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Legal Sidebar

Reviewing Recently Enacted State Abortion Laws and Resulting Litigation

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Since the start of 2019, at least 11 states have enacted new laws regulating abortions based on a fetus's gestational age, the detection of a fetal heartbeat, or specified fetal characteristics, such as a diagnosis of Down syndrome. Some of these states have also imposed restrictions on the dilation and evacuation abortion method, the most common surgical abortion method performed during the second trimester of pregnancy. Notably, these 11 states are seeking to curtail the availability of abortion notwithstanding case law from various federal appellate courts that invalidated similar state laws in the past. This flurry of legislative activity may be motivated in part to have the Supreme Court reconsider its past abortion decisions. As the state's governor recently remarked upon signing the Alabama Human Life Protection Act, "it is time, once again, for the U.S. Supreme Court to revisit this important matter[.]" While it remains to be seen whether the Supreme Court will take up this invitation, this Sidebar reviews the newly enacted state laws, discusses how courts have examined similar abortion regulations in the past, and addresses the implications of this changing legislative landscape for Congress.

Background

Since *Roe v. Wade*, the Supreme Court has recognized viability as the earliest point at which a state's interest in fetal life may allow for an outright prohibition on the performance of an abortion. In *Roe*, the Court described viability as the point in fetal development when the fetus is able to live outside of the mother's womb, with or without artificial assistance. The Court indicated that viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."

In 1992, a plurality of the Court upheld *Roe*'s essential holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, emphasizing in part that a state may not *prohibit* a woman "from making the ultimate decision to terminate her pregnancy before viability." At the same time, however, the plurality recognized that the state has legitimate interests from the outset of a woman's pregnancy in protecting the health of the woman and the life of the fetus. To effectuate these interests, the plurality determined that the state may enact pre-viability abortion *regulations* so long as they do not place an undue burden on a woman's ability to obtain an abortion. Under *Roe*, such regulations would have been unconstitutional. The plurality explained that an undue burden exists if the purpose or effect of an abortion regulation is "to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."

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Nonetheless, the *Casey* Court recognized that prior to viability "the State's interests are not strong enough to support a *prohibition* of abortion."

Courts continue to evaluate abortion regulations under the principles established in *Casey*. In practice, courts applying the undue burden standard balance the burdens and benefits imposed by such regulations. Applying the undue burden standard in 2007, the Supreme Court upheld the federal Partial-Birth Abortion Ban Act, which prohibits an abortion method involving the delivery of a substantial portion of the fetus. More recently, in *Whole Woman's Health v. Hellerstedt*, the Court determined that two Texas requirements – that physicians who perform abortions have admitting privileges at a nearby hospital and abortion facilities satisfy the same architectural and operational standards as ambulatory surgical centers – imposed an undue burden on the availability of abortion.

Abortion Restrictions Based on Gestational Age or Fetal Heartbeat Detection

The new state laws that restrict the performance of an abortion based on a fetus's gestational age wholly prohibit the procedure at various points in fetal development. For instance, laws in Arkansas and Utah ban the procedure once the fetus reaches a gestational age of 18 weeks, and Missouri prohibits the procedure once the fetus attains a gestational age of eight weeks. In addition, new laws in Georgia, Kentucky, Louisiana, Mississippi, and Ohio ban the performance of an abortion once a fetal heartbeat can be detected, which may occur once a fetus reaches a gestational age of six weeks. Finally, in the most far reaching of the new state abortion laws, Alabama's new law prohibits the practice for "an unborn child in utero at any stage of development."

Beginning in 2013, the U.S. Courts of Appeals for the Eighth and Ninth Circuits have respectively invalidated state laws in Arizona, Arkansas, Idaho, and North Dakota prohibiting the performance of an abortion once a fetus reached a gestational age younger than 24 weeks. In their decisions, the two appellate courts have cited the *Casey* plurality's determination that a state may not prohibit a woman from having an abortion before a fetus attains viability. For example, in *Edwards v. Beck*, the Eighth Circuit reviewed the Arkansas Human Heartbeat Protection Act, which prohibited abortions once the fetus had a detectable heartbeat and was at least a gestational age of 12 weeks. The Arkansas State Medical Board defended the law, characterizing the restriction as a *regulation* and not a ban on pre-viability abortions. The Board emphasized that abortions remained available for the first 12 weeks of a woman's pregnancy and that the law included exceptions for medical emergencies and to protect the mother's life. Quoting *Casey,* the court, however, viewed the law as an impermissible ban on a woman being able to make the "ultimate decision to terminate" a pregnancy prior to viability.

Similarly, in *McCormack v. Herzog*, the Ninth Circuit struck down Idaho's Pain-Capable Unborn Child Protection Act, which prohibited abortions once the fetus reached a gestational age of 20 weeks. The Idaho ban applied regardless of whether the fetus attained viability. While the court acknowledged that a state could act to protect the health and safety of a woman seeking an abortion, it emphasized that the state may not wholly restrict a woman's ability to have an abortion before viability. Examining the Idaho law, the court observed:

> [T]he broader effect of the statute is a categorical ban on all actions between twenty weeks gestational age and viability. This is directly contrary to the Court's central holding in *Casey* that a woman has the right to "choose to have an abortion before viability and to obtain it without undue interference from the State."

None of the newly enacted state laws are currently in effect. The effective dates for the laws in Alabama and Georgia are still forthcoming. Courts have enjoined the laws in the remaining states. Notably, in so doing, federal district courts have cited *Casey* in support of the argument that the laws' challengers have a strong likelihood of success on the merits. In *EMW Women's Surgical Center v. Beshear*, for example, a federal district court in Kentucky maintained that the *Casey* Court "stated in no uncertain terms that

'[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.'"

Abortion Restrictions Based on Specified Fetal Characteristics

In 2019, Arkansas, Kentucky, Missouri, and Utah enacted laws that prohibit the performance of an abortion when a woman seeks the procedure because of a diagnosis that a fetus has or could have Down syndrome. The Kentucky and Missouri laws also prohibit an abortion when a woman seeks the procedure because of the fetus's race or sex.

In the past, courts have enjoined or invalidated similar state laws. Evaluating such laws, courts have generally concluded that they conflict with the *Casey* principle that a state may not categorically prohibit a woman's decision to terminate her pregnancy before fetal viability. For example, last year in *Preterm-Cleveland v. Himes*, a federal district court in Ohio enjoined a state law that prohibited the performance of an abortion if the woman's decision to terminate her pregnancy was based in whole or in part on a fetal indication of Down syndrome. The court determined that the law unconditionally eliminated the right to terminate a pre-viable fetus for a defined group of women. As a result, the court viewed the law as going beyond simply imposing an undue burden on this right, instead concluding that the law "eradicates the right entirely."

Reviewing a similar law, the Seventh Circuit in *Planned Parenthood of Indiana and Kentucky v. Commissioner of the Indiana State Department of Health*, invalidated parts of a 2016 Indiana law that prohibited the performance of an abortion if the decision to terminate the pregnancy was solely because of the fetus's race, color, national origin, or ancestry, or because of a diagnosis of Down syndrome or any other disability. Citing *Casey*, as well as *Edwards* and *McCormack*, the court characterized the relevant provisions as not simply imposing a substantial obstacle in the path of a woman seeking an abortion, but as "absolute prohibitions on abortion prior to viability." While the court acknowledged that the state could impose regulations that affect a woman's decision to terminate her pregnancy before viability, it maintained that the state could not prohibit that decision.

During its October 2018 term, the Supreme Court declined to vacate the Seventh Circuit's decision with respect to Indiana's selective abortion provisions. Although the Court did review *Planned Parenthood of Indiana and Kentucky*, it constrained its decision to other challenged provisions in the Indiana law that address the disposal of fetal remains by abortion providers. The Court upheld these provisions, reversing the judgment of the Seventh Circuit. However, because the Seventh Circuit is the only appellate court to have considered the constitutionality of abortion restrictions based on certain fetal characteristics and because the Court tends to eschew resolving legal questions that have not resulted in a split among the lower federal courts, the Supreme Court declined to review those provisions.

Nevertheless, additional appellate court decisions involving abortion restrictions based on specified fetal characteristics are likely in the near future. The Sixth Circuit is currently considering an appeal of *Preterm-Cleveland*. Oral arguments were conducted in January 2019. Further, in August 2019, the State of Arkansas indicated that it would appeal the enjoinment of the state's recently enacted law to the Eighth Circuit. Earlier in the month, a federal district court in Arkansas enjoined the law, describing it as "an absolute prohibition on certain abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State."

Additional decisions by the Sixth and Eighth Circuits could result in the Supreme Court's consideration of state abortion restrictions based on certain fetal characteristics, particularly if a split of authority emerges between the circuits. Moreover, while concurring in the Court's decision not to review Indiana's selective abortion provisions, Justice Clarence Thomas questioned upholding these provisions in light of *Casey*, noting: "Whatever else might be said about *Casey*, it did not decide whether the Constitution requires States to allow eugenic abortions." A longtime critic of *Roe* and *Casey*, Justice Thomas, showing

a willingness to review and uphold selective abortion prohibitions, further observed: "Although the Court declines to wade into these issues today, we cannot avoid them forever . . . this Court is dutybound to address [the] scope" of the right to an abortion.

Abortion Restrictions Based on the Method Performed

Beyond state laws that *categorically prohibit* certain previability abortions, other states have enacted laws banning specified abortion methods. For instance, two states, Indiana and North Dakota, respectively enacted new abortion laws in 2019 that restrict the performance of a specific abortion method. Both laws would prohibit so-called "dismemberment abortions," which are described generally to involve the dismemberment of a living fetus using specified instruments, such as clamps or grasping forceps, and the subsequent extraction of fetal body parts from the uterus. The laws' definitions for the term "dismemberment abortion" are similar and would appear to encompass the dilation and evacuation (D&E) abortion method, the most common surgical abortion method performed during the second trimester of pregnancy. The D&E abortion method involves the dilation of the cervix and dismemberment of the fetus in the uterus. Fetal parts are subsequently removed from the uterus either with forceps or by suction.

In the past, courts have invalided similar state laws that attempted to prohibit the performance of dismemberment abortions. For example, last year in *West Alabama Women's Center v. Williamson*, the Eleventh Circuit permanently enjoined the Alabama Unborn Child Protection from Dismemberment Abortion Act, concluding that the law imposed an undue burden on a woman's ability to obtain an abortion. In *Williamson*, the state argued that because the law focused on the dismemberment of a living fetus, it would not apply if the fetus were killed prior to its dismemberment. Because abortion practitioners could kill the fetus through alternate methods before completing the D&E procedure, a prohibition on "dismemberment abortions" would not, in the view of the state, impose an undue burden on a woman's right to an abortion. However, after reviewing these alternate fetal demise methods – injecting potassium chloride into the fetus's heart, cutting the umbilical cord in utero, and injecting digoxin into the amniotic fluid – the lower court concluded that these methods would create substantial obstacles for women seeking an abortion.

Deferring to the trial court's findings that the fetal demise methods "were not safe, effective, and available," the Eleventh Circuit in *West Alabama Women's Center* concluded that these methods were technically difficult to perform and there was a lack of training opportunities to minimize medical risk to the patient. In addition, the appellate court noted that the fetal demise methods increased the time and cost associated with obtaining an abortion. Ultimately, the Eleventh Circuit maintained: "All of those findings about the fetal demise methods . . . support the conclusion that the Act would 'place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'"

In June 2019, the Supreme Court declined to review the Eleventh Circuit's decision. In a concurring opinion, however, Justice Thomas criticized the undue burden standard and described the case, now titled *Harris v. West Alabama Women's Center*, as "a stark reminder that our abortion jurisprudence has spiraled out of control." Justice Thomas's concurrences in *Harris* and the Indiana case, now titled *Box v. Planned Parenthood of Indiana and Kentucky*, show a willingness for at least some on the Court to reconsider the undue burden standard, which, in turn, may prompt additional regulations aimed at curbing abortion and provide the Court additional opportunities to further clarify, and perhaps, restrict the import of *Casey*.

How courts evaluate the new state abortion laws may be of interest to Congress following the introduction of similar measures at the federal level. Bills such as the Heartbeat Protection Act of 2019 (H.R. 490) and the Dismemberment Abortion Ban Act of 2019 (S. 1035) were introduced earlier this year. Past decisions on state abortion laws like those discussed here, whose logic would apply equally to any federal regulations of abortion, would seem to suggest that the bills might have difficulty surviving constitutional challenge in light of current case law.

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