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Abortion Cases in the Higher Federal Courts

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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.*[i] In the 2020 case, *June Medical Services v. Russo*,[ii] 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.[iii] A Maryland District Court judge, conversely, applied the plurality's balancing test and enjoined FDA health and safety standards for the abortion drug, mifepristone.[iv]

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,[v] and a Seventh Circuit decision enjoining a ban on discriminatory abortions in Indiana.[vi] In July 2020, the Court vacated and remanded two Indiana cases for further consideration in light of *June Medical*.[vii] 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."[viii]

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.[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.[x] Further, the **Fourth**, **Fifth, Seventh, Ninth, and Tenth Circuit** Courts[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[xii] and Tenth Circuits[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.[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.[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.[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

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.[xviii] 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.[xix] 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,*[xx] but is now pending in the **First Circuit.**[xxi]

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.[xxii]

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[xxiii] submitted by the State of **Alabama**, appealing the **Eleventh Circuit** holding that the state's ban is unconstitutional.[xxiv]

In *Hopkins v. Jegley*,[xxv] 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:[xxvi] "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).[xxxiii] 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*.[xli]

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.[xlii]

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.[xliii]

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.[xliv] 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).[xlv] 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.[xlvi] 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.[xlviii] 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 states**[liv] 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."[lv] 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."[lvi] 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.[lvii]

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."[lviii] The Court "cannot continue blinking the reality of what this Court has wrought."[lix] 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

	Circuit	State	Case Name	Case Number	Topic	Status
1	1st Circuit	Maine	Family Planning Association of Maine v. U.S. Dep't of Health & Human Services	1st Cir. No. 20-1781	Title X federal regulations	Case dismissed (*in favor of the regulations*) in lower the court; appeal pending
2	4th Circuit	Maryland	American College of Obstetricians & Gynecologists v. FDA	4th Cir. No. 20-1824; Sup. Ct. No. 20A-34	Mifepristone REMS during COVID-19 pandemic	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.
3	4th Circuit	Maryland	Mayor and City Council v. Azar	4th Cir. No. 19-1614 & 4th Cir. No. 20-1215	Title X federal regulations	Enjoined by the lower court; 4th Circuit affirmed after rehearing *en banc* (9-6). The injunction applies only to Maryland.

						HHS could seek review by U.S. Supreme Court.
4	4th Circuit	Maryland	Planned Parenthood v. Azar	4th Cir. No. 20-2006	Obamacare abortion coverage - separate premium	Enjoined by the lower court; appeal pending
5	4th Circuit	North Carolina	Bryant v. Woodall	4th Cir. No. 19-1685	20-week ban	Enjoined by the lower court; appeal pending
6	4th Circuit	South Carolina	Planned Parenthood v. Baker	4th Cir. No. 18-2133 Sup. Ct. No. 19-1186	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.**
7	5th Circuit	Louisiana	Planned Parenthood v. Russo	5th Cir. No. 18-30699	Clinic licensing	Lower court did not dismiss; oral arguments were heard in January 2019.
8	5th Circuit	Mississippi	Jackson Women's Health v. Dobbs	5th Cir. No. 18-60868 Sup. Ct. No. 19-1392	15-week ban	Enjoined by the lower court; 5th Circuit denied *en banc* rehearing. **State seeking review by U.S. Supreme Court.**
9	5th Circuit	Texas	Whole Women's Health v. Paxton	5th Cir. No. 17-51060	Dismemberment ban	Enjoined by the lower court; state filed petition for rehearing *en banc* in August 2020.

10	5th Circuit	Texas	Planned Parenthood v. Phillips	5th Cir. No. 17-50282	Medicaid: "free choice of provider" and private right of action	Enjoined by the lower court; 5th Circuit reversed and remanded; oral arguments in rehearing *en banc* were heard in May 2019.
11	5th Circuit	Texas	Whole Women's Health v. Phillips	5th Cir. No. 18-50730	Humane disposal of unborn remains	Enjoined by the lower court; oral arguments were heard in September 2019.
12	6th Circuit	Kentucky	EMW Women's Surgical Center v. Friedlander	6th Cir. No. 18-6161	Abortion center regulations	Enjoined by the lower court; oral arguments were heard in August 2019.
13	6th Circuit	Ohio	Preterm-Cleveland v. Himes	6th Cir. No. 18-3329	Discriminatory abortions ban: Down syndrome	Enjoined by the lower court; Oral arguments in rehearing *en banc* were heard in March 2020.
14	6th Circuit	Tennessee	Memphis Center for Reproductive Health v. Slatery	6th Cir. No. 20-5969	Graduated gestational ban beginning with heartbeat; discriminatory abortion ban: sex, race, Down Syndrome	Enjoined by the lower court; appeal pending.
15	7th Circuit	Indiana	Planned Parenthood v. Box	7th Cir. No. 17-2428	Parental consent: proof of identity; notice when court does not require consent	Enjoined by the lower court; affirmed by the 7th Circuit; U.S. Supreme Court vacated and remanded the case in light of *June Medical*, June 2020; State is seeking a rehearing *en banc*.

16	7th Circuit	Indiana	Planned Parenthood v. Commissioner, Indiana State Dep't of Health	7th Cir. No. 20-2407	Abortion reporting	Enjoined by the lower court; appeal pending
17	8th Circuit	Arkansas	Little Rock Family Planning Services v. Rutledge	8th Cir. No. 19-2690	18-week ban; discriminatory abortion ban: Down Syndrome; abortion provider qualifications	Enjoined by the lower court; oral arguments were heard in September 2020.
18	8th Circuit	Arkansas	Hopkins v. Jegley	8th Cir. No. 17-2879	Dismemberment ban; discriminatory abortion ban: sex; Medical records	Enjoined by the lower court; 8th Circuit reversed and remanded; plaintiffs are seeking a rehearing *en banc.*
19	8th Circuit	Missouri	Reproductive Health Services of Planned Parenthood v. Parson	8th Cir. No. 19-2882 & 8th Cir. No. 19-3134	Graduated gestational ban (8 wks; 14 wks; 18 wks; 20 wks); Discriminatory abortion ban: Down syndrome	Enjoined by the lower court; oral arguments were heard in September 2020.
20	8th Circuit	Missouri	Doe v. Parson	8th Cir. No. 19-1578 Sup. Ct. No. 20-385	Informed consent (religious discrimination	Dismissed by the lower court.

					claimed by plaintiff)	**Plaintiffs are seeking review by U.S. Supreme Court.**
21	11th Circuit	Alabama	Reproductive Health Services. v. Bailey	11th Cir. No. 17-13561	Parental involvement: judicial bypass	Enjoined by the lower court; oral arguments were heard in April 2018.
22	11th Circuit	Georgia	SisterSong v. Kemp	11th Cir. No. 20-13024	6-week ban	Enjoined by the lower court; appeal pending

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[i] 136 S.Ct. 2292 (2016) Majority: Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan. Dissenting: Chief Justice Roberts, Justices Thomas, and Justice Alito.
[ii] 140 S.Ct. 2103 (2020).
[iii] *Hopkins v. Jegley*, 968 F.3d 912 (8th Cir. 2020).
[iv] *American College of Obstetricians & Gynecologists v. Food and Drug Administration*, 592 U.S. ____ (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 Circ. 2018); *Box v. Planned Parenthood*, 949 F.3d 997 (7th Cir. 2019).
[viii] *Food and Drug Administration v. American College of Obstetricians and Gynecologists*, 592 U.S. ____ (2020) (Alito, J., dissenting).
[ix] 42 U.S.C. § 1396a(a)(23).
[x] *Planned Parenthood South Atlanta 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

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).

[xi] *Baker*, 941 F.3d 687, 690, 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.

[xii] *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).

[xiii] *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).

[xiv] *Gee v. Planned Parenthood of Gulf Coast Inc.*, 139 S. Ct. 408 (2018) (Thomas, J., dissenting).

[xv] *Planned Parenthood South Atlanta v. Baker*, 941 F.3d 687, 690 (4th Cir. 2019); Sup. Ct. No. 19-1186.

[xvi] *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs. v. Smith*, 913 F.3d 551 (5th Cir. 2019).

[xvii] *Planned Parenthood v. Phillips*, 5th Cir. No. 17-50282; 914 F.3d 994 (5th Cir. 2019).

[xviii] *Becerra v. Azar*, 950 F.3d 1067 (9th Circ. 2020).

[xix] *Mayor and City Council v. Azar*, 973 F.3d 258 (4th Cir. 2020).

[xx] Family Planning Association of Maine v U.S. Dep't of Health & Human Services, 2020 WL 3064426 (D. ME 2020).

[xxi] 1st. Cir. No. 20-1781.

[xxii] *Planned Parenthood v. Azar*, 2020 WL 3893241 (D. MD. 2020); 4th Cir. No. 20-2006.

[xxiii] *Harris v. West Alabama Women's Center*, 139 S.Ct. 2606 (2019).

[xxiv] *W. Ala. Women's Ctr. v. Williamson,* 900 F.3d 1310 (11th Cir. 2018).

[xxv] 8th Circ. No. 17-2879; 968 F.3d 912 (8th Cir. 2020).

[xxvi] 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.

[xxvii] 968 F.3d 912, 915-16 (8th Cir. 2020).

[xxviii] 5th Cir. No. 17-51060; 280 F. Suppl. 3d 938 (W.D. TX. 2017).

[xxix] *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.

[xxx] 888 F.3d 300 (7th Cir. 2018).

[xxxi] 6th Cir. No. 18-3329.

[xxxii] 6th Cir. No. 20-5969; 2020 WL 3957792 (M.D. TN 2020). This case also challenges a graduated gestational ban beginning with a fetal heartbeat.

[xxxiii] 8th Cir. No. 17-2879; 968 F.3d 912 (8th Cir. 2020).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.

[xxxiv] 8th Cir. No. 19-2690; 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.

[xxxv] 8th Cir. No. 19-2882; 19-3134. The enjoined law in this case also contains a graduated gestational ban (eight weeks; 14 weeks; 18 weeks; 20 weeks).

[xxxvi] 5th Cir. No. 18-30699.

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

[xxxviii] 6th Cir. No. 18-6161.

[xxxix] 11th Cir. No. 17-13561; *Reproductive Health Services v. Marshall*, 268 F. Supp. 3d 1261 (M.D. Ala. 2017).

[xl] 7th Cir. No. 17-2428.

[xli] 140 S.Ct. 2103 (2020).

[xlii] 8th Cir. No. 19-2690; 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 of gestation and prohibits abortion based on an unborn infant's Down syndrome diagnosis.

[xliii] *Food and Drug Administration v. American College of Obstetricians and Gynecologists*, 592 U.S. ____ (2020).

[xliv] 5th Cir. No. 18-50730.

[xlv] 8th Cir. No. 17-2879; 968 F.3d 912 (8th Cir. 2020). 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.

[xlvi] 139 S. Ct. 1780 (2019).

[xlvii] 7th Cir. No. 20-2407.

[xlviii] 5th Cir. No. 18-60868**;** 945 F.3d 265 (5th Cir. 2019).
[xlix] 4th Cir. No. 19-1685; 1:16-CV-01368 (M.D. NC 2019).
[l] 6th Cir. No. 20-5969; 2020 WL 3957792 (M.D. TN 2020). The law enjoined in this case also prohibits discriminatory abortion based on an unborn infant's sex, race, or Down syndrome diagnosis.
[li] 8th Cir. No. 19-2882; 19-3134 Case No. 2:19-cv-4155-HFS (W.D. Mo. Aug. 27, 2019). The law enjoined in this case also prohibits discriminatory abortion based on an unborn infant's Down syndrome diagnosis.
[lii] 8th Cir. No. 19-2690; 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.
[liii] 11th Cir. No. 20-13024; 2020 WL 3958227 (N.D. GA 2020).
[liv] North Carolina, Virginia, Louisiana, Mississippi, Texas, Indiana, Minnesota, Arizona.
[lv] *In re Rebekah Gee*, 941 F.3d 153 (5th Cir. 2019).
[lvi] *Id.*
[lvii] *Id.*
[lviii] *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S. Ct. 1780, 1793 (2019) (Thomas, J., concurring).
[lix] *Harris v. West Alabama Women's Center*, 139 S.Ct. 2606 (Thomas, J., concurring).