When *Roe* Is No More

The replacement of Justice Anthony Kennedy by Justice Brett Kavanaugh on the US Supreme Court has inspired great hope among pro-life Americans that *Roe v. Wade*'s days could be numbered. So, with Justice Kavanaugh on the Court, what are the prospects of overturning *Roe* in the next few years? It depends on which pro-life legal expert one asks. Some think that the Court is more likely to attack *Roe* incrementally, and others think it could overturn *Roe* all at once. All eyes are on the Court as it considers requests to review state laws related to abortion.

For example, the Supreme Court's recent refusal to take two cases related to laws intended to defund Planned Parenthood has raised some concern among pro-lifers. The cases involved laws in Kansas and Louisiana intended to revoke taxpayer funding for Planned Parenthood. Planned Parenthood sued both states. The Tenth Circuit Court of Appeals struck down the Kansas law, and the Fifth Circuit Court of Appeals similarly blocked the Louisiana law. The Supreme Court will often step in when there is a split among federal appeals courts, as there was here, but four justices must agree to take a case to put it on the Court's docket, and here only three—Justices Thomas, Alito, and Gorsuch—did so.

Some pro-life legal experts have expressed caution about reading the Court's refusal as a bad sign for pro-life interests with the Court. The actual legal issue of both cases did not strictly have to do with taxpayer funding of abortions or Planned Parenthood, or with the abortion issue at all. Instead, the justices were asked to consider "whether Medicaid recipients have standing to challenge states' determination of which groups qualify as Medicaid providers."[1]

1. Alexandra Desanctis, "CNN Claims SCOTUS 'Sides with Planned Parenthood' in Denying Cert," *National Review*, December 10, 2018, https://www.nationalreview.com/.

Nonetheless, an opinion written by Justice Clarence Thomas (joined by Justices Alito and Gorsuch) dissenting from the majority's refusal to take the case expresses the concerns that trouble many pro-lifers:

> What explains the court's refusal to do its job here? I suspect it has something to do with the fact that some respondents in these cases are named "Planned Parenthood." That makes the Court's decision particularly troubling, as the question presented has nothing to do with abortion. It is true that these particular cases arose after several States alleged that Planned Parenthood affiliates had, among other things, engaged in "the illegal sale of fetal organs" and "fraudulent billing practices," and thus removed Planned Parenthood as a state Medicaid provider. But these cases are not about abortion rights. They are about private rights of action under the Medicaid Act. Resolving the question presented here would not even affect Planned Parenthood's ability to challenge the States' decisions; it concerns only the rights of individual Medicaid patients to bring their own suits.[2]

There are other cases more directly involving abortion moving up the judicial "pipeline" now that could be taken up by the Court within the next year or two. Whether the Court takes one of these cases should provide a better barometer of its receptivity to taking an abortion case and potentially weakening or repealing *Roe.*

The first case involves an Indiana law enacted to ban pre-viability abortions when sought solely because of the race, sex, or disability of the unborn child. This law also requires abortion providers to dispose of the remains of an aborted child by burial or cremation, as other human remains are treated.

A trial court permanently enjoined both provisions, and the Seventh Circuit affirmed that ruling.[3] The court of appeals concluded that *Roe* and *Casey* create a categorical "right" to an abortion before viability, and the pre-viability ban, though limited to reasons of race, sex, and disability, contravenes that "right."

Regarding the law requiring disposal of fetal remains by burial or cremation, the court said there is no rational basis for the law, because unborn children are not "persons" under *Roe* and *Casey*, and therefore it is irrational to treat them as such.

In October 2018, the Indiana Attorney General asked the Supreme Court to take this case, and in early January the Court discussed whether to accept it. The Court could take up either or both provisions of the law or decline the case outright.

Another case that could find its way to the Supreme Court soon involves a ban on "dismemberment" abortions, known as D&E (dilation and evacuation) abortions. Typically done in the second trimester, D&E abortions brutally dismember fully formed living unborn babies. Laws banning the procedure have been enacted in ten states.[4] In three of those states, the laws are in effect, but they have been enjoined in

2. *Gee v. Planned Parenthood of Gulf Coast Inc.*, 586 U.S. __ (2018) (Thomas, J., dissenting), https://www.supremecourt.gov/.

3. *Planned Parenthood of Indiana and Kentucky v. Indiana State Department of Health*, no. 17-3163 (7th Cir. 2018).

4. Those states are Alabama, Arkansas, Kansas, Kentucky, Louisiana, Mississippi, Oklahoma, Ohio, Texas, and West Virginia.

the other seven pending outcomes of litigation.[5] Two of the enjoined laws are currently before US appellate courts, in the Fifth Circuit (Texas) and the Eighth Circuit (Arkansas).

Alabama enacted its dismemberment ban in 2016, and the law was struck down by a federal district court in 2017; in August 2018, the Eleventh Circuit Court of Appeals affirmed that ruling.[6] On December 21, 2018, Alabama Attorney General Steve Marshall asked the Supreme Court to hear the case.

Another case that could soon work its way to the Supreme Court involves laws requiring abortionists to have admitting privileges in a nearby hospital. The laws were enacted in Missouri and Louisiana and were upheld by US appellate courts in the Eighth and Fifth Circuits, respectively.

The Missouri law requires doctors who perform abortions to have admitting privileges in at least one nearby hospital. In addition, Missouri law requires abortion clinics to comply with a number of physical design and layout criteria. Relying on *Whole Woman's Health v. Hellerstedt* (136 S. Ct. 2292 [2016]), a federal district court enjoined these requirements. The Eighth Circuit reversed and sent the case back to the lower court for further factfinding.[7]

There are two takeaways from the Eighth Circuit's decision. First, because *Hellerstedt* requires courts to consider "the burdens a law imposes on abortion access together with the benefits those laws confer" (136 S. Ct. at 2309), the plaintiffs' challenge requires the development of a complete factual record sufficient to allow such a cost–benefit analysis. The record in this case was insufficient to make that analysis. For example, Missouri grants administrative waivers in some cases. There was not enough evidence to determine whether a waiver was available in this case.

Second, a cost–benefit analysis is required even where, as here, the challenged requirements are similar to the Texas laws struck down in *Hellerstedt*. Each state, and each record, stands or falls on its own.

The Louisiana statute requires abortion providers to have hospital admitting privileges. On September 26, 2018, a panel of the Fifth Circuit upheld the law on a vote of 2 to 1.[8] The decision reverses a district court opinion that had permanently enjoined the law. The majority opinion, penned by Circuit Judge Jerry E. Smith, concludes that the facts in this case are "remarkably different" from those that led the Supreme Court in *Hellerstedt* to strike down a law requiring similar admitting privileges in Texas.

For example, because Texas doctors could not obtain privileges, the Supreme Court found that all but eight of forty abortion clinics in that state had closed. In Louisiana, only one doctor at one clinic is currently unable to get privileges, and

5. The laws are in effect in Mississippi, Ohio, and West Virginia.

6. *West Alabama Women's Center v. Miller*, no. 17-15208 (11th Cir. 2018).

7. *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, no. 17-1996 (8th Cir. 2018).

8. *June Medical Services v. Gee*, no. 17-30397 (5th Cir. 2018).

there is no evidence that any of the clinics will close because of the law. In Texas, the Supreme Court found that the number of women forced to drive over one hundred fifty miles to obtain an abortion had increased 350 percent. In Louisiana, however, driving distances will not increase. The Supreme Court concluded that the record in *Hellerstedt* reflected no benefits from hospital admitting privileges. In Louisiana, however, the record shows that the requirement for admitting privileges helps ensure physician competency (an important requirement given that doctors trained to do abortions at one Louisiana clinic included a radiologist and an ophthalmologist).

As we wait to hear whether the Court takes one of these cases or some other case, it is important to know that the Court can use *any* abortion law to revisit and overrule *Roe*. It is not essential that the law taken up by the Court strikes at the heart of *Roe* to serve as a vehicle for reversing *Roe*. What is essential to reverse *Roe* are five Justices willing to do so.

If Roe is overturned, then what? Ending the destructive legacy of *Roe* is one of the principal goals of the pro-life movement, but contrary to a common misperception, abortion will not be outlawed throughout our nation when *Roe* is overturned. So what will the legal landscape look like when *Roe* is no more?

Unfortunately, in a post-*Roe* nation, only eleven states, comprising about 20 percent of the US population, would immediately ban abortion. This is because after *Roe*, only seven states retained their abortion bans "on the books" (although the bans are unenforceable under *Roe*),[9] and four states that repealed their pre-*Roe* statutes subsequently enacted so-called "trigger statutes" saying that abortion is prohibited immediately on the repeal of *Roe*.[10]

The other thirty-nine states, comprising about 80 percent of the population, would allow abortion post-*Roe* unless bans were enacted. In addition, ten of these states would have to overcome a higher hurdle in banning abortion post-*Roe* because their state Supreme Courts recognize a "right" to abortion in their state constitutions.[11]

Proposed Separate Abortion Payments Rule for Obamacare

When the Affordable Care Act (ACA), also known as Obamacare, became law in 2010, one major piece of the Hyde amendment (the law that prevents taxpayer funding of abortion) was missing from it. The ACA omitted the prohibition on use of federal funds to pay for health plans that cover elective abortions. Instead, the ACA incorporated a gimmick (opposed by pro-life groups) that made the law appear to avoid using tax dollars to pay for plans that cover abortion. The gimmick requires health insurance companies with plans that cover elective abortions to collect a

9. The states that have retained abortion bans are Arkansas, Arizona, Michigan, Oklahoma, Texas, West Virginia, and Wisconsin.

10. The states with trigger statutes are Louisiana, North Dakota, Rhode Island, and South Dakota.

11. Those states are Alaska, California, Florida, Massachusetts, Minnesota, Mississippi, Montana, New Jersey, New York, and Iowa.

separate payment (at least $1 per month) from each enrollee for coverage of those abortions. And the insurance company must deposit these elective abortion payments into a separate account that includes only those payments and is used exclusively to pay for elective abortions.

But this separate payment gimmick is simply being ignored by many health insurers, according to a 2014 report from the Government Accountability Office.[12] This may be because when the ACA was first put into effect, the Obama administration failed to enforce that part of the law. As a result, many pro-life Americans seeking health insurance under the ACA are likely to be unaware that their plans cover abortions and that they are paying an additional premium to cover them.

To fix this problem, the US Department of Health and Human Services (HHS) has proposed new regulations directing issuers of health insurance plans to follow this provision of the law.[13] The regulations require issuers to send a separate monthly bill to the consumer for the portion of the premium that covers abortion. In other words, the new rule will remind health insurers about the law and give them reason to believe the government will make them comply with it this time.

Ultimately, the goal of pro-life groups is to change the law to prevent use of government money to pay for plans that cover abortion. This could be accomplished by amending the ACA or enacting the No Taxpayer Funding for Abortion Act. The No Taxpayer Funding for Abortion Act would make the Hyde amendment and other current abortion funding prohibitions permanent and government-wide and would ensure that the ACA faithfully conforms to the Hyde amendment. But it is Congress, not the administration, who must take that action. Until they do, adoption of the "separate payments" rule will allow consumers to see more clearly when they are paying for elective abortions and seek a plan that does not cover them. It may also motivate companies to offer more plans without abortion coverage.

On December 12, the United States Conference of Catholic Bishops filed comments with the HHS on the proposed regulation.[14] The USCCB applauds the proposed rule because it would enforce these requirements for the first time since enactment of the ACA. The USCCB asks the administration to go one step further, however, by making it clear that people may opt out of coverage for elective abortions and, by opting out, avoid the separate charge for such coverage.

12. US Government Accountability Office, "Health Insurance Exchanges: Coverage of Non-excepted Abortion Services by Qualified Health Plans" (GAO-14-742R), September 15, 2014, https://www.gao.gov/.

13. Patient Protection and Affordable Care Act; Exchange Program Integrity, 83 Fed. Reg. 56015 (November 9, 2018).

14. USCCB Office of the General Counsel to Centers for Medicare and Medicaid Services, December 12, 2018, http://www.usccb.org/.

Food and Drug Administration Funding for Research Using Aborted Fetal Tissue

In August 2018, news reports revealed that the US Food and Drug Administration (FDA) signed a contract to purchase "fresh" aborted fetal organs from Advanced Bioscience Resources, a company that wholesales aborted fetal body parts. The purpose of the purchase was to create mice with human immune systems. Although the practice of creating mice with human immune systems is not in itself immoral, the use of tissue from induced abortions to create the humanized mice *is* immoral. The use of fetal remains procured from abortions can be interpreted as legitimizing abortion by saying that it provides important material for research. Such use also requires close collaboration between suppliers and the abortion industry.[15]

In response, a number of pro-life groups (including the USCCB Pro-Life Secretariat) signed a joint letter to HHS Secretary Alex Azar expressing strong opposition to the purchase of aborted fetal organs by the FDA and their possible use by other federal agencies.[16] The letter calls on the federal government to end the use of taxpayer dollars for such research, to end all association with those who participate in trafficking or procuring aborted baby organs, and to find ethical alternatives as soon as possible.

About a month later, on September 24, HHS announced that the FDA contract to purchase aborted baby body parts for research had been terminated.[17] In addition, HHS initiated a comprehensive review of all research involving fetal tissue and of possible alternatives to the use of human fetal tissue in research.

In response to this announcement, Cardinal Timothy Dolan, then chairman of the USCCB Committee on Pro-Life Activities, issued a statement applauding "Secretary Azar and the Administration for cutting off ties to a company whose business is to procure aborted baby parts for research."[18] But since taxpayer-funded research on aborted fetal tissue continues, including more than $100 million being spent each year by the National Institutes of Health (NIH), Cardinal Dolan also urged the administration to "act quickly to cease all funding for research involving body parts from aborted babies." He explained that "for the federal government to create a demand for abortion and use these children's body parts for research is wrong," and said that "under a pro-life Administration, there is simply no room for callously using aborted children to further a research goal."

In November, the Trump administration indicated that it may be willing to stop the purchasing of aborted baby parts if they can find ethical alternatives.[19] And on

15. See Stacy Trasancos, Science Notes and Abstracts, in the Winter 2018 issue of this journal.

16. The letter, dated September 11, 2018, is available on the website of the Susan B. Anthony List, at https://www.sba-list.org/.

17. HHS statement, news release, September 24, 2018, https://www.hhs.gov/.

18. USCCB news release, September 27, 2018, http://www.usccb.org/.

19. Micaiah Bilger, "Trump Admin Official: We Will Stop NIH from Buying Body Parts from Aborted Babies," *LifeNews*, November 16, 2018, https://www.lifenews.com/.

December 10, HHS announced that NIH would be issuing $20 million in new grants to develop alternatives to "human fetal tissue obtained from elective abortions."[20]

Nonetheless, a few days after HHS made this announcement, Dr. Francis Collins, director of the NIH, defended current NIH research that uses the body parts of babies destroyed by elective abortions and said that fetal tissue research "will continue to be the mainstay."[21]

Dr. Collins made this statement on the same day that a congressional hearing was held to explore ethical alternatives to aborted fetal tissue. One of the experts who testified at the hearing was Tara Sander Lee, who holds a doctorate in biochemistry and did postdoctoral work in molecular and cell biology at both Harvard Medical School and Boston Children's Hospital. She later established her own laboratory to study congenital heart disease and vascular disorders in children. At the December 13 hearing, Dr. Sander Lee said,

> *We do not need fetal body parts from aborted babies to achieve future scientific and medical advancements.* Very little research is actually being done that currently relies on abortion-derived fetal tissue. … After over 100 years of research, NO therapies have been discovered or developed that require aborted fetal tissue. History has shown us that we never needed fetal tissue. In the case of vaccines, cells derived from aborted fetal tissue have been used in the development process, but fetal tissues have NEVER been the exclusive means necessary for these breakthroughs. Instead, monkey cells, chicken eggs, and non-fetal human cells are used to produce vaccines for polio, measles, and mumps. The vast majority of scientists are focusing on other, ethical tissue sources and models that work just as well, if not better. *If we stop harvesting fresh tissues from aborted fetuses today, it will not stop one person from being treated or vaccinated today nor will it inhibit the development of new vaccines going forward.*[22]

Pro-life groups were understandably outraged at Dr. Collins's statement, especially given his reappointment by President Trump as director of the NIH. In response, many of these groups signed a joint letter that was sent to the President on December 18.[23] The letter concluded with this: "The millions of Americans we represent wholly reject Collins' assertions and urge you to immediately end the unethical

---

20. National Institutes of Health, "Notice of Intent to Publish Funding Opportunity Announcements for Research to Develop, Demonstrate, and Validate Experimental Human Tissue Models That Do Not Rely on Human Fetal Tissue" (NOT-OD-19-042), December 10, 2018, https://grants.nih.gov/.

21. Meredith Wadman and Jocelyn Kaiser, "NIH Chief Defends Use of Human Feetal Tissue as Opponents Decry It before Congress," *Science*, December 13, 2018, https://www.sciencemag.org/.

22. Tara Sander Lee, written testimony before House Committee on Oversight, "Exploring Alternatives to Fetal Tissue Research" hearing, December 13, 2018, https://republicans-oversight.house.gov/, original emphasis.

23. Mallory Quigley, "Pro-Life Groups Slam Tax Funding of Research Using Eyes, Livers and Brains of Aborted Babies," *LifeNews*, December 20, 2018, https://www.lifenews.com/.

practice of using taxpayer dollars to experiment on the bodies of aborted children. This terrible atrocity is incongruous with your leadership in defense of human life. We look forward to working with you and with Secretary Azar to implement a new policy that affirms the dignity of all Americans, born and unborn."

Finishing Up with Inspiration

Far too often, couples who receive the devastating news that their unborn baby has a life-threatening condition are urged by their doctors to abort the baby. They are told there is no reason to continue the pregnancy when the baby is likely to die soon after birth. Thankfully, many couples reject this dreadful advice. The following is the inspiring story of one couple, which was featured on a pro-life news site.[24]

> Katyia Rowe and Shane Johnson were told that their son Lucian's brain was not developing normally and that he would be seriously disabled. Katyia was advised she could abort Lucian up to 24 weeks' gestation.
>
> "We were devastated to be told our son's brain abnormalities were so severe they were life limiting and we should consider a termination," the couple told the *Daily Mail*.
>
> "Further scans were arranged to assess the extent of his disabilities, but when I saw him smiling and playing inside me I knew I couldn't end his life," Katyia said. She explained that "despite all the awful things I was being told, while he was inside me his quality of life looked to be wonderful and no different to any other baby's, he was a joy to watch.
>
> "I was told he would never walk or talk, yet the scans showed him constantly wriggling and moving.
>
> "As I watched I knew that while I was carrying him, he still had a quality of life and it was my duty as a mother to protect that no matter how long he had left, he deserved to live."
>
> Lucian was born on October 23, 2012, weighing 6 lb 10 oz. His father Shane said that after Lucian was born, doctors whisked him away and tried to put the child on a ventilator, without success, and scheduled tests and x-rays.
>
> Katyia recalled that she "was shocked, but we had already decided that after his birth we would let Lucian lead the way. I didn't want him given any unnecessary treatment if ultimately it wouldn't help him.
>
> "He had already given me the greatest honour of being his mummy for the last nine months. It was up to him now if he was ready to go."
>
> "They worked on him for 4 hours, [then] came in advising he only had minutes left to live," Shane related on a website he and Katyia created in memory of their son.
>
> The couple rushed to Lucian's side and finally the son she had nurtured for nine months was placed in Katyia's arms.

24. Thaddeus Baklinski, "UK Parents Reject Abortion after Seeing Son Smile on Ultrasound," *LifeSite News*, January 15, 2013, https://www.lifesitenews.com/.

Katyia said, "It was without doubt the happiest moment of my life. Lucian could have died at any time in my womb, but he held on long enough for us to meet properly.

"My son looked utterly perfect. The love and joy I felt the moment they put Lucian in my arms told me it had all been worth it.

"I thought I didn't want to be a mother, but Lucian taught me it is the most wonderful job in the world, and I will always be grateful for that," Katyia added.

Shane said that he and Katyia could see Lucian's struggle for life diminishing. Lucian died in his mother's arms nine hours after he was born.

"The peace, contentment and amount of pure love that engulfed the three of us in that room will keep us moving forward for the rest of our lives," Shane said. "We're so thankful to have had that time with Lucian for those few hours, and words can't describe just how proud we are to be the parents of such a beautiful, strong-willed little boy who through our tears, stories and memories will live on in our hearts forever!"

Greg Schleppenbach