Regulatory & Executive Branch

Proposed Rule Rescinding Conscience Protections

On January 5, 2023, the US Department of Health and Human Services (HHS) published a proposed rule seeking to rescind and replace a 2019 rule protecting conscience rights in healthcare.

Some form of conscience protection rule has existed since 2008, when the first rule was proposed under President George W. Bush. The purpose of such rules is to enforce federal laws that "protect providers, individuals, and other health care entities from having to provide, participate in, pay for, provide coverage of, or refer for, services such as abortion, sterilization, or assisted suicide," as well as conscience protections dealing with advance directives.[1]

The original 2008 rule was rescinded and replaced in 2011 under President Barack Obama. The new rule provided just one regulation for three conscience laws. Such a meager rule was later deemed "inadequate" by HHS under President Donald

1. US Department of Health and Human Services (HHS) Office for Civil Rights (OCR), "HHS Announces Final Conscience Rule Protecting Health Care Entities and Individuals," HHS Press release, May 2, 2019, https://public3.pagefreezer.com/browse/HHS.gov/31-12-2020T08:51/https://www.hhs.gov/about/news/2019/05/02/hhs-announces-final-conscience-rule-protecting-health-care-entities-and-individuals.html; see OCR and HHS Office of the Secretary, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," rule, 84 Fed. Reg. 23170 (May 21, 2019, as corrected June 7, 2019)(codified at 45 C.F.R. 88), https://www.federalregister.gov/documents/2019/05/21/2019-09667/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority.

Trump. The 2019 rule was the most comprehensive conscience protection rule to date in terms of both coverage and enforcement. This 2019 rule directed "full and robust enforcement of approximately 25 provisions passed by Congress protecting longstanding conscience rights in healthcare" and ensured that HHS would use all the tools at its disposal to enforce "the conscience protections passed by Congress." To ensure observance of these directives, the rule clarified the requirements that entities covered needed to fulfill in order to achieve compliance, which included "cooperation with OCR [the HHS Office for Civil Rights], maintenance of records, reporting, and non-retaliation requirements."[2]

The director of the HHS Office for Civil Rights at the time, Roger Severino, stated upon the institution of the rule, "Finally, laws prohibiting government funded discrimination against conscience and religious freedom will be enforced like every other civil rights law … This rule ensures that healthcare entities and professionals won't be bullied out of the health care field because they decline to participate in actions that violate their conscience, including the taking of human life."[3]

Now, HHS under President Joe Biden has proposed to "partially rescind" the 2019 rule. According to HHS,

> The Department proposes to partially rescind the May 21, 2019, final rule … while leaving in effect the framework created by the February 23, 2011, final rule. … The Department also proposes to retain, with some modifications, certain provisions of the 2019 Final Rule regarding federal conscience protections but eliminate others because they are redundant or confusing, because they undermine the balance Congress struck between safeguarding conscience rights and protecting access to health care access, or because significant questions have been raised as to their legal authorization. Further, the Department seeks to determine what additional regulations, if any, are necessary to implement certain conscience protection laws.[4]

Let's break this down.

While the rule says it allows for all the conscience regulations identified in the 2019 rule to be enforced by OCR, and even improves on the 2011 Obama-era rule by giving OCR the authority to investigate violations, there are significant reasons for concern regarding the proposed enforcement under this new rule. In fact, this new rule would completely gut the substantive enforcement provisions of the 2019 rule.

To start with, the proposed rule deletes all definitions of discrimination (as well as other key terms). Definitions serve as a foundational element of every law or regulation, as it is necessary to specify what a law is addressing in order to properly enforce it. Without a definition of what constitutes discrimination, OCR is left incapable of investigating it. This confusion is further exacerbated by the erasure

2. OCR, "HHS Announces Final Conscience Rule."
3. OCR, "HHS Announces Final Conscience Rule."
4. OCR and HHS Office of the Secretary, "Safeguarding the Rights of Conscience as Protected by Federal Statues," proposed rule, 88 Fed. Reg. 820 (January 5, 2023) (to be codified at 45 C.F.R. 88), https://www.federalregister.gov/documents/2023/01/05/2022-28505/safeguarding-the-rights-of-conscience-as-protected-by-federal-statutes. The RIN is 0945-AA18.

of detailed explanations of what conscience laws protect, which were included in the 2019 rule, as well as the removal of the requirements to achieve compliance.

While the 2019 rule lays out specific processes for investigating and remedying complaints, the new proposed rule does not even require OCR to listen to a complainant, let alone act on the complaint.

And, if a complainant is lucky enough to be heard, he or she is not guaranteed a resolution and is even left open to retaliation. Furthermore, if OCR were to pursue resolution even though it is not required, such resolution could be considered achieved through informal means, that is, means that are non-binding and therefore leave the complainant vulnerable to future discrimination. Formal means, on the other hand, which are required under the 2019 rule, consist of potential withdrawal of federal funds or a lawsuit for a conscience violation. These are far more effective methods of putting a stop to discrimination. But the proposed rule, in contrast, does not specify *any* potential remedies, despite the fact that all other regulations specify that violations may include termination of funds. In fact, termination of funds is not mentioned in this rule at all.

In addition, the proposed rule does not require that incidents of discrimination be reported, relying only on voluntary reporting, within a reporting process thoroughly hostile to the complainant. Who would file a complaint in such an environment?

Finally, there is no means for referral of a case to the US Department of Justice, nor would an accused party be considered in violation for failure to respond to a complaint. The Biden administration really has adopted every means it can to remove the teeth from the 2019 rule, which was meant to enforce the federal conscience laws that were already written into law.

The public has until March 6, 2023, to voice opposition to this proposed rule change. It is especially important to comment on this proposed rule, as the majority of comments that were filed regarding the 2019 conscience rule were in opposition. But now, we have the power to offer a real picture of how such a rule would impact real doctors and real institutions, showing how it is overwhelmingly harmful for the administration to rescind the 2019 rule. There are a number of items one could address in a public comment on this issue.

On the positive side, one can encourage the good elements of the proposed rule, namely its improvement over the 2011 rule, the variety of laws it covers, and the delegation of authority to OCR. Regarding the last point, OCR would specifically be empowered to "(1) Receive and handle complaints; (2) Conduct investigation; (3) Consult on compliance within the Department; (4) Seek voluntary resolutions of complaints; and (5) Consult and coordinate with the relevant Departmental funding component, and utilize existing regulations enforcement, such as those that apply to grants, contracts, or other programs and services."[5]

Additionally, one can comment positively on the three aspects of the 2019 rule that would be maintained: (1) its "application to all the federal conscience law provisions identified in the 2019 Rule," (2) those "provisions regarding complaint

5. OCR and HHS Office of the Secretary, "Safeguarding the Rights of Conscience," 88 Fed. Reg. 820 at 829.

handling and investigations" that are being maintained, and (3) the "voluntary notice provision."[6]

However, better enforcement mechanisms should be requested. These would include mandatory notice requirements, a requirement to maintain records and cooperate with OCR enforcement, a requirement to refrain from intimidation or retaliation, assurance of compliance, and formal means of resolution. It is critical on the latter two points to explain their importance. Of course, better enforcement mechanisms also require clear enforcement authority. HHS should be urged clearly to articulate this authority, which must include the options of withholding federal funds and referral to the Department of Justice for lawsuit. This can be coupled with an explanation of how a lack of conscience protection enforcement will force medical professionals out of their field, which will affect access to care especially for lower income communities, rural communities, and minorities. In addition, one can point to the inadequacy of state laws to protect conscience rights, necessitating strong federal enforcement of these laws. Finally, HHS should be encouraged to maintain specific aspects of the 2019 rule, including, "detailed explanation of the applicability of and prohibitions or requirements under the different conscience protection laws," and "rule of construction 'in favor of a broad protection of the free exercise of religious beliefs and moral convictions' (to the maximum extent permitted by law)."[7]

Public comments can also be used to refute the many instances of arbitrary and capricious reasoning in the proposed rule. One example of this is the HHS narrative that conscience rights must be balanced with access to abortion in ways not contemplated by the text of conscience protection laws. It is not balance to force all organizations and personnel to participate in such procedures.

Contraceptive Mandate Proposed Rule

On February 2, 2023, several departments of the Biden administration—the Internal Revenue Service, the Employee Benefits Security Administration, and HHS—proposed another rule aimed at establishing a workaround of the conscience protection rules established alongside the Patient Protection and Affordable Care Act (commonly known as Obamacare). According to the Federal Register, "Current regulations include exemptions and optional accommodations for entities and individuals with religious or moral objections to coverage of contraceptive services."[8] The proposed rule would rescind this exemption as well as the "optional accommodation for entities that object to contraceptive coverage based on non-religious

6. Rachel N. Morrison, "HHS Proposes Rule Modifying Healthcare Conscience Regulations," The Federalist Society, February 16, 2023, https://fedsoc.org/commentary/fedsoc-blog/hhs-proposes-rule-modifying-healthcare-conscience-regulations.
7. Morrison, "HHS Proposes Rule"; OCR and HHS Office of the Secretary, "Protecting Statutory Conscience Rights," 84 Fed. Reg. 23170 at 23226 and 23272.
8. Internal Revenue Service (IRS), Employee Benefits Security Administration (EBSA), and HHS, "Coverage of Certain Preventive Services Under the Affordable Care Act," proposed rules, 88 Fed. Reg. 7236 (February 2, 2023), https://www.federalregister.gov/documents/2023/02/02/2023-01981/coverage-of-certain-preventive-services-under-the-affordable-care-act. The RINs are 0938-AU94, 1210-AC13, and1545-BQ35.

moral beliefs,"[9] and, instead, "establish a new individual contraceptive arrangement that individuals enrolled in plans or coverage sponsored, arranged, or provided by objecting entities may use to obtain contraceptive services at no cost directly from a provider or facility that furnishes contraceptive services."[10] In other words, a person who is not covered for "contraceptive services" under his employer's insurance plan could go directly to a contraceptive provider who would be reimbursed by the taxpayers for his services. In this way, the individual could bypass the "objecting entity."

The Federal Register explains the process as follows: "A qualified health plan (QHP) issuer that has agreed to reimburse an eligible provider of contraceptive services that participates in the individual contraceptive arrangement would be eligible for an adjustment to the issuer's Federally-facilitated Exchange (FFE) or State Exchange on the Federal platform (SBE-FP) fee."[11]

The Departments argue for their proposed rule based on the contention that there exists a "public interest of ensuring that women enrolled in such plans and coverage have access to contraceptives with no cost." They make no case for this dubious claim but insist that it is "all the more critical now," in light of the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*. As in the case of the proposed rule rescinding conscience protections, the departments again insist on the necessity of striking a balance between "respect[ing] the religious objections to contraceptive coverage of employers, institutions of higher education, and health insurance issuers," with the so-called necessity of providing women with contraceptives at no cost.[12] They claim this rule will accomplish that.

The deadline for submitting public comments for this proposed rule is April 3, 2023.

How to File a Public Comment

As the Ethics & Public Policy Center states, "Comments are the public's last best chance to influence agency rules … If an agency fails to consider or rebut valid comments and evidence, a court may later strike down the rule as arbitrary."[13]

To submit a public comment, go to www.federalregister.gov and search for the proposed rule you are looking to comment on (searches may be done by rule name, Regulation Identifier Number (RIN), agency, or subject matter). Once you find the rule, be sure to make note of the RIN, which will be listed on the right side of the page under "Document Details." It will be necessary to include the RIN in your comment. After making note of the RIN, you will see a green button at the top of the page, which is labeled, "Submit a Formal Comment." If your comment is very short, you can type it into the comment box. Lengthy comments, on the other hand, should be typed up and saved as a Word document or PDF document, which you can submit by clicking the button labeled, "+ Add a file." You can also use

9. IRS, EBSA, and HHS, "Coverage," 88 Fed. Reg. 7236 at 7243.
10. IRS, EBSA, and HHS, "Coverage," 88 Fed. Reg. 7236.
11. IRS, EBSA, and HHS, "Coverage," 88 Fed. Reg. 7236 at 7243.
12. IRS, EBSA, and HHS, "Coverage," 88 Fed. Reg. 7236 at 7242–7243.
13. Ethics and Public Policy Center, *Public Comments on Agency Rulemaking* (n.d.), https://eppc.org/wp-content/uploads/2022/03/Public-Comments-on-Agency-Rulemaking-Explainer.pdf.

this button to include any additional documents you wish to cite, such as reports or studies that support your comment. You will see a dropdown menu labeled, "What is your comment about?" Pick the option that best fits your comment. You will then see a space to add your email address, which you should do along with checking the box to receive an email confirmation that your comment was submitted. Make sure to indicate whether you are submitting this comment on behalf of yourself as an individual, as a representative of an organization, or anonymously and fill out either your name or the organization's type and name. Finally, check the box marked, "I read and understand the statement above," and click the green "Submit Comment" button. You also have the option to preview your comment before submitting, should you like to review it first.

There are several items you can include to strengthen your comment. For starters, the name of the proposed rule and its accompanying RIN should be included in any comment. You will then want to offer a brief description of your interest in the rule or the interest of the organization you represent as well as any relevant expertise that qualifies you to speak on this matter. If you are submitting a comment on behalf of an organization, it is best to do so on letterhead. After explaining your interest in the matter, you should provide your arguments in favor of or opposed to *specific provisions* of the proposed rule. Detail and specificity are key to an effective comment. If you can supply citations or links to any studies, articles, reports, examples, evidence, or personal stories that support your argument, you should do so. Finally, it is always compelling to include an explanation of how the rule would specifically impact you, your organization, or the organization's members.

It is important to note that all public comments have submission deadlines that cannot be missed. Additionally, submitted comments are viewable by the general public although you can submit anonymously if you are concerned about your privacy. You should not be intimidated out of submitting a comment—your comment need not respond to every aspect of the proposed rule. Ultimately, it is better to submit a short statement than not to comment at all. Please note that agencies are required to read through and consider all of the public comments submitted and they become part of the public record.

Federal Legislation

The House of Representatives of the 118th Congress is made up of 212 Democrats and 222 Republicans, with one vacancy. The current Senate is made up of forty-eight Democrats, forty-nine Republicans, and three Independents, who all caucus with the Democrats.

As the House of Representatives is operating with a Republican majority, pro-life leaders are calling on the 118th Congress to take action on eight specific bills for the purpose of protecting preborn humans. In a letter signed by leaders of more than 40 pro-life organizations, the authors make clear that the basic policies they outline are "the floor, not the ceiling, of what we expect from a pro-life majority in the House of Representatives."[14] These policies are:

14. Kevin Roberts et al. to Members of Congress, [January 3, 2023?], https://www.dailysignal.com/2023/01/04/6-policies-that-anti-abortion-leaders-expect-a-pro-life-house

1. The Heartbeat Protection Act

The Heartbeat Protection Act would ban abortions after a heartbeat is detected in an unborn baby, which usually occurs around the sixth week of pregnancy. This bill (H.R. 175) was officially re-introduced on January 9 by Rep. Mike Kelly (R-PA), who previously introduced the bill during the 117th Congress. The introduction was co-led by Reps. Chris Smith (R-NJ) and Kat Cammack (R-FL) and has sixty-two original co-sponsors. The legislation, as written, "requires doctors to check for a fetal heartbeat before performing an abortion. Any physician who performs an abortion without checking for a heartbeat or aborts a child with a detected heartbeat would be subject to criminal penalties."[15] Rep. Kelly's website describes this bill as "a minimum standard of unborn protection."[16]

2. Born-Alive Abortion Survivors Protection Act

Under the Born-Alive Abortion Survivors Protection Act, children born alive after failed abortions would be required to receive the same medical attention as any other child. This Act was introduced in the House of Representatives on January 9 by Rep. Ann Wagner (R-MO) and passed by a vote of 220 to 210 two days later. It has now passed to the Senate.

3. Protecting Individuals with Down Syndrome Act.

Under this legislation, abortions based solely on a diagnosis of Down syndrome would be prohibited. On January 24, Rep. Ron Estes (R-KS) re-introduced this legislation in the House, one day after the companion bill was introduced by Sen. Steve Daines (R-MT). This legislation had been previously introduced in January 2021 but died in committee. Under the Daines bill, doctors are not only prohibited from knowingly performing an abortion that is being sought because the baby may have Down syndrome but the bill also "requires the doctor to first ask the mother if she is aware of any test results indicating that the child has Down syndrome and to inform her of prohibitions put in place by the law."[17] Both bills have been referred to the respective Judiciary committees, where they are now being considered.

-majority-to-prioritize/; Virginia Allen, "6 Policies That Anti-Abortion Leaders Expect a Pro-Life House Majority to Prioritize," The Daily Signal, The Herritage Foundation, January 4, 2023, https://www.dailysignal.com/2023/01/04/6-policies-that-anti-abortion-leaders-expect-a-pro-life-house-majority-to-prioritize/.

15. "Kelly Introduces 'Heartbeat Protection Act' to Prevent Abortions When Fetal Heartbeat Is Detected," press release, US Representative Mike Kelly 16th District of Pennsylvania, January 11, 2023, https://kelly.house.gov/media/press-releases/kelly-introduces-heartbeat-protection-act-prevent-abortions-when-fetal; see Heartbeat Protection Act of 2023, H.R. 175, 118th Cong. (2023).
16. "Kelly Introduces 'Heartbeat Protection Act.'"
17. "Daines to Introduce Bills Protecting Unborn Children, Vulnerable Mothers," news release, Steve Daines US Senator, Montana, January 20, 2023, https://www.daines.senate.gov/2023/01/20/daines-to-introduce-bills-protecting-unborn-children-vulnerable-mothers/; see Protecting Individuals with Down Syndrome Act, S. 18, 118th Cong. (2023); and Protecting Individuals with Down Syndrome Act, H.R. 461, 118th Cong. (2023).

4. SAVE Moms and Babies Act

The SAVE Moms and Babies Act would "limit the interstate flow of dangerous abortion drugs," according to pro-life leaders. This, they say, is a necessary step, given that chemical abortion pills "put women's health and safety at risk."[18] This bill (S. 95) was introduced in the Senate on January 26 by Sen. Cindy Hyde-Smith (R-MS) and has been referred to the Committee on Health, Education, Labor, and Pensions. According to Hyde-Smith's website, "This measure would reinstate the in-person dispensing requirement for abortion drugs, blocking their remote distribution by mail or through telemedicine, and also improve reporting requirements for complications." In addition, "The SAVE Moms and Babies Act would also prevent FDA approval of any new abortion drugs and prevent the further loosening of regulations of abortion drugs with previous FDA approval."[19] The Act was also introduced in the House of Representatives (H.R. 427) by Rep. Bob Latta (R-OH) on January 20 and has been referred to the House Committee on Energy and Commerce.

5. No Taxpayer Funding for Abortion Act, Abortion Insurance Full Disclosure Act, Protecting Life and Taxpayers Act

In their letter, pro-life leaders demanded, "Congress must end taxpayer funding for abortions—and the abortion industry, led by Planned Parenthood—once and for all."[20] These three pieces of legislation, if passed, would prevent taxpayers' money being used to fund abortion. The No Taxpayer Funding for Abortion Act and Abortion Insurance Full Disclosure Act have been combined as H.R. 7 in the House of Representatives and S. 62 in the Senate. H.R. 7 was introduced by Rep. Chris Smith (R-NJ) on January 9 and was quickly referred to the Committee on Energy and Commerce as well as the Committees on the Judiciary and Ways and Means "for consideration of such provisions as fall within the jurisdiction of the committee concerned."[21] S. 62 was introduced on January 25 by Senator Roger Wicker (R-MS).

The Protecting Life and Taxpayers Act was introduced in the House (H.R. 372) by Rep. Michelle Fischbach (R-MN) on January 17 and has been referred to the House Committee on Energy and Commerce. According to Rep. Fischbach's website, this legislation "ensures taxpayer dollars do not support the destruction of unborn life by requiring all federally funded entities to certify that they will not

18. Roberts et al. to Members of Congress; Allen, "6 Policies."
19. "Hyde-Smith Offers Bill to Stop FDA Abortion Drug Distribution Policies," news release, US Senator Cindy Hyde-Smith, Mississippi, January 26, 2023, https://www.hydesmith.senate.gov/hyde-smith-offers-bill-stop-fda-abortion-drug-distribution-policies; see SAVE Moms and Babies Act of 2023, S. 95, 118th Cong. (2023); and SAVE Moms and Babies Act of 2023, H.R. 427, 118th Cong. (2023).
20. Roberts et al. to Members of Congress; Allen, "6 Policies"; see No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2023, S. 62, 118th Cong. (2023).
21. All actions, No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2023, H.R. 7, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/7/all-actions.

perform abortions or provide funds to any other entity that performs an abortion, with exceptions for rape, incest, and to protect the life of the mother."[22]

6. Conscience Protection Act

Under the Conscience Protection Act, doctors and other medical professionals who refuse to perform abortions would be given the legal authority to refuse to provide or assist with the procedure. It would also ensure that such medical professionals, "have their day in court rather than being wholly at the mercy of bureaucrats in the federal government."[23]

A version of this act has been introduced in the House of Representatives (H.R. 279) by Rep. Earl Carter (R-GA) on January 11. The Pharmacist Conscience Protection Act "prohibits the federal government and federally funded entities from discriminating or otherwise taking adverse action against a pharmacist, pharmacy owner, or pharmacy technician who declines to store, fill prescriptions for, or make referrals for drugs that cause abortions (or that the individual provider believes in good faith cause abortions)."[24] H.R. 279 has been referred to the House Committee on Energy and Commerce.

Federal Legislation Threats: The So-Called Equal Rights Amendment

The current Congress has once again resuscitated the Equal Rights Amendment (ERA) with Sen. Ben Cardin (D-MD), Sen. Lisa Murkowski (R-AK), and Rep. Ayanna Pressley (D-MA) re-introducing a resolution in support of the ERA in both the House and Senate. On the Senate side, Majority Leader Chuck Schumer (D-NY) quickly "moved the measure onto the Senate's Legislative Calendar for potential consideration in April."[25] Despite the Republican majority in the House of Representatives, there is reason to believe that supporters of the resolution may attempt to force its consideration on the House Floor.

The ghastly ERA has been haunting America for decades. The good news is, it has never been able to reach ratification and will not do so now. Per Concerned Women for America, "the Equal Rights Amendment is bound by a unique set of procedural requirements for ratification. Currently, supporters are pursuing ratification

22. "Rep. Fischback Introduces the Defund Planned Parenthood Act and Protecting Life and Taxpayers Act," press release, US Congresswoman Michelle Fischbach, Minnesota's 7th District, January 19, 2023, https://fischbach.house.gov/press-releases?id=67C83E37-B8FF-4E7C-AC0B-4EB21AAE68F9; see Protecting Life and Taxpayers Act of 2023, H.R. 372, 118th Cong. (2023).
23. Roberts et al. to Members of Congress; Allen, "6 Priorities."
24. Summary, Pharmacist Concience Protection Act, H.R. 279, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/279.
25. Alexandra McPhee, "Don't Let Congress Undo *Dobbs*, Erase Women," Concerned Women for America Legistlative Action Committee, February 9, 2023, https://concernedwomen.org/dont-let-congress-undo-dobbs-erase-women/; see A Joint Resolution Removing the Deadline for the Ratification of the Equal Rights Amendment, S.J.Res. 4 and H.J.Res. 25, 118th Cong. (2023).

outside of these bounds and through improper means."[26] And yet, the changes which the ERA proposes would be so destructive to the country and, specifically, women that every attempt to resurrect it must be met with the utmost resistance.

Beneath its supposed purpose of ensuring that, "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex," the ERA actually serves the purpose of codifying in the Constitution abortion and gender ideology. This can be seen in the examples of states that have passed their own ERAs, such as New Mexico, which, in 1998, relied on its ERA "to strike down a state reg[ulation] that restricted state funding of abortions for Medicaid-eligible women."[27] Furthermore, NARAL Pro-Choice America, has stated explicitly that the ERA would "reinforce the constitutional right to abortion … [it] would require judges to strike down anti-abortion laws."[28]

Though crafted long before gender ideology came into the mainstream, the ERA seems to have been tailor-made to codify this madness since, under the amendment, "any difference in treatment between men and women can be considered denial or abridgment of equality … even includ[ing] natural, common sense differences, such as pregnancy and birth."[29] This concern was confirmed in a 2019 House Judiciary Committee hearing when Rep. Mike Johnson (R-LA) questioned supporters of the amendment, all of whom agreed that the term "sex" used in the amendment would "include discrimination on the basis of sexual orientation or transgender identity."[30]

The States

With the landmark ruling in *Dobbs v. Jackson Women's Health Organization* overturning *Roe v. Wade,* states across the country began enacting protections for the unborn. As of February 2023, thirteen states offer near-total protections prohibiting surgical abortion throughout pregnancy, with exceptions usually for rape, incest,

26. McPhee, "Don't Let Congress Undo *Dobbs*, Erase Women."
27. McPhee, "Don't Let Congress Undo *Dobbs*, Erase Women." See New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841 (1998).
28. "Image of National Email Alert from NARAL Pro-Choice America, March 13, 2019, Asserting That 'the ERA Would Reinforce the Constitutional Right to Abortion … [It] Would Require Judges to Strike Down Anti-Abortion Laws …,'" National Right to Life, April 1, 2019, https://www.nrlc.org/federal/era/image-of-national-email-alert-from-naral-pro-choice-america-march-13-2019-national-alert-asserting-that-the-era-would-reinforce-the-constitutional-right-to-abortion-it-would-require-judg/; McPhee, "Don't Let Congress Undo *Dobbs*, Erase Women."
29. McPhee, "Don't Let Congress Undo *Dobbs*, Erase Women."
30. McPhee, "Don't Let Congress Undo *Dobbs*, Erase Women"; see *Equal Rights Amendment: Hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary, House of Representatives*, 116th Cong. (April 30, 2019), Serial No. 116-16 (answers of Kathleen M. Sullivan, Partner, Quinn Emanuel Urquhart & Sullivan) and (answers of Pat Spearman, Co-Majority Whip, Nevada Senate) and (answers of Patricia Arquette, actor and advocate), https://www.govinfo.gov/content/pkg/CHRG-116hhrg41176/html/CHRG-116hhrg41176.htm. Arquette, when asked if the ERA would include "gender identity," qualified her reply: "I would like it to, but I know that is going to be argued in court."

and life and health of the mother, or some combination thereof. In addition, all but six states offer at least some protection. The pro-life movement is encouraging states to build on this momentum, introducing and passing whatever pro-life legislation is possible.

Heartbeat Acts

Nebraska State Senator Joni Albrecht has responded by introducing L.B. 626, the Nebraska Heartbeat Act, on January 17. Under this bill, abortion providers are required, prior to performing the abortion, to determine via ultrasound if there is a fetal heartbeat. They are prohibited from proceeding with the abortion if one is detected. According to The Washington Post, Senator Albrecht believes "she is one lawmaker shy of feeling confident she can lock up the votes needed to overcome a filibuster and pass [this] legislation."[31] Should this bill pass, Nebraska would be the fourth state to enact such a law, following Texas, Georgia, and Ohio (though Ohio's law is being challenged in the courts and is therefore not currently in effect).

South Carolina also passed a heartbeat law in February 2021, but it was struck down in a disappointing January 5, 2023 court decision on the grounds that the limitation "unreasonably restricted the right to an abortion."[32] Thankfully, State Senators Larry Grooms, A. Shane Massey, Josh Kimbrell, and Brian Adams introduced a bill (S. 474) on February 1 that, if passed, would force a review of this decision.

Gestational Bills

Plans have been floated to propose bills in North Carolina and Florida this year, which would ban abortions after a certain gestational age. Though the Democratic governor in North Carolina has promised to veto any pro-life legislation, a handful of Democratic legislators in the state who have a history of voting pro-life could potentially provide the votes to override a veto. According to The Washington Post, pro-life leaders in the State Senate say that "if they can win over just one House Democrat … they are likely to have the votes."[33]

In Florida, Governor Ron DeSantis has indicated that he would sign a heartbeat bill, essentially banning abortion after six-weeks' gestation; however, the Republican Senate President, Kathleen Passidomo does not seem enthusiastic about pursuing such legislation. Nevertheless, the president of the Florida Family

31. Caroline Kitchener and Rachel Roubein, "Republicans Aim to Decimate Abortion Access in Post-Roe Haven States," *Washington Post*, February 3, 2023, https://www.washingtonpost.com/politics/2023/02/03/north-carolina-florida-nebraska-abortion-roe-desantis/; see Nebraska Heartbeat Act, L.B. 626, 2023.
32. Alice V. Harris, "South Carolina Supreme Court Holds 'Fetal Heartbeat Law' Is Unconstitutional: Abortion Laws Remain the Same as Before the United States Supreme Court's Decision in *Dobbs*," Nexsen Pruet, January 6, 2023, https://www.nexsenpruet.com/publication-south-carolina-supreme-court-holds-fetal-heartbeat-law-is-unconstitutional-abortion-laws-remain-the-same-as-before; see Planned Parenthood South Atlantic v. State of South Carolina, Appellate Case No. 2022-001062, Opinion No. 28127 (S.C., January 4, 2023), https://www.sccourts.org/opinions/HTMLFiles/SC/28127.pdf.
33. Kitchener and Roubein, "Republicans Aim."

Policy Council, John Stemberger, believes, "the governor and the House support a heartbeat bill."[34]

It is also likely that Ohio will make another attempt at a gestational age ban later this year, to replace the law that has been enjoined in court.

Chemical Abortion Restrictions

Last year, Georgia and Ohio both proposed bills that would restrict the use of abortion-inducing drugs. As these bills both died in committee, legislators may introduce such legislation again this year.

Alternatives to Abortion Programs

The Dobbs ruling also amplified individual states' responsibility to provide alternatives to abortion now that the issue has returned to the state level. Many states are stepping up, going beyond proposing legislation that explicitly restricts abortion to also pursue alternatives to abortion funding as well as adoption reform, improved access to resources for moms and families in need, and the installation of Safe Haven Baby Boxes.

Texas has led the charge in this area even before the *Dobbs* decision with their Alternatives to Abortion (A2A) program, which was created in 2005 and was implemented in 2006.

The Texas program works with a variety of entities, including nonprofit pregnancy centers, social service providers, adoption agencies, and maternity homes to support pregnant women and their families by providing counseling for mothers, parenting classes, job training, and material resources, including clothing and formula. It also helps connect pregnant women to government assistance programs, such as WIC and Medicaid.

In recent years, the Texas state legislature has awarded between $80 million and $100 million a year to this program, and the results speak for themselves: "In the 2022 fiscal year, A2A served a total of 113,125 unduplicated clients who received 2,230,713 services and 178,240 referrals to government assistance and social service programs."[35]

While funding for this program is ahead of many other states, an increase is needed in this first post-Roe fiscal year. More babies are being born in Texas following the enactment of the state's Heartbeat law pre-Dobbs, as demonstrated by a recent report from Dr. Michael J. New, an associate of the pro-life Charlotte Lozier Institute. According to Dr. New, 157,856 babies were born in Texas between March and July 2022, exceeding the three-year average by more than 5,000 births.[36] This correlates with the fact that, following the September 2021 enactment of the Heartbeat law, the number of abortions in Texas has dropped by at least 10,000.

34. Kitchener and Roubein, "Republicans Aim."
35. Texas Health and Human Services, *Alternatives to Abortion Report for Fiscal Year 2022* (Texas Health and Human Services, December 2022), 3, https://www.hhs.texas.gov/sites/default/files/documents/alternatives-abortion-fy2022-rider68.pdf.
36. Michael J. New, "Texas' Gain: The Lifesaving Impact of the Texas Heartbeat Act," Charlotte Lozier Institute, November 7, 2022, https://lozierinstitute.org/texas-gain-the-lifesaving-impact-of-the-texas-heartbeat-act/.

Post-*Dobbs*, Texas returned to pre-Roe statutes prohibiting abortions in Texas. A post-*Roe* era offers an important opportunity to Texas legislators to continue to counteract the devastating legacy left behind by legalized abortion by voting to increase the budget for the A2A program.

In addition to Texas, fourteen other states authorize the offer of some form of alternative to abortion, which typically involves supplying funding toward pregnancy help or social service agencies. These states are Florida, Georgia, Indiana, Kansas, Louisiana, Minnesota, Missouri, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, and Wisconsin.

While this is a great start, there is clearly room for significant increase of these programs throughout the country. Many more states should be encouraged to follow this lead.

Arina O. Grossu