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Abortion Cases in the Higher Federal Courts

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Previous Reports:

Mary E. Harned, J.D., *Abortion Cases in the Higher Federal Courts*, On Point Series 32
Mary E. Harned, J.D, *Massachusetts Draconian Abortion Proposal*, On Point Series 31
Amanda Stirone, J.D., *Overview of Legislation and Litigation Involving Protections Against Down Syndrome Discrimination Abortion*, On Point Series 30
Mary E. Harned, J.D., *Abortion Cases in the Higher Federal Courts*, On Point Series 29
Katrina Furth, Ph.D., *Fetal EEGs: Signals from the Dawn of Life*, On Point Series 28
Amanda Stirone, J.D., *Overview of Legislation and Litigation Involving Protections Against Down Syndrome Discrimination Abortion*, On Point Series 27
Mary E. Harned, J.D., *Abortion Cases in the Higher Federal Courts*, On Point Series 26
Jeanneane Maxon, J.D., *Ten Truths about Title X*, On Point Series 25
Amanda Stirone, J.D., *State Regulation of Telemedicine Abortion and Court Challenges to Those Regulations*, On Point Series 24
Jeanneane Maxon, J.D., *Fact of Life: American Cars (and Their Drivers) Exhibit Decidedly More Pro-life than Pro-choice Views*, On Point Series 23
Teresa A. Donovan, M.P.H., *Planned Parenthood: Denying the Medical Science of Fertility Awareness*, On Point Series 22
Richard M. Doerflinger, M.A., *Oregon's Assisted Suicides: The Up-to-Date Reality in 2017*, On Point Series 21
Charles A. Donovan and Donna Harrison, M.D., *Rewire's Reckless Push for Mail-Order Mifeprex,* On Point Series 20
Caroline Savoie, *Current Bipartisan Opposition to Assisted Suicide,* On Point Series 19
Bobby Schindler, *Basic Care. Human Dignity, and Care for Medically Vulnerable Persons,* On Point Series 18
James Studnicki, Sc.D., MPH, MBA; Charles A. Donovan., *Planned Parenthood: "Irreplaceable" and "Lifesaving"?*, On Point Series 17
Thomas M. Messner, J.D., *Oregon Lawmakers Promote Abortion, Crush Civil Liberty, and Hate on Social Justice,* On Point Series 16
Richard Doerflinger, M.A., *A Reality Check on Assisted Suicide in Oregon,* On Point Series 15
Moira Gaul, M.P.H., *Ad Campaign Ruling Highlights Needs for Outreach and Healing,* On Point Series 14

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Introduction

While several states have appealed court decisions enjoining abortion restrictions to the United States Supreme Court, the Court has thus far failed to clarify or modify federal abortion jurisprudence. Specifically, the Court has declined to review an **Eleventh Circuit Court** decision enjoining a second-trimester dismemberment abortion ban in **Alabama**, and a **Seventh Circuit Court** decision enjoining a ban on discriminatory abortions in **Indiana**.[i]

In his concurrences with the Court's decisions to decline review in both cases, Justice Clarence Thomas argued that the Court cannot indefinitely avoid the questions presented by the cases:

> Having created the constitutional right to an abortion, this Court is dutybound to address its scope. . . .The Constitution itself is silent on abortion.[ii]
>
> This case serves as a stark reminder that our abortion jurisprudence has spiraled out of control. Earlier this Term, we were confronted with lower court decisions *requiring* States to allow abortions based solely on the race, sex, or disability of the child. Today, we are confronted with decisions *requiring* States to allow abortion via live dismemberment. None of these decisions is supported by the text of the Constitution. Although this case does not present the opportunity to address our demonstrably erroneous 'undue burden' standard, we cannot continue blinking the reality of what this Court has wrought.[iii]

Over a dozen cases currently pending in federal Circuit Courts could be appealed to the Supreme Court in the future, presenting more opportunities for the Court to address the "demonstrably erroneous 'undue burden' standard" applied to abortion regulations. The challenged abortion laws can be divided into four main groups: (I) Limitations on the availability of taxpayer dollars to abortion providers; (II) restrictions on abortion procedures and discriminatory abortions; (III) health, safety, and informed consent laws; and (IV) abortion bans and gestational limits on abortion.

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.[iv]

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.[v] Further, the **Fifth, Seventh, Ninth, and Tenth** Circuit Courts[vi] 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 Fifth[vii] and Tenth Circuits[viii] 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.[ix]

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 Atlantic v. Baker*.[x] 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 Fifth Circuit precedent 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.[xi] The Fifth Circuit granted a rehearing en banc on the court's own motion, which was heard in May 2019.

B. General Funding Restriction

In March 2019, the **full Sixth Circuit** reversed 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.[xii] The trial court held that the law violates the First and Fourteenth Amendments.[xiii]

C. Title X

Challenges to the Trump Administration's Title X regulations that block Title X recipients from performing or referring for abortions are pending in California, Oregon, and Washington state. In a 7-4 decision, the **Ninth Circuit** upheld a previous Ninth Circuit panel decision lifting injunctions issued by lower courts, pending appeal.

II. Restrictions on Abortion Procedures and Discriminatory Abortions.

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

Twelve states have enacted restrictions on second-trimester Dilation and Evacuation abortions (D&E), also known as dismemberment abortions. On June 28, 2019, the United States Supreme Court denied the petition for a writ of certiorari[xiv] submitted by the State of **Alabama** appealing the **Eleventh Circuit** holding that the state's ban is unconstitutional.[xv]

Three additional laws 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*;[xvi] the **Sixth Circuit** is considering the constitutionality of an enjoined **Kentucky** act in *EMW Women's Surgical Center v. Beshear*;[xvii] and the **Eighth Circuit** is considering the constitutionality of an enjoined **Arkansas** act in *Frederick W. Hopkins v. Jegley.*[xviii] If a circuit split develops—one or more circuits uphold a ban while others do not—the Supreme Court will be more likely to accept a petition for review.

Similar acts are enjoined, partially enjoined, or are otherwise not in effect in: **Indiana** (enjoined; will likely appeal); **Kansas** (injunction affirmed by Kansas Supreme Court and case remanded to trial court); **Ohio** (partially enjoined; case stayed until Kentucky case is resolved); **Oklahoma** (temporarily enjoined by state court); and **Louisiana** (trial date set; state agreed not to enforce prior to ruling).

Mississippi, North Dakota, and **West Virginia** dismemberment laws are in effect and have not been challenged.

B. Discriminatory Abortion Bans

At least 15 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; laws in five of these states are presently enjoined.

On May 28, 2019, in *Box v. Planned Parenthood of Indiana and Kentucky Inc.*, the United States Supreme Court declined to review an **Indiana** law that prohibited sex, race, and disability-selective abortions. The Court stated that "[o]nly the Seventh Circuit has thus far addressed this kind of law." The Court followed the "ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals."[xix] Therefore, the **Seventh Circuit** decision invalidating the law was affirmed, and the law is permanently enjoined.[xx]

Additional circuits are likely to issue opinions regarding challenges to these laws soon, however. In *Preterm-Cleveland v. Himes*, the **Sixth Circuit** is considering a lower court injunction on an **Ohio** ban on abortions of unborn infants diagnosed with Down Syndrome.[xxi] Again, a circuit split could lead to Supreme Court review.

III. Health, Safety, and Informed Consent Laws.

A. Admitting Privileges or Arrangements and Clinic Licensing

In *June Medical Services 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.[xxii] 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*,[xxiii] stating that the law creates a "dramatically" smaller impact in Louisiana than the law in Texas.[xxiv] The Fifth Circuit denied the plaintiffs' request for a rehearing en banc,[xxv] 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 granted the stay pending the timely filing and disposition of a petition for writ of certiorari, with four justices dissenting.[xxvi] The plaintiffs filed their petition on April 18, 2019.

In another **Louisiana** case on appeal to the **Fifth Circuit**, *Planned Parenthood Gulf Coast v. Gee*, the plaintiffs are challenging clinic licensing laws. Oral arguments were heard in January 2019.

In *Comprehensive Health of Planned Parenthood Great Plains v. Knight*, 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.[xxvii] 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.[xxviii]

In *EMW Women's Surgical Center v. Meier*, 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.[xxix] This decision is on appeal to the **Sixth Circuit**.[xxx]

B. Mandatory Ultrasound and/or Reflection Periods

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*.[xxxi]

The **Sixth Circuit** recently denied a petition for an en banc rehearing of their decision to uphold 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 in *EMW Women's Surgical Ctr. v. Beshear.*[xxxii] A trial court had enjoined the law as unconstitutional compelled ideological speech under the First Amendment of the U.S. Constitution.[xxxiii]

C. Parental Involvement

The **Eleventh Circuit** is reviewing a trial court decision enjoining a law that modified the judicial proceedings required for a minor to bypass a parental consent requirement in **Alabama**.[xxxiv] The **Seventh Circuit** is reviewing an **Indiana** trial court decision enjoining a law that included a proof of parental identity requirement prior to a minor's abortion.[xxxv]

IV. Abortion Bans and Gestational Limits on Abortion.

The State of **Mississippi** is appealing to the **Fifth Circuit** two trial court decisions that enjoined gestational limits on abortion: one would prohibit abortions at or after 15-weeks gestation,[xxxvi] the other after a heartbeat can be detected (six-weeks gestation).[xxxvii] The **Fourth Circuit** will review the injunction of a 20-week gestation limit in **North Carolina**.[xxxviii] While these are the only gestational limits on abortion that are under review at the Circuit Court level, states are aggressively enacting limits ranging from conception to 22 weeks. Most, if not all, of these laws are likely to be enjoined at the trial court level and will make their way to the Appellate Courts.

Conclusion

The number and variety of abortion-related cases pending before federal appellate courts will continue to grow. Abortion-rights advocates have filed lawsuits in at least five states that challenge multiple state regulations of abortion, arguing that the regulations' "cumulative effect" imposes an undue burden on abortion access in the state. While the Supreme Court appears reluctant to consider abortion cases right now, it will become increasingly difficult for the Court to avoid addressing the growing number of cases challenging many aspects of abortion regulation.

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[i] The Court upheld an Indiana law law regulating the disposition of fetal remains; however, because the Court determined that the law did not impact abortion access, their analysis did not rely upon or alter Supreme Court abortion jurisprudence. The Court may still choose to review an Indiana law requiring an 18-hour reflection period following an ultrasound, and a Louisiana law requiring abortion providers to maintain hospital admitting privileges.
[ii] *Box v. Planned Parenthood of Indiana and Kentucky, Inc.,* 587 U.S. ____ (2019) (Thomas, J., concurring).
[iii] *Harris v. West Alabama Women's Center*, 588 U.S. _____ (2019) (Thomas, J., concurring).
[iv] 42 U.S.C. § 1396a(a)(23).
[v] *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).
[vi] *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.
[vii] *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).
[viii] *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).
[ix] *Gee v. Planned Parenthood of Gulf Coast Inc.*, 586 U.S. ___ (2018), Thomas, J., dissenting.
[x] *326 F. Supp. 3d 39 (D. SC. 2018).*
[xi] *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs. v. Smith*, 2019 U.S. App. Lexis 1616 (5th Cir. 2019).
[xii] *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908 (6th Cir. 2019).

[xiii] *Planned Parenthood of Greater Ohio v. Hodges*, 201 F. Supp. 3d 898 (S.D. OH. 2016).
[xiv] *Harris v. Alabama Women's Center*, 588 U.S. ___ (2019).
[xv] *W. Ala. Women's Ctr. v. Williamson,* 900 F.3d 1310 (11th Cir. 2018).
[xvi] 280 F. Suppl. 3d 938 (W.D. TX. 2017).
[xvii] 6th Cir. Case No. 19-5516.
[xviii] 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.
[xix] *Box v. Planned Parenthood of Indiana and Kentucky, Inc.,* 587 U.S. ____ (2019). The Court upheld a challenged provision that requires the humane disposal of fetal remains.
[xx] 2018 U.S. App. Lexis 17676 (7th Cir. 2018).
[xxi] 6th Cir. Case No. 8-3329; 294 F. Supp. 3d 746 (W.D. OH. 2018).
[xxii] 905 F.3d 787 (5th Circ. 2018).
[xxiii] 136 S. Ct. 2292 (2016).
[xxiv] *Gee* at 3.
[xxv] *June Med. Servs., L.L.C. v. Gee*, 2019 U.S. App. LEXIS 1787 (5th Circ. 2019).
[xxvi] *June Med. Servs., L.L.C. v. Gee*, 586 U. S. ____ (2019).
[xxvii] 903 F.3d 750 (8th Cir. 2018).
[xxviii] *Comprehensive Health of Planned Parenthood Great Plains v. Lyskowski,* Case No. 2:16-CV-04313-BCW.
[xxix] 2018 U.S. Dist. LEXIS 208844 (W.D. KY. 2018).
[xxx] 6th Cir. Case No. 18-6161.
[xxxi] 896 F.3d 809 (7th Cir. 2018).
[xxxii] 2019 U.S. App. LEXIS 9945 (6th Cir. Apr. 4, 2019); 6th Cir. Case No.17-6151; 17-6183, Order Denying Rehearing en banc (June 28, 2019).
[xxxiii] 283 F. Supp. 3d 629 (W.D. KY. 2017).
[xxxiv] *Reproductive Health Services, et al. v. Marshall***,** 268 F. Supp. 3d 1261 (M.D. AL. 2017).
[xxxv] *Planned Parenthood of Indiana v. Adams*, 258 F. Supp. 3d 929 (S.D. IN. 2017).
[xxxvi] *Jackson Women's Health v. Dobbs*, 5th Cir. No. 18-60868.
[xxxvii] *Jackson Women's Health v. Dobbs*, 5th Cir. No 19-60455.
[xxxviii] *Bryant v. Woodall*, 1:16-CV-01368 (M.D. NC 2019); 4th Cir. No. 19-1685.