufficiently established the statute's prohibitions by requiring prosecutors to prove that (1) an embryo existed, and (2) the act against the mother "could or did end the embryo's existence."[320]

With regard to defendant's Equal Protection argument, the court first acknowledged that the statute draws gender-based distinctions by exempting mothers from prosecution for harming their unborn child, while denying this exemption to fathers.[321] Nevertheless, the court rejected the argument by distinguishing between a defendant who assaults a pregnant woman therefore causing the death of her embryo or fetus without the woman's consent, and a woman who consents to the termination of her pregnancy.[322] The court stated that the basis of this distinction is the woman's constitutionally protected right to privacy in her decision to have an abortion.[323]

The court noted that the defendant lacked standing to challenge the Eighth Amendment.[324] With regard to defendant's Establishment Clause argument, the

316. *Id.* at 400-01.

317. 70 M.J. 585, 586-87 (A.F. Ct. Crim. App. 2011).

318. *See id.* at 589, 591-92.

319. *Id.* at 588 (quoting Gonzales v. Carhart, 550 U.S. 124, 148 (2007)) (internal quotation marks omitted).

320. *Id.*

321. *Id.* at 590.

322. *Id.* at 591 (citing People v. Ford, 581 N.E.2d 1189, 1199 (Ill. App. Ct. 1991); State v. Merrill, 450 N.W.2d 318, 321-22 (Minn. 1990)).

323. *Id.*

324. *Id.* at 592.

court held that the statute did not violate the Establishment Clause because the statute did not "advance[] traditional Christian views regarding life" by implicitly establishing that life begins at conception.[325] The court particularly relied upon the Supreme Court's holding in *Harris v. McRae*[326] that the existence of parallels between religious values and a statute by itself is insufficient to render a statute unconstitutional under the Establishment Clause.[327]

Unsuccessful challenges to state feticide statutes have advanced the same arguments from *Boie*.[328] New challenges with novel arguments are met with new justifications for the statute's validity.[329] For example, the defendant in *State v. Merrill*[330] argued that a Minnesota feticide statute violated his Equal Protection rights by equating a non-viable fetus with a person.[331] The defendant argued that the statute's failure to incorporate a viability requirement violated the *Roe* Court's determination that a non-viable fetus is not a person.[332] In rejecting the defendant's argument, the court explained that a statute must produce dissimilar treatment of similarly situated individuals in order to violate Equal Protection.[333] The *Merrill* court reasoned that such dissimilar treatment was absent from this case because, unlike a fetus, the defendant was not part of the class of individuals being burdened by the statute rather than benefiting from it.[334] Additionally, in *People v. Ford*,[335] the court rejected another Equal Protection challenge when it explained that only a rational basis is needed to uphold the statute because the fetal homicide statute did not affect a fundamental right or discriminate against a suspect class.[336] The court found that the goal of protecting the potential of human life was a valid legislative purpose to which the statute was rationally related.[337] While defendants continue to provide additional arguments, state feticide statutes have yet to be altered.

Another novel argument from defendants stems from the 2017 GOP tax overhaul plan.[338] The plan included the proposition that an unborn child can qualify as

325. *See id*. at 592–93.
326. Harris v. McRae, 448 U.S. 297 (1980).
327. *Boie*, 70 M.J. at 592.
328. *See, e.g*., Webster v. Repro. Health Servs., 492 U.S. 490, 522 (1989); Smith v. Newsome, 815 F.2d 1386, 1388 (11th Cir. 1987); People v. Ford, 581 N.E.2d 1189, 1202 (Ill. App. Ct. 1991); State v. Smith, 676 So.2d 1068, 1072 (La. 1996); State v. Merrill, 450 N.W.2d 318, 322-24 (Minn. 1990); State v. Black, 526 N.W.2d 132, 134 (Wis. 1994).
329. *See generally Merrill*, 450 N.W.2d at 318.
330. *Id*. at 318.
331. *Id*. at 321.
332. *Id*.
333. *Id*.
334. *See id*.
335. 581 N.E.2d 1189 (Ill. App. Ct. 1991).
336. *Id*. at 1200.
337. *Id*.
338. Alex Kasprak, *Does the GOP Tax Bill Introduce Anti-Abortion "Fetal Personhood" Legislation?*, SNOPES (Nov. 16, 2017), https://www.snopes.com/fact-check/gop-tax-bill-fetal-personhood-legislation/.

a beneficiary to college tuition savings funds.[339] The proposal defined an unborn child as a child in utero during any stage of development.[340] Many activists saw this language as an attempt to bestow rights on the fetus and curtail full reproductive rights of the woman.[341] Pro-life supporters argued that the bill simply allowed families to start accruing benefits earlier in the child's life.[342] However, one could open the account at any time and designate beneficiaries later under the previous tax plan.[343] Ultimately, the rationale behind the bill was irrelevant. The Senate repealed the language prior to passing the final draft.[344] The plan exemplifies one of the many novel ways that feticide laws could be implemented into the American system.

While cases upholding feticide statutes emphasize that the statutes do not affect a woman's right to choose to terminate her pregnancy,[345] recent cases have demonstrated the contrary. For example, in 2015, after an Indiana woman named Purvi Patel suffered a miscarriage and disposed of her stillborn, she was convicted of feticide and neglect and sentenced to a prison term of twenty years.[346] The prosecution presented an expert witness testifying that the fetus had probably reached viability, relying on a viability test that some argue was "disproven over 100 years ago."[347] In contrast, such complaints did not arise with regard to the viability test applied by the defense's expert witness, who determined that the fetus was likely not viable and was between twenty-three and twenty-four weeks old.[348] The Indiana Court of Appeals has since reduced Purvi Patel's sentence.[349]

Other cases in Indiana suggest that feticide laws might be used to restrict women's access to abortion.[350] In *Bei Bei Shuai v. State*, Shuai was charged with murder under Indiana's feticide statute when she caused the termination of her pregnancy through a suicide attempt.[351] While the charges were ultimately

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. Alex Kasprak, *Does the GOP Tax Bill Introduce Anti-Abortion "Fetal Personhood" Legislation?*, SNOPES (Nov. 16, 2017), https://www.snopes.com/fact-check/gop-tax-bill-fetal-personhood-legislation/.

344. *Id.*

345. *See, e.g.*, United States v. Boie, 70 M.J. 585, 591 (A.F. Ct. Crim. App. 2011) (contrasting a right to abortion and a feticide statute); State v. Merrill, 450 N.W.2d 318, 321–22 (Minn. 1990) (establishing that feticide statute does not affect mother's right to choose).

346. Emily Bazelon, *Purvi Patel Could Be Just The Beginning*, N.Y. TIMES (Apr. 1, 2015), https://www.nytimes.com/2015/04/01/magazine/purvi-patel-could-be-just-the-beginning.html http://www.nytimes.com/2015/04/01/magazine/purvi-patel-could-be-just-the-beginning.html?_r_0.

347. *Id.* (quoting Gregory J. Davis) (quotation marks omitted).

348. *See id.*

349. *Indiana Court Tosses Purvi Patel's 2015 Feticide Conviction*, NBC NEWS (July, 22, 2016), http://www.nbcnews.com/news/asian-america/indiana-court-tosses-purvi-patel-s-2015-feticide-conviction-n615026.

350. *See* Nora Christie Sandstad, *Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights During Pregnancy*, 26 L. & INEQ. 171, 172 (2008) (explaining that the UVVA could be used to further restrict women's access to abortion).

351. Bei Bei Shuai v. State, 966 N.E.2d 619, 622-23 (Ind. Ct. App. 2012).

dropped after Ms. Shuai agreed to plead guilty to criminal recklessness,[352] the court of appeals' decision suggests that feticide laws can be used to impose further restrictions on abortion.[353] The Court of Appeals of Indiana rejected Ms. Shuai's argument that the feticide statutes cannot be applied against a pregnant woman because the statute did not contain such a limitation, and the common law immunities for pregnant women harming their own fetuses did not apply due to the General Assembly's decision not to include these exceptions.[354]

B. FETAL PERSONHOOD AND TORT LAW

Some states recognize fetal personhood by allowing for compensation for wrongful death claims based upon the destruction of an unborn fetus.[355] However, states differ as to whether a wrongful death claim based upon the destruction of a fetus requires that the fetus has reached viability.[356]

In *Wiersma v. Maple Leaf Farms*, the Supreme Court of South Dakota held that wrongful death claims based upon the unconsented termination of a pregnancy do not require that the fetus reach viability at the time of the termination.[357] In wrongful death suits, a viability requirement would create an arbitrary standard because the viability requirement was solely established to protect a woman's right to terminate her pregnancy.[358] The court explained that when the termination of the pregnancy resulted from a third party's unconsented tortious act, such protections were not triggered.[359]

In contrast, in *Kandel v. White*, the Court of Appeals of Maryland reaffirmed the viability requirement that was previously developed.[360] The *Kandel* court explained that allowing for wrongful death suits based upon the destruction of a non-viable fetus would create a logical contradiction between the mother's right to voluntarily terminate her pregnancy and a third party's liability for an

352. Diana Penner, *Woman Freed After Plea Agreement in Baby's Death*, INDIANAPOLIS STAR (Aug. 2, 2013, 9:32 PM), http://www.usatoday.com/story/news/nation/2013/08/02/woman-freed-after-plea-agreement-in-babys-death/2614301/.

353. *See Bei Bei Shuai*, 966 N.E.2d at 622, 631-32 (stating that one issue is "[w]hether the trial court erred when it denied Shuai's motion to dismiss").

354. *See id.* at 628–29, 631.

355. *See, e.g.*, Summerfield v. Maricopa Cnty., 698 P.2d 712, 721 (Ariz. 1985). *But see* Crosby v. Glasscock Trucking Co., 532 S.E.2d 856, 857 (S.C. 2000) ("[N]onviable stillborn fetus may not maintain a wrongful death action.").

356. *Compare Summerfield*, 698 P.2d at 724 (allowing for recovery on wrongful death claims based upon the death of a viable fetus), *with* Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 792 (S.D. 1996) (holding that wrongful death claims did not require viability of the fetus), *and* Pino v. United States, 183 P.3d 1001, 1006 (Okla. 2008) (rejecting argument that Oklahoma's wrongful death statute requires viability).

357. 543 N.W.2d at 787.

358. *See id.* at 792.

359. *See id.*

360. Kandel v. White, 663 A.2d 1264, 1267–68 (Md. 1995) (citing Grp. Health Ass'n v. Blumenthal, 453 A.2d 1198 (Md. 1983)).

unintentional act.[361] The court also noted that the third party might not even know of the woman's pregnancy.[362]

C. Fetal Personhood Under State Law—Constitutional Amendments and Legislation

Recent proposals for personhood amendments to state constitutions[363] and personhood statutes[364] directly challenge one *Roe v. Wade* holding that fetuses do not have legal standing as persons.[365] The statutes would define legal personhood at the moment of conception, and thus, as the UVVA discussed in Part IV-A, would create a constitutional tug of war between the protections of the fetus's right to life and the woman's right to an abortion.

Other unsuccessful attempts to establish personhood have been made across the country. A proposed personhood amendment in Mississippi garnered national attention in 2011 because the state was considered more receptive to anti-abortion measures, and both the Democratic and Republican candidates for governor stated that they supported the bill.[366] Most Mississippi voters, however, voted

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361. *See id.*

362. *See id.*

363. These states include Colorado, Florida and Montana. *See* Bruce Finley, *Abortion Foes to Try Again to Pass Personhood Amendment in Colorado*, Denver Post (Nov. 21, 2011, 3:07 PM), http://www.denverpost.com/news/ci_19380916 (stating that voters rejected a personhood amendment on the 2008 and 2010 ballots by a three-to-one margin, but anti-abortion group, Personhood USA, petitioned to get the amendment on the 2012 ballot); Katie Sanders, *Personhood Florida Aims to Mimic Mississippi's Amendment Push*, Miami Herald (Nov. 8, 2011, 3:50 AM), http://www.modbee.com/latest-news/article3138258.html (stating that Personhood USA failed to gather enough signatures for the 2012 ballot, but will try to get a personhood amendment on the 2014 ballot). Nevertheless, the amendments were not adopted. *See Colorado Election Results*, govotecolorado.com (Nov. 4, 2014), http://results.enr.clarityelections.com/CO/53335/149718/Web01/en/summary.html (establishing that in 2012 the voters in Colorado voted against the constitutional amendment); *2012 Ballot Issues*, Mont. Sec'y Of State, https://sosmt.gov/elections/ballot_issues/2012-2/ (establishing that there were insufficient signatures for a valid ballot measure regarding to amend Montana's constitution) (last visited Jan. 18, 2019); Initiatives 2014, Fla. Dep't Of State: Div. Of Elections, http://dos.elections.myflorida.com/initiatives/ (last visited Jan. 18, 2019) (establishing that 2014 Florida ProLife Personhood Amendment was withdrawn).

364. *See* N.D. Cent. Code Ann. § 14-02.1-02 (2011).

(defining person as all human being, meaning "individual living member of the species of homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation"); H.R. 1054, 53d Leg., 2d Sess. (Okla. 2012) (defining person as "a human being at all stages of human development of life, including the state of fertilization or conception, regardless of age, health, level of functioning, or condition of dependency"); H.R. 1440, 2011 Sess. (Va. 2011) (establishing that life begins at conception and defining an unborn child as "children or the offspring of human beings from the moment of conception until birth at every stage of biological development").

365. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 913-14 (1992) (Stevens, J., concurring in part and dissenting in part).

366. *See* Erik Eckholm, *Push for 'Personhood' Amendment Represents New Tack in Abortion Fight*, N.Y. Times (Oct. 25, 2011), http://www.nytimes.com/2011/10/26/us/politics/personhood-amendments-would-ban-nearly-all-abortions.html.

against the amendment.[367] Political commentators predicted that additional personhood amendments or bills would be introduced,[368] and in fact, a Virginia state delegate introduced a personhood bill on November 21, 2011.[369] It was later suspended from consideration.[370] In March 2013, North Dakota attempted to become the first state to pass by referendum an amendment to the state constitution that would attribute personhood to unborn fetuses.[371] The citizens of North Dakota voted against the adoption of the amendment in 2014.[372] A year later, after an attack on a pregnant woman during which the attacker cut the fetus out of the woman's uterus, Colorado Republicans proposed a fetal homicide bill.[373] The bill was defeated on May 4, 2015.[374] In January 2018, South Carolina attempted to pass the "Personhood Act" which was designed to directly challenge *Roe v. Wade* by stating that life begins at fertilization.[375] However, it was defeated in the state Senate on May 1, 2018.[376] While it is evident that there is an effort to establish fetal personhood by various supporters and politicians, there has yet to be enough support to pass legislation that would contradict *Roe v. Wade* in regards to fetal personhood.

VII. CONCLUSION

Following *Planned Parenthood v. Casey*, "legitimate state interests" have been used to justify bans on abortion based on fetal development, women's reasons for obtaining abortions, and the medical procedure used, and restrictions on access to

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367. *See, e.g.*, Aaron Blake, *Anti-Abortion 'Personhood' Amendment Fails in Mississippi*, WASH. POST (Nov. 8, 2011), http://www.washingtonpost.com/blogs/the-fix/post/anti-abortion-personhood-amendment-fails-in-mississippi/2011/11/08/gIQASRPd3M_blog.html.

368. *See* Jacques Berlinerblau, *Why the Mississippi Personhood Amendment Self-Imploded*, WASH. POST (Nov. 9, 2011), http://www.washingtonpost.com/blogs/georgetown-on-faith/post/why-the-mississippi-personhood-amendment-self-imploded/2011/11/09/gIQApQqI5M_blog.html.

369. Anita Kumar, *Lawmaker Files "Personhood" Bill in the House*, WASH. POST (Nov. 21, 2011), http://www.washingtonpost.com/blogs/virginia-politics/post/lawmaker-files-personhood-bill-in-the-house/2011/11/21/gIQArEFGjN_blog.html.

370. Sam Favate, *Virginia Senate Drops 'Personhood' Bill*, WALL ST. J. (Feb. 24, 2012 4:37 PM), http://blogs.wsj.com/law/2012/02/24/virginia-senate-drops-personhood-bill/.

371. Esm¨Deprez, *North Dakota Lawmakers Send 'Personhood' Amendment to Voters*, BLOOMBERG (Mar. 22, 2013 5:28 PM), http://www.bloomberg.com/news/2013-03-22/north-dakota-lawmakers-send-personhood-amendment-to-voters.

372. Tierney Sneed, *State Anti-Abortion Measures Meet Mixed Fates*, U.S. NEWS (Nov. 5, 2014), http://www.usnews.com/news/articles/2014/11/05/colorado-north-dakota-reject-personhood-while-tennessee-approves-anti-abortion-measure.

373. Valerie Richardson, *Colorado Dems Defeat Fetal Homicide Bill Filed After Grisly Attack on Pregnant Woman*, WASH. TIMES (May 5, 2015), http://www.washingtontimes.com/news/2015/may/5/colorado-democrats-defeat-fetal-homicide-bill-file/.

374. *See id.*

375. Grace Guarnieri, *South Carolina 'Personhood Act' that Could Ban Abortions Aims to Overturn* Roe v. Wade, NEWSWEEK (Feb. 21, 2018 3:02 PM), https://www.newsweek.com/south-carolina-personhood-act-abortions-815131.

376. *See* Tim Smith, *SC Senate Defeats Proposal That Would Have Banned All Abortions*, THE STATE (May 2, 2018, 6:57 AM), https://www.thestate.com/news/politics-government/article210273854.html.

abortion such as targeted regulations of abortion providers, waiting periods, counseling, and ultrasound requirements, parental involvement laws.

In *Whole Woman's Health v. Hellerstedt*, the Court held that when a state passes an abortion regulation that is justified by the state's legitimate interest in protecting women's health, the degree to which women's health is likely to be protected by the new regulation must be proportionate to the burden on the provision of abortion care created by compliance with the regulation.[377] The impact of *Hellerstedt* remains to be seen,[378] with the pro-choice rhetoric gained from the opinion seemingly dashed by the election of President Donald Trump, who pledged on the campaign trail that he would not only outlaw abortion but make sure that women who chose to have abortions are punished.[379] Although the aforementioned comment was subsequently recanted,[380] President Trump has repeatedly referenced overturning *Roe* via his Supreme Court nominations.[381] Time will tell whether the nominations and subsequent confirmations of Justices Neil Gorsuch and Brett Kavanaugh put *Roe* and its precedential value at risk.[382] One thing remains certain: the legal framework surrounding abortion will continue to be a highly contentious topic in the legislative and judicial branches at both the federal and state level.

377. 136 S. Ct. 2292, 2298 (2016).

378. *See generally* Linda Greenhouse & Reva B. Siegel, *The Difference A Whole Woman Makes: Protection for the Abortion Right After* Whole Woman's Health, 126 YALE L. J. FORUM 149 (2016).

379. *See* Matt Flegenheimer & Maggie Haberman, *Donald Trump, Abortion Foe, Eyes 'Punishment' for Women, Then Recants*, N.Y. TIMES (Mar. 30, 2016), https://www.nytimes.com/2016/03/31/us/politics/donald-trump-abortion.html.

380. *Id.*

381. John Wagner, *Trump Calls* Roe v. Wade *a 'Controversy That I'm Going to Leave to the Courts'*, WASH. POST (Sept. 24, 2018) https://www.washingtonpost.com/politics/trump-calls-roe-v-wade-a-controversy-that-im-going-to-leave-to-the-courts/2018/09/24/c2da5be6-c002-11e8-9005-5104e9616c21_story.html?utm_term=.22f5869dc961.

382. *Trump Chooses Brett Kavanaugh for the Supreme Court*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/us/politics/trump-supreme-court-nominee.html.