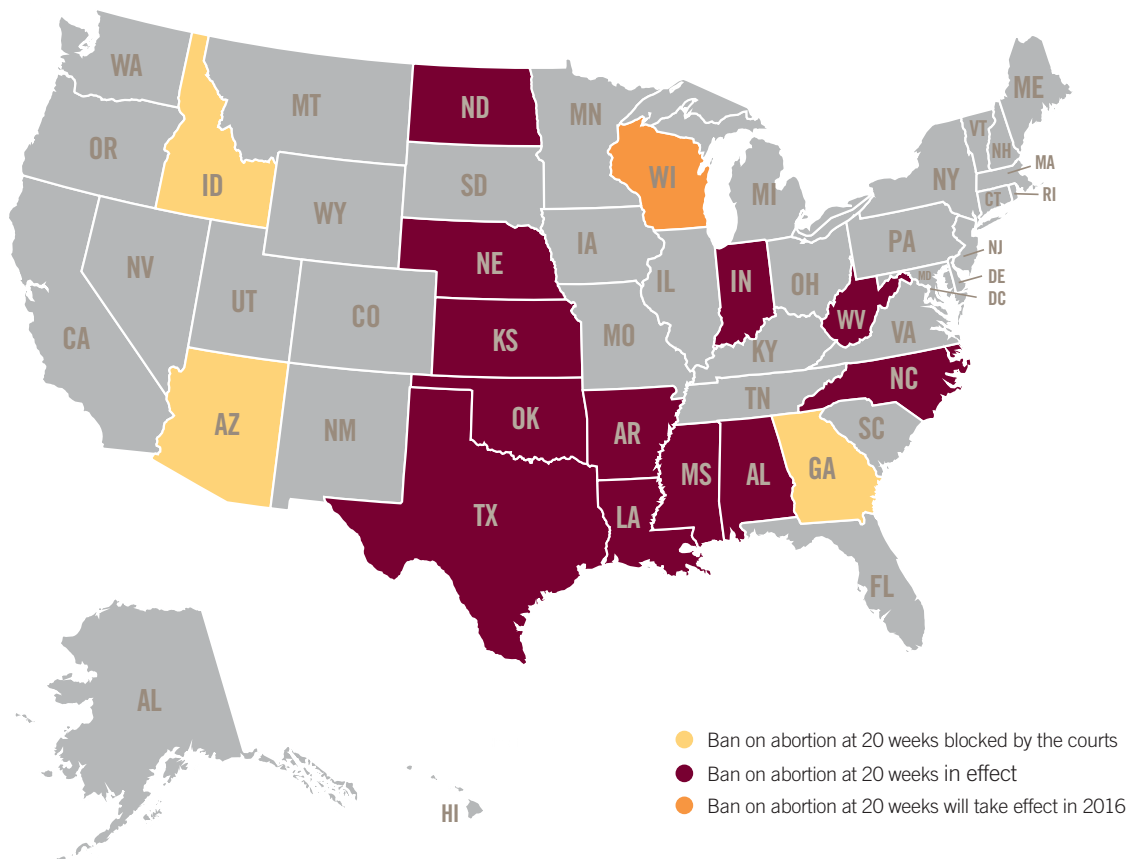


# BANS ON ABORTION AT 20 WEEKS: UNCONSTITUTIONAL, UNCONSCIONABLE, AND UNWARRANTED

The Supreme Court has ruled time and again that liberty is at the core of a woman’s right to control her destiny and her body, including decisions about whether ending or continuing a pregnancy is the best option for her. Every woman is fully capable of making thoughtful choices about her family, future, and reproductive health on her own, and must be allowed to do so with the advice of the health care professional she trusts and without unwarranted interference from politicians who presume to know better. Lawmakers have no more business playing doctor and dictating medical procedures than they do imposing their judgment on a woman’s private medical decisions. The proliferation of attempts to outlaw abortion at 20 weeks of pregnancy<sup>1</sup> represent ongoing efforts to redefine our constitutional rights and insert politicians into our personal health care decisions.

The promise of the Constitution is that our rights – including the right to decide to have an abortion – are so fundamental that they must be equally protected for all, no matter the state where we live. But to date, state legislators have enacted 16 unconstitutional laws banning abortion at 20 weeks, prior to fetal viability (see chart on page 5).<sup>2,3</sup> Under Supreme Court precedent, pre-viability bans on abortion are clearly unconstitutional and the courts have blocked all such laws that have been challenged.<sup>4</sup>



State and national lawmakers alike should focus on advancing real measures to protect women's health and well-being, not dangerous political measures that deny women access to critical care. Instead, anti-choice members of Congress have joined the unfortunate state trend, first by introducing legislation in 2012 to ban abortion at 20 weeks in the District of Columbia, and then expanding on that in 2013 with a nationwide ban. The proposed nationwide ban was again introduced in January 2015 (H.R. 36 and S. 1553) and is currently making its way through Congress. This cruel and unconstitutional bill only includes exceptions in cases of life endangerment, incest, or rape. There is no health exception, forcing doctors to consult with legal counsel on how close each patient has to be to potential death before moving forward. Nor is there an exception for severe fetal abnormalities that would make fetal survival unlikely or impossible.

Moreover, burdensome provisions would require adult rape survivors to receive and document medical care or counseling related to the rape at least 48 hours prior to receiving the abortion—at a facility other than the one where they will receive abortion care—creating a cruel and unnecessary two-day mandatory delay. Minors who are raped and incest survivors would be required to report the assaults to law enforcement or child protective services to receive care. The nationwide ban would also threaten compassionate doctors with a harsh penalty of up to five years in prison, forcing providers to choose between the best care for their patients and jail time.

## UNCONSTITUTIONAL.

The U.S. Supreme Court has affirmed time and time again—from *Roe v. Wade* to *Planned Parenthood v. Casey*—that states cannot ban abortion prior to viability.<sup>5</sup> As stated in the plurality *Casey* opinion:

**“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.”<sup>6</sup>**

Furthermore, the majority of Americans agree with the Court: seven in ten support upholding the rights guaranteed by *Roe*.<sup>7</sup> As a matter of settled law that is supported by most Americans, our elected officials have an obligation to oppose such clearly unconstitutional measures.

The courts have consistently upheld a woman's right to an abortion prior to viability, blocking every 20-week ban that has been challenged. Last year, the Supreme Court refused to review a decision permanently blocking Arizona's ban on abortion at 20 weeks of pregnancy, letting stand a Ninth Circuit ruling that called the law “unconstitutional under an unbroken stream of Supreme Court authority, beginning with *Roe* and ending with *Gonzales*.”<sup>8</sup> Courts have also blocked 20-week bans in Georgia and Idaho.<sup>9</sup>

The Supreme Court has held that a ban on abortion before *or after* viability must allow physicians to exercise their sound medical judgment to protect a woman's life and health under all circumstances.<sup>10</sup> Further, the Court rejected the notion that health can be defined

narrowly, finding that exceptions must protect a woman's life and health, including her psychological health.<sup>11</sup> However, nearly all enacted bans on abortion after 20 weeks are unconstitutional because they only include an extremely narrow exception to protect a woman from serious risks to her life or physical health and do not allow physicians to consider mental health issues when evaluating whether a woman's health is compromised by pregnancy. The federal ban would not even include a health exception and specifically excludes mental health as a consideration. As a matter of settled law, any ban on abortion that includes such narrow exceptions is unconstitutional.

## UNCONSCIONABLE.

Every woman has her own story and we can't possibly know the individual life circumstances surrounding each woman's pregnancy. A woman facing an unintended pregnancy needs options, and abortion bans take them away. Bans on abortion at 20 weeks take critical medical decisions out of a woman's hands at a time when she needs trusted medical advice, compassion, and access – not political interference. A recent study found that common reasons for ending a pregnancy after 20 weeks include barriers to accessing earlier abortion care, late detection of pregnancy, delayed decision-making, and trouble meeting the financial costs of care and travel.<sup>12</sup> A woman who is 20 weeks pregnant may also find that she needs an abortion because she requires medical treatment in order to protect her health or life. It is also possible that she may learn in the second trimester about a fetal anomaly that would negatively impact the health of her pregnancy. These realities make it all the more evident that politicians trying to ban abortion at 20 weeks are doing so with the utmost disregard for a woman's personal circumstances.

In the United States, the majority of abortions are performed during the first trimester of pregnancy and only 1.3% occur at 21 weeks or later, a number that has not varied significantly since 1983.<sup>13</sup> While it may be a small percentage of women who face this situation, each one should be able to make the critical decision without unwarranted political interference.

It is callous to prohibit doctors from providing services to a woman who has just received critical test results about the health of her pregnancy and who is in the midst of making a difficult and deeply personal decision. And it's unconscionable to expect a woman to have to go to court to be able to access her constitutional right in her own state because politicians are playing doctor.<sup>14</sup>

Bans on abortion at 20 weeks aren't being enacted in a vacuum; in many states, a woman must navigate restrictions, regulations, and red tape to receive the abortion care she needs. From sham laws that force clinics to close their doors to unconstitutional bans on abortion that impose the judgment of politicians on a woman's private decisions, the goal of anti-abortion extremists is clear: criminalize access to safe abortion care and return us to the dark days before *Roe v. Wade*.

This restrictive state environment can prevent women from accessing abortion care early in pregnancy – and make it illegal to get it later. So far in 2015, politicians in 48 states have considered around 350 bills that would restrict women's access to reproductive health care. These are the very kinds of medically unnecessary restrictions that have shuttered high-quality

clinics, increasing the cost and the distance a woman must travel to receive reproductive health services. Later abortion is even harder to access.<sup>17</sup> Today, only one-third of facilities provide abortion at 20 weeks of pregnancy and just half of those provide it at any later stage.<sup>18</sup> In a recent study, nearly 4 in 10 women who had a later abortion said that it was difficult to find a facility that could provide the necessary care. Women accessing later abortion were more than twice as likely as women receiving first trimester care to report delayed medical care due to difficulty getting to a facility.<sup>19</sup> Further, the study found that a woman needing a later abortion is approximately four times more likely than a woman having a first trimester abortion to drive three or more hours to the nearest facilities that will perform her abortion.<sup>20</sup>



State and federal legislatures are not the only threat to safe, legal abortion care. From voting booths in Albuquerque, New Mexico to the halls of Congress, politicians and anti-abortion activists are pushing dangerous bans on abortion. In 2013, extremists launched a ballot measure campaign in Albuquerque to ban abortion at 20 weeks. In response, a coalition of reproductive health, rights, and justice groups organized a strong community-centered grassroots campaign to defeat the measure, turning out voters who resoundingly rejected the measure by a ten-point margin.<sup>15</sup> Despite their loss, anti-choice organizers vowed to pursue municipal strategies where they cannot succeed in state legislatures.<sup>16</sup>

*Image Credit: Strong Families New Mexico*

It is unconscionable to bar a woman from making the decision that is best for her and her family because she is delayed by working to cover the cost of an abortion. Since 1976, the Hyde Amendment has withheld Medicaid coverage for abortion, except in very limited circumstances. Many states impose additional discriminatory restrictions on insurance, whether provided by an employer, the government, or even purchased individually.<sup>21</sup> As a result, low-income women who decide to have an abortion are often forced to wait up to three weeks longer than other women to have the procedure while raising the necessary funds. Delays push women closer to gestational limits while increasing the overall cost of the procedure.<sup>22</sup> Rather than exacerbating the existing catch-22 that disproportionately affects low-income women, lawmakers should focus on expanding access to a full range of essential reproductive care for every woman.

## UNWARRANTED.

Major medical groups strongly oppose politically-motivated interference in the physician-patient relationship, which criminalizes doctors for adherence to evidenced-based care. Upholding the fundamental principles of the medical profession, physicians' groups such as the American Congress of Obstetricians and Gynecologists (ACOG), American Academy of Pediatrics, American Academy of Family Physicians, American College of Surgeons, and American College of Physicians have called on lawmakers to respect the sanctity of the patient-provider relationship, stating:

**“Legislative mandates to the practice of medicine do not allow for the infinite array of exceptions where the mandate may be unnecessary, inappropriate, or even harmful to an individual patient... Lawmakers would also do well to remember that patient autonomy as well as individual needs, values, and preferences must be respected.”<sup>23</sup>**

ACOG has determined that it is imperative to provide the more than 58,000 health care professionals it represents with evidence-based recommendations for providing safe abortion care in the second trimester, noting that this service is “an important component of comprehensive women’s health care.”<sup>24</sup>

Contrary to medical facts, politicians have pursued bans on abortion at 20 weeks using the false claim that a fetus can feel pain at that point in pregnancy. In extensive reviews of the literature, leading scientists in the field of reproductive health have determined that assertions of fetal pain supporting a ban on abortions at 20 weeks are unfounded.<sup>25</sup> Opponents of reproductive rights have prioritized 20-week bans based on junk science in order to obscure their true intentions: to shame women who choose to have an abortion and ultimately, ban abortion altogether.

State-based medical groups have gone on record opposing these bans. Most recently, the Wisconsin Section of ACOG, Wisconsin Medical Society, the Wisconsin Academy of Family Physicians, and Wisconsin Chapter of the American Academy of Pediatrics publicly opposed a 20-week abortion ban in their state. They noted that this type of “bad policy” is based on unsound science and poses a threat to women’s health.<sup>26</sup> A group of 100 obstetrician-gynecologists directed a letter of opposition to the state legislature and Governor Scott Walker, writing:

**“[The ban] would block Wisconsin ob-gyns from being able to treat our patients in a medically appropriate and humane manner. This bill would undoubtedly place us in the unconscionable position of having to watch our patients and their loved ones undergo emotional trauma, illness, and suffering during what is already a difficult time.”<sup>27</sup>**

Ultimately, bans on abortion at 20 weeks take critical and personal medical decisions out of the hands of women and their trusted health care providers. Politicians are not medical experts and should not legislate based on junk science that endangers women’s health and lives.

## MOVING FORWARD ON WOMEN’S HEALTH.

Despite the constitutional right to abortion explicitly recognized by the Supreme Court more than four decades ago, and despite the clear need for safe, accessible, and compassionate abortion care, politicians at every level of government continue to attack a woman’s ability to access the abortion care she needs. Bans on abortion at 20 weeks are just another example of politicians ignoring the privacy, health, and needs of pregnant woman in favor of a short-sighted political win.

We all deserve better. We must advance policies that support comprehensive sex education, affordable contraception, and safe, legal, accessible abortion care—including compassionate, commonsense federal legislation like the Women’s Health Protection Act and the EACH Woman Act.<sup>28</sup>

## State Bans on Abortion at 20 Weeks - As of September 2015

STATE (ENACTED)	SUMMARY	EXCEPTIONS
<b>Alabama (2011)</b>	20 weeks post-fertilization*	Narrow exceptions for life and physical health
<b>BLOCKED: Arizona (2012)</b>	20 weeks, calculated from LMP*	Narrow exceptions for life and medical emergency
<b>Arkansas (2013)</b>	20 weeks post-fertilization*	Narrow exceptions for life, physical health, rape, incest
<b>BLOCKED: Georgia (2012)</b>	20 weeks gestation*~	Narrow exceptions for life and physical health, lethal fetal anomaly
<b>BLOCKED: Idaho (2011)</b>	20 weeks post-fertilization*	Narrow exceptions for life and physical health
<b>Indiana (2011)</b>	20 weeks post-fertilization*	Narrow exceptions for life and physical health
<b>Kansas (2011)</b>	22 weeks calculated from LMP*	Narrow exceptions for life and physical health
<b>Louisiana (2012)</b>	20 weeks post-fertilization*	Narrow exceptions for life and physical health, lethal fetal anomaly
<b>Mississippi (2014)</b>	20 weeks calculated from LMP*	Narrow exceptions for life and physical health, lethal fetal anomaly
<b>Nebraska (2010)</b>	20 weeks post-fertilization*	Narrow exceptions for life and physical health
<b>North Carolina (1973)</b>	20 weeks	Life and health
<b>North Dakota (2013)</b>	20 weeks post-fertilization*	Narrow exceptions for life and physical health
<b>Oklahoma (2011)</b>	20 weeks post-fertilization*	Narrow exceptions for life and physical health
<b>Texas (2013)</b>	20 weeks post-fertilization*	Narrow exceptions for life and physical health, lethal fetal anomaly
<b>West Virginia (2015)</b>	22 weeks calculated from LMP*	Narrow exceptions for life and physical health, lethal fetal anomaly
<b>EFFECTIVE IN 2016: Wisconsin (2015)</b>	20 weeks post-fertilization*	Narrow exception for medical emergency
<p>* Based on the false assertion that the fetus can feel pain                      ~ A ban on abortion at 20 weeks post-fertilization is being enforced only against post-viability abortions</p>		

## Endnotes

- <sup>1</sup> Most 20-week bans prohibit abortions after 20 weeks “post-fertilization,” or 22 weeks from the woman’s last menstrual period (lmp).
- <sup>2</sup> Guttmacher Institute, “Fact Sheet: State Policies in Brief: State Policies on Later Abortions,” last modified July 1, 2015, *available at* [http://www.guttmacher.org/statecenter/spibs/spib\\_PLTA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf). In 2013, extremist politicians in Arkansas and North Dakota passed very early pre-viability bans on abortion that courts have permanently blocked as unconstitutional. The North Dakota law would have banned abortion as early as six weeks. The Arkansas ban would have prohibited abortion at a gestational age of pregnancy of 12 weeks or greater.
- <sup>3</sup> Medical science determines viability not as a particular gestational age, but as the point at which a fetus can survive outside the womb. This point changes, dependent on the pregnancy and the woman’s body, among other factors. Thus, physicians determine viability using their best clinical judgment with regards to each pregnancy and based on the best available medical evidence. That said, no delivered baby has ever survived at less than 21 weeks and survival rates of very premature babies have not improved significantly in over a decade. The Supreme Court defines fetal viability as “when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus’ sustained survival outside the womb, with or without artificial support. 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.” Advancing New Standards in Reproductive Health, “The Science of ‘Viability,’” Issue Brief 4, (2010), *available at* <http://www.ansirh.org/research/late-abortion/countering-misinformation/fetal-pain.php>.
- <sup>4</sup> *Roe v. Wade*, 410 U.S. 113, 153-54, 164-65 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992).
- <sup>5</sup> *Roe*, 410 U.S. at 113, 153-54, 164-65; *Casey*, 505 U.S. at 833, 879.
- <sup>6</sup> *Casey*, 505 U.S. at 833, 871.
- <sup>7</sup> Louise Radnofsky and Ashby Jones, “Support Grows for *Roe v. Wade*,” *Wall Street Journal* (2013), *available at* <http://www.wsj.com/articles/SB10001424127887323301104578255831504582200>.
- <sup>8</sup> *Isaacson v. Horne*, 716 F.3d 1213, 1231 (9<sup>th</sup> Cir. 2014).
- <sup>9</sup> Courts have also permanently blocked extreme pre-viability bans in North Dakota and Arkansas. See Endnote 2.
- <sup>10</sup> *Roe*, 410 U.S. at 16; *Casey*, 505 U.S. at 879 (quoting *Roe*, same).
- <sup>11</sup> See *Casey*, 505 U.S. at 882 (“It cannot be questioned that psychological well-being is a facet of health.”); *Thornburgh v. ACOG*, 476 U.S. 747, 768-69 (1986) (invalidating post-viability abortion restriction because it placed pregnant women at medical risk by failing to require maternal health to be the “physician’s paramount consideration”); *Women’s Med. Prof’l Corp. v. Voinovich*, 911 F. Supp. 1051, 1080-81 (S.D. Ohio 1995) (holding post-viability abortion restriction unconstitutional because “a state may not constitutionally limit the provision of abortions only to those situations in which a pregnant woman’s physical health is threatened, because this impermissibly limits the physician’s discretion to determine what measures are necessary to preserve her health”), *aff’d on other grounds*, 130 F.3d 187 (6<sup>th</sup> Cir. 1997). In another context, the Court recognized that “[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.” *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (holding that the doctor-patient privilege extends to psychotherapy).
- <sup>12</sup> Diana Greene Foster and Katrina Kimport, “Who Seeks Abortions at or After 20 Weeks?” *Perspectives on Sexual and Reproductive Health* 45 no. 4 (2013).
- <sup>13</sup> Demographically, women who seek an abortion after 20 weeks do not differ notably from those who have an abortion in the first trimester with regards to race, ethnicity, or number of previous abortions or children, among other identifiers (Foster and Kimport). Advancing New Standards in Reproductive Health, “What do we know about women who get later abortions?,” Issue Brief 3, (2014), *available at* <http://www.ansirh.org/wp-content/uploads/2013/06/LaterAbortion.FactSheet.7-2014.pdf>, *citing* Karen Pazol, Sonya B. Gamble, Wilda Y. Parker, Douglas A. Cook, Suzanne B. Zane, and Saeed Hamdan, “Abortion surveillance—United States, 2006,” *MMWR Surveillance Summary* (2009).
- <sup>14</sup> For personal stories on how medically unwarranted abortion restrictions including 20-week abortion bans impact women’s lives, visit <http://www.drawtheline.org/stories/>.
- <sup>15</sup> Teddy Wilson, “Albuquerque 20 Week Abortion Ban Voted Down,” *RH Reality Check* (November 20, 2013), accessed January 28, 2015, *available at* <http://rhrealitycheck.org/article/2013/11/20/albuquerque-20-week-abortion-ban-voted-down>.
- <sup>16</sup> Katie McDonough, “Albuquerque Voters Defeat 20 Week Abortion Ban, Issue Major Blow to National Anti-Abortion Movement,” *Salon* (November 20, 2013), accessed January 28, 2015, *available at* [http://www.salon.com/2013/11/20/albuquerque\\_voters\\_defeat\\_20\\_week\\_abortion\\_ban\\_issue\\_major\\_blow\\_to\\_national\\_antiabortion\\_movement](http://www.salon.com/2013/11/20/albuquerque_voters_defeat_20_week_abortion_ban_issue_major_blow_to_national_antiabortion_movement).
- <sup>17</sup> Advancing New Standards in Reproductive Health, “Maps showing access – and lack of it – to later abortion services in the United States,” (2015), *available at* <http://www.ansirh.org/research/late-abortion.php>.
- <sup>18</sup> Advancing New Standards in Reproductive Health, *citing* Jenna Jerman and Rachel K. Jones, “Secondary measures of access to abortion services in the US, 2011-2012: Gestational age limits, cost, and harassment,” *Women’s Health Issues* 24, no. 4 (2014).
- <sup>19</sup> Foster and Kimport.
- <sup>20</sup> *Ibid.*
- <sup>21</sup> Center for Reproductive Rights, “The High Cost of State Bans on Abortion Coverage,” (2015), *available at* <http://www.reproductiverights.org/document/the-high-cost-of-state-bans-on-abortion-coverage>.
- <sup>22</sup> Heather D. Boonstra, “The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States,” Guttmacher Institute (2007), *available at* <http://www.guttmacher.org/pubs/gpr/10/1/gpr100112.pdf>.
- <sup>23</sup> Steven E. Weinberger, Hal C. Lawrence, Douglas E. Henley, Errol R. Alden, & David B. Hoyt, “Legislative Interference with the Patient-Physician Relationship,” *New England Journal of Medicine* No. 367 (2012), *available at* <http://www.nejm.org/doi/full/10.1056/NEJMsb1209858>.
- <sup>24</sup> American Congress of Obstetricians and Gynecologists, “Second-Trimester Abortion,” *Practice Bulletin*, no. 135 (2013).
- <sup>25</sup> Royal College of Obstetricians and Gynaecologists, “Fetal Awareness Review of Research and Recommendations for Practice,” (2010), *available at* <https://www.rcog.org.uk/globalassets/documents/guidelines/rcogfetalawarenesswpr0610.pdf>; Susan J. Lee, Henry J Peter Ralston, Eleanor A. Drey, John Colin Partridge & Mark A. Rosen, “Fetal pain: a systematic multidisciplinary review of the evidence,” *Journal of the American Medical Association*, no. 294, (2005) *available at* <http://jama.jamanetwork.com/article.aspx?articleid=201429>.
- <sup>26</sup> Kathy Harke (WI-ACOG), Jeffrey Britton (WIAAP), Jerry Halverson (Wisconsin Medical Society), and Dave Eitrheim (WAFP), “Joint Letter to the Wisconsin Senate Regarding 20-Week Abortion Ban Legislation” (2015), *available at* <http://www.acog.org/-/media/Sections/WI/Joint-Letter-to-Senate.pdf?la=en>.
- <sup>27</sup> American Congress of Obstetricians and Gynecologists, Wisconsin Section, “ACOG-Wisconsin to Governor Walker and Members of the Wisconsin legislature, 2015,” accessed July 31, 2015, *available at* <http://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/2015WIOpenLtr20WeekBan.pdf?dmc=1&ts=20150608T1300079066>.
- <sup>28</sup> Women’s Health Protection Act, S. 217, H.R. 448, 114<sup>th</sup> Congress (2015); Equal Access to Abortion Coverage in Health Insurance (EACH Woman) Act, H.R. 2972, 114<sup>th</sup> Congress (2015).

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