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Abortion Cases in the Higher Federal Courts

Mary E. Harned, J.D.

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Comments and information requests can be directed to:

Charlotte Lozier Institute

2800 Shirlington Rd, Suite 1200

Arlington, VA 22206

E-mail: info@lozierinstitute.org

Ph. 202-223-8073/www.lozierinstitute.org

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Introduction

Our nation’s highest court may soon clarify or modify federal abortion jurisprudence after agreeing to hear *June Medical Services v. Gee*, a case in which a **Fifth Circuit** panel upheld a **Louisiana** law requiring an abortion provider to have admitting privileges at a hospital within 30 miles of his or her practice.ⁱ The circuit court distinguished the challenged Louisiana law from the similar Texas act invalidated by the United States Supreme Court in *Whole Woman’s Health v. Hellerstedt* in 2016,ⁱⁱ stating that Louisiana’s law creates a “dramatically” smaller impact than the law in Texas.ⁱⁱⁱ Plaintiffs, however, are asking the Supreme Court to reverse the Fifth Circuit, arguing that the Louisiana law must be invalidated under the precedent set by *Hellerstedt*.

The Court also granted the State’s cross-petition requesting clarification whether abortion providers have third-party standing to challenge abortion limitations on behalf of their patients when they lack a “close” relationship and there is no “hindrance” to their patients’ ability to sue on their own behalf.^{iv} If the Court correctly determines that abortion providers do not have this standing, their decision will curtail the abortion industry’s aggressive efforts to dismantle constitutional pro-life laws across the nation.

This potentially positive development in abortion-related law follows a term in which the Court 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**.^v In his concurrences with the Court’s decisions to decline review in these cases, Justice Clarence Thomas argued that the Court cannot indefinitely avoid the questions presented by the states:

Having created the constitutional right to an abortion, this Court is dutybound to address its scope. . . .The Constitution itself is silent on abortion.^{vi}

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.^{vii}

It remains to be seen whether the Supreme Court, through a decision in *June Medical Services v. Gee* or another case, will end the “reality blinking.” Two additional cases^{viii} have been appealed to the Supreme Court, and over a dozen cases currently pending in federal circuit courts could be appealed in the future, presenting more opportunities for the Court to address the “demonstrably erroneous ‘undue burden’ standard” applied to abortion regulations.^{ix}

The challenged abortion laws before federal circuit courts 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.^x

The **Fourth Circuit** recently joined the **Fifth, Sixth, Seventh, Ninth, and Tenth Circuit** Courts in holding 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.^{xi} Further, the **Fourth, Fifth, Seventh, Ninth, and Tenth Circuit** Courts^{xii} 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^{xiii} and Tenth Circuits^{xiv} 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.^{xv}

The **Fifth Circuit** recently 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, it 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.^{xvi} The Fifth Circuit granted a rehearing en banc on the court’s own motion, and heard oral arguments in May 2019.^{xvii}

B. Title X

Challenges to the Trump Administration’s Title X regulations that block program recipients from performing or referring for abortions are pending in a consolidated **Ninth Circuit** Case (**California, Oregon, and Washington**)^{xviii} and in **Maryland**.^{xix} A Ninth Circuit panel lifted lower-court injunctions pending appeal; however, the Ninth Circuit vacated the panel’s judgment and reinstated the injunctions. Oral arguments before the court were held on September 23, 2019. In the Maryland case, oral arguments before the **Fourth Circuit** were held on September 18, 2019.

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

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

Eleven 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^{xx} submitted by the State of **Alabama**, appealing the **Eleventh Circuit** holding that the state’s ban is unconstitutional.^{xxi}

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*,^{xxii} the **Sixth Circuit** is considering the constitutionality of an enjoined **Kentucky** act in *EMW Women’s Surgical Center v. Beshear*,^{xxiii} and the **Eighth Circuit** is considering the constitutionality of an enjoined **Arkansas** act in *Hopkins v. Jegley*.^{xxiv} 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); **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 supreme court); and **Louisiana** (trial date set; state agreed not to enforce prior to ruling).

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

B. Discriminatory Abortion Bans

At least fourteen 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 at least 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.”^{xxv} Therefore, the **Seventh Circuit** decision invalidating the law was affirmed, and the law is permanently enjoined.^{xxvi}

Since the Court's decision, the **Sixth Circuit** affirmed a lower court's injunction of an **Ohio** ban on abortions of unborn infants diagnosed with Down syndrome in *Preterm-Cleveland v. Himes*.^{xxvii} Additional circuits are likely to issue opinions regarding challenges to these laws soon. The **Eighth Circuit** is considering appeals in two **Arkansas** cases. In *Hopkins v. Jegley*, the lower court enjoined a ban on abortions based on sex,^{xxviii} while in *Little Rock Family Planning Services v. Rutledge*, the lower court enjoined a ban on abortions based on a Down syndrome diagnosis.^{xxix} 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

Litigation challenging laws and regulations pertaining to the health and safety of women considering or seeking abortion continues to proliferate. In a **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.^{xxx}

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.^{xxxi} This decision is on appeal to the **Sixth Circuit**, where oral arguments were heard on August 8, 2019.^{xxxii}

B. Ultrasound Requirements

The United States Supreme Court is considering the State of Indiana’s request to review *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of the Ind. State Dep’t of Health*, in which the **Seventh Circuit** affirmed a lower-court injunction of an **Indiana** law requiring an 18-hour reflection period after an ultrasound before a woman may obtain an abortion.^{xxxiii}

Conversely, the *plaintiffs* in a **Kentucky** case are asking the Supreme Court to review a **Sixth Circuit** decision upholding 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*.^{xxxiv}

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** in *Reproductive Health Services v. Bailey*.^{xxxv} In *Planned Parenthood of Indiana and Kentucky v. Box*, the **Seventh Circuit** recently denied the State of **Indiana**’s request for a rehearing en banc of a decision affirming the injunction of a law requiring parental notice prior to a minor’s abortion.^{xxxvi}

D. Physician-Only Laws and Telemedicine

On November 7, 2019, the **Seventh Circuit** affirmed a lower court’s refusal to permit the **Wisconsin** state legislature to intervene in *Planned Parenthood of Wisconsin v. Kaul*, a case challenging a law that permits only physicians to prescribe abortion-inducing drugs, requires an examination by the prescribing physician, and prohibits the use of telemedicine for abortion.^{xxxvii} The attorney general in Wisconsin is pro-abortion, and state legislators fear that he will not aggressively defend the law.

The State of **Arkansas** is also defending a law that prohibits non-physicians from performing abortions. *Little Rock Family Planning Services v. Rutledge* is before the **Eighth Circuit**.^{xxxviii}

E. Dignified Disposition of Fetal Remains

The **Fifth Circuit** heard oral arguments in September 2019 in the case *Whole Woman’s Health v. Phillips*, where **Texas** is appealing the injunction of a law regulating how abortion providers dispose of fetal remains after an abortion.^{xxxix} Also, in *Hopkins v. Jegley*, the **Eight Circuit** is considering the injunction of an **Arkansas** law that requires the dignified disposition of aborted infants.^{xl} The Supreme Court upheld an Indiana law regulating the disposition of fetal

remains in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*; 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.^{xli} The Fifth and Eighth Circuits may adopt the Supreme Court’s reasoning, or may apply to these measures the heightened scrutiny typically applied to abortion-related laws.

IV. Abortion Bans and Gestational Limits on Abortion.

States are aggressively enacting gestational limits on abortion, ranging from conception to 22 weeks. Most, if not all, of these laws have been or will be enjoined at the trial court level and will be appealed. In two cases named *Jackson Women’s Health v. Dobbs*, the State of **Mississippi** is appealing to the **Fifth Circuit** trial court decisions that enjoined gestational limits on abortion, one at or after 15-weeks gestation,^{xlii} the other after a heartbeat can be detected (6-weeks gestation).^{xliii} The **Fourth Circuit** is reviewing the injunction of a 20-week gestation limit in **North Carolina** in *Bryant v. Woodall*.^{xliv} In *Reproductive Health Services of Planned Parenthood of the St. Louis Region v. Parson*, the State of **Missouri** is appealing to the **Eighth Circuit** a lower-court decision enjoining restrictions on abortion after 8 weeks, 14 weeks, and 18 weeks.^{xlv} The State of **Arkansas** is also appealing to the **Eighth Circuit** an injunction on a law restricting abortions after 18 weeks.^{xlvi}

Forecast: The Future of Abortion Law Litigation

The number and variety of abortion-related cases pending before federal appellate courts will continue to grow. While direct attacks on more controversial laws (*e.g.*, early gestational bans) gain the most attention, abortion-rights advocates are also advancing a broader and more aggressive strategy. They have filed lawsuits in at least six states that challenge multiple state laws and regulations written to regulate abortion.

Astonishingly, the plaintiffs in these cases argue that they do not need to prove that each individual law is unconstitutional, or that they even have standing to challenge each law. Rather, they want to eviscerate a state’s entire body of laws and regulations enacted to protect unborn children and their mothers with one lawsuit, by arguing that all of the laws together impose an “undue burden” on abortion. Court acceptance of this argument is essential to these cases, given that many of the challenged laws mirror provisions individually found constitutional by the Supreme Court (*e.g.*, physician-only laws; informed consent requirements; parental involvement laws; reporting requirements; and laws requiring the dignified disposition of fetal remains).

The abortion industry’s new tactic has not yet received validation from a federal circuit court. In October, the Fifth Circuit characterized a cumulative-effects challenge in Louisiana as

“an extraordinary case,” “unprecedented,” and not “blessed” by the Supreme Court which “has analyzed abortion provisions separately rather than cumulatively.”^{xlvii} The Fifth Circuit court returned the case to the district court, directing the lower court to “analyze Plaintiffs’ standing to challenge each provision of law at issue.”^{xlviii} While the circuit court did not go so far as to hold that a “cumulative-effects challenge” is not cognizable, the court held that the only way to make that determination is to first conduct a proper jurisdictional analysis of each claim.^{xlix}

If in *June Medical Services v. Gee* the Supreme Court clarifies standing and jurisdictional requirements in abortion litigation, states may avoid lengthy and costly court battles to defend these laws against illegitimate cumulative-effects lawsuits. Otherwise, federal courts may reach varied conclusions, injecting even more murkiness into the madness that is abortion jurisprudence.

Mary E. Harned, J.D. is an associate scholar with the Charlotte Lozier Institute.

ⁱ U.S. No. 18-1323, <https://www.supremecourt.gov/docket/docketfiles/html/public/18-1323.html>; *June Medical Services v. Gee*, 905 F.3d 787 (5th Cir. 2018).

ⁱⁱ 136 S. Ct. 2292 (2016).

ⁱⁱⁱ *Gee* at 791.

^{iv} U.S. No. 18-1460, <https://www.supremecourt.gov/docket/docketfiles/html/public/18-1460.html>.

^v The Court upheld an Indiana 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.

^{vi} *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S. Ct. 1780, 1793 (2019) (Thomas, J., concurring).

^{vii} *Harris v. West Alabama Women’s Center*, No. 18-837 (U.S. Jun. 28, 2019) (Thomas, J., concurring).

^{viii} *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of the Ind. State Dep’t of Health*, U.S. No. 18-1019; 896 F.3d 809 (7th Cir. 2018); *EMW Women’s Surgical Ctr. v. Beshear*, No.17-6151 (6th Cir.); 17-6183 (6th Cir.); 920 F.3d 421 (6th Cir. 2019).

^{ix} See Thomas concurrence, *supra*.

^x 42 U.S.C. § 1396a(a)(23).

^{xi} *Planned Parenthood South Atlanta v. Baker*, No. 18-2133, p. 3 (4th Cir. 2019) (holding § 1396a(a)(23) creates a private right of action); *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1224-29 (10th Cir. 2018) (same); *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).
- ^{xii} *Baker*, 18-2133, p. 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.
- ^{xiii} *Gee v. Planned Parenthood of Gulf Coast Inc.*, 17-1492; 876 F.3d 699 (5th Cir. 2017) (en banc rehearing denied); 862 F.3d 445 (5th Cir. 2017).
- ^{xiv} *Andersen v. Planned Parenthood of Kansas and Mid-Missouri*, 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).
- ^{xv} *Gee v. Planned Parenthood of Gulf Coast Inc.*, 139 S. Ct. 408 (2018) (Thomas, J., dissenting).
- ^{xvi} *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs. v. Smith*, 913 F.3d 551 (5th Cir. 2019).
- ^{xvii} No. 17-50282 (5th Cir.); 914 F.3d 994 (5th Cir. 2019).
- ^{xviii} *Essential Access Health, Inc. v. Azar*, No. 19-15974 (9th Cir.); *California v. Azar*, No. 19-15974 (9th Cir.); *Oregon v. Azar*, No. 19-35386 (9th Cir.); *AMA v. Azar*, No. 19-35386 (9th Cir.); *Washington v. Azar*, No. 19-35394 (9th Cir.); *National Family Planning & Reproductive Health Assoc.*, No. 19-35394 (9th Cir.).
- ^{xix} *Mayor and City Council v. Azar*, No. 19-1614 (4th Cir. 2019).
- ^{xx} *Harris v. Alabama Women's Center*, No. 18-837 (U.S. Jun. 28, 2019).
- ^{xxi} *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018).
- ^{xxii} No. 17-51060 (5th Cir.); 280 F. Suppl. 3d 938 (W.D. TX. 2017).
- ^{xxiii} No. 19-5516 (6th Cir.); *EMW Women's Surgical Ctr. v. Meier*, 373 F. Supp. 3d 807 (W.D. Ky 2019).
- ^{xxiv} No. 17-2879 (8th Cir.); 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, disclose information about minors' abortions to law enforcement, and prohibit sex-selection abortions.
- ^{xxv} *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S. Ct. 1780, 1782 (2019). The Court upheld a challenged provision that requires the humane disposal of fetal remains.
- ^{xxvi} 888 F.3d 300 (7th Cir. 2018).
- ^{xxvii} No. 18-3329 (6th Cir. Oct. 11, 2019).
- ^{xxviii} No. 17-2879 (8th Cir.); 267 F. Supp. 3d 1024 (E.D. Ark. 2017). This case also challenges provisions that require abortion providers to seek patients' medical records, dispose of fetal remains in a humane manner, disclose information about minors' abortions to law enforcement, and restrict dismemberment abortions.
- ^{xxix} No. 19-2690 (8th Cir.); Case No. 4:19-cv-00449-KGB (E.D. Ark. Jul. 23, 2019). The enjoined law in this case also limits abortion after 18 weeks and prohibits non-physicians from performing abortions.
- ^{xxx} No. 18-30699 (5th Cir.)
- ^{xxxi} [2018 U.S. Dist. LEXIS 208844](#) (W.D. KY. 2018).
- ^{xxxii} No. 18-6161 (6th Cir.).
- ^{xxxiii} U.S. No. 18-1019; 896 F.3d 809 (7th Cir. 2018).
- ^{xxxiv} No. 17-6151 (6th Cir.); 17-6183 (6th Cir.); 920 F.3d 421 (6th Cir. 2019).
- ^{xxxv} No. 17-13561 (11th Cir.); *Reproductive Health Services v. Marshall*, 268 F. Supp. 3d 1261 (M.D. Ala. 2017).
- ^{xxxvi} No. 17-2428 (7th Cir. Oct. 30, 2019).
- ^{xxxvii} No. 19-1835 (7th Cir. Nov. 7, 2019).
- ^{xxxviii} No. 19-2690 (8th Cir.); Case No. 4:19-cv-00449-KGB (E.D. Ark. Jul. 23, 2019). The enjoined law in this case also limits abortion after 18-weeks gestation and prohibits abortion based on an unborn infant's Down syndrome diagnosis.
- ^{xxxix} No. 18-50730 (5th Cir.).
- ^{xl} No. 17-2879 (8th Cir.); 267 F. Supp. 3d 1024 (E.D. Ark. 2017). This case also challenges provisions that require abortion providers to seek patients' medical records, disclose information about minors' abortions to law enforcement, prohibit sex-selection abortions, and restrict dismemberment abortions.
- ^{xli} 139 S. Ct. 1780 (2019).
- ^{xlii} No. 18-60868 (5th Cir.).
- ^{xliii} No. 19-60455 (5th Cir.).
- ^{xliv} No. 19-1685 (4th Cir.); 1:16-CV-01368 (M.D. NC 2019).
- ^{xlvi} No. 19-2882 (8th Cir.); Case No. 2:19-cv-4155-HFS (W.D. Mo. Aug. 27, 2019).

^{xlvi} No. 19-2690 (8th Cir.); Case No. 4:19-cv-00449-KGB (E.D. Ark. Jul. 23, 2019). The enjoined law in this case also prohibits non-physicians from performing abortions and prohibits abortion based on an unborn infant's Down syndrome diagnosis.

^{xlvii} *In re Rebekah Gee*, No. 19-30353 (5th Cir. Oct. 18, 2019).

^{xlviii} *Id.*

^{xlix} *Id.*