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**Abortion Cases in the
Higher Federal Courts**

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Introduction

The challenged abortion laws that may be reviewed by the United States Supreme Court in the near future can be divided into three main groups: (I) Limitations on the availability of taxpayer dollars to abortion providers; (II) restrictions on abortion procedures and discriminatory abortions; and (III) health, safety, and informed consent laws.

I. Limitations on the availability of taxpayer dollars to abortion providers.

A. Medicaid: Private Right of Action and Free Choice of Provider

In recent years, states have enacted laws or taken administrative actions that disqualified abortion providers from participation in their Medicaid programs. When challenging these state laws, abortion providers have raised two interdependent claims in litigation: (1) that Medicaid recipients have a private right of action to challenge a state’s disqualification of a Medicaid provider in court; and (2) that the laws violate federal law, specifically the Medicaid statute’s “free choice of provider” provision.¹

The **Fifth, Sixth, Seventh, Ninth, and Tenth** Circuit Courts have held that §1396a(a)(23)(A) of the federal Medicaid statute confers a private right of action, enabling Medicaid recipients to sue. Only the **Eighth Circuit** held that such a right does not exist.² Further, the **Fifth, Seventh, Ninth, and Tenth** Circuit Courts³ have held that terminations of abortion providers from Medicaid programs violate the Free Choice of Provider provision.

In late 2018, the **U.S. Supreme Court declined to review decisions from the Fifth⁴ and Tenth Circuits⁵ enjoining laws in Louisiana and Kansas, respectively.** Dissenting Justices criticized the Court’s failure to settle the question of whether Medicaid recipients have a private right of action to challenge in court a state’s disqualification of a Medicaid provider.⁶

¹ 42 U.S.C. § 1396a(a)(23).

² *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1224-29 (10th Cir. 2018) (holding § 1396a(a)(23) creates a private right of action); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457-62 (5th Cir. 2017) (same); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 965-68 (9th Cir. 2013) (same); *Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health*, 699 F.3d 962, 972-77 (7th Cir. 2012) (same); *Harris v. Olszewski*, 442 F.3d 456, 460-65 (6th Cir. 2006) (same). *Contra Does v. Gillespie*, 867 F.3d 1034, 1039-45 (8th Cir. 2017) (holding § 1396a(a)(23)(A) does not create a private cause of action).

³ *Andersen*, 882 F.3d at 1229-36; *Gee*, 862 F.3d at 462-68; *Betlach*, 727 F.3d at 968-74; *Comm’r of Ind.*, 669 F.3d at 977-80.

⁴ *Gee v. Planned Parenthood of Gulf Coast Inc.*, Docket 17-1492; 876 F.3d 699 (5th Cir. 2017) (en banc rehearing denied); 862 F.3d 445 (5th Cir. 2017).

⁵ *Andersen v. Planned Parenthood of Kansas and Mid-Missouri*, Docket 17-1340; 882 F.3d 1205 (10th Cir. 2018) (preliminary injunction affirmed in part, vacated in part; case remanded); 2016 U.S. Dist. Lexis 86948 (D. KS. 2016) (preliminary injunction granted).

⁶ *Gee v. Planned Parenthood of Gulf Coast Inc.*, 586 U.S. ____ (2018), Thomas, J., dissenting.

While the U.S. Supreme Court has delayed settling this issue for now, the **Fourth Circuit** will consider the question soon. **South Carolina** is appealing a trial court decision granting a preliminary injunction against the state's termination of abortion providers from the state Medicaid program in *Planned Parenthood South Atlanta v. Baker*.⁷ The lower court held that the plaintiffs have a private right of action and the termination violates the Medicaid Free Choice of Provider provision.

Conversely, the **Fifth Circuit** reversed and remanded a lower court decision enjoining a **Texas** agency decision to exclude Planned Parenthood from the state Medicaid program. While the court did not reverse the holding in *Gee* that a private right of action exists, they held that the lower court failed to apply the correct standard of review by not giving deference to the agency's actual findings and accepting evidence beyond the agency record.⁸

B. General Funding Restriction

The **full Sixth Circuit** is reviewing a trial court decision enjoining an **Ohio** law that prevents the Ohio Department of Health from using funds from six non-abortion-related federal health programs to contract with abortion providers and their affiliates.⁹ The trial court held that the law violates the First and Fourteenth Amendments.¹⁰

II. **Restrictions on Abortion Procedures and Discriminatory Abortions.**

A. 2nd-Trimester Dismemberment (D&E) Acts

Restrictions on second-trimester Dilation and Evacuation abortions (D&E), also known as dismemberment abortions, have been enacted in nine states. Two are presently before U.S. Circuit Courts. The **Fifth Circuit** is evaluating the constitutionality of an enjoined **Texas** act in *Whole Woman's Health v. Paxton*.¹¹ The **Eighth Circuit** is similarly considering the constitutionality of an **Arkansas** act in *Frederick W. Hopkins, M.D., M.P.H. v. Larry Jegley, et al.*¹²

⁷ 326 F. Supp. 3d 39 (D. SC. 2018).

⁸ *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs. v. Smith*, 2019 U.S. App. Lexis 1616 (5th Cir. 2019).

⁹ *Planned Parenthood of Greater Ohio v. Himes*, 892 F.3d 1283 (6th Cir. 2018).

¹⁰ *Planned Parenthood of Greater Ohio v. Hodges*, 201 F. Supp. 3d 898 (S.D. OH. 2016).

¹¹ 280 F. Suppl. 3d 938 (W.D. TX. 2017).

¹² 267 F. Supp. 3d 1024 (E.D. AR. 2017). This case also challenges provisions that require abortion providers to seek patients' medical records, dispose of fetal remains in a humane manner, and disclose information about minors' abortions to law enforcement.

In August 2018, the **Eleventh Circuit** held that the **Alabama** act was unconstitutional in *W. Ala. Women's Ctr. v. Williamson*.¹³ The state is appealing that decision to the United States Supreme Court.

Similar acts are enjoined or are otherwise not in effect in: **Kansas** (enjoined and waiting for ruling from the state Supreme Court); **Kentucky** (trial date set; state agreed not to enforce prior to ruling); **Oklahoma** (temporarily enjoined by state court); and **Louisiana** (trial date set; state agreed not to enforce prior to ruling).

In **Mississippi** and **West Virginia**, dismemberment acts are in effect and have not been challenged.

B. Discriminatory Abortion Bans

Twelve states have enacted bans on the performance of abortion based on the sex of the unborn child, the child's race, and/or the presence of a genetic anomaly.

In *Preterm-Cleveland v. Himes*, the **Sixth Circuit** is presently considering a lower court injunction on an **Ohio** ban on abortions of unborn infants diagnosed with Down Syndrome.¹⁴ In *Box v. Planned Parenthood of Indiana and Kentucky Inc.*, **Indiana** is asking the United States Supreme Court to review and reverse a **Seventh Circuit** decision¹⁵ holding that a ban on abortions based on the unborn child's race, sex, or disability is unconstitutional.¹⁶

III. Health, Safety, and Informed Consent Laws.

A. Admitting Privileges or Arrangements

In *June Medical Services L.L.C. v. Gee*, a **Fifth Circuit** panel upheld a **Louisiana** law that requires an abortion provider to have admitting privileges at a hospital within 30 miles of his or her practice.¹⁷ The court distinguished the challenged Louisiana law from the Texas law invalidated by the United States Supreme Court in *Whole Woman's Health v. Hellerstedt*,¹⁸ stating that the law creates a "dramatically" smaller impact in Louisiana than the law in Texas.¹⁹ The Fifth Circuit denied the plaintiffs' request for a rehearing en banc,²⁰ leading the plaintiffs to file an emergency petition with the United States Supreme Court to delay enforcement while they petition the Court for review. The U.S. Supreme Court

¹³ 900 F.3d 1310 (11th Cir. 2018).

¹⁴ 294 F. Supp. 3d 746 (W.D. OH. 2018).

¹⁵ 2018 U.S. App. Lexis 17676 (7th Cir. 2018).

¹⁶ This case also challenges a provision that requires the humane disposal of fetal remains.

¹⁷ 905 F.3d 787 (5th Circ. 2018).

¹⁸ 136 S. Ct. 2292 (2016).

¹⁹ *Gee* at 3.

²⁰ *June Med. Servs., L.L.C. v. Gee*, 2019 U.S. App. LEXIS 1787 (5th Circ. 2019).

granted the stay pending the timely filing and disposition of a petition for writ of certiorari, with four justices dissenting.²¹

In *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, the **Eighth Circuit** vacated a lower court decision enjoining a **Missouri** law that requires abortion providers to have authorization to perform surgery at a hospital within 15 minutes of their practice, and contains physical requirements for abortion facilities, which can be waived upon request.²² The case has been returned to the lower court for more fact finding to determine if the law creates an undue burden on abortion access.

In *EMW v. Glisson*, a trial court permanently enjoined a **Kentucky** law that required abortion clinics to maintain written “transfer agreements” with a licensed acute care hospital and written “transport agreements” with a licensed ambulance service. The court held that the required agreements violated the plaintiffs’ substantive due process rights under the Fourteenth Amendment to the U.S. Constitution.²³ This decision is on appeal to the **Sixth Circuit**.

B. Chemical Abortion Regulation

A preliminary injunction issued against an **Arkansas** law requiring a chemical abortion provider to have a signed contract with a physician who agrees to handle complications, and who has active admitting privileges and gynecological/surgical privileges at a hospital designated to handle any emergencies associated with abortion-inducing drugs, was vacated at the request of both parties.²⁴ Planned Parenthood is now complying with the law.

Litigation over a similar law in **Missouri** was stayed²⁵ pending the outcome of the Arkansas case and a challenge to a similar Missouri law regulating surgical abortions (see discussion of *Hawley* in Part A, above).

C. Mandatory Ultrasound and/or Reflection Periods

The **Sixth Circuit** is considering whether a **Kentucky** law requiring abortion providers to perform an ultrasound prior to an abortion, display and describe the ultrasound images, and make audible the fetal heartbeat violates the First Amendment of

²¹ *June Med. Servs., L.L.C. v. Gee*, 586 U. S. ____ (2019).

²² 903 F.3d 750 (8th Cir. 2018).

²³ [2018 U.S. Dist. LEXIS 208844](#) (W.D. KY. 2018).

²⁴ *Planned Parenthood Arkansas & E. Okla. v. Jegley*, Case No. 4:15-cv-00784-KGB (E.D. Ark. 2018).

²⁵ *Comprehensive Health of Planned Parenthood Great Plains v. Williams*, No. 17-4207-CV-C-BP (W.D. Mo 2018).

the U.S. Constitution by compelling ideological speech. In *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, a trial court enjoined the law.²⁶

The **Seventh Circuit** affirmed the injunction of an **Indiana** law requiring an 18-hour reflection period after an ultrasound before a woman may obtain an abortion. The state is asking the U.S. Supreme Court to review this case, *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of the Ind. State Dep’t of Health*.²⁷

D. Parental Involvement

The **Eleventh Circuit** is considering the appeal of a trial court decision enjoining a law which modified the judicial proceedings required for a minor to bypass a parental consent requirement in **Alabama**.²⁸

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²⁶ 283 F. Supp. 3d 629 (W.D. Ky 2017).

²⁷ 896 F.3d 809 (7th Cir. 2018).

²⁸ *Reproductive Health Services, et al. v. Marshall*, 268 F. Supp. 3d 1261 (M.D. AL 2017).