ARTICLES

ABORTION

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I. INTRODUCTION

The landmark decision of *Roe v. Wade* prompted an escalation of the abortion rights dialogue of the 1960s, propelled on one side by the women's movement and concerns about the health implications of illegal abortions and population

growth, and on the other by pressure from the Catholic Church and political parties.[1]

Roe v. Wade established the right to abortion in the United States.[2] However, since the 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 January 1, 2021, at least twenty-three states have imposed stringent standards on abortion clinics,[4] including mandated counseling designed to dissuade people[5] from obtaining abortions,[6] required waiting periods before an abortion,[7] required parental involvement before a minor obtains an abortion,[8] and limited use of state Medicaid funds to pay for medically necessary abortions,[9] all of which narrow the protections of abortion rights under the *Casey* standard.[10]

Twenty-four years after *Casey*, in *Whole Woman's Health v. Hellerstedt*, the Court upheld the undue burden standard and used it to strike down a stringent Texas state law that required abortion providers to obtain admitting privileges at a local hospital and abortion clinics to make significant structural modifications

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

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

3. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 837 (1992).

4. *See State Laws and Policies: Targeted Regulation of Abortion Provider*s, GUTTMACHER INST. (Jan. 1, 2021), https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers.

5. The *Georgetown Journal of Gender and the Law* acknowledges that people of all gender identities may seek abortion and thus are also forced to navigate the same restrictive thicket of policies surrounding abortion. Abortion is not just a cisgender women's issue, but that of any pregnant person, independent of their gender identity. Because the vast majority of case law and statutory code regarding abortion refers exclusively to cisgender women, this Article will use the terms "woman" or "women" when directly discussing statutes and case law that refer only to cisgender women, and otherwise seek to use more gender-inclusive language. While a more robust discussion of the particular difficulties that trans and nonbinary people face in obtaining abortion is beyond the scope of this Article, it is worth Noting that particularly because most laws and decisions only refer to cisgender women, those who are not cisgender may experience additional difficulties in seeking abortion care. *See generally* Heidi Moseson et al., *The Imperative for Transgender and Gender Nonbinary Inclusion*, 135 OBSTETRICS & GYNECOLOGY 1059, 1059–68 (2020); Caitlin van Horn, *Trans and Nonbinary People Get Abortions Too*, ALLURE (July 30, 2019), https://www.allure.com/story/abortion-gender-neutral-language-transgender-men-nonbinary.

6. *See State Laws and Policies: Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Jan. 1, 2021), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion.

7. *See id.*

8. *See State Laws and Policies: Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (Jan. 1, 2021), https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions.

9. *See State Laws and Policies: State Funding of Abortion Under Medicaid*, GUTTMACHER INST. (Jan. 1, 2021), https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid.

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

to meet the standards of an ambulatory surgical center.[11] The victory in *Whole Woman's Health* was somewhat limited by the Supreme Court's opinion of *June Medical Services v. Russo*.[12] Chief Justice Roberts's concurrence in that case, which found the Louisiana restriction on clinics to be an undue burden based on the precedent of *Whole Woman's Health*, called for a reevaluation of *Whole Woman's Health* itself.[13] Chief Justice Roberts argued that instead of balancing benefits and burdens as was done in *Whole Woman's Health*, the Court should revert to a two-pronged analysis of (a) whether the law imposes a substantial obstacle and (b) whether said restriction passes rational basis review.[14] Given the newly-minted conservative 6-3 majority on the Court,[15] further restrictions on the right to an abortion, as seen in Chief Justice Roberts's concurrence, should be anticipated. It will be more difficult for abortion rights activists to overcome the "rational basis" test to limit regulations.

This article examines various developments in abortion law between 1973 and 2020 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 *June Medical Services*. Part II also describes the current landscape 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 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."[16]

Finally, in Part VII, this article reflects on the importance of the Supreme Court's decision to take up *June Medical Services* and what the case means for abortion rights moving forward, especially given recent changes in the Supreme Court's composition. In the past two years, Justice Kavanaugh was nominated

11. *Id.* at 2300.

12. Gretchen Borchelt, *Symposium: June Medical Services v. Russo: When a "Win" is Not a Win*, SCOTUSBLOG (June 30, 2020, 12:31 PM), https://www.scotusblog.com/2020/06/symposium-june-medical-services-v-russo-when-a-win-is-not-a-win/.

13. June Medical Servs. v. Russo, 140 S. Ct. 2103, 2135–36 (2020) (Roberts, C.J., concurring) ("Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts.").

14. *Id.* at 2135.

15. Joan Biskupic, *The Supreme Court Hasn't Been This Conservative since the 1930s*, CNN: POLITICS (Sept. 26, 2020, 6:33 PM), https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html.

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

and appointed to the bench following Justice Kennedy's retirement.[17] Occasionally claiming to be an institutionalist, Justice Kavanaugh respects the jurisprudence of *Roe v. Wade*, but has affirmed that he would rule favorably on greater abortion restrictions[18] and signaled the possibility of overruling *Roe* as well.[19] Justice Ruth Bader Ginsburg, a stalwart champion of women's rights, passed away in October of 2020, raising the pro-choice movement's concerns regarding the future of women's rights and autonomy.[20] With Justice Ginsburg's seat open, President Trump nominated Seventh Circuit Judge Amy Coney Barrett to the bench, with Majority Leader Mitch McConnell (R-KY) and Chairman of the Judiciary Senator Lindsey Graham (R-SC) pushing for an expedited nomination process and ultimately bringing about her confirmation on October 26, 2020.[21] Justice Barrett was confirmed by a 52-48 party-line vote,[22] recalling the highly partisan 50-48 vote seen during Justice Kavanaugh's controversial confirmation.[23] During her confirmation hearings, then-Judge Barrett noted that *Griswold v. Connecticut* would likely not be overturned but refused to say whether it was rightly decided.[24] *Griswold* laid the groundwork for *Roe v. Wade*; if the logic of that opinion is called into question, as some are suggesting now-Justice Barrett is doing, *Roe* may come under fire as well under the theory that the Fourteenth Amendment does not contain a privacy right.[25]

II. CONSTITUTIONAL ABORTION RIGHTS

In *Roe v. Wade*, the Supreme Court held that the right to personal privacy, guaranteed by the Constitution, included the right to choose to terminate a

17. Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 16, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html.

18. Joan Biskupic, *Roe v. Wade is "Precedent," Kavanaugh Says, but There's More to the Future of Abortion*, CNN (Sept. 6, 2018, 11:43 AM), https://www.cnn.com/2018/09/05/politics/kavanaugh-roe-v-wade-planned-parenthood-casey/index.html.

19. Robert Barnes & Michael Kranish, *Kavanaugh Advised Against Calling Roe v. Wade "Settled Law" While a White House Lawyer*, WASH. POST (Sept. 6, 2018, 11:51 AM), https://www.washingtonpost.com/politics/courts_law/kavanaugh-advised-against-calling-roe-v-wade-settled-law-while-a-white-house-lawyer/2018/09/06/f30216dc-b1df-11e8-a20b-5f4f84429666_story.html.

20. Anna North, *What Ruth Bader Ginsburg's Death Means for the Future of Abortion Rights*, VOX (Sept. 19, 2020, 2:50 PM), https://www.vox.com/21446616/ruth-bader-ginsburg-and-abortion-roe-wade.

21. Jordan Carney, *GOP Senate Confirms Trump Supreme Court Pick to Succeed Ginsburg*, THE HILL (Oct. 26, 2020, 8:06 PM), https://thehill.com/homenews/senate/522867-gop-senate-confirms-trump-supreme-court-pick-to-succeed-ginsburg.

22. *Id.*

23. Stolberg, *supra* note 17.

24. Samantha Raphelson, *Pressed on Landmark Contraception Case, Barrett Again Declines to Answer*, NPR (Oct. 14, 2020, 3:42 PM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/14/923713602/pressed-on-landmark-contraception-case-barrett-again-declines-to-answer.

25. Jerry Lambe, *Amy Coney Barrett's Refusal to Label Landmark Contraception Case a "Super-Precedent" Seen as "Major Tell,"* LAW & CRIME (Oct. 14, 2020, 4:56 PM), https://lawandcrime.com/supreme-court/amy-coney-barretts-refusal-to-label-landmark-contraception-case-a-super-precedent-seen-as-major-tell/.

pregnancy via abortion.[26] *Roe* grounded the right to abortion in the right to privacy found in the penumbras of the Bill of Rights recognized in *Griswold v. Connecticut*[27] and *Eisenstadt v. Baird*.[28] 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.[29] These interests influenced the development of the trimester framework, based on the development stage of the fetus for determining whether state regulation was permissible.[30] Under this framework, states gain more regulatory authority as a pregnancy progresses.[31]

The Court next addressed abortion in *Planned Parenthood v. Danforth*, in which it unanimously upheld an informed consent provision that applied to all abortions, including those performed in the first trimester.[32] The Court determined that it was "desirable and imperative" for women to make the decision to terminate a pregnancy "with full knowledge of its nature and consequences."[33] 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.[34] The written consent requirement in *Danforth* was followed by a legislative trend toward creating 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.[35]

The Court upheld the Hyde Amendment in *Harris v. McRae*.[36] 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

26. Roe v. Wade, 410 U.S. 113, 153 (1973).

27. Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965); *Roe*, 410 U.S. at 129.

28. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); *Roe*, 410 U.S. at 129.

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

30. 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 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.

31. *See id.* at 164–65.

32. 428 U.S. 52, 53–54 (1976) (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) ("The reporting and record keeping requirements . . . are not constitutionally offensive in themselves").

33. *Id.* at 67.

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

35. Hyde Amendment, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976); s*ee also* Pub. L. No. 116-94, 133 Stat. 2579 (2019).

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

medically necessary abortions.[37] The Court rejected these arguments.[38] 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.[39] Rather, the subsidization encouraged alternative activity deemed to be in the best public interest.[40] 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.[41] Therefore, the Hyde Amendment's prohibition against the use of federal Medicaid distributions to fund most abortion procedures was found constitutional.

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;[42] (2) a hospitalization requirement for all second- and third-trimester abortions;[43] (3) a state requirement mandating that doctors report medical information, identifying information, and reasons for performing all post-viability abortions;[44] (4) sections of a state ordinance requiring clinics to provide women with information about pregnancy before giving consent;[45] 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."[46]

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 the

37. *Id.* at 304–05.

38. *Id.* at 308.

39. *Id.* at 322–23.

40. *Id.* at 298–99.

41. *Id.*

42. *See* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 450 (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).

43. *Id.* 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).

44. *See* Thornburgh v. Am. Coll. of Obstetricians & 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 Casey*, 505 U.S. 833.

45. *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).

46. *Thornburgh*, 476 U.S. at 768–69.

right to an abortion.[47] In the seminal case *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, the Court again affirmed the right to abortion.[48] Nonetheless, it discarded *Roe*'s trimester framework holding that it "misconceive[d] the nature of the pregnant woman's interest; and . . . undervalue[d] the State's interest in potential life."[49] The Court adopted the new "undue burden test."[50] Only state regulations that imposed an undue burden on the ability to obtain an abortion encroached "into the heart of the liberty protected by the Due Process Clause.'"[51] Basing this decision on the Due Process Clause's guarantee of liberty marked a shift away from the fundamental right-to-privacy framework the Court established in *Roe*.[52]

With this new understanding, the Court sought to balance a woman's constitutionally-protected liberty against the state's interest in the woman's health and the potential life of the unborn fetus.[53] *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."[54] 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

47. *See Casey*, 505 U.S. at 873–79.

48. *See id.*

49. *Id.* at 873.

50. 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 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 Casey*, 505 U.S. 833.

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

52. *See id.* at 846 (discussing how the shift in focus to substantive due process was part of a modern trend resurrecting Mugler v. Kansas, 123 U.S. 623, 660–61 (1887)); *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).

53. *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).

54. *Id.* at 877.

would excuse compliance with other provisions, and a reporting requirement imposed on abortion clinics and their physicians; it then invalidated a spousal consent requirement.[55] 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.[56] The Court explained that the decision to have an abortion would be "more informed and deliberate" after a period of reflection.[57] The Court did not address the potential negative consequences that additional requirements such as a waiting period would create for those seeking abortions.[58]

In addition to the Court's new undue burden test, the *Casey* Court partially reaffirmed *Danforth* by striking down the spousal notification requirement.[59] The Court held that the requirement was facially unconstitutional because it imposed a substantial obstacle for the "significant number" of women who chose not to inform their husbands regarding their decision to terminate a pregnancy.[60] 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.[61] *Casey* affirmed that the right to have an abortion is an individual right that can be exercised 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.[62] As Chief Justice Rehnquist noted in his concurring opinion, by giving greater weight to states' interests, *Casey's* undue burden standard

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55. *Id*. at 887, 898–901.

56. *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 the twenty-four-hour waiting period is unconstitutional).

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

58. 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*, 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 885–87. 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*.

59. *Casey*, 505 U.S. at 898.

60. *See id*. at 893–94.

61. *See id*. at 898.

62. *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).

conflicted with *Roe's* central holding that abortion is a fundamental right.[63] The *Casey* decision disappointed many reproductive rights supporters.[64] 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.[65]

Abortion providers challenged this act as facially unconstitutional for vagueness, because it was unclear what the law banned, in *Gonzales v. Carhart*.[66] 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.[67] 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.[68]

The Supreme Court found the PBABA constitutional with Justice Kennedy writing for the *Gonzales* majority.[69] 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.[70] 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.[71] 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*.[72] The petitioners in *Whole Woman's Health* 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.[73] 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.[74] The *Whole Woman's Health* Court found Texas's regulations to be undue burdens that created a barrier to an abortion by forcing a significant number of Texas abortion clinics that could not adhere to the new

63. *See Casey*, 505 U.S. at 954 (Rehnquist, C.J., concurring in part and dissenting in part).
64. *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.
65. *See* Pub. L. No. 108-105, 117 Stat. 1206 (2003) (codified at 18 U.S.C.A. § 1531(a)).
66. Gonzales v. Carhart, 550 U.S. 124, 147 (2007).
67. *Id.* at 147.
68. *Id.* at 144.
69. *Id.* at 168.
70. *Id.* at 145–46 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992)).
71. *Id.*
72. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).
73. *Id.* at 2300.
74. *Id.* at 2300–01.

requirements to close their doors.[75] Although the statute echoed the language of *Casey* stating that increased driving distance for patients was not an "undue burden,"[76] the Court found that the combination of increased driving distances and mass clinic closures was an undue burden.[77] Furthermore, because the surgical center regulations provided no health benefits for women,[78] the Texas statutes 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 pre-viability abortion" without conferring "medical benefits sufficient to justify the burdens," the statute was impermissible.[79]

In June 2020, the Supreme Court decided in *June Medical Services LLC v. Russo* to strike down the Louisiana Unsafe Abortion Protection Act 620, which was almost identical to the Texas admitting privilege law at issue in *Whole Woman's Health*. The Louisiana Act at issue in *June Medical Services* required any physician who performs or induces an abortion to hold "active admitting privileges at a hospital . . . not further than thirty miles from the location at which the abortion is performed or induced."[80] In 2016, when the Supreme Court struck down the nearly-identical Texas law in *Whole Woman's Health,* Justice Kennedy had joined the Court's four liberal members for a majority.[81] The decision was made by an eight-member Court due to the death of Justice Antonin Scalia, who was succeeded by Justice Neil Gorsuch the next year.[82] Justice Anthony Kennedy then retired in 2018 and was replaced by a second Trump appointee, Justice Brett Kavanaugh.[83] The changes in the composition of the Court led to speculation that *June Medical Services* could be used to narrow *Whole Woman's Health*, because the Court chose to consider an abortion regulation in *June Medical Services* nearly identical to the one considered only a few years previously in *Whole Woman's Health*.[84]

Before the Supreme Court granted certiorari, the Fifth Circuit had reversed the District Court upholding Act 620, stating that there was no evidence that Louisiana facilities would close as a result of the Act nor would it "impose a

75. *Id*. at 2313.

76. *Casey*, 505 U.S. at 885–87.

77. *Whole Woman's Health*, 136 S. Ct. at 2300, 2313.

78. *Casey*, 505 U.S. at 895 (discussing previous case law in which regulations were upheld because it would be beneficial for the person seeking the abortion, such as upholding parental consultants for minors seeking abortions).

79. *Whole Woman's Health*, 136 S. Ct. at 2300.

80. LA. STAT. ANN. § 40:1061.10 (2016).

81. Adam Liptak, *Supreme Court Strikes Down Louisiana Abortion Law, With Roberts the Deciding Vote*, N.Y. TIMES (June 29, 2020), https://www.nytimes.com/2020/06/29/us/supreme-court-abortion-louisiana.html.

82. *Id*.

83. *Id*.

84. *See id*.

substantial burden on a large fraction of women."[85] To come to this decision the Fifth Circuit disregarded the clear error standard by invasively reviewing and undermining the district court's factual findings which led to its determination that the law required a different result.[86] In Justice Kavanaugh's dissent from the grant of the stay, which gave short term reprieve from the enforcement of the law, he asserted that the case would largely turn on the "intensely factual" question of whether the law would actually impose an undue burden,[87] foreshadowing the shift in the court since the *Whole Woman's Health* decision.

In *June Medical Services,* a four-member liberal plurality joined by Chief Justice Roberts's lone concurrence held the Louisiana law was unconstitutional. Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, reiterated the standard set in *Casey* and *Whole Woman's Health* that courts are required "independently to review the legislative findings upon which an abortion-related statute rests and to weigh the law's 'asserted benefits against the burdens' it imposes on abortion access."[88] The Justices found that the district court had appropriately applied this standard and that its significant factual findings on both the burdens and the benefits have substantial evidentiary support and none is "clearly erroneous."[89] Thus, the Court found that the district court's factual and legal determinations must be upheld, the Louisiana law created a "substantial obstacle" to women seeking abortions, the law offered no significant health-related benefits, and that the law consequently imposed an "undue burden" on women's constitutional right to choose to have an abortion.[90] Writing alone, Chief Justice Roberts reiterated his disagreement with the *Whole Woman's Health* holding but concurred in the judgment because stare decisis "require[d]" the Court "to treat like cases alike."[91]

The four dissenting Justices each filed a separate opinion, underscoring the conservative side of the Court's hostility towards abortion rights. Justice Thomas dissented by first arguing that the plaintiffs did not have standing because abortion providers are a third party challenging health and safety regulations on behalf of their patients.[92] Justice Thomas further suggested that the Court's abortion precedent is grievously wrong and should be overruled because it creates the right to abortion without any support from the Constitutional text.[93] Justice Thomas

85. June Med. Servs., L.L.C. v. Gee, 905 F.3d 787, 791 (5th Cir. 2018), *cert. granted*, 140 S. Ct. 35 (2019), *rev'd sub nom.* June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

86. Fadwa Hammoud, *Symposium: June Medical Services—An Opportunity to Reject Invasive Appellate Review*, SCOTUSBLOG (Jan. 28, 2020, 1:30 PM), https://www.scotusblog.com/2020/01/symposium-june-medical-services-an-opportunity-to-reject-invasive-appellate-review/.

87. *See* June Med. Servs., L.L.C. v. Gee, 139 S. Ct. 663, 664 (2019) (Kavanaugh, J., dissenting from Court's stay order).

88. *June Med. Servs., L.L.C.*, 140 S. Ct. at 2112.

89. *See id.* at 2132.

90. *Id.*

91. *Id.* at 2133–34 (Roberts, C.J., concurring).

92. *See id.* at 2142 (Thomas, J., dissenting).

93. *See id.* at 2149.

concluded that the Court had neither the jurisdiction nor the constitutional authority to declare Louisiana's "duly enacted law" unconstitutional.[94] Justice Alito also filed a dissenting opinion, in which Justices Gorsuch, Thomas, and Kavanaugh joined in part, arguing that the majority misused *stare decisis* and invoked an inapplicable standard of appellate review distorting the record.[95] Justice Gorsuch also dissented, arguing the majority exceeded its judicial authority.[96] Finally, Justice Kavanaugh dissented, first pointing out that five members of the court rejected the *Whole Woman's Health* cost-benefit balancing standard and stating that he agreed with Justice Alito that the case should have been remanded for additional factfinding.[97]

Initially, the decision was applauded by abortion rights activists as a win that a conservative Court declined to overturn *Roe v. Wade*.[98] Specifically, activists applauded Chief Justice Roberts's concurrence, despite his dissent in *Whole Woman's Health* just four years prior and his reputation as a staunch conservative.[99] However, legal experts were quick to realize that the Chief Justice was not a hero for pro-choice advocates, but had hewed closely to principles of *stare decisis* while still declaring *Whole Woman's Health* was wrongly decided.[100] The concurrence opened the door for incremental rulings that could slowly chip away at the Court's long-standing reproductive rights precedent.[101]

On August 7, 2020, less than two months after Chief Justice Roberts's concurrence in *June Medical Services*, the Eighth Circuit made the first attempt at interpreting the Supreme Court's decision in *Hopkins v. Jegley*.[102] The Eastern District of Arkansas granted a preliminary injunction preventing the enforcement of four Arkansas laws that regulate abortion: (1) the Arkansas Unborn Child Protection from Dismemberment Abortion Act; (2) the Sex Discrimination by Abortion Prohibition Act; (3) an Amendment concerning the disposition of fetal remains; and (4) an amendment concerning the maintenance of forensic samples from abortions performed on a child.[103] Collectively, the Arkansas legislation would ban dilation and evacuation, which is the safest and most common method of abortion after the first trimester, require a doctor to obtain a patient's full medical history before performing an abortion, mandate that doctors call the police

94. *See id.*

95. *See id.* at 2153 (Alito, J., dissenting).

96. *See id.* at 2171 (Gorsuch, J., dissenting).

97. *See id.* at 2182 (Kavanaugh, J., dissenting).

98. *See* Dahlia Lithwick & Mark Stern, *John Roberts' Stealth Attack on Abortion Rights Just Paid Off*, SLATE (Aug. 7, 2020), https://slate.com/news-and-politics/2020/08/john-roberts-8th-circuit-abortion-rights-arkansas.html.

99. *See id.*; Editorial Board, *John Roberts is no Pro-Choice Hero*, N.Y. TIMES (June 29, 2020), https://www.nytimes.com/2020/06/29/opinion/supreme-court-abortion.html.

100. *See June Med. Servs.*, 140 S. Ct. at 2133–34 (Roberts, C.J., concurring).

101. *See John Roberts is no Pro-Choice Hero*, *supra* note 99.

102. *See* Mary Ziegler, *Courts are Already Cutting off Abortion Access—Without Saying a Word about Roe*, WASH. POST (Aug. 17, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/08/17/jegley-undue-burden-roe/.

103. *See* Hopkins v. Jegley, 968 F.3d 912, 914 (8th Cir. 2020).

any time anyone under the age of seventeen has an abortion, and require that after every procedure both genetic parents each consent to the state's chosen methods for disposing of fetal remains.[104] The Eighth Circuit interpreted Chief Justice Roberts's concurring opinion in *June Medical Services* to mean that the appropriate question under *Casey* is whether the law poses a substantial obstacle or burden, rather than to balance whether the benefits outweighed the burdens.[105] The Eighth Circuit further discussed a point from the Kavanaugh dissent recognizing that five members of the Supreme Court rejected the *Whole Woman's Health* cost-benefit standard and found the District Court's use of it to be inappropriate.[106] The Eighth Circuit vacated the district court's preliminary injunction and remanded for reconsideration "in light of Chief Justice Roberts's separate opinion in *June Medical Services*, which is controlling."[107] This decision illuminates the impact of Chief Justice Roberts's concurrence, transforming the undue burden test by making it far less protective of abortion rights.[108] Before *June Medical Services* the courts took a hard look at all the evidence surrounding a law's balance of benefit and burdens in a given case, but now if legislators can claim that a matter is scientifically uncertain, the courts can give them more room to regulate abortion by applying the less-stringent test.[109] *Jegley* is a preview of how the courts could further narrow abortion rights by simply continuing to redefine what counts as an "undue burden."[110]

Not long after the *June Medical Services* decision was published, Justice Ruth Bader Ginsburg, "the second woman to serve on the Supreme Court and a pioneering advocate for women's rights," passed away.[111] President Trump quickly moved to replace Justice Ginsburg, only weeks before he was up for re-election. His third Supreme Court nominee, Judge Amy Coney Barrett, was confirmed by Senate Republicans in a vote split along party lines on October 26, 2020.[112] It was the first time in 151 years that a Supreme Court Justice "was confirmed without the support of a single member of the minority party."[113] Many fear that the new Justice will undermine Justice Ginsburg's legacy, particularly when it comes to women's rights and reproductive rights.[114] Justice Barrett reviewed abortion

104. *See* Ziegler, *supra* note 102.
105. *See Jegley*, 968 F.3d at 915.
106. *See id*.
107. *Id*. at 916.
108. *See* Ziegler, *supra* note 102.
109. *See id*.
110. *See id*.
111. *See* Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html.
112. *See* Clare Foran & Ted Barrett, *Senate Confirms Trump's Supreme Court Nominee a Week Ahead of Election Day*, CNN (Oct. 26, 2020, 9:44 PM), https://www.cnn.com/2020/10/26/politics/senate-confirmation-vote-supreme-court-amy-coney-barrett/index.html.
113. *See* Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html.
114. *See* Foran & Barrett, *supra* note 112.

restriction cases while sitting on the Court of Appeals for the Seventh Circuit.[115] In that time she has "demonstrated her willingness to defer to state legislatures passing many types of abortion restrictions,[116] including two Indiana laws: the first would ban abortions sought solely because of the sex or disability of a fetus and the second would require abortion providers to bury or cremate fetal remains.[117] She also voted in favor "of a law that would mandate doctors to inform the parents of a minor seeking an abortion, with no exceptions."[118] Justice Barrett wrote in a 2013 *Texas Law Review* article, "If anything, the public response to controversial cases like Roe reflects public rejection of the proposition that stare decisis can declare a permanent victor in a divisive constitutional struggle rather than desire the precedent remain forever unchanging."[119] Even without a direct challenge to *Roe*, the Supreme Court's increasingly conservative tilt coupled with Chief Justice Roberts's open door opinion in *June Medical Services* have created the ability for it to further chip away at abortion rights.

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.[120] 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 person'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, may

115. *Amy Coney Barrett: The Supreme Court Nominee on Abortion, Healthcare and Her Faith*, BBC (Oct. 13, 2020), https://www.bbc.com/news/election-us-2020-54512678.

116. *See* Mary Ziegler, *Amy Coney Barrett's Supreme Court Confirmation Jeopardizes more than Abortion*, NBC, (Oct. 27, 2020, 10:02 AM), https://www.nbcnews.com/think/opinion/amy-coney-barrett-s-supreme-court-confirmation-jeopardizes-more-abortion-ncna1244568.

117. *See* Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES, (Oct. 15, 2020), https://www.nytimes.com/article/amy-barrett-views-issues.html.

118. *See Amy Coney Barrett: The Supreme Court Nominee on Abortion, Healthcare and Her Faith*, *supra* note 115.

119. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1727 (2013).

120. *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. REV. 9 (2014), https://www.guttmacher.org/gpr/2014/03/surge-state-abortion-restrictions-puts-providers-and-women-they-serve-crosshairs.

ultimately have the same impact as "bans in reality" on people's ability to obtain abortion care.[121]

1. Bans on Fetal Development

Later-term abortions are rare[122] in part because of state prohibitions of the practice. Twenty states prohibit abortion post-viability and one state prohibits abortion in the third trimester.[123] Twenty-two states impose prohibitions on abortions even earlier in pregnancy.[124] Seventeen state legislatures have passed or introduced bills that ban abortions at twenty weeks based on purported evidence of fetal pain.[125] 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.[126]

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.[127] 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*," which forbade states from proscribing abortion care pre-viability.[128] Despite the Ninth Circuit's holding in *Isaacson*, many states have attempted to ban abortions based on the gestational age of the fetus. All of these bans have been either temporarily or permanently enjoined by courts. The pre-viability bans range anywhere from eight weeks to twenty-two weeks from last menstrual period (LMP).[129] The earliest in

121. *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 95 (2017), https://www.guttmacher.org/journals/psrh/2017/04/barriers-abortion-care-and-their-consequences-patients-traveling-services.

122. 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. Tara C. Jatlaoui et al., *Abortion Surveillance—United States, 2014*, 66 MORBIDITY & MORTALITY WKLY. REP. 24, 24 (2017), https://www.cdc.gov/mmwr/volumes/66/ss/pdfs/ss6624-H.PDF.

123. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (last updated Mar. 1, 2021), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions.

124. *See id.*

125. *See State Bans on Abortion Throughout Pregnancy*, *supra* note 123; *see also, 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).

126. *Diagnosis of Birth Defects*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/birthdefects/diagnosis.html (last visited Feb. 11, 2021).

127. ARIZ. REV. STAT. ANN. § 36-2159 (2020) (prohibiting abortions after twenty weeks of gestational age except in cases of medical emergency).

128. 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.

129. *See State Bans on Abortion Throughout Pregnancy*, *supra* note 123.

fetus development a state has banned abortion is Missouri, which attempted to ban abortion at eight weeks.[130] Two more states, Louisiana[131] and Mississippi,[132] attempted to ban abortion at fifteen weeks. The Fifth Circuit Court of Appeals in *Jackson Women's Health Organization v. Dobbs* ruled the fifteen weeks from LMP bans unconstitutional in Louisiana and Mississippi.[133] Arkansas[134] and Utah[135] passed abortion bans at the eighteen-week point. And finally, Arizona[136] and North Carolina[137] attempted to ban abortion at the twenty-week point.

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 six weeks[138] to twelve[139] weeks. In 2013, Arkansas passed Act 103, a ban on abortions at twelve weeks.[140] The ban was one of the strictest in the nation; many women may not even know they are pregnant after twelve weeks of gestation.[141] The Eighth Circuit Court of Appeals permanently enjoined Arkansas's ban in *Edwards v. Beck*.[142] Even earlier than Arkansas' Act 103 was North Dakota's six-week abortion ban, signed into law in March 2013.[143] 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.[144] This ban was also

130. MO. ANN. STAT. §188.056 (West 2020) (temporarily enjoined by Reprod. Health Servs. of Planned Parenthood v. Parson, 389 F. Supp. 3d 631, 640 (W.D. Mo. 2019)).

131. LA. STAT. ANN. § 14:87 (West 2019). The Louisiana abortion ban after fifteen weeks never went into effect because it was conditioned on the Fifth Circuit upholding a similar ban in Mississippi. The Fifth Circuit enjoined the Mississippi law from taking effect. *See* Jackson Women's Health Org. v. Dobbs, 951 F.3d 246, 248 (5th Cir. 2020).

132. MISS. CODE ANN. § 41-41-191 (West 2020), *invalidated by Jackson Women's Health Org*., 951 F.3d at 248.

133. *Jackson Women's Health Org*., 951 F.3d at 248.

134. ARK. CODE ANN. § 20-16-2004 (West 2020), *invalidated by* Little Rock Fam. Planning Servs. v. Rutledge, 398 F. Supp. 3d 330, 424 (E.D. Ark. 2019).

135. UTAH CODE ANN. § 76-7-302.5 (West 2020). The Utah gestational age abortion limit has been temporarily enjoined as a court case moves forward as to its constitutionality. Dennis Romboy, *Judge Allows Legal Challenge to Utah 18-week Abortion Ban to Move Ahead*, DESERET NEWS (Jul. 14, 2020), https://www.deseret.com/utah/2020/7/14/21324684/abortion-ban-utah-law-federal-lawsuit-supreme-court-louisiana-legal-challenge-18-week.

136. ARIZ. REV. STAT. ANN. § 36-2159 (2020), *invalidated by* Isaacson v. Horne, 716 F.3d 1213, 1231 (9th Cir. 2012).

137. N.C. GEN. STAT. ANN. § 14-45.1 (West 2020), *invalidated by* Bryant v. Woodall, 363 F. Supp. 3d 611, 631 (M.D.N.C. 2019).

138. N.D. CENT. CODE ANN. § 14-02.1-05.2 (West 2019) (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, 775 (8th Cir. 2015).

139. ARK. CODE ANN. § 20-16-1304 (West 2017) (prohibiting abortions after detection of fetal heartbeat or twelve weeks gestation), *invalidated by* Edwards v. Beck, 786 F.3d 1113 (8th Cir. 2015).

140. § 20-16-1304.

141. *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/.

142. *Edwards*, 786 F.3d 1113.

143. N.D. CENT. CODE ANN. § 14-02.1-05.2 (West 2019), *invalidated by MKB Mgmt. Corp*., 795 F.3d 768.

144. *Id.*

permanently enjoined by the Eighth Circuit Court of Appeals in *MKB Management Corporation v. Stenehjem*.[145] Iowa enacted a similar statute that was to become effective July 1, 2018.[146] This ban was permanently enjoined, much like the Arkansas and North Dakota bans, in *Planned Parenthood of the Heartland, Inc. v. Reynolds*.[147] Multiple other states have attempted to pass fetal heartbeat bans, but courts have continuously struck them down as unconstitutional. These states include Ohio,[148] Georgia,[149] Louisiana,[150] Kentucky,[151] and Mississippi.[152] The Louisiana ban would only have gone into effect if the Mississippi ban was upheld in federal court, but it was not.[153] 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.[154]

2. Bans Based on the Reason for the Abortion

Bans based on the reason for an abortion are especially contentious across the country. These bans limit abortion access if the reason a person seeks an abortion is invalid in the eyes of the state legislature. Critics often point to these bans as attempts to restrict otherwise constitutional abortion access. Reason-based bans typically place severe penalties on abortion providers unless they affirmatively question their patients' motivations for an abortion.[155]

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.[156] 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.[157] Another fear was that Asian

145. *MKB Mgmt. Corp.*, 795 F.3d 768.

146. IOWA CODE ANN. § 146C.2 (West 2021); *invalidated by* Planned Parenthood of the Heartland v. Reynolds, No. EQCE83074, 2019 WL 312072 (N.D. Iowa Jan. 22, 2019).

147. *Planned Parenthood of the Heartland*, 2019 WL 312072.

148. OHIO REV. CODE ANN. §219.196 (West 2020), *invalidated by* Preterm-Cleveland v. Yost, 394 F. Supp. 3d 796 (S.D. Ohio 2019).

149. GA. CODE ANN. §31-9b-2 (West 2020), *invalidated by* SisterSong Women of Color Reprod. Just. Collective v. Kemp, No. 1:19-cv-02973-SCJ, 2020 WL 3958227 (N.D. Ga. July 13, 2020).

150. LA. STAT. ANN. §40:1061.1.3 (West 2019).

151. KY. REV. STAT. ANN. §311.7706 (West 2020), *invalidated by* EMW Women's Surgical Ctr. v. Beshear, No. 3:19-cv-178-DJH, 2019 WL 1233575 (W.D. Ky. Mar. 15, 2019).

152. MISS. CODE ANN. §41-41-34.1 (West 2020), *invalidated by* Jackson Women's Health Org. v. Dobbs, 951 F.3d 246 (5th Cir. 2020).

153. Melinda Deslatte, *Louisiana's 'heartbeat' abortion ban isn't in effect, but these restrictions will soon be*, ADVOCATE, (July 14, 2019), https://www.theadvocate.com/baton_rouge/opinion/article_83c05bea-a4b8-11e9-9ba4-3bb2b57b584e.html.

154. Megan Donovan, *Gestational Age Bans: Harmful at Any Stage of Pregnancy*, 2020, GUTTMACHER INST. (Jan. 9, 2020), https://www.guttmacher.org/gpr/2020/01/gestational-age-bans-harmful-any-stage-pregnancy.

155. *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].

156. ARIZ. REV. STAT. ANN. § 13-3603.02 (2020).

157. *Sex or Race Selection or Genetic Anomaly*, *supra* note 155.

immigrants would make the decision to obtain abortion care based on a strong preference for one sex over another.[158] The Maricopa County chapter of the NAACP and the National Asian Pacific American Women's Forum challenged the Arizona law.[159] The Ninth Circuit Court of Appeals held that the alleged injury—the stigmatizing effect of the legislation—was insufficient to support standing.[160] Five other states, including Mississippi,[161] Missouri,[162] Kentucky,[163] Tennessee,[164] and Indiana,[165] have joined Arizona in passing laws banning race and sex selective abortions. Mississippi, Missouri, and Arizona's laws banning race and sex selective abortions are currently considered good law, while the laws in Kentucky,[166] Tennessee,[167] and Indiana[168] have been either temporarily or permanently enjoined and are not in effect. Seven other states have passed a ban solely on sex selective abortions,[169] including Arkansas,[170] Kansas,[171] North Carolina,[172] North Dakota,[173] Oklahoma,[174] Pennsylvania,[175] and South Dakota.[176]

Along with bans on abortions based on the sex or race of the fetus, some states have enacted bans of abortions based on genetic anomalies of the fetus. In situations where a woman learns her fetus may have a genetic anomaly, she may abort the fetus in all states except North Dakota, Mississippi, and Missouri.[177]

158. *Id.*

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

160. *Id.*

161. MISS. CODE. ANN. § 41-41-31 (West 2020).

162. MO. ANN. STAT. § 188.038.3 (West 2020).

163. KY. REV. STAT. ANN. § 311.731 (West 2020), *temporarily enjoined by* EMW Women's Surgical Ctr. v. Beshear, No. 3:19-cv-178-DJH, 2019 WL 1233575 (W.D. Ky. Mar. 15, 2019).

164. TENN. CODE ANN. § 39-15-217 (West 2020), *temporarily enjoined by* Memphis Ctr. for Reprod. Health v. Slatery, No. 3:20-cv-00501, 2020 WL 3957792 (M.D. Tenn. July 13, 2020).

165. IND. CODE ANN. § 16-34-4-8 (West 2020), *invalidated by* Planned Parenthood of Ind. & 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).

166. *See EMW Women's Surgical Ctr.*, 2019 WL 1233575.

167. *See Memphis Ctr. for Reprod. Health*, 2020 WL 3957792.

168. *See Planned Parenthood of Ind. & Ky., Inc.*, 888 F.3d 300.

169. *See Sex or Race Selection or Genetic Anomaly*, *supra* note 155.

170. ARK. CODE ANN. § 20-16-1904 (West 2020).

171. KAN. STAT. ANN. § 65-6726 (West 2020).

172. N.C. GEN. STAT. § 90-21.121 (West 2020).

173. N.D. CENT. CODE ANN. § 14-02.1-04.1 (West 2019).

174. OKLA. STAT. ANN. tit. 63, § 1-731.2 (West 2020).

175. 18 PA. STAT. AND CONS. STAT. ANN. § 3204 (West 2020).

176. S.D. CODIFIED LAWS § 34-23A-64 (2020).

177. *Sex or Race Selection or Genetic Anomaly*, *supra* note 155; N.D. CENT. CODE ANN § 14-02.1-04.1 (West 2017). 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.*

Louisiana,[178] Ohio,[179] Arkansas,[180] Kentucky,[181] and Tennessee[182] have similar prohibitions, but enforcement is temporarily enjoined as cases challenging the legislation proceed through the courts.[183] Indiana's prohibition on abortions sought based on a genetic anomaly of the fetus was permanently enjoined in *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner, Indiana State Department of Health*.[184] While other states do not ban abortions based on genetic anomalies, Arizona, Kansas, Minnesota, and Oklahoma require that a woman undergo counseling prior to getting an abortion due to a lethal, incurable condition of the fetus.[185] Utah also has a ban on abortion due to genetic anomalies that will only go into effect if a court decision allows states to ban abortion in these cases.[186] Additional states are considering prohibitions or parameters on abortions sought because of a genetic anomaly.[187] 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 person's ability to terminate a pregnancy by limiting the methods available. There are two ways to perform an abortion: surgically or via medication.[188] Restrictions on surgical and medication

178. *Sex or Race Selection or Genetic Anomaly*, *supra* note 155; LA. STAT. ANN. § 40:1061.1.2 (West 2018); June Med. Servs. LLC v. Gee, 280 F. Supp. 3d 849 (M.D. La. 2017).

179. OHIO REV. CODE ANN. § 2919.10 (West 2020); Preterm-Cleveland v. Himes, 294 F. Supp. 3d 746 (S.D. Ohio 2018), *appeal filed*, 6th Cir. (Apr. 12, 2018).

180. ARK. CODE ANN. § 20-16-2103 (West 2020), *temporarily enjoined by* Little Rock Fam. Planning Servs. v. Rutledge, 397 F. Supp. 3d 1213 (E.D. Ark. 2019).

181. KY. REV. STAT. ANN. § 311.731 (West 2020), *temporarily enjoined by* EMW Women's Surgical Ctr. v. Beshear, No. 3:19-cv-178-DJH, 2019 WL 1233575 (W.D. Ky. Mar. 15, 2019).

182. TENN. CODE ANN. § 39-15-217 (West 2020), *temporarily enjoined by* Memphis Ctr. for Reprod. Health v. Slatery, No. 3:20-cv-00501, 2020 WL 3957792 (M.D. Tenn. July 13, 2020).

183. *See Louisiana Genetic Abnormalities Abortion Ban (HB 2019)*, REWIRE NEWS, https://rewirenewsgroup.com/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*, 294 F. Supp. 3d 746.

184. 265 F. Supp. 3d 859 (S.D. Ind. 2017), *aff'd sub nom.* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. 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).

185. *Sex or Race Selection or Genetic Anomaly*, *supra* note 155. "[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, *supra* note 177.

186. *Sex or Race Selection or Genetic Anomaly*, *supra* note 155.

187. *Id.*

188. *The Different Types of Abortions*, EASTSIDE GYNECOLOGY, https://eastsidegynecology.com/blog/different-types-of-abortion/ (last visited Nov. 2, 2020).

methods of abortion vary based on state and trimester.[189] Additionally, some surgical procedures are specifically regulated, such as dilation and evacuation and dilation and extraction.[190]

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-two states and the federal government have laws currently in effect that prohibit the use of certain surgical abortion procedures performed after the first trimester.[191] These laws target two surgical procedures in particular: standard dilation and evacuation (D&E)[192] and dilation and extraction (D&X), also referred to as intact dilation and evacuation.[193] The Supreme Court holds that a federal ban on D&X procedures—commonly referred to as "partial-birth abortion bans"—is constitutionally permissible.[194]

The Supreme Court initially addressed the constitutionality of partial-birth abortion bans in *Stenberg v. Carhart*.[195] 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."[196] The Nebraska statute banned the D&X procedure, despite members of the medical community believing that it was the safest procedure in certain

189. *See id.*; Attia @ Planned Parenthood, *What are the different types of abortion?*, PLANNED PARENTHOOD (Nov. 21, 2019, 9:22 PM), https://www.plannedparenthood.org/learn/teens/ask-experts/what-are-the-different-types-of-abortion (last visited Nov. 2, 2020).

190. *See The Different Types of Abortions*, *supra* note 188; Julie Rovner, '*Partial-Birth Abortion': Separating Fact From Spin*, NPR (Feb. 21, 2006), https://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin.

191. These states are Arizona, Arkansas, Georgia, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and West Virginia. *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 visited Nov. 2, 2020).

192. 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 924. The procedure varies depending on the stage of fetal development. *Id.* at 925. 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.*

193. 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.*

194. *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).

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

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

circumstances.[197] 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."[198] 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.[199]

President George W. Bush signed the PBABA, a federal prohibition on D&X procedures, into law in 2003.[200] In passing the PBABA, federal legislators echoed the 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.[201] The Judiciary Committee Report accompanying the bill cited several Supreme Court decisions to show that the Court historically deferred to congressional findings.[202] Unlike the statute at issue in *Stenberg*, the PBABA's text explicitly included only D&X procedures.[203] However, the PBABA did not include a constitutionally required health exception.[204]

Originally, three federal courts reviewed the PBABA and found it unconstitutional.[205] The Supreme Court granted certiorari in two of the cases, *Carhart v.*

197. *Id.* at 932.

198. *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).

199. *Id.* at 939.

200. *See* 18 U.S.C. § 1531. 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).

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

202. *See id.* at 9–12.

203. *See* 18 U.S.C. §§ 1531(b)(l)(A)-1531(b)(l)(B). 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.*

204. *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. § 1531(a).

205. 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

Gonzales and *Planned Parenthood Federation of America v. Ashcroft*, and handed down its opinion in *Gonzales v. Carhart*.[206] The Eighth Circuit, in *Carhart v. Gonzales*, had held that the PBABA was unconstitutional because it lacked a health exception to protect the life of the mother.[207] In *Planned Parenthood Federation of America v. Ashcroft*, the Northern District of California held the PBABA was unconstitutional because it lacked a health exception required under *Stenberg* and placed an undue burden on people seeking to abort a nonviable fetus.[208] The district court found that the statute encompassed and outlawed pre-viability D&E procedures and inductions, as well as D&X procedures.[209] As such, the PBABA's language created a risk of criminal liability for virtually all abortions performed after the first trimester and acted as a disincentive for physicians to perform abortions.[210]

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.[211] 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.[212] 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.[213] The Court distinguished the PBABA from the statute at issue in *Stenberg*[214] by determining that the statute in *Stenberg* prohibited delivering "a living unborn child,"[215] while the PBABA only prohibited delivering a living

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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); Nat'l 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), v*acated*, 224 F. App'x 88 (2d Cir. 2007).

206. *See Gonzales*, 550 U.S. at 131.

207. *Carhart*, 413 F.3d at 803.

208. *See Ashcroft*, 320 F. Supp. 2d 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.*

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

210. *Id.* at 440–41.

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

212. *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.*

213. *See id.*

214. *See id.* at 151.

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

fetus by means of a D&X procedure.[216] The PBABA was sufficiently different from the *Stenberg* statute and not unconstitutionally broad due to this difference in language,[217] in conjunction with the intent and anatomical landmark requirements.[218]

In *Gonzales*, for the first time since *Casey*, the Court upheld a late-term abortion ban that did not contain an exception for the health of the mother.[219] The parties in *Gonzales* presented conflicting evidence regarding the necessity and safety of the D&X procedure.[220] The petitioner relied on congressional findings demonstrating that the D&X procedure was not necessary to preserve the health of the mother.[221] 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.[222] 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.[223]

Today, the PBABA is valid law and prohibits D&X abortions.[224] In addition to the federal law, twenty states have enacted their own partial-birth abortion laws.[225] 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.[226]

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.[227] Ten states have enacted D&E abortion bans, which some state legislatures have named "Unborn Child Protection from Dismemberment Abortion" Acts.[228] Prior

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216. *See Gonzales*, 550 U.S. at 150–51.

217. *See id.* at 150–56.

218. *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).

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

220. *Id.* at 161–62.

221. *See id.*

222. *See id.*

223. *See id.* at 163–64.

224. 18 U.S.C. § 1531.

225. *See Bans on Specific Abortion Methods Used After the First Trimester*, *supra* note 191.

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

227. *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), https://www.guttmacher.org/sites/default/files/article_files/gpr2003517.pdf.

228. *See Dilation and Evacuation Bans*, REWIRE (last updated Aug. 14, 2020), https://rewirenewsgroup.com/legislative-tracker/law-topic/dilation-and-evacuation-bans/ (last visited Nov. 2, 2020). These states are Alabama, Arkansas, Kansas, Kentucky, Louisiana, Mississippi, Ohio, Oklahoma, Texas, and West Virginia.

to the Supreme Court's decision in *June Medical Services v. Russo*, federal and state courts had enjoined eight of these laws.[229] However, the August 2020 Eighth Circuit holding in *Hopkins v. Jegley*[230] specifically invokes Justice Roberts's concurring opinion in *June Medical Services*[231] to uphold four strict Arkansas abortion laws, one of which involves a D&E ban (the D&E Mandate). Under the *June Medical Services* test, as interpreted by the Eighth Circuit, courts may not ask whether an abortion law provides any benefits to patients.[232] Instead, they must only ask whether the regulation imposes a "substantial obstacle" to an individual's path to an abortion.[233] The Eighth Circuit remanded *Hopkins* to the trial court for reassessment under this standard, allowing the challenged Arkansas laws—the D&E Mandate included—to take effect in the meantime.[234] On remand, the United States District Court for the Eastern District of Arkansas held that under the *June Medical Services* analysis, which solely considers burdens, "the D&E Mandate has the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus for whom the Mandate is relevant," leading the district court to issue a preliminary injunction enjoining enforcement of the D&E Mandate.[235]

Because D&E procedures account for the majority of second-trimester abortions in the United States,[236] broader invocation of *June Medical Services* to uphold D&E bans could carry significant repercussions on the options available to patients. Moreover, abortion restrictions generally contribute to the cycle of legal, financial, and logistical delays in accessing care, including by pushing abortions later into pregnancy.[237] As such, the consequences of broad D&E bans would be most acutely felt by those already struggling to obtain access to

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See ALA. CODE § 26-23G-1, et seq. (2020); ARK. CODE ANN. §§ 20-16-1801, et seq. (West 2020); KAN. STAT. ANN. § 65-6741, et seq. (West 2018); LA. STAT. ANN. § 40:1061.1.1 (2020); MISS. CODE ANN. § 41-41-151 (West 2020); OKLA. STAT. ANN. tit. 63, § 1-737.7, et seq. (West 2020); TEX. HEALTH & SAFETY CODE ANN. § 171.151 (West 2019); W. VA. CODE ANN. § 16-20-1 (West 2020); H.B. 454, 2018 Reg. Sess. (Ky. 2018).

229. *See Bans on Specific Abortion Methods Used After the First Trimester*, *supra* note 191. These states are Alabama, Arkansas, Kansas, Kentucky, Louisiana, Ohio, Oklahoma, and Texas. *See* W. Ala. Women's Ctr. v. Miller, 217 F. Supp. 3d 1313, 1348 (M.D. Ala. 2016), *aff'd*, W. Ala. Women's Ctr. v. Williamson, 900 F.3d 1310 (11th Cir. 2018); Hodes 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. Cline, 382 P.3d 1048 (Okla. 2016) (holding that the D&E legislation was unconstitutional under the state constitution's single-subject rule); June Med. Servs., 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 Surgical Ctr. v. Beshear, 283 F. Supp. 3d 629, 633 (W.D. Ky. 2017) *rev'd and remanded*, 920 F.3d 421 (6th Cir. 2019); Whole Woman's Health v. Paxton, 280 F. Supp. 3d 938 (W.D. Tex. 2017); Planned Parenthood Sw. Ohio Region v. Yost, 375 F. Supp. 3d 848, 872 (S.D. Ohio 2019).

230. Hopkins v. Jegley, 968 F.3d 912, 915–16 (8th Cir. 2020).

231. *June Med. Servs.*, 140 S. Ct. 2103, 2137–38 (2020).

232. *Hopkins*, 968 F.3d at 915 (quoting *June Med. Servs.*, 140 S. Ct. at 2137–38).

233. *Id.*

234. *Id.* at 916.

235. Hopkins v. Jegley, No. 4:17-cv-00404-KGB, 2021 WL 41927, at *71 (E.D. Ark. Jan. 5, 2021).

236. Megan K. Donovan, *supra* note 227.

237. *See id.* at 36.

abortion. Finally, because fetal anomalies and maternal health complications are often diagnosed during the second trimester, people who receive these diagnoses would be disproportionately impacted by D&E bans.[238]

b. Medication Abortion Bans and Restrictions. Medication or non-surgical abortions are frequently used during the early stages of pregnancy.[239] 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.[240] 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.[241] In combination, the administration of mifepristone and misoprostol is considered to be 95% to 98% effective in terminating an early pregnancy.[242]

The FDA initially approved mifepristone in 2000.[243] 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.[244] An FPL is not a legal requirement.[245] 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) patients can self-administer misoprostol at home; and
(3) the drug is effective for two additional weeks of pregnancy (up to sixty-three days).[246]

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238. *Id.* at *37*.

239. *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/#.WPlvUlMrJsM.

240. *Mifeprex (mifepristone) Information*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/Drugs/DrugSafety/ucm111323.htm (last updated Feb. 5, 2018).

241. *Id.*

242. *See* Rebecca Allen & Barbara M. O'Brien, *Uses of Misoprostol in Obstetrics and Gynecology*, 2 REVS. IN OBSTETRICS & GYNECOLOGY 159, 161 (2009).

243. *See Highlights of Prescribing Information: Mifeprex*, U.S. FOOD & DRUG ADMIN., http://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf (last updated Mar. 2016).

244. *Mifeprex (Mifepristone) Tablets, 200 MG 5*, U.S. FOOD & DRUG ADMIN. (July 19, 2005), http://www.accessdata.fda.gov/drugsatfda_docs/label/2005/020687s013lb1.pdf.

245. Brief in Opposition at 4, Cline v. Okla. Coal. for Reprod. Just., 571 U.S. 985 (2013) (No. 12-1094), 2013 WL 2352228 ("Such 'off-label' use of a drug is perfectly legal, and indeed common."); *Understanding Unapproved Use of Approved Drugs "Off Label,"* U.S. FOOD & DRUG ADMIN. (Feb. 5, 2018), https://www.fda.gov/patients/learn-about-expanded-access-and-other-treatment-options/understanding-unapproved-use-approved-drugs-label ("From the FDA perspective, once the FDA approves a drug, healthcare providers generally may prescribe the drug for an unapproved use when they judge that it is medically appropriate for their patient.").

246. Brief in Opposition at 3–4, *Cline*, 571 U.S. 985 (No. 12-1094).

In the United States, some studies report that at least 96% of all medication abortions involve a regimen that varies from the FPL.[247] In March 2016, the FDA updated the FPL with relaxed guidelines that closely resemble the physician-created protocols: the FPL 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.[248] Such changes to the FPL make medication abortions less burdensome for abortion-seekers by decreasing the cost of and barriers to the procedure.[249]

Still, the FDA imposes several burdens on people seeking medication abortions pursuant to the 2011 Elements to Assure Safe Use (ETASU).[250] The ETASU mandates that mifepristone be prescribed only by approved healthcare providers, and dispensed only in hospitals, clinics, or medical offices and that the patient sign a Patient Agreement Form affirming safe conditions will be met.[251] In July 2020, a Maryland federal judge granted an injunction suspending the FDA's rule requiring that mifepristone be dispensed in person at "certain health care settings" by a health care provider who has preregistered with the drug's manufacturer.[252] The court agreed with the American College of Obstetricians and Gynecologists and other physician groups that brought the suit who argued that, during the COVID-19 pandemic, the FDA's "In-Person Requirements" for obtaining mifepristone impose a "substantial obstacle" to patients seeking medication abortion care.[253] In January 2020, the Supreme Court stayed the district court's order granting the injunction, pending disposition of the appeal in the United States Court of Appeals for the Fourth Circuit.[254] As such, the FDA can continue to enforce its requirement that people visit hospitals, clinics, or medical offices to obtain mifepristone.[255] In a dissent joined by Justice Kagan, Justice Sotomayor argued that the FDA's rule cannot defer to the FDA's decision to not lift the in-person requirement because the government did not submit an explanation for its

247. *Id.* at 4.

248. *Highlights of Prescribing Information: Mifeprex*, *supra* note 243; *see also* Sabrina Tavernise, *New FDA Guidelines Ease Access to Abortion Pill*, N.Y. TIMES (Mar. 30, 2016), https://www.nytimes.com/2016/03/31/health/abortion-pill-mifeprex-ru-486-fda.html.

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

250. 21 U.S.C. § 355-1(f)(3).

251. *Id.*

252. *See* Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin., 472 F. Supp. 3d 183, 191 (D. Md. 2020).

253. *See id.* at 216.

254. *See* Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 578, 578 (Jan. 12, 2021) (Mem).

255. Jeff Overley, *Justices Let FDA Require Abortion Pill Visits Amid Pandemic*, LAW360 (Jan. 12, 2021, 10:23 PM), https://www.law360.com/articles/1344340/justices-let-fda-require-abortion-pill-visits-amid-pandemic.

decision. She argued "[t]here simply is no reasoned decision here to which this Court can defer."[256]

Moreover, states have used legislation to additionally burden 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.[257] Nineteen states require the clinician to be in the physical presence of the patient when prescribing the regime, thus limiting rural patients' ability to utilize telemedicine.[258] Thirty-two states require a physician to administer the medication abortion.[259] Despite the legislation imposed by various states, medication remains a safe and effective form of abortion early in pregnancy and is used in greater than one-third of abortions in America.[260]

B. Legislative Restrictions on the Provision of Abortion

Opponents of abortion have passed strategic legislation that places strict requirements on the doctors and clinics that provide abortion care or on the people seeking an abortion.[261] *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.[262] 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.[263] Some of these regulations may constitute "undue burdens" as defined

256. *Food & Drug Admin.*, 141 S. Ct. at 585 (Sotomayor, J., dissenting).

257. N.D. Cent. Code Ann. § 14-02.1-03.5 (West 2019); Tex. Health & Safety Code Ann. § 171.063 (West 2019), *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. Just. v. Cline, 292 P.3d 27 (Okla. 2012), *cert. dismissed 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 Ark. & E. Okla. v. Jegley for Pulaski Cnty., No. 4:15-CV-00784-KGB, 2018 WL 3029104, at *47 (E.D. Ark. Jun. 18, 2018).

258. *See* Medication Abortion, Guttmacher Inst., https://www.guttmacher.org/state-policy/explore/medication-abortion (last updated Oct. 6, 2020).

259. *Id.*

260. Katherine Kortsmit et al., *Abortion Surveillance—United States, 2018*, Ctrs. for Disease Control & Prevention (Nov. 27, 2020), https://www.cdc.gov/mmwr/volumes/69/ss/ss6907a1.htm#T11_down ("[Among the reported abortions] 38.6% were early medical abortions (a nonsurgical abortion at ≤9 weeks' gestation) . . . and 1.4% were medical abortions at >9 weeks' gestation").

261. *See* Smith, *supra* note 125, 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").

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

263. *See* Smith, *supra* note 125, 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").

by *Casey* and *Whole Woman's Health*.[264] These regulations may function as bans in reality for people seeking abortions because of the almost insurmountable barriers they create.[265]

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 people 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.[266] 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.[267] Generally, TRAP laws fall into one of three categories: hospitalization requirements, facility licensing schemes, or ambulatory surgical center requirements.[268]

While the stated purpose of TRAP laws is typically a desire to protect women's health and safety, they function to reduce access to abortion.[269] Hospitalization requirements mandate that abortions be performed in a licensed hospital.[270] 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.[271] Ambulatory surgical center laws require clinics to conform to facility requirements designed for the performance of outpatient surgeries even though abortion is a far safer procedure than most outpatient surgeries.[272]

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

265. *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).

266. *See State Laws and Policies: Targeted Regulation of Abortion Providers, supra* note 4.

267. *Id.*

268. Bonnie S. Jones et al., *State Law Approaches to Facility Regulation of Abortion and Other Office Interventions*, 108 AM. J. PUB. HEALTH L. & ETHICS 486, 487 (2018).

269. Rebecca Mercier et al., *TRAP Laws and the Invisible Labor of US Abortion Providers*, 26 CRIT. PUB. HEALTH 77, 77 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4999072/pdf/nihms811259.pdf.

270. Jones et al., *supra* note 268, at 487.

271. *Id.* at 489–91 (citing state statutes mandating hallway and doorway widths, emergency power supplies, nurse and physician accreditations and admitting privileges to transfer patients to hospitals).

272. Ashoka Mukpo, *TRAP Laws are the Threat to Abortion Rights You Don't Know About*, ACLU (Mar. 3, 2020), https://www.aclu.org/news/reproductive-freedom/trap-laws-are-the-threat-to-abortion-

TRAP laws deter physicians from becoming or remaining providers of abortion by subjecting those who provide abortions to a wide variety of potential civil and criminal penalties and intruding significantly into their practice of medicine.[273] 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.[274]

The constitutionality of TRAP laws was the subject of one of the most anticipated Supreme Court cases in 2016, *Whole Woman's Health v. Hellerstedt*.[275] As discussed above, in *Whole Woman's Health*, the Court considered Texas's 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.[276] The Court held that H.B. 2 imposed an undue burden on the constitutional right to choose an abortion because the admitting privileges and ACS requirements provided few health benefits for women, and those it did provide were outweighed by the substantial obstacle to abortion access created by the law.[277] In June 2020, the Supreme Court found that a district court "faithfully applied" this balancing test when it struck down a Louisiana admitting privileges law that was "almost word-for-word identical" to the Texas law in *Whole Woman's Health*.[278]

In 2016, 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, Louisiana and Wisconsin,[279] and Alabama dropped its appeal of a TRAP law held unconstitutional in 2014.[280] Additionally, the Center for Reproductive Rights and Planned

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rights-you-dont-know-about/ ("Abortion is a far safer procedure than those performed at most [Ambulatory Surgical Centers], in part because abortion does not involve any incision.").

273. *See, e.g.*, LA. STAT. ANN. § 40:1061.29 (imposed civil penalties on physicians who do not comply with abortion regulations, including maintaining admitting privileges) (held unconstitutional); KY. REV. STAT. ANN. § 311.990 (West) (fining any physician who violates state abortion regulations, including showing an ultrasound to the person seeking abortion, not more than $100,000 for the first offense); *see generally* Sumathi Narayana et al., *Family Doctors and the Criminalization of Abortion Care*, 51 FAM. MED. 803 (2019) ("Six states have passed laws that criminalize doctors for providing abortion care, in some cases with felony sentences of up to 99 years.").

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

275. 136 S. Ct. 2292 (2016).

276. *Id.* at 2296.

277. *Id.* at 2318.

278. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112, 2120 (2020).

279. 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.

280. Drew Galloway, *Alabama Attorney General Dismisses Appeal of 2014 Ruling Declaring State Abortion Clinic Law Unconstitutional*, WHNT NEWS (June 27, 2016, 3:54 PM), https://whnt.com/news/

Parenthood announced legal campaigns to use *Whole Woman's Health* to challenge TRAP restrictions in Louisiana, Arizona, Florida, Michigan, Missouri, Pennsylvania, Tennessee, and Virginia.[281] Admitting privilege laws in Alabama, Louisiana, Mississippi, and Tennessee have been permanently enjoined.[282]

More recently, several jurisdictions have questioned the deference given to the legislature within the *Whole Woman's Health* balancing system.[283] The district court and the Sixth Circuit both ruled that the statute was unduly burdensome; however, they declined to extend the balancing test provided by *Whole Woman's Health*, delineating between the undue burden test and the constitutional right to an abortion.[284] In June 2018, the Sixth Circuit granted a hearing *en banc* to vacate the previous opinion and judgment, and to restore *Himes* to the docket sheet as a pending appeal.[285] In March 2019, the Sixth Circuit found that the Ohio law's condition on state funds did not violate the Constitution because organizations like Planned Parenthood "do not have a due process right to perform abortions."[286] The court also found no violation of a woman's constitutional right to an abortion because it found no showing that the law would limit the number of abortion clinics in the state, unlike *Whole Woman's Health*.[287] The issue of when to apply the *Whole Woman's Health* balancing test remains unresolved, leaving room to erode protections against the undue burdens on abortion providers from TRAP laws.

For instance, in August 2020 the Eighth Circuit lifted an injunction preventing Arkansas abortion restrictions from taking effect when it applied the "undue burden" inquiry Chief Justice Roberts articulated in his concurring opinion in *June Medical Services*.[288] Rather than applying the *Whole Woman's Health* balancing test—which the *June Medical Services* plurality applied—the Eighth Circuit held that the Arkansas law was constitutional because it did not pose "a substantial obstacle" or "substantial burden" on a woman seeking an abortion, citing Roberts's emphasis on the "wide discretion" courts should afford to legislatures in "areas of medical uncertainty."[289] Courts may continue to use Chief Justice

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politics/ala-attorney-general-dismisses-appeal-of-2014-ruling-declaring-state-abortion-clinic-law-unconstitutional/.

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

282. *See State Laws and Policies: Targeted Regulation of Abortion Providers*, *supra* note 4.

283. *See* Planned Parenthood of Greater Ohio v. Himes, 888 F.3d 224, 244 (6th Cir. 2018); OHIO REV. CODE ANN. § 3701.034 (West 2020).

284. *Id.*

285. *See id.*

286. Planned Parenthood of Greater Ohio v. Hodges, 917 F.3d 908, 910 (6th Cir. 2019).

287. *Id.* at 912.

288. Hopkins v. Jegley, 968 F.3d 912, 915–16 (8th Cir. 2020).

289. *Id.* at 914–16 (quoting June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2136-37 (2020) (Roberts, C.J., concurring)).

John Roberts's opinion in *June Medical Services* to support more deference toward state legislatures' TRAP laws.[290]

2. Counseling, Waiting Periods, and Ultrasound Requirements

The majority of states impose counseling and waiting periods before the patient is able to obtain an abortion.[291] Currently, thirty-three states require that patients receive counseling before an abortion is performed.[292] Twenty-five of those states require waiting a specified amount of time between the mandated counseling and the abortion procedure.[293] States have mandated that ultrasounds and fetal auscultation (a method of listening to the heartbeat) be conducted or made available to people seeking abortion care.[294] States have also mandated that ultrasounds and fetal auscultation (a method of listening to the heartbeat) be conducted or made available to people seeking abortion care.[295] 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

290. *See* Becca Andrews, *Remember When People Thought the June Medical SCOTUS Ruling Was a Win for Abortion Rights? Think Again.*, MOTHER JONES (Aug. 7, 2020), https://www.motherjones.com/politics/2020/08/june-medical-roberts-opinion-arkansas-abortion-ban/.

291. *State Laws and Policies: Counseling and Waiting Periods for Abortion*, *supra* note 6.

292. *See* ALA. CODE § 26-23A-4 (2020); ALASKA STAT. ANN. § 18.16.060 (West 2020); ARIZ. REV. STAT. ANN. § 36- 2153 (2020); FLA. STAT. ANN. § 390.025 (West 2020); GA. CODE ANN. §31-9A-3 (West 2020); IDAHO CODE ANN. § 18-609 (West 2020); IND. CODE ANN. § 16-34-2-1.1 (West 2020); IOWA CODE ANN. § 146A.1 (West 2020); KAN. STAT. ANN. § 65-6709 (West 2020); KY. REV. STAT. ANN. § 311.725 (West 2020); LA. STAT. ANN. § 40:1061.10 (2020); MASS. GEN. LAWS ANN. ch. 112 § 12S (West 2020); MICH. COMP. LAWS ANN. § 333.17015 (West 2020); MINN. STAT. ANN. § 145.4242 (West 2020); MISS. CODE ANN. § 41-41-33 (West 2020); MO. ANN. STAT. §§ 188.027, 188.039 (West 2020); MONT. CODE ANN. § 50-20-106 (West 2019); NEB. REV. STAT. ANN. § 28-327 (West 2020); N.C. GEN STAT. ANN. § 90-21.82 (West 2020); N.D. CENT. CODE ANN. § 14-02.1-03 (West 2019); OHIO REV. CODE ANN. § 2317.56 (West 2020); OKLA. STAT. ANN. tit. 63 § 1-738.2 (West 2020); 18 PA. STAT. AND CONS. STAT. ANN. § 3205 (West 2020); S.C. CODE ANN. § 44-41-330 (2020); S.D. CODIFIED LAWS § 34A-10.1 (2020); TENN. CODE ANN. § 39-15-202 (West 2020); TEX. HEALTH & SAFETY CODE ANN. § 171.013 (West 2019); UTAH CODE ANN. § 76-7-305 (West 2020); W. VA. CODE ANN. § 16-2i-2 (West 2020); WIS. STAT. ANN. § 253.10 (West 2019); *see also State Laws and Policies: Counseling and Waiting Periods for Abortion*, *supra* note 6.

293. *See* ALA. CODE § 26-23A-4 (2020); ARIZ. REV. STAT. ANN. § 36- 2153 (2020); GA. CODE ANN. §31-9A-3 (West 2020); IDAHO CODE ANN. § 18-609 (West 2020); IND. CODE ANN. § 16-34-2-1.1 (West 2020); KAN. STAT. ANN. § 65-6709 (West 2020); KY. REV. STAT. ANN. § 311.725 (West 2020); LA. STAT. ANN. § 40:1061.10 (2020); MICH. COMP. LAWS ANN. § 333.17015 (West 2020); MINN. STAT. ANN. § 145.4242 (West 2020); MISS. CODE ANN. § 41-41-33 (West 2020); MO. ANN. STAT. §§ 188.027, 188.039 (West 2020); NEB. REV. STAT. ANN. § 28-327 (West 2020); N.C. GEN STAT. ANN. § 90-21.82 (West 2020); N.D. CENT. CODE ANN. § 14-02.1-03 (West 2019); OHIO REV. CODE ANN. § 2317.56 (West 2020); OKLA. STAT. ANN. tit. 63 § 1-738.2 (West 2020); 18 PA. STAT. AND CONS. STAT. ANN. § 3205 (West 2020); S.C. CODE ANN. § 44-41-330 (2020); S.D. CODIFIED LAWS § 34A-10.1 (West 2020); TEX. HEALTH & SAFETY CODE ANN. § 171.013 (West 2019); UTAH CODE ANN. § 76-7-305 (West 2020) W. VA. CODE ANN. § 16-2i-2 (West 2020); WIS. STAT. ANN. § 253.10 (West 2020).

294. *See Requirements for Ultrasound*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/requirements-ultrasound (last updated Oct. 15, 2020).

295. *See id.*

a patient receives written or verbal information about ultrasound services.[296] States have argued that these laws are justified by a state's interest in guaranteeing fully-informed consent; most of these statutes only require that abortion

296. *See* ALA. CODE § 26-23A-6 (2020) (requiring that an ultrasound be conducted and that an opportunity to view the image be provided); ARIZ. REV. STAT. ANN. § 36-2156 (2020) (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 2020) (mandating that, if an ultrasound is performed, a woman be offered an opportunity to view the images); FLA. STAT. ANN. § 390.0111 (West 2020), *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 (2019) (mandating that a pregnant female receive verbal information about accessing ultrasound services); IDAHO CODE ANN. § 18-609 (West 2020) (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 2020) (mandating that an ultrasound be conducted and that the provider offer the woman the opportunity to view the ultrasound); IOWA CODE ANN. § 146A.1 (West 2021) (requiring that the woman undergo an ultrasound and that she be given an opportunity to view the ultrasound) (this version of the statute has been written in compliance with Planned Parenthood of the Heartland v. Reynolds, 915 N.W.2d 206 (Iowa 2018)); KAN. STAT. ANN. § 65-6709 (West 2020); KY. REV. STAT. ANN. § 311.727 (West 2020) (mandating that a physician perform an ultrasound and display and describe the images); LA. STAT. ANN. § 40:1061.10 (2020) (requiring that an ultrasound be conducted and that the woman be offered the opportunity to view the ultrasound); MICH. COMP. LAWS ANN. § 333.17015 (West 2020) (mandating that, if an ultrasound is performed, the woman be offered an opportunity to view the images); MISS. CODE ANN. 41-41-34 (West 2021) (requiring that an ultrasound be performed and that the woman be offered an opportunity to view the images); MO. ANN. STAT. § 188.027 (West 2020) (mandating that a woman be provided written information about ultrasound services); NEB. REV. STAT. ANN. § 28- 327 (West 2019) (mandating that a woman be offered verbal and written information about accessing ultrasound services); N.C. GEN STAT. ANN. § 90-21.85 (West 2020) (requiring providers to conduct an ultrasound and 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 2020) (requiring that the provider offer ultrasound services); OHIO REV. CODE ANN. § 2317.561 (West 2020) (requiring that providers offer the opportunity to view the images, if an ultrasound is performed); OKLA. STAT. ANN. tit. 63, § 1-738.2 (West 2020) (requiring that a woman seeking an abortion be informed of the availability of ultrasound imaging and heart tone monitoring) (a previous version of this statute requiring a provider to conduct an ultrasound and to display and describe the images was permanently enjoined by Nova Health Sys. v. Pruitt, 292 P.3d 28 (Okla. 2012)); S.C. CODE ANN. § 44-41-330 (2010) (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 2020) (requiring that a woman be given the opportunity to view sonogram images prior to abortion); TENN. CODE ANN. § 39-15-215 (WEST 2020) (mandating that a physician perform an ultrasound, as well as display and describe the images); TEX. HEALTH & SAFETY CODE § 171.012 (West 2019) (requiring that an ultrasound be performed, and that the provider display and describe the images), *aff'd* Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012); UTAH CODE ANN. § 76-7-305 (West 2020) (requiring that a woman be provided with written materials and shown an informational video, and that a provider offer ultrasound services); W. VA. CODE ANN. § 16-2I-2 (2021) (requiring that a provider offer a woman the opportunity to view the images if an ultrasound is performed); WIS. STAT. ANN. § 253.10 (West 2021) (requiring that a woman receive verbal and written information about ultrasound services, that a provider conduct an ultrasound prior to treatment, and that a provider display and describe the images). 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).

providers offer information or the opportunity to conduct an ultrasound or to view the resulting images.[297]

However, fourteen states currently have laws that mandate an ultrasound be conducted prior to treatment;[298] and two states have more restrictive legislation mandating that the ultrasound be performed at least twenty-four hours before the abortion.[299] North Carolina and Oklahoma have mandatory ultrasound requirements that are currently unenforceable due to a temporary or permanent court injunction.[300] The most stringent of these statutes mandates that the provider display the images to the patient and provide an accompanying verbal explanation.[301]

These restrictions have been met with controversy on both political[302] and constitutional bases.[303] 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

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297. *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").

298. These states are Alabama, Arizona, Florida, Indiana, Kansas, Kentucky, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, Tennessee, Texas, and Wisconsin. *See* ALA. CODE § 26-23A-6 (2020); ARIZ. REV. STAT. ANN. § 36-2156 (2020); FLA. STAT. ANN. § 390.0111 (West 2020); IND. CODE ANN. § 16-34-2-1.1 (West 2020); KAN. STAT. ANN. § 65-6709 (West 2020); KY. REV. STAT. ANN. § 311.727 (West 2020); LA. STAT. ANN. § 40:1061.10 (2020); N.C. GEN. STAT. ANN. § 90-21.85 (West 2020); OHIO REV. CODE ANN. § 2317.561 (West 2020); OKLA. STAT. tit. 63, § l-738.3d (2015); TENN. CODE ANN. § 39-15-215 (West 2020); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2020); WIS. STAT. ANN. § 253.10 (West 2020).

299. These states are Arizona and Louisiana. *See* ARIZ. REV. STAT. ANN. § 36-2156 (2020); LA. STAT. ANN. § 40:1061.10 (2020).

300. *See* N.C. GEN. STAT. ANN. § 90-21.85 (West 2020), *permanently enjoined by* Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014); OKLA. STAT. tit. 63, § l-738.3d (2015), *permanently enjoined by* Nova Health Sys. v. Pruitt, 292 P.3d 28 (Okla. 2012).

301. These states are Louisiana, Kentucky, North Carolina (permanently enjoined), Oklahoma (permanently enjoined), Tennessee, Texas, and Wisconsin. *See* LA. STAT. ANN. § 40:1061.10 (2020); KY. REV. STAT. ANN. § 311.727 (West 2020); N.C. GEN. STAT. ANN. § 90-21.85 (West 2020), *permanently enjoined by Stuart*, 774 F.3d 238; OKLA. STAT. tit. 63, § l-738.3d (2015), *permanently enjoined by Nova Health Sys.*, 292 P.3d 28; TENN. CODE ANN. § 39-15-215 (West 2020); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2020); WIS. STAT. ANN. § 253.10 (West 2020). 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 2020) ("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").

302. *See, e.g.*, *The Rachel Maddow Show* (MSNBC television broadcast Apr. 8, 2013), https://www.msnbc.com/transcripts/rachel-maddow-show/2013-04-08-msna741211 ("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?").

303. *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).

and the patients.[304] 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.[305] 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.[306] The North Carolina statute compelled physicians "to physically speak and show the state's non-medical message to patients unwilling to hear or see."[307] 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.[308]

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.[309] The Fifth Circuit held 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."[310] The Fifth Circuit also held that the statute was not an undue burden on the 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.[311]

The application of strict scrutiny to ultrasound requirements lies in tension with *Casey*, which upheld mandatory informational requirements that were "truthful and not misleading"[312] 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."[313] In 2019, the Sixth Circuit sided with the Fifth Circuit, upholding a Kentucky statute requiring physicians to display and describe ultrasound to the patient before performing an abortion.[314] As the Supreme Court again denied certiorari, the circuit court split over the constitutional implications of ultrasound requirements remains. However, with Justice Amy Coney Barrett

304. Stuart v. Huff, 834 F. Supp. 2d 424, 433, 436–437 (M.D.N.C. 2011) (granting a preliminary injunction).

305. *Id*. at 428–29, 432.

306. *Id*. at 430–31 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992)).

307. *Id*. at 432.

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

309. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 975, 977 (W.D. Tex. 2011), *vacated in part*, 667 F.3d 570 (5th Cir. 2012) (granting a preliminary injunction against a statute that required an abortion provider to (1) perform an ultrasound and make it visible and (2) make the fetal heartbeat audible to the patient before they could give informed consent to have an abortion).

310. Tex. Med. Providers Performing Abortion Services v. Lakey, 667 F.3d 570, 580 (5th Cir. 2012).

311. *Id*. at 584 (Higginbotham, J., concurring).

312. *Casey*, 505 U.S. at 882.

313. *Id*. (internal citations omitted).

314. EMW Women's Surgical Ctr. v. Beshear, 920 F.3d 421, 424 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 655 (2019).

confirmed to the Supreme Court, advocacy groups anticipate the Court will likely uphold such requirements if they decide to take a case passing on their constitutionality.[315]

3. Parental Involvement Laws for Minors

There are two iterations of parental involvement laws—parental consent and parental notification laws. Parental consent statutes require that a pregnant minor obtain permission from one or both parents before obtaining an abortion while notification statutes require minors to notify either one or both parents.[316] Courts tend to uphold these statutes when they qualify parental notification with a judicial bypass provision.[317] Parental consent statutes constitutionally require a judicial bypass provision that allows 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.[318] Significantly, the Supreme Court has not ruled on whether parental notification statutes must include a judicial bypass provision.[319] 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.[320]

The Court first confronted a parental notification statute in the 1981 case *H.L. v. Matheson*.[321] There, an unemancipated minor made a facial challenge to Utah's parental notification law but failed to assert that she was sufficiently mature to obtain an abortion without parental involvement.[322] The Court held that Utah could reasonably and constitutionally mandate parental involvement when a minor fails to assert and prove sufficient maturity.[323]

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.[324] The presence of a judicial bypass procedure has been a determining factor in

315. Nancy Northup, *Statement: Judge Amy Coney Barrett Nominated to the Supreme Court*, CTR. FOR REPROD. RTS. (Sept. 26, 2020), https://reproductiverights.org/press-room/statement-amy-coney-barrett-nominated-supreme-court ("In the three years that Judge Amy Coney Barrett has served on the U.S. Court of Appeals for the Seventh Circuit, she has ruled against abortion rights both times the issue was before her.").

316. *State Laws and Policies: Parental Involvement in Minors' Abortions, supra* note 8.

317. *See e.g.*, H.L. v. Matheson, 450 U.S. 398, 399 (1981) (upholding a Utah statute that required a physician to notify, if possible, parents of a minor seeking an abortion because of the state's interest in sharing medical information to protect the minor's health).

318. Bellotti v. Baird, 443 U.S. 622, 630, 648–50 (1979) ("If, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement.").

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

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

321. *See* H.L. v. Matheson, 450 U.S. 398 (1981).

322. *Id.* at 401, 407 (discussing how a statute asked physicians to notify, if possible, the parents or guardian of the minor seeking the abortion if she is unmarried).

323. *Id.* at 409.

324. *See id.* at 411.

subsequent cases concerning parental notice statutes.[325] 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 meets all the requirements for judicial bypass procedures established in *Bellotti*.[326]

Health and life of the mother exceptions to parental involvement laws are also necessary for constitutionality of parental consent and notice statutes. 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.[327] The Court reiterated that restricting access to abortions that are necessary for the health or life of the mother is unconstitutional, and in such cases lower courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application.[328] While health and life cases are in the minority, those cases remain firmly unimpacted by parental consent laws.

Currently, twenty-three states have active parental consent laws.[329] Another three states have parental consent laws that are currently enjoined by court

325. *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 a parental notification statute, 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 456–57 (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); *Akron Ctr. for Reprod. Health, Inc.*, 497 U.S. at 510–16 (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).

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

327. 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).

328. *Id.* at 326–28.

329. These states are Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, 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 (2020); ARIZ. REV. STAT. ANN. § 36-2152 (2020); ARK. CODE ANN. §§ 20-16-801, 20-16-804 (West 2020); IDAHO CODE ANN. § 18-609A (West 2020); IND. CODE ANN. § 16-34-2-4 (West 2020); KY. REV. STAT. ANN. § 311.732 (West 2020); ME. REV. STAT. ANN. tit. 22, § 1597-A (2020); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 2020); MICH. COMP. LAWS ANN. § 722.903 (West 2020); MISS. CODE ANN. § 41-41-53 (West 2020); MO. REV. STAT. § 188.028 (2020); MONT. CODE ANN. § 50-20-504 (West 2020); NEB. REV. STAT. ANN. §§ 71-6902–690 (West 2020); N.C. GEN. STAT. ANN. §§ 90-21.7 (West 2020); N.D. CENT. CODE ANN. § 14-02.1-03.1 (West 2020); 18 PA. STAT. AND CONS. STAT. ANN. § 3206 (West 2020); 23 R.I. GEN. LAWS ANN. § 23-4.7-6 (West 2020); S.C. CODE ANN. §§ 44-41-31–37 (2020); TENN. CODE ANN. §§ 37-10-303, 37-10-304 (West 2020); WIS. STAT. ANN. § 48.375 (West 2020).

order.[330] Ten states have active parental notification laws,[331] and three states have parental notification laws that are enjoined by a court order.[332] Six states require both parental notification and parental consent.[333] In addition, one state, Ohio, requires notice twenty-four hours prior or written parental consent.[334]

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.[335] The statute allows for the doctor performing the abortion to judge whether: (1) the minor is mature and capable of giving 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 a parent or guardian; or (5) a reasonable effort to give notice has been unsuccessful.[336] Therefore, rather than requiring a judge to make the decision, a doctor has the ability to circumvent the parental notification requirement.[337]

IV. PUBLIC FUNDING AND ABORTION

Measures enacted to prevent public funding for abortion procedures are a major roadblock in abortion access.[338] Passed in 1976, the Hyde Amendment bars the use of federal funds to pay for an abortion except in narrow circumstances.[339] Currently, the Hyde Amendment permits the contribution of federal funds to the

330. These states are California (permanently), Montana (temporarily), and New Mexico (permanently). *See* CAL. HEALTH & SAFETY CODE § 123450 (West 2020), *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); Planned Parenthood of Mont. v. State, 342 P.3d 684 (Mont. 2015); N.M. Op. 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).

331. These states are Colorado, Delaware, Georgia, Illinois, Iowa, Maryland, Minnesota, New Hampshire, South Dakota, and West Virginia. *See* COLO. REV. STAT. ANN. § 13-22-704 (West 2020); DEL. CODE ANN. tit. 24, § 1783 (West 2020); GA. CODE ANN. §§ 15-11-682 (West 2020); 750 ILL. COMP. STAT. ANN. 70/15 (West 2020); IOWA CODE ANN. §§ 135L.2, 135L.3 (West 2020); MD. CODE ANN., HEALTH-GEN. § 103 (West 2020); MINN. STAT. ANN. § 144.343 (West 2020); N.H. REV. STAT. ANN. § 132:33 (2020); S.D. CODIFIED LAWS § 34-23A-7 (2020); W. VA. CODE ANN. §§ 16-2F-1, et seq (West 2020).

332. These states are Alaska, Nevada, and New Jersey. *See* ALASKA STAT. ANN. § 18.16.020 (West 2020), *held unconstitutional by* Planned Parenthood of the Great N.W. v. Alaska, 375 P.3d 1122 (Alaska 2016); NEV. REV. STAT. § 442.255 (2020), *held unconstitutional by* Glick v. McKay, 937 F.2d 434 (9th Cir. 1991); N.J. STAT. ANN. § 9:17A-l.4 (West 2020), *held unconstitutional by* Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620 (2000).

333. These states are Florida, Oklahoma, Texas, Utah, Virginia, and Wyoming. *See* FLA. STAT. ANN. § 390.01114 (West 2020); OKLA. STAT. ANN. tit. 63 § 1-744.2 (West 2020); TEX. FAM. CODE ANN. § 33.002 (West 2020); TEX. OCC. CODE ANN. § 164.052(a)(19) (West 2020); UTAH CODE ANN. §§ 76-7-304 to 304.5 (West 2020); VA. CODE ANN. § 18.2-76 (West 2020); WYO. STAT. ANN. § 35-6-118 (West 2020).

334. OHIO REV. CODE ANN. §§ 2151.85, 2919.12 (West 2020).

335. MD. CODE ANN., HEALTH-GEN. § 20-103(c)(l) (West 2020).

336. § 20-103(b)–(c).

337. *Id.*

338. *See Hyde Amendment*, PLANNED PARENTHOOD ACTION FUND, https://www.plannedparenthoodaction.org/issues/abortion/hyde-amendment (last visited Oct. 30, 2020).

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

cost of abortions for women enrolled in Medicaid only in cases of rape, incest, and life endangerment.[340] The life endangerment exception only applies where the endangerment arises from a "physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself."[341]

The Hyde Amendment principally affects women who depend on Medicaid, creating additional obstacles for low-income individuals seeking to access their health care options.[342] Today, 15.6 million women (ages nineteen to sixty-four) have Medicaid coverage; additionally, Medicaid provides coverage to one in five women of reproductive age (fifteen to forty-four).[343]

A. FEDERAL BANS ON PUBLIC FUNDING FOR ABORTION

2020 marked the forty-fourth anniversary of the Hyde Amendment.[344] Though the Amendment remains controversial, the Supreme Court upheld its constitutionality in the 1980 case *Harris v. McRae*.[345] 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."[346] 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."[347] Nor did the restrictions violate the Equal Protection Clause.[348] 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.[349] Finally, the Court rejected the argument that the funding restrictions informed by tenets of Catholicism constituted an establishment of religion.[350] Although it was ultimately held constitutional, the Hyde Amendment remains contentious, because it disproportionately burdens poor people and people of color,[351] and for many low-income individuals it acts

340. *See* Hyde Amendment, Pub. L. No. 94-439, § 302(b), 90 Stat. 1418 (2013).

341. *Id.* This specification ensures that mental health risks to a woman's life may not be used to justify federal funding for abortion.

342. *See Whose Choice? How the Hyde Amendment Harms Poor Women*, CTR. FOR REPROD. RTS, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Hyde_Report_FINAL_nospreads.pdf (last visited Oct. 30, 2020) [hereinafter *Whose Choice?*].

343. *Hyde Amendment*, *supra* note 338.

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

345. 448 U.S. 297, 326 (1980).

346. *Id.* at 298.

347. *Id.*

348. *See id.* at 324–26.

349. *See id.* at 324–25.

350. *See id.* at 319–20.

351. 123 CONG. REC. 19, 700 (1977); *see also Whose Choice?*, *supra* note 342, at 12.

effectively as an abortion ban.[352]

Today, congressional funding for Planned Parenthood is consistently the point of public and political debate.[353] Since 2011, Congress has pushed efforts to strip Planned Parenthood of the federal funding it receives through Title X.[354] The Title X Family Planning Program was created in 1976 to provide family planning to primarily low-income individuals.[355] 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.[356] 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.[357] In February 2011, the House passed an amendment that withdrew federal funds from Planned Parenthood.[358] However, the amendment did not pass in the Senate.[359] Republicans have continually tried to pull federal funding from Planned Parenthood since 2011.[360]

The federal funding Planned Parenthood receives primarily covers preventative healthcare, including contraception, cancer screening, and the diagnosis and treatment of sexually transmitted diseases.[361] According to its latest annual report, only 4% of the medical services performed at Planned Parenthood affiliates were abortion services, while STI testing and treatment accounted for 50%.[362] Nonetheless, anti-abortion politicians and activists hope to permanently close Planned Parenthood's doors, using a rescission of Title X funding as a

352. *See* Alina Salganicoff et al., *The Hyde Amendment and Coverage for Abortion Services*, KAISER FAM. FOUND. (Sept. 10, 2020), https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services/.

353. *See Hyde Amendment*, *supra* note 338.

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

355. *See* § 300 Project Grants and Contracts for Family Planning Services, 42 U.S.C. §§ 300–300a-8.

356. *See* ANGELA NAPILI, CONG. RSCH. SERV., R45181, TITLE X (PUBLIC HEALTH SERVICES ACT) FAMILY PLANNING PROGRAM (2018), https://crsreports.congress.gov/product/pdf/R/R45181; *see also About Title X Service Grants*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://opa.hhs.gov/grant-programs/title-x-service-grants/about-title-x-service-grants (last visited Oct. 30, 2020).

357. *See* Nather & Nocera, *supra* note 354.

358. *See* Felicia Sonmez, *Senate Passes 2011 Funding Bill, Rejects Measures to Defund Planned Parenthood and Health Care*, WASH. POST (Apr. 14, 2011), https://www.washingtonpost.com/blogs/2chambers/post/senate_passes_2011_funding_bill_rejects_measures_to_defund_planned_parenthood_and_health_care/2011/04/14/AFla9peD_blog.html.

359. *See id.*

360. *E.g.*, A Bill to Prohibit Federal Funding of Planned Parenthood Federation of America, S. 158, 116th Cong. (2019); Defund Planned Parenthood Act of 2019, H.R. 369, 116th Cong. (2019); Defund Planned Parenthood Act of 2017, H.R. 354, 115th Cong. (2017); A Bill to Prohibit Federal funding of Planned Parenthood Federation of America, S. 1881, 114th Cong. (2017); Defund Planned Parenthood Act of 2015, H.R. 3134, 114th Cong. (2015).

361. Miriam Berg, *How Federal Funding Works at Planned Parenthood*, PLANNED PARENTHOOD ACTION FUND (Jan. 5, 2017, 9:00 PM), https://www.plannedparenthoodaction.org/blog/how-federal-funding-works-at-planned-parenthood.

362. PLANNED PARENTHOOD, 2018-2019 ANNUAL REPORT 3 (2020), https://www.plannedparenthood.org/uploads/filer_public/2e/da/2eda3f50-82aa-4ddb-acce-c2854c4ea80b/2018-2019_annual_report.pdf.

mechanism.[363] Planned Parenthood supporters claim that an amendment prohibiting Planned Parenthood in particular from receiving Title X funds would be an unconstitutional "bill of attainder."[364]

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's platform.[365] While conservatism is typically associated with a pro-life stance, the election of Donald Trump in 2016 solidified Planned Parenthood specifically as a target for conservative rhetoric.[366] In television interviews on the campaign trail, Trump repeatedly answered in the affirmative when asked whether he would defund Planned Parenthood.[367] Trump continued these promises into 2020, promising to fully defund Planned Parenthood and other abortion providers if reelected.[368] His 2016 interviews also referenced hidden-camera videos claiming that the organization profits from fetal tissue sales.[369] The allegations occurred during the congressional summer recess of 2015, and upon their discovery, some Republicans rushed to halt public funding for Planned Parenthood.[370] Planned Parenthood denied these allegations, and Democrats reinforced that it provides crucial health care services to men and women.[371] A Congressional committee later determined the undercover videos were manipulated and falsified by pro-life activists.[372]

The Trump Administration and congressional Republicans 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.[373] The Senate Parliamentarian ruled that the part of the healthcare bill aimed at Planned Parenthood did not pertain

363. Nather & Nocera, *supra* note 354.

364. *See id.*

365. *See Republican Views on Planned Parenthood*, REPUBLICAN VIEWS (Apr. 28, 2017), https://www.republicanviews.org/republican-views-on-planned-parenthood/.

366. *See id.*

367. Pete Baklinski, *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.

368. Letter from Donald Trump, President of the U.S., to Pro-Life Voices for Trump (Sept. 3, 2020), https://cdn.donaldjtrump.com/public-files/press_assets/pro-life-letter-potus.pdf.

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

370. *See id.*

371. *See id.*

372. 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.

373. 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/.

directly to the federal budget, and thus, did not satisfy the Byrd Rule.[374] Because the provision did not comply with the Byrd Rule, its passage required sixty votes in the Senate, which the Republicans did not secure.[375] Despite this legislative hiccup, in 2018 the executive branch laid out proposals for "defunding" Planned Parenthood without specifically singling out the organization,[376] but failed to enact them. Planned Parenthood maintained its Title X funding in 2018.[377]

In March 2019, the Trump Administration succeeded in overhauling the requirements for Title X in an attempt to restrict access to abortion. These regulations, known as the domestic gag rule, include a prohibition on abortion referrals, coercive counseling standards, and strict requirements on the physical and financial separation of Title X and abortion services.[378] In 2019, Planned Parenthood chose to forgo Title X funding rather than comply with the gag rule.[379] In 2020, the gag rule cut the Title X network's patient capacity in half, and it is estimated that nearly 1,000 clinics left the network as a result of the rule.[380]

The gag rule has been challenged in courts across the country, and there are currently conflicting decisions in the circuits. In February 2020, the Ninth Circuit upheld the rule.[381] In September 2020, the Fourth Circuit struck down the rule.[382] In October 2020, the American Medical Association petitioned the Supreme Court to review the Ninth Circuit's decision[383] and Secretary of Health and Human Services Alex Azar petitioned the Court to review the Fourth Circuit's decision.[384] In January 2021, both cases were distributed for conference.[385]

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374. *See id.*

375. *Id.*

376. *See* Julie Rovner, *Trump Proposes Cutting Planned Parenthood Funds: What Does That Mean?*, 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.

377. *See 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.

378. Ruth Dawson, *Trump Administration's Domestic Gag Rule Has Slashed the Title X Network's Capacity by Half*, GUTTMACHER INST. (Feb. 5, 2020), https://www.guttmacher.org/article/2020/02/trump-administrations-domestic-gag-rule-has-slashed-title-x-networks-capacity-half.

379. Pam Belluck, *Planned Parenthood Refuses Federal Funds Over Abortion Restrictions*, N.Y. TIMES (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/health/planned-parenthood-title-x.html.

380. Dawson, *supra* note 378.

381. Mary Anne Pazanowski & Lydia Wheeler, *Trump HHS Can Enforce Abortion Gag Rule, Ninth Circuit Says (2)*, BLOOMBERG L. (Feb. 24, 2020), https://news.bloomberglaw.com/health-law-and-business/trump-hhs-can-enforce-abortion-gag-rule-ninth-circuit-says.

382. Alice Miranda Ollstein, *Federal court blocks Trump's abortion 'gag' rule*, POLITICO (Sept. 3, 2020), https://www.politico.com/news/2020/09/03/court-blocks-trump-abortion-gag-rule-408579.

383. *AMA petitions U.S. Supreme Court to review Title X restrictions*, AM. MED. ASS'N (Oct. 1, 2020), https://www.ama-assn.org/press-center/press-releases/ama-petitions-us-supreme-court-review-title-x-restrictions.

384. Petition for Writ of Certiorari to The United States Court of Appeals for The Fourth Circuit, Mayor of Balt. v. Azar, 973 F. 3d 258 (2020) (No. 20-454).

385. *American Medical Association v. Cochran*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/american-medical-association-v-cochran/ (last visited Feb. 10, 2021); *Cochran v. Mayor and*

President Trump also tightened restrictions on federal funding for abortion 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 family planning funding from the United States.[386] In May of his first year in office, Trump expanded the ban to apply to all federal funding, increasing the ban's reach from $600 million to $12 billion.[387] This expansion was the first since the rule's inception in 1984.[388] In May 2019, Trump expanded the prohibition yet again, applying the restriction not only to recipients of federal funding but also their sub-recipients, even if those organizations do not directly receive any money from the United States.[389] President Trump's reach in this area goes beyond domestic policies, threatening the ability and viability of the procedure globally.

It is expected in the early days of the new administration that President Biden will reverse President Trump's changes to federal funding policy for abortion. He has pledged to reverse the Mexico City Policy and it is expected he will also roll back the recent changes to Title X.[390] President Biden also changed his stance on the Hyde Amendment in recent years, declaring his opposition in 2019.[391] As his administration progresses, the landscape in this area will continue to develop and the legal battles will 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.[392] As of October 1, 2020, twenty-two states have implemented restrictions on coverage for abortions in insurance policies for public employees.[393]

City Council of Baltimore, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/cochran-v-mayor-and-city-council-of-baltimore/ (last visited Feb. 10, 2021).

386. 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.

387. Zara Ahmed, *The Unprecedented Expansion of the Global Gag Rule: Trampling Rights, Health and Free Speech*, 23 GUTTMACHER POL'Y REV. 13, 13 (Apr. 28, 2020).

388. *Id*. at 14.

389. *Id*. at 14.

390. Chloe Atkins, *Biden readies sweeping rollback of Trump-era abortion crackdown*, NBC NEWS (Jan. 18, 2021, 6:07 AM), https://www.nbcnews.com/politics/white-house/biden-readies-sweeping-rollback-trump-era-abortion-crackdown-n1254552.

391. Katie Glueck, *Joe Biden Denounces Hyde Amendment, Reversing His Position*, N.Y. TIMES (June 6, 2019), https://www.nytimes.com/2019/06/06/us/politics/joe-biden-hyde-amendment.html.

392. 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_O.

393. *Regulating Insurance Coverage of Abortion*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/regulating-insurance-coverage-abortion (last visited Feb. 10, 2021). 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 (2018) (prohibiting the use of public funds for the performance of any abortion unless necessary to save the woman's life or to

The Supreme Court upheld state statutes that restricted "Medicaid-funded abortions" in both *Beal v. Doe*[394] and *Maher v. Roe*.[395] 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.[396] 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.[397] 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.[398] The Court reiterated that lack of public funding does not unduly burden the right to seek an abortion and therefore is not unconstitutional.[399] 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.[400]

Following the 2015 release of falsified Planned Parenthood videos,[401] 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.[402] 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.[403]

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avert substantial and irreversible impairment of a major bodily function of the woman); COLO. REV. STAT. ANN. § 25.5-3-106 (West 2018); GA. CODE ANN. § 33-24-59.l7(a) (West 2018); IDAHO CODE ANN. § 41-2142 (West 2018); IND. CODE ANN. § 27-8-13.4-2 (West 2018); KAN. STAT. ANN. § 40-2,190 (West 2018); KY. REV. STAT. ANN. § 304.5-160 (West 2018); MICH. COMP. LAWS ANN. § 400.109a (West 2018); MISS. CODE ANN. § 41-41-91 (West 2018); MO. ANN. STAT. § 376.805 (West 2018); NEB. REV. STAT. ANN. § 44- 8403 (West 2018); N.C. GEN. STAT. ANN. § 143C-6-5.5 (West 2018); N.D. CENT. CODE ANN. § 14-02.3-03 (West 2018); OHIO REV. CODE ANN. § 9.04 (West 2018); OKLA. STAT. ANN. tit. 63, § 1-741.3 (West 2018); 18 PA. STAT. AND CONS. STAT. ANN. § 3215 (West 2018); R.I. GEN. LAWS ANN. § 36-12-2.1 (West 2020); S.C. CODE ANN. § 38-71-238 (West 2018); UTAH CODE ANN. § 31A-22-726 (West 2018). Additionally, Massachusetts prohibits coverage of post-viability "partial-birth" abortions. MASS. GEN. LAWS ANN. ch. 32A § 10(C) (West 1996).

394. 432 U.S. 438, 447 (1977).

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

396. *Beal*, 432 U.S. at 444.

397. *Id.*

398. *Maher*, 432 U.S. at 470.

399. *Id.* at 470–71.

400. *Id.* at 480.

401. 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).

402. 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/ (stating that Alabama, Arkansas, Arizona, Florida, Louisiana, Kansas, Missouri, Oklahoma, Texas, and Wisconsin have moved to disqualify Planned Parenthood from receiving Medicaid funds).

403. 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-

The Supreme Court did not resolve the issue of whether patients can sue their state in federal court to ensure receipt of Medicaid benefits from their preferred provider, Planned Parenthood, for example.[404] Louisiana and Kansas both filed petitions of certiorari for cases asking this question.[405] The Supreme Court denied both petitions for a writ of certiorari on December 10, 2018, where Justice Thomas, joined by Justice Alito and Justice Gorsuch, dissented.[406] The Supreme Court let the decisions from the US Court of Appeals for the Fifth and Tenth Circuits stand, meaning that Medicaid recipients are allowed to challenge a state's designation of who or what is a qualified preferred provider.

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. Eleven states prohibit all private insurance coverage of abortion.[407] Additionally, twenty-six states restrict abortion coverage in plans offered through the health insurance exchanges.[408] The PPACA established these state healthcare exchanges to assist individuals and small businesses in obtaining health insurance.[409]

After the enactment of the law, twenty-six states passed laws that restrict the use of the state health exchanges to receive an abortion.[410] Some states allow for

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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).

404. *See* Andersen v. Planned Parenthood of Kan. & Mid-Mo., 882 F.3d 1205 (10th Cir. 2018), *cert denied*, 586 U.S. (2018); Gee v. Planned Parenthood of Gulf Coast, Inc., 862 F.3d 445 (5th Cir. 2017), *cert. denied*, 586 U.S. ___ (2018).

405. Petition for Writ of Certiorari, *Andersen*, 586 U.S. (No. 17-1340); Petition for Writ of Certiorari, *Gee*, 586 U.S. (No. 17-1492).

406. Gee v. Planned Parenthood of Gulf Coast, Inc., 586 U.S. (2018) (Thomas, J., dissenting).

407. IDAHO CODE ANN. § 41-2142 (West 2018); IND. CODE ANN. § 27-8-33-4 (West 2018); KAN. STAT. ANN. § 40-2,190 (West 2018); KY. REV. STAT. ANN. § 304.5-160 (West 2018); MICH. COMP. LAWS ANN. § 550.543 (West 2018); MO. ANN. STAT. § 376.805 (West 2018); NEB. REV. STAT. ANN. § 44-8403 (West 2018); N.D. CENT. CODE ANN. § 14-02.3-03 (West 2017); OKLA. STAT. ANN. tit. 63, § 1-741.3 (West 2018); UTAH CODE ANN. § 31A-22-726 (West 2018); TEX. INS. CODE ANN. art. 1696.002 (West 2017).

408. *Regulating Insurance Coverage of Abortions*, *supra* note 393.

409. *See* Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 et seq.

410. ALA. CODE § 26-23C-3 (2018); ARIZ. REV. STAT. ANN.§ 20-121 (2018); ARK. CODE ANN. § 23-79-156 (West 2018); FLA. STA. ANN. § 627.66996 (West 2018); GA. CODE ANN. § 33-24-59.17 (West 2018); IDAHO CODE ANN. § 41-1848 (West 2018); IND. CODE ANN. § 27-8-33-4 (West 2018); KAN. STAT. ANN. § 40-2-190 (West 2018); LA. STAT. ANN. § 22:1014 (2018); MICH. COMP. LAWS ANN. § 550.542 (West 2018); MISS. CODE ANN. 41-41-99 (West 2018); MO. ANN. STAT. § 376.805 (West 2018); NEB. REV. STAT. ANN. § 44-8403 (West 2018); N.C. GEN. STAT. ANN. § 58-51-63 (West 2018); N.D. CENT. CODE ANN. § 14-02.3-03 (West 2017); OHIO REV. CODE ANN. § 3901.87 (West 2018); OKLA. STAT ANN. tit. 63, § 1-741.3 (West 2018); 18 PA. CONST. STAT. AND CONST. STAT. ANN. § 3215 (West 2018); S.C. CODE ANN. § 38-71-238 (West 2018); S.D. CODIFIED LAWS § 58-17-147 (West 2018); TENN. CODE ANN. § 56-26-134 (West 2018); UTAH CODE ANN. § 31A-22-726(4) (West 2018); VA. CODE ANN. § 38.2-3451 (West 2018); WIS. STAT. ANN. § 632.8985 (West 2018).

exceptions for insurance coverage of abortion in the case of life endangerment, rape, and incest;[411] only two states allow for no exceptions even in such cases.[412] 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.[413] Following RFRA suits, both Connecticut and Rhode Island began offering plans that did not include expanded abortion coverage.[414] 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.[415]

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.[416] 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."[417] Nevertheless, in recent years, some jurisdictions have decided to attribute personhood to fetuses in criminal law, tort law, and state constitutional law.[418]

411. *See, e.g.*, ALA. CODE § 26-23C-3 (2018) (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 2018) (inhibiting 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).

412. LA. STAT. ANN. § 22:1014 (2018); TENN. CODE ANN. § 56-26-134 (West 2018).

413. Diana Chandler, *Religious Liberty Lawsuit Challenges Illinois abortion Insurance Mandate*, BAPTIST PRESS (June 11, 2020), https://www.baptistpress.com/resource-library/news/religious-liberty-lawsuit-challenges-illinois-abortion-insurance-mandate/; Richard Salit, *Lawsuit Filed Over Abortion Services in Health Source RI Plans*, PROVIDENCE J. (Jan. 15, 2015, 10:16 PM), http://www.providencejournal.com/article/20150115/NEWS/301159984.

414. *See* Salit, *supra* note 413.

415. Alina Salganicoff et al., *Coverage for Abortion Services and the ACA*, KAISER FAM. FOUND. (Sept. 19, 2014), https://www.kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-and-the-aca/.

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

417. *Id.* at 159.

418. *See, e.g.,* 18 U.S.C. § 1841; 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.").

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.[419] 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.[420] At the time of the federal UVVA's passage in 2004, twenty-six states had already passed homicide laws that recognized unborn victims.[421]

Of these states, nineteen recognized unborn children as victims regardless of the stage of prenatal development.[422] Another eleven states afforded partial coverage to unborn victims that applied to some stages of prenatal development.[423]

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419. 18 U.S.C. § 1841 ("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.").

420. *See id.*

421. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1103 (A)(5) (2019); IDAHO CODE ANN. §§ 18-4001, 18-4016 (West 2018); 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West 2016); IND. CODE ANN. § 35-42-1-6 (West 2016); IOWA CODE ANN. § 707.8 (West 2016); KY. REV. STAT. ANN. § 507A.010 (West 2016); LA. STAT. ANN. § 14:2 (2020); NEB. REV. STAT. ANN. § 28-389 (West 2016); OHIO REV. CODE ANN. §§ 2903.01, 2903.09 (West 2018); S.D. CODIFIED LAWS ANN. §§ 22-16-1.1, 22-1-2 (West 2017); TEX. PENAL CODE ANN. §§ 1.07, 19.01 (West 2017); UTAH CODE ANN. § 76-5-201 (West 2016); VA. CODE ANN. § 18.2-32.2 (West 2016).

422. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1103 (2016) (establishing a penalty of manslaughter for killing of an "unborn child in the womb at any stage of its development"); IDAHO CODE ANN. § 18-4016 (West 2016) ("'[E]mbryo' or 'fetus' shall mean any human in utero."); 720 ILL COMP. STAT. ANN. 5/9-1.2 (West 2016) ("'[U]nborn child' shall mean any individual of the human species from fertilization until birth."); KY. REV. STAT. ANN. § 507A.010 (West 2016); ("'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 (2020) ("'Unborn child' means any individual of the human species from fertilization and implantation until birth."); NEB. REV. STAT. ANN. § 28-389 (West 2018) ("'Unborn child' means an individual member of the species Homo sapiens, at any stage of development in utero"); OHIO CODE ANN. §§ 2903.01, 2903.09 (West 2018) (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 ANN. §§ 22-16-1.1, 22-1-2 (West 2017) (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 2015) (establishing that "caus[ing] the death" of a fetus at "every stage of gestation" constitutes homicide); UTAH CODE ANN. § 76-5-201 (West 2018).

423. *See* ARK. CODE ANN. § 5-1-102(13)(b)(i)(a) (West 2018) (establishing the criminal penalty for killing an unborn child of twelve or more weeks of gestation); CAL. PENAL CODE § 187(a) (West 2016) (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 (Cal. 2004), as an embryonic stage of seven to eight weeks); FLA. STAT. ANN. § 782.09 (West 2016) (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 2016) (providing that the killing of an unborn child after viability is vehicular homicide); IND. CODE ANN. § 35-42-1-1 (West 2018) (establishing the killing of "a fetus that has attained viability" is murder); NEV. REV. STAT. ANN. § 200.210 (West 2015) (providing that the killing of an "unborn quick child" is manslaughter); OKLA. STAT. ANN. tit. 21, § 713 (West 2017) (repealed by Laws 2006, c. 185, § 23, effective Nov. 1, 2006) (providing that the killing of an "unborn quick child" is manslaughter); 11 R.I. GEN. LAWS ANN. § 11-23-5 (West 2016) (repealed by P.L. 2019, ch. 27, § 4, eff. June 19, 2019) (establishing that the penalty for killing of an unborn quick child is

Today, thirty states have homicide laws that fully cover fetuses, and eight states allow partial coverage.[424] Indiana has since broadened its statute to recognize any stage of development rather than only post viability.[425]

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."[426] 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."[427] Since *Roe*, the "fundamental premise of constitutional law" governing abortion is that fetuses are not entitled to the legal protections afforded persons.[428] 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.[429] Under the Constitution a fetus is not entitled to a "right to life."[430] Thus, the termination of a pregnancy has never been treated as a termination of life entitled to Fourteenth Amendment protection.[431] As such, the UVVA proved controversial because it classified the fetus or embryo as a legal person deserving of criminal law protections.[432]

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.[433] 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.[434] If the law recognizes a fetus as a constitutional person, states could be required to

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manslaughter); WASH. REV. CODE ANN. § 9A.32.060(l)(b) (West 2016) (providing that the killing of an "unborn quick child" is manslaughter); *see also* Commonwealth 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) (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* State v. Shafer, 531 S.E.2d 524 (S.C. 2000).

424. *State Laws on Fetal Homicide and Penalty-enhancement for Crimes Against Pregnant Women*, NAT'L CONF. OF STATE LEGISLATURES (May 1, 2018), https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx.

425. *Id*.

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

427. 18 U.S.C. § 1841.

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

429. *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).

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

431. *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.").

432. *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).

433. *See id.*

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

outlaw abortion in some circumstances because it would be akin to murder.[435] When constitutional rights are in conflict or competition, "any power to increase the constitutional population by unilateral decision would be, in effect, a power to decrease rights the Constitution grants to others."[436] The Supreme Court has not passed on the constitutionality of the UVVA, leaving the conflict between the UVVA's language and the *Roe* decision unresolved.

One case unsuccessfully attempted to challenge the constitutionality of the UVVA. In *United States v. Boie*, the defendant, who 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."[437] The Air Force Court of Criminal Appeals rejected the constitutional challenges to the UVVA.[438] 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."[439] 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."[440]

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.[441] 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.[442] 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.[443]

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435. *See id.* at 398–99.

436. *Id.* at 400–01.

437. *United States v. Boie*, 70 M.J. 585, 586–87 (A.F. Ct. Crim. App. 2011).

438. *See id.* at 589, 591–92.

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

440. *Id.*

441. *Id.* at 590.

442. *Id.* at 591 (citing People v. Ford, 581 N.E.2d 1189, 1202 (Ill. App. Ct. 1991); State v. Merrill, 450 N.W.2d 318, 321–22 (Minn. 1990)).

443. *Id.*

The court noted that the defendant lacked standing to challenge the Eighth Amendment.[444] With regard to defendant's Establishment Clause argument, the 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.[445] The court particularly relied upon the Supreme Court's holding in *Harris v. McRae*[446] that the existence of parallels between religious values and a statute by itself is insufficient to render a statute unconstitutional under the Establishment Clause.[447]

Unsuccessful challenges to state feticide statutes have advanced the same arguments from *Boie*.[448] New challenges with novel arguments are met with new justifications for the statute's validity.[449] For example, the defendant in *State v. Merrill*[450] argued that a Minnesota feticide statute violated his Equal Protection rights by equating a non-viable fetus with a person.[451] 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.[452] 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.[453] 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.[454] Additionally, in *People v. Ford*,[455] 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.[456] 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.[457] While defendants continue to provide additional arguments, state feticide statutes have yet to be altered.

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444. *Id.* at 592
445. *See id.* at 592–93.
446. Harris v. McRae, 448 U.S. 297, 319 (1980).
447. *Boie*, 70 M.J. at 592.
448. *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. Black, 526 N.W.2d 132, 134 (Wis. 1994); State v. Merrill, 450 N.W.2d 318, 322–24 (Minn. 1990).
449. *See generally Merrill*, 450 N.W.2d at 318.
450. *Id.* at 318.
451. *Id.* at 321.
452. *Id.*
453. *Id.*
454. *See id.*
455. 581 N.E.2d 1189 (Ill. App. Ct. 1991).
456. *Id.* at 1200.
457. *Id.*

Another novel argument stems from the 2017 GOP tax over-haul plan.[458] The plan included the proposition that an unborn child can qualify as a beneficiary to college tuition savings funds.[459] The proposal defined an unborn child as a child in utero during any stage of development.[460] Many activists saw this language as an attempt to bestow rights on the fetus and curtail full reproductive rights of the woman.[461] Pro-life supporters argued that the bill simply allowed families to start accruing benefits earlier in the child's life.[462] However, one could open the account at any time and designate beneficiaries later under the previous tax plan.[463] Ultimately, the rationale behind the bill was irrelevant, as the Senate repealed the language prior to passing the final draft.[464] 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,[465] 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 baby, she was convicted of feticide and neglect and sentenced to a prison term of twenty years.[466] 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."[467] 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.[468] The Indiana Court of Appeals has since reduced Purvi Patel's sentence.[469]

Other cases in Indiana suggest that feticide laws might be used to restrict women's access to abortion.[470] In *Bei Bei Shuai v. State*, Shuai was charged with

458. *See* 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/.

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

464. *See id.*

465. *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).

466. 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.

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

468. *See id.*

469. *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.

470. *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).

murder under Indiana's feticide statute when she caused the termination of her pregnancy through a suicide attempt.[471] While the charges were ultimately dropped after Ms. Shuai agreed to plead guilty to criminal recklessness,[472] the Court of Appeals' decision suggests that feticide laws can be used to impose further restrictions on abortion.[473] 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.[474]

In Alabama, Marshae Jones was indicted on manslaughter charges after being shot in the stomach while five months pregnant, triggering the death of her fetus.[475] She was involved in a fight with Ebony Jemison, who prosecutors and police characterize as acting in self-defense, when Ms. Jemison fired a warning shot that accidentally hit Ms. Jones in the stomach.[476] Ultimately, the district attorney dismissed the case against Ms. Jones.[477] Ms. Jemison, the person who fired the shot, was charged with murder and attempted murder but the grand jury dismissed the charges.[478] However, this incident marks the first time in the state's history that it has attempted to prosecute a pregnant person for attempted manslaughter relating to the death of their unborn child.[479]

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.[480]

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

472. 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/.

473. *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.").

474. *See id.* at 628–29, 631.

475. Vanessa Romo, *Woman Indicted For Manslaughter After Death Of Her Fetus, May Avoid Prosecution*, NPR (June 28, 2019, 4:49 PM), https://www.npr.org/2019/06/28/737005113/woman-indicted-for-manslaughter-after-death-of-her-fetus-may-avoid-prosecution.

476. *Id.*

477. Darran Simon & Susan Scutti, *DA Drops All Charges Against a Pregnant Woman Indicted in Her Baby's Death After Shooting in Alabama*, CNN (July 3, 2019, 4:16 PM), https://www.cnn.com/2019/07/03/us/pregnant-alabama-woman-manslaughter-indictment/index.html.

478. *Id.*

479. *See* Susan Scutti & Hollie Silverman, *Motion Filed to Dismiss Charges Against Pregnant Woman, a Shooting Victim Indicted For Death of Her Unborn Child*, CNN (July 1, 2019, 2:54 PM), https://www.cnn.com/2019/07/01/us/pregnant-woman-shot-death-of-unborn-child/index.html.

480. *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.").

However, states differ as to whether a wrongful death claim based upon the destruction of a fetus requires that the fetus has reached viability.[481]

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.[482] 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.[483] The court explained that when the termination of the pregnancy resulted from a third party's unconsented tortious act, such protections were not triggered.[484]

In contrast, in *Kandel v. White*, the Court of Appeals of Maryland reaffirmed the viability requirement that was previously developed.[485] 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 unintentional act.[486] The court also noted that the third party might not even know of the woman's pregnancy.[487]

C. FETAL PERSONHOOD UNDER STATE LAW-CONSTITUTIONAL AMENDMENTS AND LEGISLATION

Recent proposals for personhood amendments to state constitutions[488] and personhood statutes[489] directly challenge one *Roe v. Wade* holding that fetuses do

481. *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).

482. *Wiersma*, 543 N.W.2d 787.

483. *See id.* at 792.

484. *See id.*

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

486. *See id.*

487. *See id.*

488. 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), https://www.denverpost.com/2011/11/20/abortion-foes-to-try-again-to-pass-personhood-amendment-in-colorado/ (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*, MIA. HERALD (Nov. 8, 2011, 3:50 AM), http://www.modbee.com/latest-news/article3138258.html (stating 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 2014 Colorado Ballot Measures Results*, POLITICO (Nov. 15, 2014, 1:36 AM), https://www.politico.com/2014-election/results/map/ballot-measures/colorado/#.X_NknulKijA (establishing that in 2014 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 to amend Montana's constitution) (last visited Jan. 4, 2020); *Initiatives 2014*, FLA. DEP'T OF STATE: CIV. OF

not have legal standing as persons.[490] 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 person'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.[491] However, most Mississippi voters voted against the amendment.[492] Political commentators predicted that additional personhood amendments or bills would be introduced.[493] In fact, a Virginia state delegate introduced a personhood bill on November 21, 2011.[494] It was later suspended from consideration.[495] 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.[496] The citizens of North Dakota voted against the adoption of the amendment in 2014.[497] In 2013, Kansas enacted the

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ELECTIONS, https://dos.elections.myflorida.com/initiatives/ (last visited Jan. 4, 2020) (establishing that 2014 Florida ProLife Personhood Amendment initiative is still active).

489. *See* N.D. CENT. CODE ANN. § 14-02.1-02 (West 2020) (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.B. 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").

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

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

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

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

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

495. 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/.

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

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

"Pro-Life Protections Act" which contains personhood language and declares that life begins at fertilization.[498]

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.[499] The bill was defeated on May 4, 2015.[500] 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.[501] However, it was defeated in the state Senate on May 1, 2018.[502] Most recently, in 2019, Georgia proposed the "Living Infants Fairness and Equality (LIFE) Act" which amends state law to define "natural person" to mean "any human being including an unborn child."[503] In other words, the bill recognizes fetuses as natural persons. 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* regarding fetal personhood.

VII. CONCLUSION

Following *June Medical Services v. Russo*,[504] a 2020 case in which the Supreme Court struck down a Louisiana law largely identical to the Texas law found unconstitutional in *Whole Woman's Health*,[505] the future of the constitutional right to abortion, for a brief moment, seemed secure. However, the Eighth Circuit used Chief Justice Roberts's concurrence to uphold restrictions in *Hopkins v. Jegley*,[506] setting the stage for continued litigation over increasingly restrictive regulations. Moreover, it has yet to be seen whether the Court will utilize the principle of *stare decisis* in a challenge to *Roe* as it did in *Russo*, especially given the limited nature of Chief Justice Roberts's concurrence. These questions became more urgent following the death of Justice Ruth Bader Ginsburg on September 18, 2020.[507] *Roe* has taken center stage in the public

498. Pro-life Protections Act, H.B. 2253, 2013 Sess. (Kan. 2013).

499. 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/.

500. *See id.*

501. 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.

502. *See* Tim Smith, *SC Senate Defeats Proposal That Would Have Banned All Abortions*, THE STATE (May 2, 2018, 7:57 AM), https://www.thestate.com/news/politics-government/article210273854.html.

503. Living Infants Fairness and Equality (LIFE) Act, S.B. 218, 155th Gen. Assemb., Reg. Sess. (Ga. 2019).

504. *See* June Med. Servs. LLC v. Russo, 140 S. Ct. 2103 (2020).

505. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

506. *See* Hopkins v. Jegley, 968 F.3d 912 (8th Cir. 2020).

507. Robert Barnes & Michael Fletcher, *Ruth Bader Ginsburg, Supreme Court Justice and legal pioneer for gender equality, dead at 87*, WASH. POST (Sept. 18, 2020), https://www.washingtonpost.com/local/obituaries/ruth-bader-ginsburg-dies/2020/09/18/3cedc314-fa08-11ea-a275-1a2c2d36e1f1_story.html.

arena once again following the nomination of Judge Amy Coney Barrett to fill Ginsburg's seat on the Court. Today, with the confirmation of Judge Barrett to the Supreme Court, the ideological makeup of the Court tips significantly in favor of conservatives and the fate of *Roe* remains in the balance. However, 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.