RECENT ABORTION BAN LITIGATION

More than 40 years ago, the Supreme Court's decision in *Roe v. Wade* recognized that the Fourteenth Amendment protects a woman's right to decide for herself whether to continue or end a pregnancy prior to viability. Not only do a majority of Americans—7 in 10—support upholding that decision, but the Supreme Court made it clear 20 years ago in *Planned Parenthood* v. *Casey* that *Roe*'s protection of a woman's right to a pre-viability abortion is settled law that the Court will not overturn. Plain and simple, pre-viability abortion bans violate that constitutional right. In fact, as you will read below, every time these bans have been challenged in the courts, they have been blocked. A nationwide ban would suffer the same fate —and Congress has an obligation not to pass blatantly unconstitutional laws.

- The U.S. Court of Appeals for the Ninth Circuit permanently struck down **Arizona**'s 20-week ban in May 2013, calling the measure "unconstitutional under an unbroken stream of Supreme Court authority, beginning with *Roe* and ending with *Gonzales*." The Supreme Court denied Arizona's certiorari petition in January 2014.
- The district court's permanent injunction of **Idaho**'s 20 week post-fertilization ban with extremely narrow exceptions was upheld by the Ninth Circuit in May 2015. The State chose not to appeal to the U.S. Supreme Court.
- In **Arkansas** the Center and the ACLU obtained a permanent injunction of the state's 12-week ban in federal district court. The state appealed to the Eighth Circuit, which affirmed the lower court decision in May 2015. The Supreme Court denied review in January 2016.
- The most aggressive ban is in **North Dakota**, which bans abortion upon detection of a fetal heartbeat, which can be as early as 6 weeks. The Center obtained a permanent injunction, which was upheld by the Eighth Circuit and denied review by the Supreme Court.

Arizona 20 Week Abortion Ban

In 2012, Governor Jan Brewer signed into law HB 2036, an omnibus abortion bill that led to greater restrictions on medication abortion and imposed numerous other requirements. One provision of the bill prohibited the performance of abortion beginning at 20 weeks LMP. This instituted a ban two weeks earlier than other 20-week bans that have been passed recently (which have been 20-weeks post-fertilization, 22 weeks LMP). This is approximately the time the vast majority of women undergo a comprehensive scan that uncovers most major abnormalities that pose risks to the health of women and their fetuses.

The only exception to the ban was when the woman faced a medical emergency that posed a serious threat to her life or physical health. While other 20 week bans also contain extremely narrow health exceptions, Arizona's was the only one that required that the circumstances constitute an emergency requiring immediate action. It imposed criminal and civil penalties on physicians found to violate the law, including jail time, civil liability, and revocation of their medical licenses.

***Isaacson, M.D. v. Horne*:** The Center for Reproductive Rights and the ACLU filed suit against the ban on behalf of three Arizona physicians who perform abortions, including physicians who serve women with high-risk pregnancies. The Ninth Circuit permanently struck down the law. Arizona appealed to the Supreme Court, and the Supreme Court denied certiorari, which denied review, allowing the permanent injunction to stand.

CENTER FOR REPRODUCTIVE RIGHTS

1634 Eye St NW, Suite 600
Washington, DC 20006
Tel 202 628 0286
www.reproductiverights.org

Idaho 20 Week Abortion Ban

In April of 2011, Idaho Governor Butch Otter signed into law a measure criminalizing abortion at 20 weeks post-fertilization. Idaho's law only contains extremely narrow exceptions.

***McCormack v. Herzog*:** In March 2013, the federal district court struck down the 20-week ban as unconstitutional. The State appealed the case to the Ninth Circuit, which heard oral arguments in July 2014. The Ninth Circuit held the ban to be unconstitutional in May 2015. Idaho chose not to appeal to the U.S. Supreme Court.

Arkansas 12 Week Ban

In 2013, Arkansas passed Act 301, which bans abortion when (1) a fetal heartbeat can be detected during an ultrasound exam and (2) the gestational age of the pregnancy is 12 weeks or greater. It was originally scheduled to take effect on July 18, 2013. The law is one of the most extreme in the nation, only surpassed by the North Dakota measure banning abortion as early as six weeks of pregnancy, before many women even know they are pregnant.

The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.

Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992) (plurality opinion of Justices Kennedy, O'Connor, and Souter).

***Edwards v. Beck*:** In April of that year, the Center for Reproductive Rights and the ACLU filed suit in the U.S. District Court for the Eastern District of Arkansas on behalf of two physicians who provide abortion services at a Little Rock clinic. The court granted a preliminary injunction in May 2013. The court then issued a permanent injunction against the ban in March 2014. The State appealed to the Eighth Circuit, which affirmed the lower court decision in May 2015. In October 2015, Arkansas filed for a writ of certiorari with the U.S. Supreme Court, which was denied in January 2016.

North Dakota 6 Week Abortion Ban

In March 2013, North Dakota Governor Jack Dalrymple signed HB 1456 into law—the earliest and most extreme abortion ban in the country that would make all abortions in the state illegal after the point at which a fetal heartbeat can be detected (about six weeks of pregnancy), with very limited exceptions.

***MKB Management Corp d/b/a Red River Women's Clinic v. Burdick*:** The Center for Reproductive Rights filed a lawsuit challenging HB 1456 on behalf of the Red River Women's Clinic and one of its physicians before it was scheduled to take effect on August 1, 2013. The court granted a preliminary injunction in July 2013 on the ground that the U.S. Constitution does not permit the North Dakota legislature to prohibit pre-viability abortion. Summary judgment was granted in April 2014, permanently enjoining the law. The State appealed to the Eighth Circuit, which heard oral arguments in January 2015 and affirmed the injunction in July 2015. The State then appealed to the U.S. Supreme Court, which denied review January 2016.

SUPREME COURT PRECEDENT CONCERNING BANNING ABORTION BEFORE VIABILITY

TOPIC & CASE	COURT'S HOLDING	KEY QUOTE REFERENCING VIABILITY
Roe v. Wade *410 U.S. 113 (1973)*	The Supreme Court held that states cannot ban abortion prior to viability.	"[F]or the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State. . . . **[T]he 'compelling' point is at viability**." 410 U.S. 113, 163.
Planned Parenthood of Central Missouri v. Danforth *428 U.S. 52 (1976)*	The Supreme Court upheld a state act provision defining viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life supportive systems."	"**[I]t is not the proper function of the legislature or the courts to place viability**, which essentially is a medical concept, **at a specific point** in the gestation period." 428 U.S. 52, 64.
Colautti v. Franklin *439 U.S. 379 (1979)*	The Supreme Court struck down a state act provision as unconstitutionally vague, for failing to make physicians' good-faith determination of viability conclusive, and for failing to inform physicians when their duty to the fetus arises.	"Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus. **Viability is the critical point.** And we have recognized no attempt to stretch the point of viability one way or the other." 439 U.S. 379, 388-89.
Webster v. Reproductive Health Services *492 U.S. 490 (1989)*	A plurality of the Supreme Court determined that states may constitutionally require testing for viability after 20 weeks of gestation.	"On this Court's interpretation of § 188.029 **it is clear that Missouri has not substituted any of the 'elements entering into the ascertainment of viability'** as 'the determinant of when the State has a compelling interest in the life or health of the fetus.' . . . **Thus, consistent with *Colautti,* viability remains the 'critical point' under § 188.029.**" 492 U.S. 490, 529 (O'Connor, J., concurring).
Planned Parenthood of Southeastern Pennsylvania v. Casey *505 U.S. 833 (1992)*	In a joint opinion, a plurality of Justices reaffirmed the essential holding of *Roe*: that states cannot ban abortion prior to viability.	"**The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe,* at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy**, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that **no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.**" 505 U.S. 833, 860.

RECENT PRE-VIABILITY LITIGATION IN FEDERAL COURT

TOPIC & CASE	COURT'S HOLDING	KEY QUOTE REFERENCING VIABILITY	CURRENT STATUS
Arizona: 20 Week Abortion Ban ***Isaacson, M.D. v. Horne*** *716 F.3d 1213 (2013)*	The U.S. Court of Appeals for the Ninth Circuit held that a prohibition on abortion beginning at twenty weeks gestation, before the fetus is viable, was **unconstitutional.**	"Because Section 7 deprives the women to whom it applies of the ultimate decision to terminate their pregnancies prior to fetal viability, it is **unconstitutional** under a long line of invariant Supreme Court precedents." 716 F.3d 1213, 1217.	State of Arizona appealed the Ninth Circuit's decision; the U.S. Supreme Court declined to review the case.
Idaho: 20 Week Abortion Ban ***McCormack v. Herzog*** *788 F.3d 1017 (9th Cir. Idaho 2015)*	The Ninth Circuit Court of Appeals held that a categorical ban on abortions at and after twenty weeks was **unconstitutional**.	"Section 18-505 prohibits abortions of fetuses of twenty or more weeks postfertilization. The twenty-week ban applies regardless of whether the fetus has attained viability. . . . Because § 18-505 places an arbitrary time limit on when women can obtain abortions, the statute is **unconstitutional**." 788 F.3d 1017, 1029.	Rehearing denied by Ninth Circuit Court of Appeals; the State declined to petition the U.S. Supreme Court for review.
Arkansas: 12 Week Abortion Ban ***Edwards v. Beck*** *786 F.3d 1113 (8th Cir. Ark. 2015)*	Pre-viability ban held **unconstitutional** by the U.S. Court of Appeals for the Eighth Circuit.	"Whether or not exceptions are made for particular circumstances**, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability**. By banning abortions after 12 weeks' gestation, the Act prohibits women from making the ultimate decision to terminate a pregnancy at a point before viability." 786 F.3d 1113, 1117 (internal citation omitted).	State of Arkansas appealed the Eighth Circuit decision; the U.S. Supreme Court declined to review the case.
North Dakota: Ban on Abortion as Early as 6 Weeks ***MKB Mgmt. Corp. v. Stenehjem*** *795 F.3d 768 (8th Cir. N.D. 2015)*	Pre-viability abortion ban struck down as **unconstitutional** by the U.S. District Court for the District of North Dakota.	"Because there is no genuine dispute that H.B. 1456 generally prohibits abortions before viability . . . and because we are bound by Supreme Court precedent holding that **states may not prohibit pre-viability abortions**, we must affirm the district court's grant of summary judgment to the plaintiffs." 795 F.3d 768.	State of North Dakota appealed the Eighth Circuit decision; the U.S. Supreme Court declined to review the case.