NARAL Pro-Choice America

Abortion Bans at 20 Weeks: A Dangerous Restriction for Women

In 2010, Nebraska passed a law banning abortion care after 20 weeks, under the auspices of concern about fetal pain.[1] Since then, anti-choice advocates have fueled the trend: 12 additional states—Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, North Dakota, Oklahoma, and Texas—have enacted similar bans.[2] (In 2014, West Virginia's governor, Ray Tomblin (D), became the first (and only) state executive to veto a ban.[3]) The National Right to Life Committee has designated these bans as a top legislative priority.[4]

These bans are so extreme they offend even the most basic sense of common decency:[5] None of these laws has an adequate health exception[6] and only one provides an exception for cases of rape or incest.[7] Fewer than half offer an ambiguous exception for certain fetal anomalies,[8] while the others offer no exception for fetal anomalies at all.[9]

The anti-choice movement has pressed this legislation federally too: in 2012, Rep. Trent Franks (R-AZ) and Sen. Mike Lee (R-UT) introduced a 20-week ban that targets the District of Columbia, and a majority of House members voted in support of the legislation. In 2013, Sen. Lee filed the bill as an amendment to the FY'14 budget resolution and both Sen. Lee and Rep. Franks reintroduced the ban as a freestanding bill (H.R.1797/S.886).[10] Rep. Franks subsequently broadened his bill to apply nationwide[11] and Sen. Lindsey Graham (R-SC) introduced his own version (S.1670).[12] In 2013, a majority of House members voted in favor of the nationwide ban, H.R.1797.[13] With a total of 19 states introducing 43 similar abortion-ban measures since 2010[14] and the Franks/Lee/Graham bills at the federal level, this type of proposal poses a nationwide threat to the health and wellbeing of American women.

NARAL Pro-Choice America does not oppose post-viability bans that include appropriate exceptions for cases in which a woman's life or health are at risk. However, these 20-week bans ignore the question of viability, lack the needed exceptions, and instead are meant as a direct challenge to the Supreme Court's ruling in *Roe v. Wade*.

NARAL Pro-Choice America opposes 20-week abortion bans for several principal reasons:

Some Women Need Later Abortion Care

Twenty-week abortion bans deny medical care to women in the most desperate of circumstances. Sadly, with the murder of Dr. George Tiller in 2009 by an anti-choice extremist,[15] women have fewer and fewer places to turn. In Nebraska – the home state of Dr. Leroy Carhart, one of a very small number of doctors in the country who can assist these women – opponents of choice used legislative means to deny these women access to essential medical care and drive Dr. Carhart out of the state.[16] Now this approach has spread to other states that

previously had served as critical access points to later care for women in broad swaths of the country.[17]

Although only 1.5 percent of abortions occur after 20 weeks,[18] women need safe, legal, later abortion care for a variety of reasons: some (such as those entering menopause) are not expecting to become pregnant and do not discover it for many weeks; some, barred by public funding bans on abortion, take weeks to gather the funds for the procedure; some encounter serious health threats later in pregnancy; and some discover heartbreaking fetal anomalies that could not be detected earlier. For example:

- Danielle Deaver was 22 weeks pregnant when her water broke. Tests showed that Danielle had suffered anhydramnios, a premature rupture of the membranes before the fetus has achieved viability. Without sufficient amniotic fluid, the fetus likely would be born with a shortening of muscle tissue that results in the inability to move limbs. In addition, the fetus likely would suffer deformities to the face and head, and the lungs were unlikely to develop beyond the 22-week point. The couple, in counsel with their doctor, explored every possible action to save the pregnancy. However, there was less than a 10-percent chance that, if born, the baby would be able to breathe on its own and only a two-percent chance the baby would be able to eat on its own. They decided to terminate the pregnancy and asked the doctor if she could help them "put an end to this nightmare." The doctor's response…"no, [I] can't." Under the Nebraska ban, which had been in effect for just two months, the Deavers had no recourse to avert the pain and suffering that was to follow. Eight days later, after Danielle endured intense pain and infection, their daughter Elizabeth was born and survived for just 15 minutes.[19]

  In 2012, when Arizona was considering its own 20-week abortion ban, Danielle Deaver wrote a letter to anti-choice Gov. Jan Brewer, urging her to veto the bill. Danielle asked that the difficult decision to terminate a wanted pregnancy be left to families and their doctors, instead of politicians. Even with an infection that would ultimately jeopardize her future fertility, Danielle was not sick enough to qualify for Nebraska's narrow life exception, and so was forced to wait days for the pregnancy to end.[20]

- When she was 19 weeks pregnant, Tiffany Campbell and her husband Chris learned her pregnancy was afflicted with a severe case of twin-to-twin transfusion syndrome, a condition where the two fetuses unequally share blood circulation. The diagnosis was that one of the fetuses had a strained heart and acute risk of heart failure while the other had a blood supply that was insufficient to sustain normal development. The Campbells were told that without a selective termination, they risked the loss of both. At 22 weeks, in consultation with their doctors, they made the difficult decision to abort one fetus in order to save the other. Today, "the lifesaving procedure that [they] underwent" would be illegal under the new 20-week ban model.[21]

- Vikki Stella, a diabetic, discovered months into her pregnancy that the fetus she was carrying suffered from several major anomalies and had no chance of survival. Because of Vikki's diabetes, her doctor determined that induced labor and Caesarian section were both riskier procedures for Vikki than an abortion. The procedure not only protected Vikki from immediate medical risks, but also ensured that she would be able to have children in the future.[22]

- When Dawn Mosher was four months pregnant, she and her husband Timothy learned that the fetus she was carrying had a severe condition which had forced the brain to develop at the base of the cranium. Timothy testified in opposition to the Nebraska law: "All treatable options became no options at all. The damage was beyond repair." After much consideration and prayer Timothy and Dawn decided that they did not want a life of "constant pain and suffering" for their child and chose to terminate the pregnancy.[23]

- Christy Zink was 21 weeks pregnant when she learned the fetus she was carrying was suffering from multiple severe anomalies including agenesis of the corpus callosum— a rare birth defect in which the central connecting structure of the brain is absent. Even more severe, the brain had developed in small globular splotches, meaning effectively that an entire hemisphere was missing. Christy and her husband consulted medical experts around the world and were told that, if the fetus survived the pregnancy, which was uncertain, the baby would be in a state of near-constant seizures, requiring numerous surgeries to remove what little of the brain matter remained. Christy made the difficult decision to terminate the pregnancy, a choice that would be illegal if a 20-week abortion ban were law in Washington, D.C.[24]

Anti-Choice Disregard for Women and Children

During a court challenge, a federal judge worried aloud about the pain and suffering Arizona's 20-week ban would cause by making abortion illegal even in cases of fatal fetal anomalies:

> *"They're basically born into hell and then die…I don't see how the courts could act before viability."*

To this concern, Arizona's solicitor general replied:

> ***"With due respect, that's the woman's problem."***

This callous response belies that—despite claims to the contrary—20-week bans are not about protecting women or children at all.

Tara Culp-Ressler, *Arizona Defends Its Restrictive Abortion Ban Because Fetal Birth Defects Are "The Woman's Problem"* THINK PROGRESS HEALTH, Nov. 6, 2012 *at* http://thinkprogress.org/health/2012/11/06/1144301/arizona-fetal-birth-defects-womans-problem/ (last visited Nov. 6, 2012) (emphasis added)

Every pregnancy is different. No politician can possibly decide what is best for a woman and her family in every circumstance.

These Laws Lack Necessary Exceptions[1]

Each of the current state bans outlaw abortion care after 20 weeks with only a narrow exception for the life of the woman, an inadequate exception to protect a woman's health, and only one state allows an exception for cases of rape or incest.[25] Only four states—Georgia, Louisiana, Mississippi, and Texas—offer an ambiguous exception for certain fetal anomalies with the nine other states offering no exception at all for cases of fetal anomaly. Egregiously, the federal bills include no health exception at all![26] Laws such as these can jeopardize a woman's health or her ability to have children in the future.

These bans lack an exception for instances where the pregnancy is the result of rape or incest, even when the survivors of sexual violence are young girls.

- Each year, approximately 25,000 women in the United States become pregnant as a result of rape. Additionally, approximately 30 percent of rapes involve women under age 18.[27]

- Research by the Women's Reproductive Rights Assistance Project (WRRAP) found that girls 10-17 years of age accessed abortion care after 20 weeks—care now outlawed by these bans—more often than older women and that the women seeking WRRAP's assistance were more likely than the general population to report experiencing rape.[28] Some young survivors of sexual abuse or incest may need abortion care later in their pregnancies because they may not yet be as familiar with their bodies and may take some additional time to process the possibility of unintended pregnancy in addition to the trauma of rape.

- The youngest survivor documented in the WRRAP report was a 10-year-old victim of incest.[29] The bans make no exception for young women facing such trauma.

20-Week Abortion Bans Are Blatantly Unconstitutional

The Supreme Court has long held that a woman has the unequivocal right to choose abortion care until the point of fetal viability.[30] Under this standard, states may regulate abortion care, but not ban it before viability.[31] Twenty-week abortion bans brazenly challenge the Supreme Court's standards and deliberately attempt to push the law earlier and earlier into a woman's pregnancy.

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[1] As introduced, the Franks bill allowed no exception for instances where the pregnancy is the result of rape or incest, even when the survivors of sexual violence are young girls. Rep. Franks' defense of this provision, amazingly, was that the incidence of pregnancies resulting from rape is "very low." The media firestorm and public backlash that ensued forced him to add a very narrow exception for cases of sexual assault—but it is totally inadequate. The exception only includes rape that has been reported to law enforcement, and incest against a minor that has been reported to law enforcement or a government agency. This new provision would still leave many sexual-assault survivors without access to legal abortion care.

All 13 states that enacted 20-week bans already had post-viability bans in place at the time.[32] Sponsors of these bans are attempting to lure the court into reopening the issue of legal abortion entirely by moving away from the viability standard established in *Roe*.

In fact, State Sen. Mike Flood, the author of the Nebraska ban, openly acknowledges that his law "walks away from viability as a standard."[33] Anti-choice strategist Mary Spaulding Balch, attorney for the National Right to Life Committee, also has admitted that: "What I would like to bring to the attention of the court is, there is another line. This new knowledge is something the court has not looked at before and should look at."[34]

In 2007, the Supreme Court's decision in *Gonzalez v. Carhart* began paving the way for this round of attacks on women's reproductive health.[35] By a slim 5-4 majority[36] that included two conservative justices newly appointed by President George W. Bush—Chief Justice John Roberts and Justice Samuel Alito[37]—the court for the first time abandoned its holding that protections for a woman's health must always be paramount in any laws governing abortion.[38] Now, anti-choice proponents of 20-week abortion bans, including Sen. Flood, readily admit that, "Absent the holding in *Gonzales*, I don't think Nebraska would have any ability to even propose a bill like this and see it held constitutional."[39]

So far, however, federal and state courts have consistently found 20-week abortion bans unconstitutional. Last year, the Ninth Circuit Court of Appeals struck down Arizona's law, finding that a woman "has a constitutional right to choose to terminate her pregnancy before the fetus is viable."[40] Also in 2013, a federal court enjoined Idaho's law,[41] and a state court issued a preliminary injunction on Georgia's law in 2012.[42] West Virginia Gov. Tomblin, in a statement explaining his decision to veto the 20-week ban passed by his state's legislature, noted the unconstitutionality of the proposal—as well as the danger these types of bans pose to women's health.[43]

Anti-Choice Lawmakers Are Pushing 20-Week Bans for Political Gain

Sponsors of these extreme abortion bans have further exposed their true motive of exploiting women's personal, private health circumstances for political advantage. After forcing a vote in 2012 on his D.C.-specific version of the 20-week abortion ban, Rep. Franks predicted that his use of the wedge issue would result in a political benefit to the anti-choice voting bloc in Congress. "It will cost some people the election, but it will cost more Democrats the election than it will Republicans," he said. "I'm convinced that in very few districts in America will someone lose because they voted [for this ban]. And if that's the case, maybe they need a different district anyways."[44]

Lee's Federal Bill Unfairly Targets the District of Columbia

Opponents of choice long have used the District of Columbia as an anti-choice proving ground. The Lee bill (and the Franks version, before he expanded it) aimed at the reproductive rights of women living in the nation's capital are no different. Over the past two-plus decades, in all but

four years, anti-choice politicians have used the congressional appropriations process to impose a discriminatory restriction which bars the District of Columbia from using its own local funds to provide abortion care to its low-income residents, effectively narrowing the reproductive-health options of many poor women living in Washington, D.C. Similarly, Lee's 20-week ban continues the anti-choice legacy of undermining home rule in the District of Columbia by supplanting the judgment of local leaders elected by D.C. citizens to serve their needs, and ultimately make a mockery of the democratic process in the nation's capital. [45]

Conclusion

Bans on abortion care after 20 weeks are a blatant attempt to deny women their constitutional rights. These laws interfere in the doctor-patient relationship, the sanctity of which is a cornerstone of medical care in our country. They are the latest attempt in the more than four-decade-long campaign to make abortion illegal again in America, and pose an extremely serious threat to the health of women in the most desperate of circumstances.

January 1, 2015

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[1] Neb. Rev. Stat. §§ 28-3, 102 to 111 (Enacted 2010).

[2] NARAL PRO-CHOICE AMERICA & NARAL PRO-CHOICE AMERICA FOUNDATION, *Who Decides? The Status of Women's Reproductive Rights in the United States* (24th ed. 2015), *available at* www.WhoDecides.org.

[3] *See* Bill Chappell, *West Virginia's Governor Vetoes Abortion Ban*, NPR, March 29. 2014, *available at* http://www.npr.org/blogs/thetwo-way/2014/03/29/296283766/west-virginia-s-governor-vetoes-abortion-ban (last visited Nov. 2, 2014).

[4] *See* Americans United for Life, Defending Life 2013, 57, *available at* http://aul.org/featured-images/AUL-1301_DL13%20Book_FINAL.pdf (last visited Nov. 2, 2014).

[5] *See* Brief for American College of Obstetricians and Gynecologists and American Congress of Obstetricians and Gynecologists at 8-13, *Isaacson v. Horne* (2:12-cv-01501-JAT) (9th Cir. Appealed July 30, 2012).

[6] Ala. Code §§ 26-23B-1 to 26-23B-9 (2011); H.B. 2036, 2nd Reg. Sess. (Az. 2012); H.B. 1037, 89th Gen. Assem., Reg. Sess. (Ark. 2013); Ga. Code Ann. § 16-12-141(c) (2012); Idaho Code § 18-501 to 18-510 (2011); Ind. Code Ann. §§ 16-34-2-0.5, 16-34-2-1 to -7 (2011); K.S.A. 65-6703 (2011); LA Rev. Stat. § 40:1299.30.1 (2012); H.B. 1400, 1st Reg. Sess. (Miss. 2014); Neb. Rev. Stat. §§ 28-3,102—111 (2010); N.D.C.C. § 14-02.1-01 (2013); Okla. Stat. Ann. tit. 63, § 1-745.1 (2011); H.B.2, 82nd Gen. Assem., 2nd. Sess. (Tex. 2013). Years listed in parentheses note the year the law was enacted for ease of reference.

[7] H.B. 1037, 89th Gen. Assem., Reg. Sess. (Ark. 2013).

[8] Ga. Code Ann. § 16-12-141(c); LA Rev. Stat. § 40:1299.30.1; H.B. 1400, 1st Reg. Sess. (Miss. 2014); Tex. H.B.2, 82nd Gen. Assem., 2nd. Sess.

[9] Ala. Code §§ 26-23B-1 to 26-23B-9 (2011); H.B. 2036, 2nd Reg. Sess. (Az. 2012); H.B. 1037, 89th Gen. Assem., Reg. Sess. (Ark. 2013); Idaho Code § 18-501 to 18-510 (2011); Ind. Code Ann. §§ 16-34-2-0.5, 16-34-2-1 to -7 (2011); K.S.A. 65-6703 (2011); Neb. Rev. Stat. §§ 28-3,102—111 (2010); N.D.C.C. § 14-02.1-01 (2013); Okla. Stat. Ann. tit. 63, § 1-745.1 (2011). Years listed in parentheses note the year the law was enacted for ease of reference.

[10] H.R.1797, 113th Congress (2013); S.886, 113th Congress (2013).

[11] H.R.1797, available at http://thomas.loc.gov/cgi-bin/query/z?c113:H.R.1797: (compare the introduced with engrossed version).

[12] S.1670, 113th Congress (2013).

[13] H.R.1797, Pain-Capable Unborn Child Protection Act: Roll Vote No. 251. Congressional Record 159:87 (June 18, 2013) p.3730-3731.

[14] These states are Arizona, Arkansas, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, New Hampshire, North Dakota, Oregon, South Carolina, Texas, Virginia, and West Virginia. NARAL Pro-Choice America Foundation, *Tracker Report* (internal document).

[15] Joe Stumpe & Monica Davey, *Abortion Doctor Shot to Death in Kansas Church*, N.Y. TIMES, A1, June 1, 2009, *available at* http://www.nytimes.com/2009/06/01/us/01tiller.html?pagewanted=all&_r=0 (last visited Nov. 2, 2014).

[16] After Nebraska enacted that state's 20-week ban, Dr. Carhart was forced to leave the state. A Maryland anti-choice group is waging a campaign to remove him from that state as well, absent a 20-week ban. *See* Robin Marty, *Anti-Choicers Hope to "Drive Carhart" Out of Maryland*, RH REALITY CHECK, Dec. 8, 2010, http://rhrealitycheck.org/article/2010/12/08/antichoice-activists-hope-drive-carhart-maryland/ (last visited Nov. 2, 2014).

[17] *Id.*

[18] Guttmacher Institute, *Fact Sheet: Induced Abortion in the United States*, July 2014 *at* http://www.guttmacher.org/pubs/fb_induced_abortion.html (last visited Nov. 2, 2014).

[19] Jason Clayworth, *Her Baby Wasn't Expected to Live, But Nebraska Law Banned Abortion*, DES MOINES REGISTER, Mar. 6, 2011.

[20] Matthew Hendley, *Nebraska Woman Lets Jan Brewer Know Proposed Abortion Bill Actually Affects Bill,* PHOENIX NEW TIMES, Apr. 5, 2012 *at* http://blogs.phoenixnewtimes.com/valleyfever/2012/04/nebraska_woman_lets_jan_brewer_1.php (last visited Nov. 2, 2014).

[21] *Public Hearing on LB1103 before the Committee on Judiciary, Nebraska Legislature*, (Neb. 2010) (testimony of Tiffany Campbell).

[22] *Partial Birth Abortion Ban of 1995: Hearing on H.R.1833/S. 939 before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (testimony of Vikki Stella).

[23] *Public Hearing on LB1103 before the Committee on Judiciary, Nebraska Legislature*, (Neb. 2010) (testimony of Timothy Mosher).

[24] Press Release, National Abortion Federation, *Statement of Christy Zink on Harmful Impact of HR 3803* (May 17, 2012) *at* http://prochoice.org/statement-of-christy-zink-on-harmful-impact-of-hr-3803/ (last visited Nov. 2, 2014).

[25] H.B. 1037, 89th Gen. Assem., Reg. Sess. (Ark. 2013).

[26] *See* S.886, 113th Congress (2013).

[27] Felicia Stewart & James Trussell, *Prevention of Pregnancy Resulting from Rape: A Neglected Preventive Health Measure,* 19 AM. J. PREV. MED. 228, 228 (2000).

[28] National Network of Abortion Funds, *Abortion Funding: A Matter of Justice*, 2005, *at* http://fundabortionnow.org/sites/default/files/national_network_of_abortion_funds_-_abortion_funding_a_matter_of_justice.pdf (last visited Nov. 2, 2014).

[29] *See id.*

[30] *Isaacson v. Horne*, 716 F.3d 1213, 1217 (2013). *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[31] *Roe*, 410 U.S. at 163-64. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

[32] *See* Sarah Kliff, *The landscape of abortion bans, in one must-see map*, THE WASHINGTON POST, March 28, 2013, http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/28/the-landscape-of-abortion-bans-in-one-must-see-map/ (last visited Nov. 2, 2014).

[33] Robert Barnes, *Tests of* Roe *More Frequent Since Justices Upheld Late-Term Abortion Ban in '07,* WASH.POST, Dec. 28, 2010 *at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/27/AR2010122703379.html (last visited Nov. 2, 2014).

[34] Dave Bohon, *Nebraska Abortion Law Challenges* Roe v. Wade, NEW AMERICAN, April 17, 2010 *at* http://www.thenewamerican.com/culture/family/item/585-nebraska-abortion-law-challenges-roe-v-wade (last visited Nov. 2, 2014).

[35] 550 U.S. 124 (2007). In its decision, for the first time, the Supreme Court upheld a blanket ban on a type of abortion procedure that did not have an exception for a woman's health. *Id.* at 133. The opinion was also notable for its paternalistic account of abortion care's impact on a woman's emotional wellbeing. *See id.* at 159–60.

[36] *Id* at 131.

[37] Deb Riechmann, *Bush Nominates Roberts for Supreme Court*, THE WASHINGTON POST, July 20, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/07/19/AR2005071900138_pf.html (last visited Nov. 2, 2014); Peter Baker, *Alito Nomination Sets Stage for Ideological Battle*, THE WASHINGTON POST, Nov. 1, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103100180.html (last visited Nov. 2, 2014).

[38] *Gonzalez*, *supra* note 29, at 131.

[39] *See supra note 31.*

[40] *Isaacson, supra* note 28.

[41] *McCormack v. Hiedeman*, 900 F.Supp.2d 1128 (2013).

[42] Lathrop v. Deal, Superior Court of Fulton County, Civil Action File No.: 2012-cv-224423 (Dec. 21, 2012).

[43] *See supra 3.*

[44] Daniel Newhauser, *Witness: Mary Bono Mack, Robert Dold Confronted Eric Cantor About Abortion Vote,* ROLL CALL, July 31, 2012.

[45] *See* Samantha Lachman, *How DC Home Rule Will Help Low-Income Women Seeking Abortions*, THE NATION., Aug. 5, 2013, http://www.thenation.com/article/175595/how-dc-home-rule-will-help-low-income-women-seeking-abortions# (last visited Nov. 2, 2014).