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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Abortion advocates contend that the United States Supreme Court is on the precipice of reversing Roe v. Wade—the conservative justices are simply waiting for the arrival of another like-minded colleague, and they may find that person in Judge Amy Coney Barrett. An honest review of recent decisions by the Court, however, simply fails to support this belief. Instead of building a case for Roe’s demise, the Court has managed to make abortion jurisprudence even murkier for legislators and lower courts trying to determine the constitutionality of abortion laws, while otherwise refusing to make substantive decisions in abortion cases.

**Undue Burden or Balancing Test?**

In 2016, the Court (which then included Justice Kennedy, and did not include Justices Gorsuch and Kavanaugh) created and applied a new balancing test to determine whether a law infringes on a woman’s “constitutional right” to abortion in Whole Woman’s Health v. Hellerstedt. In the 2020 case, June Medical Services v. Russo, the Court failed to clarify how lower courts should now review abortion laws. The plurality—Justices Breyer, Ginsburg, Sotomayor, and Kagan—applied the Whole Woman’s Health balancing test; the rest of the court, including Chief Justice Roberts who joined the plurality in judgment, criticized the plurality’s reasoning.

Courts are now struggling to determine which June Medical opinion to follow—the plurality’s opinion or Chief Justice Roberts’s concurrence, which rejected the balancing test but was needed by the plurality to strike down the challenged Louisiana law. The Eighth Circuit Court of Appeals recently applied the undue burden standard, citing Chief Justice Roberts’ concurrence in June Medical, and reversed a lower court’s decision enjoining several abortion laws. A Maryland District Court judge, conversely, applied the plurality’s balancing test and enjoined FDA health and safety standards for the abortion drug, mifepristone.

**Dodging the Hard Questions**

June Medical was an anomaly, because the Court has otherwise refused to make substantive abortion decisions since becoming arguably more conservative. In 2019, the Court declined to review
an Eleventh Circuit decision enjoining a second-trimester dismemberment abortion ban in Alabama, and a Seventh Circuit decision enjoining a ban on discriminatory abortions in Indiana. In July 2020, the Court vacated and remanded two Indiana cases for further consideration in light of June Medical. One case addressed whether a state can require ultrasound as part of an 18-hour reflection period before an abortion. The other case addressed enhancements to a parental involvement law.

Most recently, on October 8, 2020, the Court refused to grant a stay of an injunction that prevents the Food and Drug Administration from enforcing health and safety protocols written to protect women who take the abortion-inducing drug, mifepristone. The injunction, imposed by a federal district judge in Maryland, applies nationwide during the COVID-19 public health emergency. The Court directed FDA to file another motion with the same judge, arguing that the injunction should be dissolved, modified, or stayed because “relevant circumstances have changed.” The Court gave the District Court 40 days to rule on the motion before FDA can return to the Supreme Court.

By punting this case into the future, the Court squandered the opportunity to clarify that a “right to abortion” does not include the right to a particular method of abortion. In the very least, the Court could have stayed the injunction out of proper deference to the FDA's expertise on drug safety. Justices Alito and Thomas rightly dissented from this decision, stating that “[t]his case presents important issues that richly merit review.”

More Cases on the Horizon

At least 22 abortion-related cases are pending in federal appellate courts; parties in three of these cases have sought review from the Supreme Court. There are numerous additional cases pending in federal district and state courts that could eventually find their way to the Supreme Court. While this number alarms abortion advocates, who see Roe’s reversal lurking around every corner, a Court that will not issue a stay to protect long-standing FDA health and safety restrictions on an abortion-inducing drug does not appear prepared to make that leap.

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.\textsuperscript{ix}

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.\textsuperscript{x} Further, the Fourth, Fifth, Seventh, Ninth, and Tenth Circuit Courts\textsuperscript{xi} 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\textsuperscript{xii} and Tenth Circuits\textsuperscript{xiii} 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.\textsuperscript{xiv} The State of South Carolina is again asking the Court to answer this question through a petition for certiorari, seeking the reversal of the Fourth Circuit’s injunction of the state’s law.\textsuperscript{xv}

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, 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.\textsuperscript{xvi} The Fifth Circuit granted a rehearing en banc on the court’s own motion, and heard oral arguments in May 2019.\textsuperscript{xvii}
B. Title X

Several states have challenged the Trump Administration’s Title X regulations that protect the integrity of the program by blocking program recipients from performing or referring for abortions. In February, the Ninth Circuit issued an *en banc* decision upholding the regulations. Conversely, the Fourth Circuit issued an *en banc* decision in *Mayor and City Council v. Azar* affirming an injunction of the regulations in Maryland only. A challenge to the regulations was upheld in the Maine case, *Family Planning Association of Maine v. U.S. Dep’t of Health and Human Services*, but is now pending in the First Circuit.

C. Obamacare Abortion Premium

In the Fourth Circuit, *Planned Parenthood v. Azar*, the Department of Health and Human Services is appealing a decision in federal court in Maryland that enjoined the provision in Obamacare that requires a separate insurance premium payment for abortion coverage in insurance plans that cover abortion within an Exchange.

II. Restrictions on Abortion Procedures and Discriminatory Abortions.

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

At least a dozen 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 submitted by the State of Alabama, appealing the Eleventh Circuit holding that the state’s ban is unconstitutional.

In *Hopkins v. Jegley*, the plaintiffs are seeking a review by the full Eighth Circuit after a panel vacated the district court’s preliminary injunction against Arkansas’s dismemberment ban, and returned the case to the trial court for reconsideration. “the district court—without the benefit of Chief Justice Roberts’s separate opinion in *June Medical*—applied the Whole Woman’s Health cost-benefit standard to the challenged laws.” The court therefore “remand[ed] for reconsideration in light of Chief Justice
Roberts’s separate opinion in June Medical, which is controlling, as well as the Supreme Court’s decision in *Box v. Planned Parenthood of Ind. & Ky., Inc.*..."xxvii The State’s response to the petition for *en banc* review is due October 14, 2020.

The State of Texas has requested a rehearing from the full Fifth Circuit after a panel affirmed the injunction of a dismemberment ban in *Whole Woman’s Health v. Paxton.*xxviii 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.

B. Discriminatory Abortion Bans

At least 17 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; one or more laws in at least seven 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.”xxix Therefore, the Seventh Circuit decision invalidating the law was affirmed, and the law is permanently enjoined.xxx

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.*xxxi However, the Sixth Circuit granted the State’s petition to rehear the case *en banc*, and the decision is pending. There is also an appeal of an injunction against a Tennessee law banning abortion based on the unborn infant’s sex, race, or Down Syndrome diagnosis before the Sixth Circuit, in *Memphis Center for Reproductive Health v. Slatery.*xxxii

In *Hopkins v. Jegley*, the Eighth Circuit is considering the plaintiffs’ request for a full-court review of a panel decision to vacate an injunction against an Arkansas law banning abortions based on sex and remand the case to the district court (see part II.A, above).xxxi In *Little Rock Family Planning Services v.*
Rutledge, another challenge to an Arkansas law before the Eight Circuit, oral arguments were held in September. The State is appealing an injunction on a ban on abortions based on a Down syndrome diagnosis.xxxiv In Reproductive Health Services of Planned Parenthood v. Parson, Missouri is appealing an injunction against a law prohibiting abortions of unborn infants diagnosed with Down syndrome, also before the Eighth Circuit.xxxv

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. Russo, the plaintiffs are challenging clinic licensing laws. Oral arguments were heard in January 2019.xxxvi

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.xxxvii This decision is on appeal to the Sixth Circuit, where oral arguments were heard in August 2019.xxxviii

B. 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.xxxix In Box v. Planned Parenthood of Indiana and Kentucky, the State of Indiana has petitioned the Seventh Circuit for a rehearing en banc of a decision affirming the injunction of a law requiring parental notice prior to a minor’s abortion.xl This case is back in the Seventh Circuit after the
Supreme Court granted the State’s petition for writ of certiorari, vacated the judgment, and remanded the case for further consideration in light of June Medical Services L.L.C. v. Russo.

C. Physician-Only Laws, Telemedicine, and Abortion-Inducing Drugs

The State of Arkansas is defending a law that prohibits non-physicians from performing abortions. Little Rock Family Planning Services v. Rutledge is before the Eighth Circuit, and oral arguments were heard in September.

The Food and Drug Administration is appealing an injunction issued by a federal district judge in Maryland against critical elements of the FDA Risk Evaluation and Mitigation Strategy (REMS) for the abortion-inducing drug, mifepristone. The injunction applies nationwide until the COVID-19 public health emergency ends. The FDA sought a stay of the injunction pending the outcome of litigation from the 4th Circuit (denied) and the U.S. Supreme Court. As discussed in the introduction, the Court directed FDA to file another motion with the same judge, arguing that the injunction should be dissolved, modified, or stayed because “relevant circumstances have changed.” The Court gave the District Court 40 days to rule on the motion.

D. Dignified Disposition of Fetal Remains

The Fifth Circuit heard oral arguments in September 2019 in the case Whole Women’s Health v. Phillips, where Texas is appealing the injunction of a law regulating how abortion providers dispose of fetal remains after an abortion. Also, in Hopkins v. Jegley, the Eighth Circuit is considering the plaintiffs’ request for a full-court review of a panel decision to vacate an injunction against an Arkansas law that requires the dignified disposition of aborted infants (see part II.A, above). 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. 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.

E. Abortion Reporting
In Planned Parenthood v. Commissioner, Indiana has appealed to the Seventh Circuit the injunction of a law requiring abortion reporting.xlvii

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 are likely to be enjoined at the trial court level. In Jackson Women’s Health v. Dobbs, the State of Mississippi has asked the U.S. Supreme Court to review the Fifth Circuit’s decision affirming the injunction of a limit on abortion at or after 15-weeks of gestation.xlvii The Fourth Circuit is reviewing the injunction of a 20-week gestation limit in North Carolina in Bryant v. Woodall.xlix The Sixth Circuit is reviewing the injunction of a graduated gestational ban beginning with the fetal heartbeat in Memphis Center for Reproductive Health v. Slatery.l

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 eight weeks, 14 weeks, 18 weeks, and 20 weeks.li The State of Arkansas is also appealing to the Eighth Circuit an injunction on a law restricting abortions after 18 weeks in Little Rock Family Planning Services v. Rutledge.lii Oral arguments were held in both Eighth Circuit cases in September 2020. In the Eleventh Circuit, the state of Georgia is appealing a lower court decision enjoining a six-week ban in SisterSong v. Kemp.liii

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 eight statesliv that challenge multiple state laws and regulations written – in some cases, many years ago and previously upheld - 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 2019, 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.” 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.” 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.

While this new, aggressive strategy has not yet found a foothold in abortion jurisprudence, a federal appellate court may determine it is valid in the future without better guidance from the Supreme Court about the appropriate standard of review to apply to laws protecting unborn infants and their mothers. Everyone should agree that it is important for the Court to make this clarification, and welcome the Court’s review of a case to accomplish this. Justice Thomas wisely wrote in recent concurring opinions: "Having created the constitutional right to an abortion, this Court is dutybound to address its scope. . . .The Constitution itself is silent on abortion." The Court “cannot continue blinking the reality of what this Court has wrought.” Perhaps, with Judge Barrett’s addition to the Court, the Court will provide pro-life legislators, governors, and attorneys general with a clearer understanding of how they can protect America’s most vulnerable, and just maybe the result will be a better world for unborn children and their mothers.

**Abortion-related Cases Pending in U.S. Circuit Courts of Appeals or the United States Supreme Court**
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<td>American College of Obstetricians &amp; Gynecologists v. FDA</td>
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<td>Mifepristone REMS during COVID-19 pandemic</td>
<td>Enjoined by the lower court; 4th Circuit did not grant a stay pending appeal; FDA sought a stay from the U.S. Supreme Court; in October 2020, the Supreme Court held FDA’s petition “in abeyance to permit the District Court to promptly consider a motion by the Government to dissolve, modify, or stay the injunction, including on the ground that relevant circumstances have changed.” The District Court has 40 days to act.</td>
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<td>4th Circuit</td>
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<td>Title X federal regulations</td>
<td>Enjoined by the lower court; 4th Circuit affirmed after rehearing en banc (9-6). The injunction applies only to Maryland.</td>
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<td>Medicaid “free choice of provider” and private right of action Enjoined by the lower court; 4th Circuit affirmed, holding that the plaintiffs had a private right of action and would likely prevail under Medicaid free choice of provider provision. State seeking review by U.S. Supreme Court.</td>
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<td>15-week ban Enjoined by the lower court; 5th Circuit denied en banc rehearing. State seeking review by U.S. Supreme Court.</td>
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<td>Dismemberment ban Enjoined by the lower court; state filed petition for rehearing en banc in August 2020.</td>
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<td>Graduated gestational ban (8 wks; 14 wks; 18 wks; 20 wks); Discriminatory abortion ban: Down syndrome</td>
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Mary E. Harned, J.D. is an associate scholar with the Charlotte Lozier Institute.

ii 140 S.Ct. 2103 (2020).
iii Hopkins v. Jegley, 968 F.3d 912 (8th Cir. 2020).
v Harris v. West Alabama Women’s Center, 139 S.Ct. 2606 (2019).
vi Box v. Planned Parenthood, 139 S. Ct. 1780 (2019). 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.

vii Box v. Planned Parenthood, 896 F. 3d 809 (7th Cir. 2018); Box v. Planned Parenthood, 949 F.3d 997 (7th Cir. 2019).


x Planned Parenthood South Atlantic v. Baker, 941 F.3d 687, 690 (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
restrict dismemberment abortions. Patients' medical records, dispose of fetal remains in a humane manner, disclose information about minors' abortions to law enforcement, and prohibit sex selection abortions.

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.

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The enjoined law in this case also contains a graduated gestational ban (eight weeks; 14 weeks; 18 weeks; 20 weeks). 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.

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The law enjoined in this case also prohibits discriminatory abortion based on an unborn infant’s sex, race, or Down syndrome diagnosis.

North Carolina, Virginia, Louisiana, Mississippi, Texas, Indiana, Minnesota, Arizona.


Harris v. West Alabama Women’s Center, 139 S.Ct. 2606 (Thomas, J., concurring).