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Legal Fact Sheet: 20-Week Abortion Bans

Since 2010, 18 states have enacted a ban on abortion after 20 weeks into a woman's pregnancy.[1] These laws ban abortion prior to viability,[2] in clear violation of a woman's constitutionally protected right to an abortion.

While each enacted 20-week ban incorporates narrow exceptions (e.g., life endangerment or lethal fetal abnormality), none of these exceptions cure the constitutional defects inherent to 20-week bans.

20-week bans are categorically unconstitutional.

The U.S. Supreme Court has consistently held for over 40 years that states may not ban abortion prior to viability.[3] The Court has also made clear that states are prohibited from drawing a line at a particular gestational age to establish fetal viability.[4] And, the Court has insisted that the determination of viability must be left to the physician's judgment.[5]

In addition, the narrow health exceptions contained in 20-week bans are unconstitutional at any stage of pregnancy, even after viability, because they **do not adequately allow physicians to exercise their medical judgment to protect women's health in all circumstances.**[6]

The U.S. Court of Appeals for the Ninth Circuit struck down 20-week bans in Idaho[7] and Arizona[8] as clearly unconstitutional. In striking down the Arizona ban, the court held that the law was unconstitutional "under a long line of invariant Supreme Court precedents"[9] that guarantee a woman's right to end a pregnancy prior to viability.

Arizona appealed this decision but the U.S. **Supreme Court refused to hear the case**, so the law remains permanently enjoined.[10]

1. The majority of these laws apply at 20 weeks "post-fertilization age," or 22 weeks since the woman's last menstrual period, though a minority apply at 20 weeks lmp.
2. Viability is generally understood to be around 24 weeks from the date of the woman's last menstrual period. See, e.g., AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS, ACOG STATEMENT ON HR 3803 (June 18, 2012), available at http://www.acog.org/~/media/Departments/Government%20Relations%20and%20Outreach/20120618DCAborStmnt.pdf ("Most obstetrician-gynecologists understand fetal viability as occurring near 24 weeks gestation utilizing LMP dating.").
3. See Roe v. Wade, 410 U.S. 113, 163-64 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992); see also id. at 870 ("We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy."); id. at 879; Gonzales v. Carhart 550 U.S. 124, 146 (2007) ("[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy,'" quoting Casey).
4. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 64 (1976).
5. Colautti v. Franklin, 439 U.S. 379 (1979); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (holding that the determination of viability is a matter for the judgment of the attending physician)
6. Since recognizing the constitutional right to choose an abortion, the Supreme Court has consistently held that a ban on abortion after viability must include an exception for situations in which an abortion "is necessary, in appropriate medical judgment, for the preservation of the life or health" of the woman. Roe, 410 U.S. at 165 (emphasis added); Casey, 505 U.S. at 879 (quoting Roe, same). A woman needing an abortion to protect her health whose condition does not meet the narrow exceptions in a 20-week ban would not be able to end her pregnancy in order to protect her health, as Supreme Court precedent has required for over forty years.
7. McCormack v. Herzog, 788 F.3d 1017, 1029 (9th Cir. 2015).
8. Isaacson v. Horne, 716 F.3d 1213, (9th Cir. 2013), cert. denied, 82 U.S.L.W. 3404 (U.S. Jan. 13, 2014) (No. 13-402).
9. Id. at 1217.
10. 82 U.S.L.W. 3404 (U.S. Jan. 13, 2014) (No. 13-402).

The U.S. Supreme Court's most recent decision on abortion rights, Whole Woman's Health v. Hellerstedt, reaffirmed that abortion is a constitutionally-protected right subject to heightened judicial scrutiny.

Whole Woman's Health[11] reaffirmed more than forty years of U.S. Supreme Court precedent holding that abortion is a constitutional right and that a law is unconstitutional if it places an undue burden on a woman's right to decide to have an abortion "before the fetus attains viability." [12]

Under *Whole Woman's Health*, **courts must apply heightened scrutiny to restrictions on abortion.**[13] In so doing, courts cannot give "uncritical deference" to the facts supporting the government's position;[14] courts must actually consider whether credible evidence supports the legislative fact-finding and other evidence presented by the state.

20-week bans fail the most basic constitutional test, repeated for more than four decades, and most recently in Whole Woman's Health: that states simply cannot ban abortion prior to viability.[15]

20-week bans are rooted in opposition to legal abortion and not credible medical evidence.

Advocates of 20-week bans claim that 20 weeks is the point in pregnancy at which fetuses can feel pain, but **these claims are not supported by medical evidence**. The world's leading medical institutions that establish standards for reproductive health care agree that, before 26 weeks of gestation, the fetus does not possess the structural and functional neurological capacity to experience pain.[16] Moreover, the Constitution precludes states from banning abortion before viability for any reason.

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11. 136 S.Ct. 2292, 2016 WL 3461560 (June 26, 2016).
12. Id. at 2299.
13. See id. at 2309-10.
14. Id. at 2310.
15. See Roe v. Wade, 410 U.S. 113, 163-64 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992); see also id. at 870; id. at 879; Gonzales v. Carhart 550 U.S. 124, 146 (2007); Whole Woman's Health, 136 S.Ct. at 2320 ("we now use 'viability' as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health.").
16. Brief For American College of Obstetricians and Gynecologists and American Congress of Obstetricians and Gynecologists as Amici Curiae in Support Of Plaintiffs-Appellants and Reversal, Isaacson et al. v. Horne et al., 716 F.3d 1213 (9th Cir. 2013) (No. 12–16670); Royal College of Obstetricians and Gynaecologists, Fetal Awareness - Review of Research and Recommendations for Practice, (March 2010) https://www.rcog.org.uk/globalassets/documents/guidelines/rcogfetalawarenesswpr0610.pdf.