STATE OF THE STATES 2017:

A PROACTIVE

PUSH

IN THE WAKE OF

WHOLE WOMAN'S HEALTH

CENTER FOR REPRODUCTIVE RIGHTS

January 2018

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INTRODUCTION

EMBOLDENED

BY THE 2016 ELECTION, STATE LEGISLATURES ACROSS THE COUNTRY HAVE CONTINUED THEIR UNWAVERING ATTACKS ON WOMEN'S* ACCESS TO REPRODUCTIVE HEALTH CARE SERVICES.

In 2017, state legislators have quietly introduced more than 400 bills restricting women's access to reproductive health care—57 of which became law this legislative session. This year marks the seventh consecutive year of a continued assault on reproductive rights at the state level. In fact, since 2011, the Center for Reproductive Rights (the Center) has tracked 2,556 bills restricting women's access to reproductive health care services, 370 of which have been signed into law.

*Although this report uses female pronouns as well as the term "woman," we recognize that people who do not identify as women still need access to a full range of reproductive health care services, including access to abortion care and contraception. The Center intends that all policy recommendations made in this document apply to all people who need access to reproductive health care.

This year has been different in one significant respect: anti-abortion politicians have had to contend with a powerful Supreme Court ruling that has strengthened the legal standard courts must use to determine the constitutionality of abortion restrictions. *Whole Woman's Health v. Hellerstedt*, one of the Center's pivotal cases, requires courts to examine whether abortion restrictions have tangible benefits that outweigh the burdens they place on a woman's access to care based on credible medical or scientific evidence. Because *Whole Woman's Health* rendered most health-justified abortion restrictions that proliferated throughout the states since 2011 presumptively unconstitutional—laws like requiring abortion providers to have admitting privileges at a local hospital—anti-abortion politicians have been forced to shift tactics. Now, abortion opponents have focused their efforts on passing laws that shame and stigmatize women in the name of "fetal dignity," a new strategy by the anti-abortion movement to ban abortion method by method. This change in strategy has brought forth another avalanche of outrageous and unconstitutional bills, such as measures requiring the burying or cremation of embryonic or fetal tissue or laws attempting to outlaw the standard dilation and evacuation (D&E) abortion procedure, one of the safest, most common methods for ending a pregnancy in the second trimester.

Despite these continued attacks, women's health advocates have persisted in pushing forward a bold, inclusive policy agenda with the goal of expanding access to critical reproductive health services. Throughout the 2017 legislative session, the Center tracked nearly 400 bills that would improve a woman's access to reproductive health care services, 39 of which were signed into law. Almost every state introduced proactive measures, including bills expanding access to contraception as well as several groundbreaking bills codifying the legal right to an abortion and reinstating or expanding public funding for abortion care. In particular, many states stepped in to enshrine protections in state law for copay free insurance coverage for contraception in response to threats from Congress and the White House to dismantle the Affordable Care Act. State policymakers also acted to improve maternal health outcomes in a variety of ways, including ensuring workplace protections for pregnant workers, establishing maternal mortality review boards, and prohibiting the shackling of pregnant incarcerated women. As threats at the federal level continue to surge, the stakes have never been higher for women and the pro-choice activists working tirelessly to increase access to reproductive health and rights.

Federal and state courts have also delivered numerous victories for abortion rights, serving as a steadfast line of defense against legislative attacks on women's access to reproductive health care. In the wake of *Whole Woman's Health*, state laws designed to shut down clinics or criminalize abortion providers failed to stand up to the rigorous legal standard set forth by the U.S. Supreme Court last year in this historic case, and courts were able to repeatedly block them from taking effect across the country.

This report provides a comprehensive overview of state legislation enacted in 2017 restricting access to abortion and family planning services in addition to the proactive approaches state policymakers used to strengthen access to reproductive health care and an analysis of major court developments related to reproductive health and rights. Now, perhaps more than ever, it is essential that we strengthen our commitment to a world where all people have access to the full spectrum of quality, affordable reproductive health care so they can determine whether and when to have children and parent with dignity.

All data valid as of December 1, 2017.

RESTRICTIONS ON ABORTION RIGHTS CONTINUE AT THE STATE LEVEL.

IN JUNE 2016, THE U.S. SUPREME COURT ISSUED ITS MOST SIGNIFICANT RULING ON ABORTION RIGHTS IN MORE THAN TWO DECADES.

The historic decision in the Center's case *Whole Woman's Health v. Hellerstedt* struck down two Texas laws designed to close most of the state's abortion clinics under the guise of protecting women's health and safety. The decision in *Whole Woman's Health* reaffirmed a woman's constitutional right to abortion and articulated a strong, evidence-based standard courts must apply when evaluating the constitutionality of an abortion restriction.

Despite this victory, the outcome of the 2016 presidential election emboldened abortion opponents who have made it clear that the anti-abortion movement is not backing down from their assault on women's reproductive rights. In 2017, anti-abortion state legislators have introduced more than 400 measures that would restrict access to reproductive health services, 57 of which have been signed into law.

However, the Supreme Court's decision in *Whole Woman's Health* has forced the anti-abortion movement to shift course. Abortion rights advocates are now challenging Texas-like clinic shutdown laws in courts across the country using *Whole Woman's Health*. Since the decision, litigants are also using the decision to strike down similar health-justified laws in 10 states. In response, the anti-abortion narrative has shifted from purporting to protect women's health to contending that abortion restrictions promote "fetal dignity." This new approach proves that the goal of the anti-abortion movement has really always been to end abortion access—not protect women's health.

As part of this strategic shift to promote "fetal dignity," anti-abortion lawmakers have devoted a significant amount of energy to two types of abortion bans: those banning abortion after 20 weeks and those banning a common abortion method. So far in 2017, states have introduced 20 bills making it a crime for doctors to provide one of the safest, most common methods of ending a pregnancy in the second trimester, a dilation and evacuation (D&E) abortion procedure. These measures threaten the safety of women and undermine the ability of health care professionals to use their best judgment in providing care for their patients. In Texas and Arkansas, these bills are now law.

State lawmakers also proposed bans on abortion after 20 weeks 24 times in 2017, two of which became law in Iowa and Kentucky. Despite the fact that a patient, in consultation with her medical provider, may determine that abortion care after 20 weeks is her best medical option for a variety of reasons, including her health or life, the anti-abortion movement continues to attack this right. These

unconstitutional bills take decision-making away from patients and their trusted health care providers, and instead put it in the hands of anti-abortion politicians determined to take these rights away. Some states have gone even farther: seven[1] states introduced bans at six weeks and one state introduced a ban at 12 weeks.[2]

Measures restricting the way medical facilities handle embryonic or fetal tissue resulting from an abortion or miscarriage have also become a trend since the Center's victory in *Whole Women's Health*. In 2017, state lawmakers introduced nine bills requiring funeral-like rituals for embryonic and fetal tissue. One of these bills became law in Texas, joining existing fetal funeral requirements in Indiana and Louisiana.

[1] Alabama, Mississippi, Missouri, New York, Oklahoma, Tennessee and West Virginia

[2] South Carolina

Fortunately, not every law that passed this year took effect. Please see the litigation section for information on which laws were blocked by courts in 2017 using the  symbol.

ASSAULTS ON REPRODUCTIVE RIGHTS CONTINUED AT THE STATE LEVEL

ARKANSAS

ENACTED MORE ANTI-ABORTION BILLS THAN ANY OTHER STATE THIS SESSION.

Anti-abortion lawmakers in Arkansas continued their assault on women's health in 2017, introducing more than a dozen restrictive bills and enacting more anti-abortion laws than any other state in the nation.

TARGETED REGULATION OF ABORTION PROVIDERS (TRAP) LAWS

House Bill 1428 creates a "zero tolerance" policy that would require the Department of Health to close an abortion clinic for reasons wholly unrelated to its ability to provide safe medical care. 

DILATION AND EVACUATION (D&E) BANS

House Bill 1032 prohibits the performance of D&E procedures—a safe, medically-proven method of second trimester abortion and a very common method of ending a pregnancy in the second trimester in the United States, which is used 95% of the time. Making D&E

procedures unavailable could force women to undergo additional, invasive, and unnecessary procedures to obtain abortion care against the best medical judgment of their physicians.

SEX-SELECTIVE ABORTION BAN/DOCTORS AS DETECTIVES

House Bill 1434 prohibits a physician from performing an abortion if the patient is seeking the abortion solely based on the sex of the fetus. Sex selection bans blatantly endorse stereotypes about Asian Americans who proponents say are deciding to have abortions due to a preference for having boys. These kinds of laws place a devastatingly unfair burden on Asian American women to overcome a presumption about their motives for making medical choices that are right for them. Moreover, the law suggests that banning abortion due to a woman's reasons is legitimate—a slippery slope that could lead to the policing of any number of reasons a woman may decide to end a pregnancy. These kinds of laws are just another attempt by anti-choice lawmakers to restrict access to abortion care and shame patients.

"THIS LAW IS CLOAKED IN THE LANGUAGE OF NON-DISCRIMINATION, BUT IS NOTHING MORE THAN A DECEPTIVE ATTEMPT TO BAN ABORTION... THIS BILL SETS A DANGEROUS PRECEDENT FOR TARGETING WOMEN OF COLOR AND UNDERMINING THEIR LEGAL RIGHT TO ABORTION. THESE POLICIES ARE NOT ABOUT GENDER EQUITY OR SUPPORTING AAPI WOMEN—ONLY ABOUT ADVANCING THE POLITICAL AGENDA OF CONSERVATIVE POLITICIANS. OUR LOVING FAMILIES ARE PROOF ENOUGH THAT THESE BILLS ARE MISGUIDED, HARMFUL, AND UNNECESSARY...WE DESERVE POLICIES THAT AFFIRM THE DIGNITY AND AGENCY OF OUR CHOICES, NOT ONES THAT PERPETUATE MISINFORMATION AND STIGMA."

—National Asian Pacific American Women's Forum

House Bill 1434 also prohibits a woman from obtaining an abortion until her physician has spent an undefined amount of "time and effort" obtaining medical records relating to her "entire pregnancy history." The measure, which puts a doctor in the unnecessary position of playing detective, has no medical significance and could cause women an indefinite delay in receiving care. It would also require the disclosure of a woman's abortion history to every health care professional from which she has received pregnancy care during her current pregnancy and any previous pregnancy.

FORCED NOTIFICATION AND MEDICATION ABORTION BAN

House Bill 1466 enacts a host of restrictions that force doctors to notify others, including family members, of a woman's abortion. Such restrictions could impose significant, if not indefinite, delays on a woman's ability to access abortion or miscarriage care. This bill could also effectively ban medication abortion by imposing impossible requirements on women and their health care providers when a woman completes her medication abortion outside of a doctor's office. This law also prohibits fetal tissue research.

TARGETING MINORS

House Bill 2024 violates the privacy rights of young women under the age of 17 seeking safe, legal abortion services by disclosing their names and additional information to local law enforcement officials. This bill could effectively ban medication abortion for young women who would prefer to remain anonymous.

TEXAS

CONTINUED ITS RELENTLESS ATTACK ON WOMEN'S HEALTH.

Despite Texas' defeat in the Supreme Court defending medically unwarranted abortion restrictions last year—and its accompanying multi-million dollar legal bill—anti-abortion lawmakers in the state continued their relentless crusade against abortion access in 2017. This year alone, Texas lawmakers introduced no less than 70 bills intended to restrict women's access to reproductive health care—and even made anti-abortion measures a priority in a special session called by Governor Greg Abbott. Luckily, Texas advocates fended off many of these threats thanks to powerful on-the-ground organizing. Nonetheless, Texas passed several harmful laws that will impact abortion access throughout the state.

OMNIBUS ANTI-ABORTION BILL

Senate Bill 8 was the most sweeping anti-abortion bill passed by any state in 2017. In addition to imposing new, burdensome abortion reporting requirements and prohibiting the donation of fetal tissue from an abortion, the newly enacted law prohibits the safest, most common method of performing an abortion in the second trimester after about 15 weeks of pregnancy. This ban could force patients to undergo untested, unstudied, and more invasive procedures to obtain the care they need.

The new law also requires abortion patients to endure funeral-like rituals following an abortion, miscarriage, or ectopic pregnancy by forcing providers to bury or cremate embryonic or fetal tissue for no medical reason and regardless of a patient's personal wishes or beliefs. Despite the fact that nearly identical regulations issued by the state in 2016 were blocked by a federal court, anti-choice lawmakers in Texas still chose to codify them into law again.

INSURANCE COVERAGE BAN

Passed during special session, House Bill 215 prohibits health insurance exchanges set up by the Affordable Care Act from offering coverage for abortion care. In the private insurance market, insurers are also now prohibited from providing abortion coverage unless it is offered as a "rider" that is obtained and paid for separately. This bill discriminates against lower income Texans and women of color by amplifying existing health disparities, which disproportionately harm women who already face barriers to accessing care.

ABORTION REPORTING REQUIREMENTS

Texas Senate Bill 8 and special session House Bills 13 and 215 join forces to complicate abortion reporting requirements and increase administrative burdens on abortion providers with no medical benefit. The new requirements increase the frequency and detail of the reports on abortions performed that must be submitted to the state, and require that they be submitted by each individual treating physician rather than as a comprehensive report by the clinic. This additional red tape is not designed to improve patient health or safety, but rather to make it as burdensome as possible for clinics to continue offering abortion care.

CONSCIENCE PROTECTIONS FOR CHILD WELFARE SERVICE PROVIDERS

Texas House Bill 3859 enacts broad refusal rights for private agencies providing child welfare services. Under the law, the state allows child welfare providers it contracts with to refuse to provide any services to which they object based on their religious beliefs. As a result, religiously affiliated child welfare providers can prevent the young people they serve from accessing the contraception and abortion care they need.

TOP RESTRICTIVE TRENDS

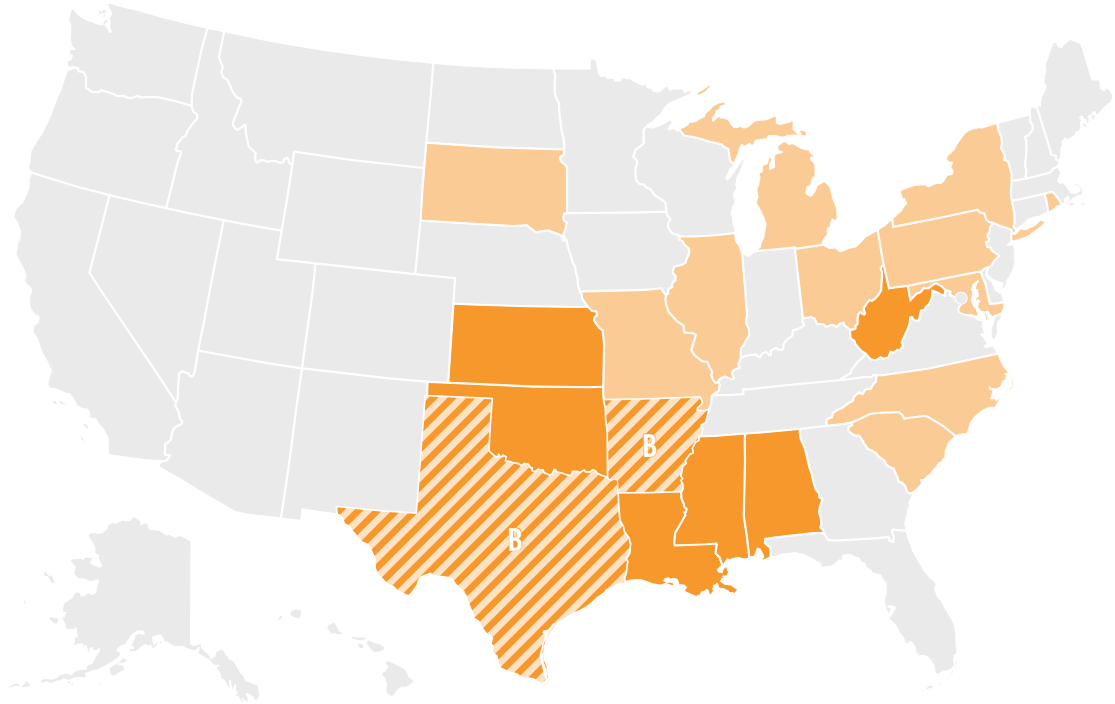
ACROSS THE NATION

DILATION AND EVACUATION (D&E) BANS

This session, states continued their effort to criminalize D&E abortion procedures—a safe, common, medically-proven method of ending a pregnancy in the second trimester. These laws impose significant burdens on patients by forcing them to undergo unnecessary, and sometimes untested, procedures to obtain abortion care, even against the best medical judgment of their physicians.

The U.S. Supreme Court has repeatedly reaffirmed strong constitutional protections for a woman's right to an abortion. In fact, in *Stenberg v. Carhart*, the court held that a ban on D&E procedures was unconstitutional. Moreover, the most recent Supreme Court case addressing an abortion ban, *Gonzales v. Carhart*, ruled that a ban on a different kind of second trimester procedure was constitutional only because of the continued availability of D&E procedures. Well-established legal precedent has therefore allowed courts to block D&E bans each time they are challenged.

Since 2015, six states have enacted nearly identical bans on the standard D&E procedure. Due to court challenges, only two of these laws are in effect in states where the bans are not expected to have an impact on abortion services. In 2017, 13 additional states introduced copycat legislation that would ban the procedure. Arkansas and Texas passed D&E bans this year, but the Center and our allies challenged both laws in court. Because of our work, both laws are temporarily blocked while litigation continues.



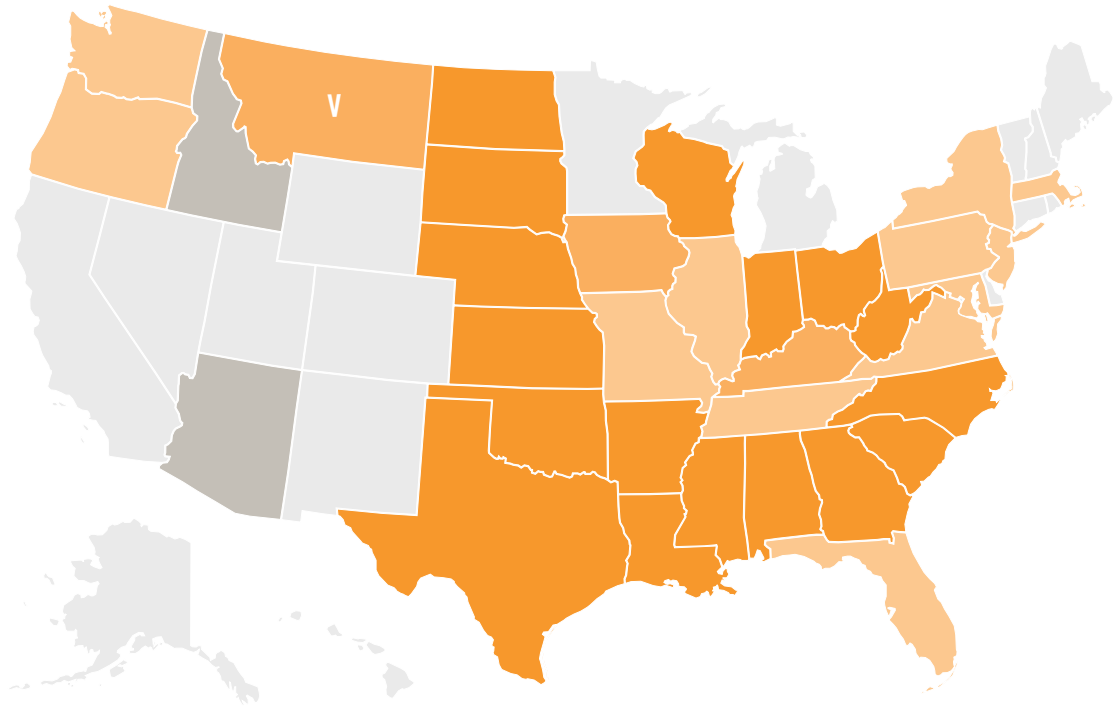
Introduced Enacted B Blocked

PRE-VIABILITY ABORTION BANS

Attempts to ban abortion after 20 weeks of pregnancy have continued to dominate state legislatures across the country in 2017—a trend in state houses since 2010. These types of laws are blatantly unconstitutional; the Supreme Court has ruled time and again that states cannot ban abortion care prior to viability (around 24 weeks of pregnancy). Despite legal precedent, the anti-abortion movement has continued their crusade against abortion by promoting these laws using discredited junk science that claims a fetus can feel pain after a certain period in a pregnancy.

There are many reasons why a woman may need to end a pregnancy as it progresses. For example, state-imposed barriers to abortion care and bans on insurance coverage can cause delays, or a pregnancy may not be detected until later. In addition, at any point in a pregnancy a woman may find that she needs an abortion because she requires medical treatment to protect her health or save her life. She may also delay receiving care because she has trouble meeting the associated financial costs of an abortion and related travel, which can sometimes be hundreds of miles away due to clinic closures. Pre-viability abortion bans exacerbate the cost of accessing care as abortions become costlier and providers become fewer as a pregnancy progresses.

At the start of the 2017 legislative session, 19 states had already passed 20-week abortion bans. This session, an additional 16 states have introduced similar types of legislation. In Iowa and Kentucky, newly enacted bans are now in force, and in Montana a 20-week abortion ban was vetoed by Governor Steve Bullock.



MEDICATION ABORTION REVERSAL

This session, several states introduced legislation that would force physicians to give their patients information about the potential to "reverse" a medication abortion. These laws are intended to spread misinformation and would turn the informed consent process on its head, requiring providers to give patients information that goes against their best medical judgment. The notion that a medication abortion can be "reversed" is based entirely on junk science and goes against well-documented, science-based research. Unfortunately, Utah successfully passed one such bill this session.

PROACTIVE POLICIES

ADVOCATES ARE PUSHING A PROACTIVE VISION AND GAINING GROUND

THIS YEAR, THE CENTER TRACKED NEARLY 400 PIECES OF LEGISLATION THAT WOULD EXPAND ACCESS TO REPRODUCTIVE HEALTH CARE SERVICES AT THE STATE LEVEL.

Nearly every state introduced proactive measures this past session, many passing bold, unprecedented measures to push reproductive health care access forward in their states.

STATES ACROSS THE NATION ARE BLAZING THE TRAIL FOR PROACTIVE REPRODUCTIVE HEALTH POLICIES

ILLINOIS

ENACTED HOUSE BILL 40, A LANDMARK PIECE OF LEGISLATION WHICH REINSTATED PUBLIC FUNDING FOR ABORTION CARE IN MEDICAID AND STATE PUBLIC EMPLOYEE INSURANCE.

The law ends the unfair practice of singling out abortion care from insurance coverage, requiring it to be covered like any other medical procedure. The law will ensure that Illinoisans have coverage for a full range of pregnancy-related services, including abortion, regardless of whether they get their health insurance through the state. The law also repealed harmful language in Illinois law that expressed the desire to prohibit abortion if *Roe v. Wade* were overturned, ensuring that the legal standards established in that decision remain the law of the land in Illinois regardless of what happens at the federal level.

STATE ADVOCACY HIGHLIGHT

The enactment of House Bill 40 in Illinois was a monumental win for the coalition of advocates working to lift coverage restrictions for abortion care. Governor Bruce Rauner signed the bill after a summer of strong and creative on-the-ground advocacy efforts by Illinois advocates. All* Above All, an organization dedicated to lifting bans that deny abortion coverage, made waves in Springfield with the ACLU of Illinois and the National Network of Abortion Funds at the State Fair and surrounding events by creating a billboard encouraging Illinoisans to urge Governor Rauner to keep his word and sign House Bill 40. The youth led organization Reproductive Justice Action League of the Illinois Caucus for Adolescent Health (ICAH) designed a balloon march and demonstration in support of House Bill 40 as well. As part of their demonstration, activists amplified the voices of local young people who have had abortions by reading stories ICAH has been collecting in Chicago. They ensured that their messaging around House Bill 40 was inclusive by not just including women, but all people who can get pregnant.

Illinois State Representative Litesa Wallace (D-67) supporting House Bill 40 at the Crown Plaza in Springfield with All Above All.*

"ADVOCATES IN OREGON AND ILLINOIS, WHO HAVE WORKED CLOSELY WITH US ON THEIR LEGISLATIVE CAMPAIGNS, BENEFITTED FROM THE NATIONAL MOMENTUM AROUND THIS ISSUE, BUT OF COURSE THEIR ADVOCACY, ORGANIZING, AND LEADERSHIP HAVE ALSO BEEN MAJOR FORCES IN CREATING THAT MOMENTUM OVER THE PAST FEW YEARS. THESE WINS WOULD NOT HAVE BEEN POSSIBLE WITHOUT A DIVERSE SET OF STRATEGIES THAT INTEGRATE BUILDING A BASE, ADVANCING A BOLD NARRATIVE THAT CENTERS COMMUNITIES IMPACTED, AND TIRELESS ADVOCACY AT THE STATE CAPITOL."

—Ravina Daphtary, Director of State Strategies, All Above All*

DELAWARE

ENACTED LEGISLATION TO CODIFY THE PROTECTIONS OF *ROE V. WADE* INTO STATE LAW TO ENSURE THAT WOMEN WILL BE ABLE TO ACCESS ABORTION CARE IN THE STATE REGARDLESS IF THE FEDERAL PRECEDENT IS OVERTURNED.

The law also repealed several harmful restrictions on abortion, including a law requiring abortion patients wait 24 hours before having the procedure, receive state-mandated counseling prior to obtaining care, and obtain parental consent for minors, an often unenforced requirement.

OREGON

PASSED GROUNDBREAKING AND COMPREHENSIVE LEGISLATION CODIFYING THE LEGAL RIGHT TO AN ABORTION IN THE STATE AND REQUIRING HEALTH INSURERS TO COVER A FULL SPECTRUM OF REPRODUCTIVE HEALTH SERVICES—INCLUDING ABORTION—WITHOUT A CO-PAY.

This first-of-its-kind legislation, called the Reproductive Health Equity Act, also requires both public and private insurers in the state to cover contraception, vasectomies, prenatal and postpartum care, screenings for reproductive cancers and STIs, and counseling for survivors of domestic violence. The bill specifies that such coverage be accessible to individuals regardless of their citizenship status, gender identity, or insurance type.

STATE ADVOCACY HIGHLIGHT

The success of House Bill 3991 has been largely credited to the collaboration between Oregon lawmakers and the Pro-Choice Coalition of Oregon, a collective of local reproductive rights advocates, community organizations, and racial and gender justice groups, including Western States Center, ACLU of Oregon, Asian Pacific American Network of Oregon, Family Forward Oregon, NARAL Pro-Choice Oregon, Oregon Latino Health Coalition, and Planned Parenthood Advocates of Oregon.

The Pro-Choice Coalition of Oregon rallying in support of House Bill 3991.

Amy Casso, Gender Justice Program Director of Western States Center, attributed the coalition's success

"TO THE LEADERSHIP OF THOSE WHO WERE LIVING WITH THE HARMS OF REPRODUCTIVE INEQUITY: WOMEN, PEOPLE OF COLOR, IMMIGRANTS, AND TRANSGENDER AND GENDER NON-CONFORMING PEOPLE." HER ADVICE FOR OTHERS WHO HAVE A BOLD VISION FOR PROACTIVE POLICY IN THEIR STATES IS TO "DREAM BIG. DEFINE SUCCESS BY STICKING TOGETHER AND SEIZING ON THE OPPORTUNITY TO ENVISION, CHALLENGE, AND FIGHT FOR OUR OWN REPRODUCTIVE FREEDOM."

NEW YORK

ENACTED REGULATIONS THAT GUARANTEE INSURANCE COVERAGE FOR ABORTION AND MOST TYPES OF CONTRACEPTION WITHOUT A CO-PAY.

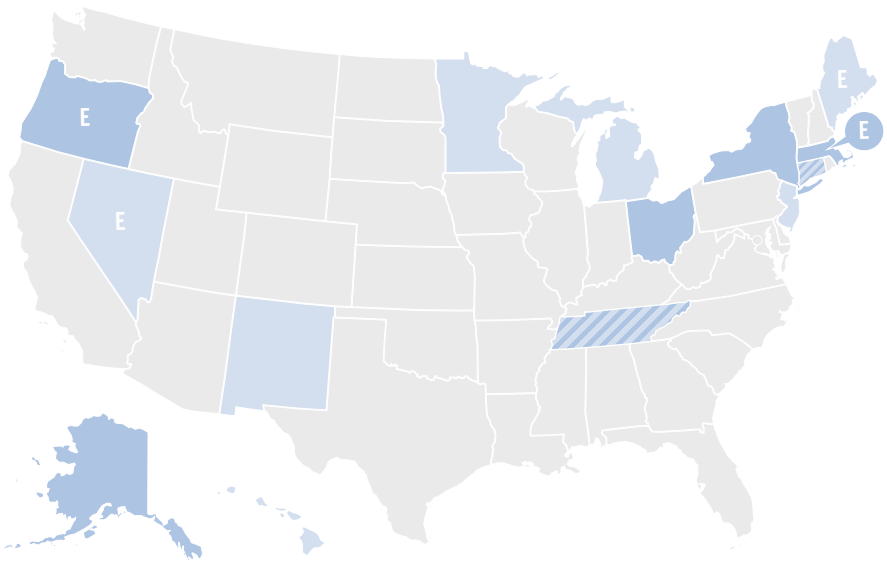
The regulations clarify that commercial insurance policies are required to include at least one form of contraception within each of the Food and Drug Administration's approved methods without a co-pay and must allow for the dispensing of an entire prescribed supply of contraceptives for up to 12 months. The regulations also clarify existing coverage requirements for medically necessary abortions and require insurance policies to provide hospital, surgical, or medical expense coverage for medically necessary abortions without a co-pay, co-insurance, or first meeting an annual deductible.

EXPANDING ACCESS TO CONTRACEPTION

WITH UNCERTAINTY SURROUNDING THE FUTURE OF THE AFFORDABLE CARE ACT'S (ACA) CONTRACEPTIVE COVERAGE REQUIREMENT, LEGISLATORS ARE INCREASINGLY TAKING STEPS TO PROTECT AND EXPAND COVERAGE IN THEIR STATES.

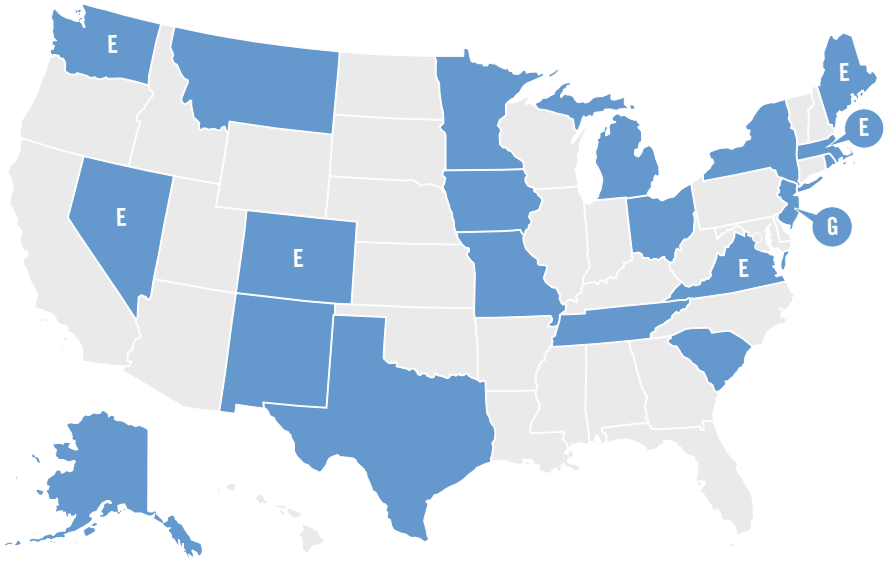
The ACA recognized that prohibitive out-of-pocket costs are a significant barrier for women's consistent contraceptive use and required that some contraception options be covered with no cost sharing. Over 60 million women with private insurance coverage have benefitted from this provision. Since 2014, states have started to broaden coverage with no cost sharing beyond the ACA requirement for all contraception methods, including prescription and over-the-counter methods, and vasectomies. In an effort to further improve usage and continuation rates of contraception use, many states have also added provisions allowing patients to fill multiple months of a prescription at one time and expanding access to contraception at pharmacies. Now more than ever, it is important that lawmakers push to protect and expand coverage for contraceptives in their states.

EXPANDED ACCESS TO NO CO-PAY CONTRACEPTION



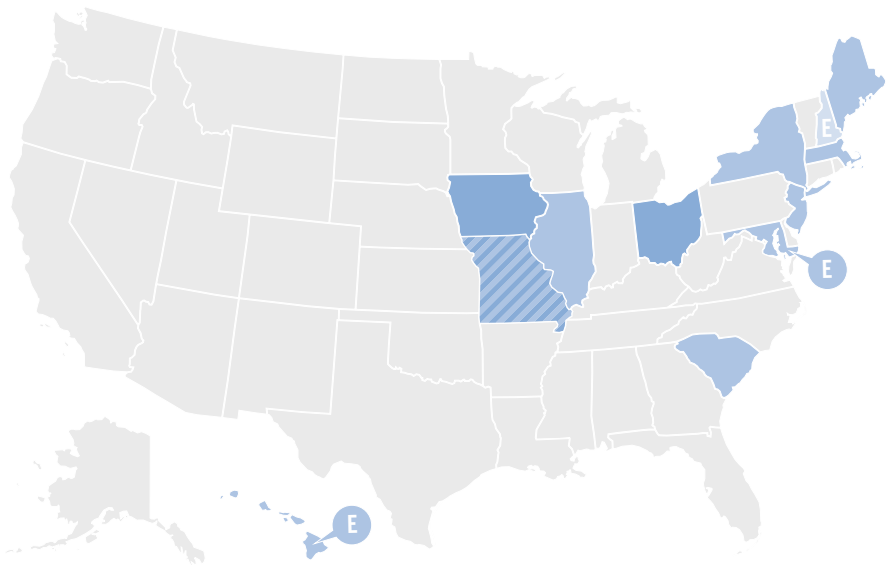
- Codified the ACA's contraceptive coverage requirements
- Expanded no co-pay coverage beyond the ACA's requirements
- E Enacted

ALLOWED PATIENTS TO FILL MULTIPLE MONTHS OF A PRESCRIPTION



- Allows dispensing of and/or requires insurance coverage for up to a 12-month contraceptive supply
- G Eligible for governor
- E Enacted

EXPANDED ACCESS TO CONTRACEPTION AT PHARMACIES



- Established commission to study pharmacist prescribed contraception
- Authorized pharmacists to prescribe and/or dispense certain contraceptives
- Allowed pharmacists to prescribe up to a 12-month supply of oral contraception
- E Enacted

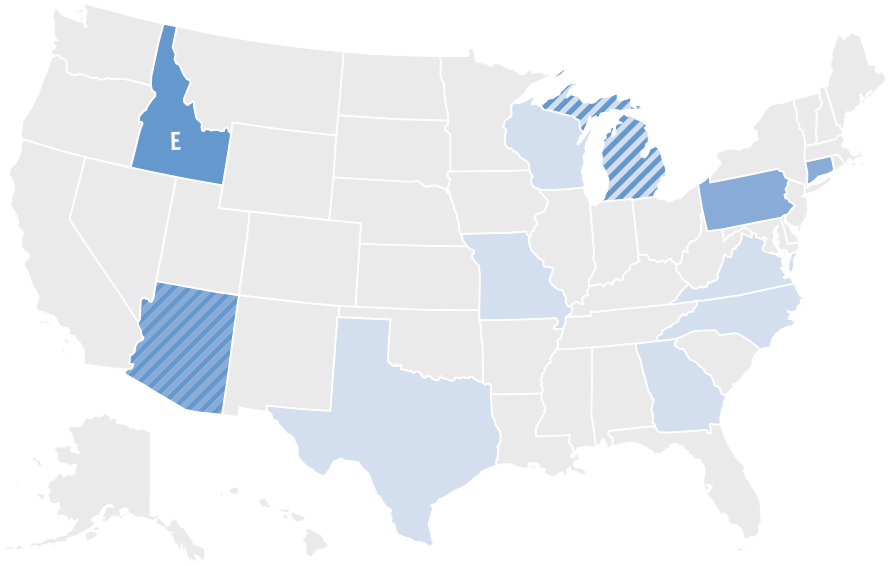
EXPANDING ACCESS TO ABORTION

DESPITE THE CLEAR CONSTITUTIONAL RIGHTS RECOGNIZED IN THE LANDMARK SUPREME COURT DECISION IN *ROE V. WADE*, AND REAFFIRMED LAST YEAR IN *WHOLE WOMAN'S HEALTH V. HELLERSTEDT*, POLITICIANS IN MANY PARTS OF THE COUNTRY HAVE ENACTED LAWS THAT SINGLE OUT ABORTION CARE AND BURDEN PATIENTS AND PROVIDERS WITH REGULATIONS THAT APPLY TO NO OTHER SIMILAR MEDICAL PROCEDURE.

These sham laws interfere with the safe provision of abortion care, shut down clinics providing abortion services, and ultimately jeopardize women's health. States are beginning to turn the tide against such restrictions by introducing legislation, like the Whole Woman's Health Act, to eliminate them.

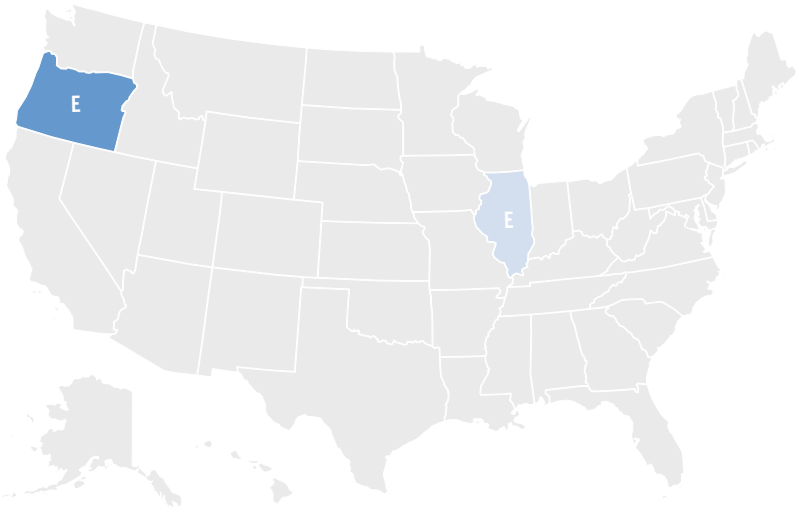
States this session also took groundbreaking action to ensure abortion care is covered by insurance. When women are unable to obtain insurance coverage for an abortion, it can cause some women to delay care while they raise the necessary funds to pay for the procedure, a decision which has the potential to endanger women's health. Moreover, insurance restrictions on abortion coverage amplify existing health disparities, which disproportionately harm women who already face barriers to accessing health care, including low-income women and women of color. The best public health policy is one that provides a woman with coverage for a full range of reproductive services, including abortion, regardless of where she gets her insurance.

ELIMINATED MEDICALLY UNJUSTIFIED ABORTION RESTRICTIONS



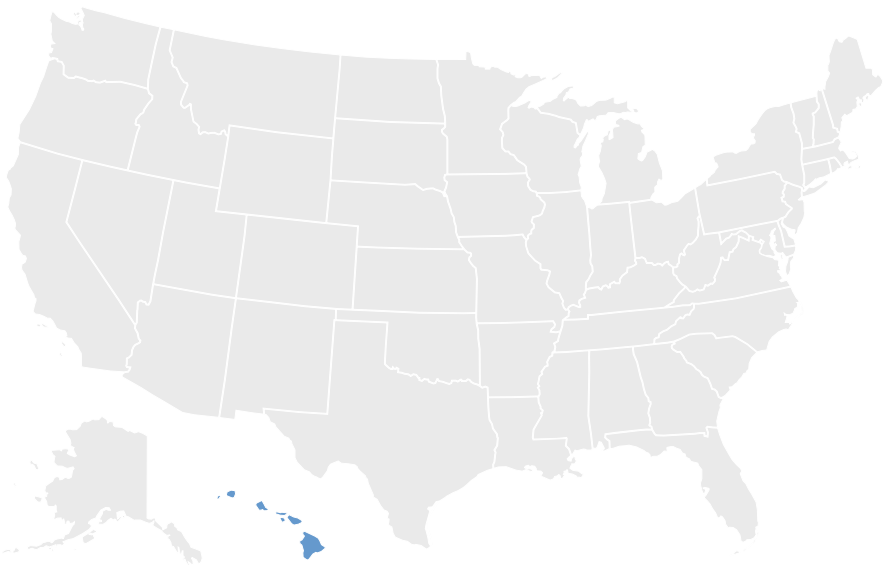
- The Whole Woman's Health Act codifies the legal standards articulated in *Whole Woman's Health* and repealed laws that conflict with its decision
- Prohibited laws that would require providers to have admitting privileges at a local hospital and/or abortion clinics to have ambulatory surgical center requirements
- Repealed other harmful restrictions
- E Enacted

RESTORED AND EXPANDED INSURANCE COVERAGE FOR ABORTIONS



- Reinstated public funding for abortion care in Medicaid and state public employee insurance plans
- Required comprehensive no-copay coverage of reproductive health care services, including abortion, contraception, and sterilization in public and private insurance plans; required Oregon Health Authority to design a program to ensure statewide abortion coverage for all residents
- E Enacted

EXPANDED TYPE OF CLINICIANS WHO CAN PROVIDE ABORTIONS



Expanded type of clinicians who can provide abortions

STATE ADVOCACY HIGHLIGHT

In the last few years, North Carolina has seen some of the most restrictive abortion provisions in the country. This session, progressive legislators and advocates worked to turn the tide by introducing the Whole Woman's Health Act. Advocates saw the bill as an opportunity to educate people about the state of abortion access in North Carolina, and especially highlight the fact that restrictions weren't automatically eradicated after the *Whole Woman's Health* Supreme Court victory. The goal was to set out a clear vision for what abortion access should look like in the state, and across the country. ACLU of North Carolina held a press conference to announce the introduction of the bill along with the Carolina Abortion Fund, NARAL North Carolina, Planned Parenthood South Atlantic, and Progress NC.

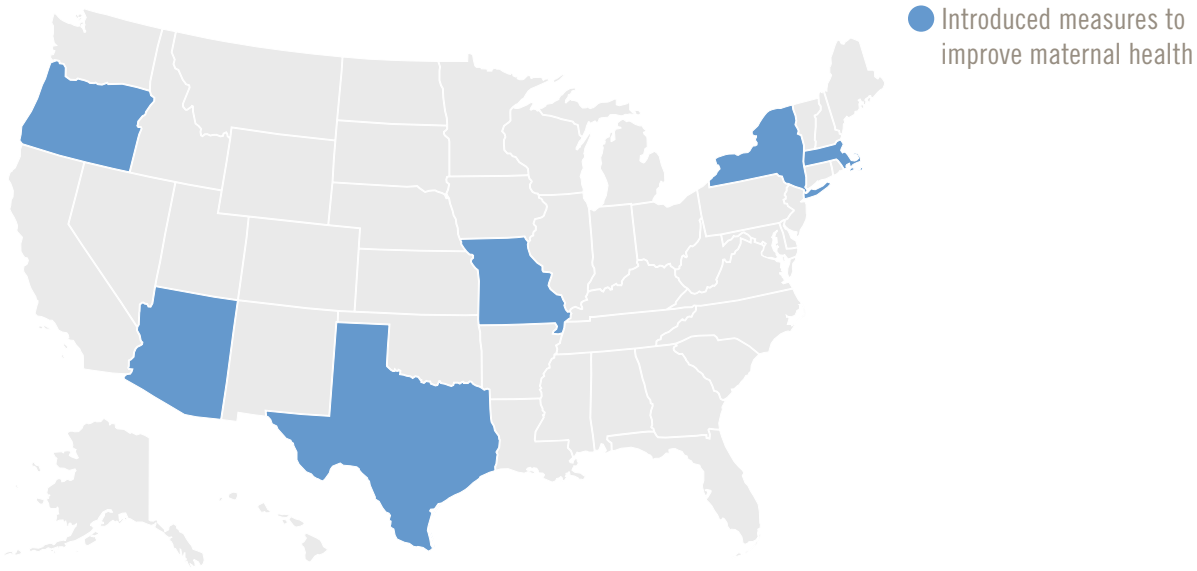
Staff from the Carolina Abortion Fund, NARAL North Carolina, Planned Parenthood South Atlantic, ACLU of North Carolina, and Progress NC at the Whole Woman's Health Act bill introduction.

IMPROVING PROTECTIONS DURING PREGNANCY

DESPITE HAVING ONE OF THE MOST COMPLEX HEALTH CARE SYSTEMS IN THE WORLD, THE UNITED STATES IS UNDERPERFORMING IN THE AREA OF MATERNITY CARE IN COMPARISON TO SEVERAL OTHER DEVELOPED COUNTRIES—ESPECIALLY IN REGARDS TO MATERNAL MORTALITY RATES.

Poor maternal health outcomes are often preventable, making it crucial that federal and state policymakers recognize the importance of services and accountability measures that promote healthy pregnancies and postpartum care. Several states this session considered legislation designed to improve the data collection and analysis of maternal deaths as well as other measures that would advance equitable access to quality maternal health care, including expanded protections for pregnant workers and students.

INTRODUCED MEASURES TO IMPROVE MATERNAL HEALTH



MASSACHUSETTS

Authorized the State Department of Health to establish a maternal mortality review committee to review maternal deaths and establish strategies to prevent them

MISSOURI

Prohibited shackling of pregnant incarcerated women and required all correctional centers to develop specific procedures for the intake and care of pregnant offenders

NEW MEXICO (VETOED BY GOVERNOR SUSANA MARTINEZ)

Established a Maternal Mortality and Severe Maternal Morbidity Review Committee to review maternal mortality and severe maternal morbidity in the state and make recommendations for prevention

NEW YORK

Required maternal health care providers to invite new mothers to fill out a questionnaire in an effort to detect maternal depression

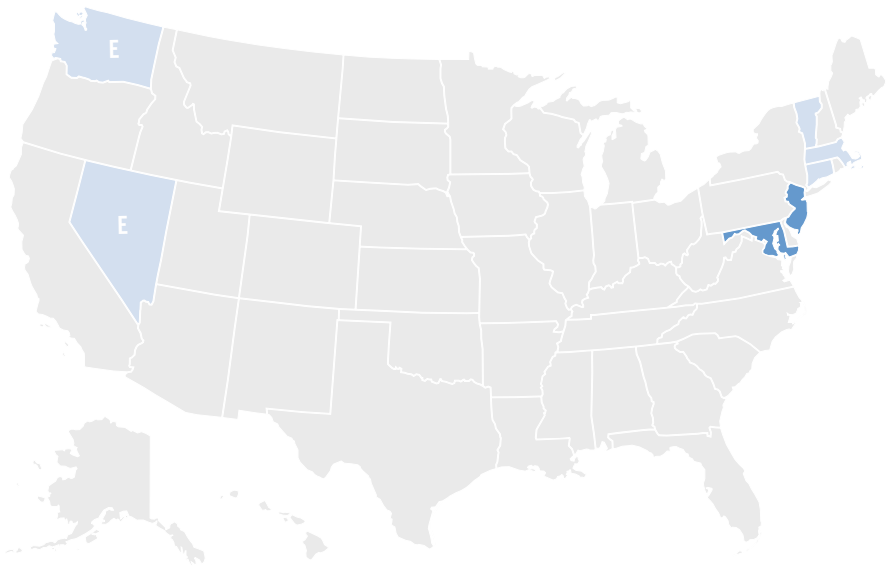
OREGON

Required coverage for doula services

TEXAS

Improved coverage for services relating to maternal depression under Medicaid (enacted); continued state task force that reviews pregnancy-related deaths and created a pilot project to provide medical transportation for children accompanied to services by pregnant mothers

IMPROVING PROTECTIONS FOR PREGNANT WORKERS AND STUDENTS



WASHINGTON

Expanded paid family/medical leave protections

MARYLAND

Required creation of excused absence policy for pregnant students

NEW JERSEY

Prohibited discrimination of pregnant undergraduate, associate, and graduate students and required schools to provide reasonable accommodations for pregnant students

BLACK MAMAS MATTER ALLIANCE ON THE HILL

Since 2014, the Center has convened and worked closely with a dynamic group of experts to apply a human rights and racial justice lens to issues related to U.S. maternal health. Through the visionary leadership of its members, this group has evolved and become the Black Mamas Matter Alliance (BMMA), a Black women-led cross-sectoral alliance that centers the lived experiences of Black mamas to advocate, drive research, build power, and shift the culture for Black maternal health, rights, and justice.

This past June, in cooperation with the Congressional Black Caucus and the Congressional Caucus on Black Women and Girls, BMMA organized and hosted a briefing on Capitol Hill titled, "Black Maternal Health Matters: Policies to Improve Black Maternal Health in the United States."

Over 150 people attended the briefing at the Longworth House Office Building in Washington, D.C. Presenters shared information about the current state of Black maternal health in the United States, described actions needed to address disproportionate rates of maternal mortality among women of color, and discussed emerging ideas for sustainable policy solutions, including opportunities for federal legislation.

The briefing speakers represented different areas of expertise within the maternal health community: Dr. Fleda Mask Jackson from the Save 100 Babies campaign; Dr. Haywood Brown, president of the American Congress/ College of Obstetricians and Gynecologists; Cherisse Scott of SisterReach; Dr. Joia Crear-Perry of the National Birth Equity Collaborative served as moderator.

This important briefing was the first of its kind to highlight Black maternal health, and ultimately emphasized the need to shift policy priorities, cultivate research, and take action to strategically improve maternal care and outcomes for Black mamas. Moving forward, the Center will continue to work with BMMA state advocates and other stakeholders to advance human rights in maternal health.

Members of the Black Mamas Matter Alliance steering committee on Capitol Hill. This past June, in cooperation with the Congressional Black Caucus and the Congressional Caucus on Black Women and Girls, BMMA organized and hosted a briefing on Capitol Hill titled, "Black Maternal Health Matters: Policies to Improve Black Maternal Health in the United States."

THE ROLE OF THE COURTS IN 2017

IN 2017, FEDERAL AND STATE COURTS STOOD AS A STALWART LINE OF DEFENSE

FOR THE RIGHT TO ACCESS ABORTION, BLOCKING STATE LAWS DESIGNED TO MAKE IT HARDER FOR WOMEN TO OBTAIN REPRODUCTIVE HEALTH CARE ACROSS THE COUNTRY.

The overwhelming success of advocates in the courts this year comes on the heels of the Supreme Court's 2016 decision in *Whole Woman's Health v. Hellerstedt*, which reaffirmed a woman's longstanding constitutional guarantee to abortion care and strengthened the legal standard that courts must use to evaluate new abortion restrictions. Positive ripple effects made their way through the courts all year, even as states enacted different types of restrictions that they hoped would survive a court challenge. With the exception of one federal circuit court and one state court, courts consistently acted to protect reproductive rights in 2017, rejecting baseless attempts by anti-choice state politicians to roll back constitutional protections.

USING WHOLE WOMAN'S HEALTH *TO BLOCK TEXAS-STYLE TRAP LAWS*

In the wake of the Supreme Court's landmark decision, courts across the country have used *Whole Woman's Health* to block TRAP (targeted regulation of abortion providers) laws in other states enacted under the guise of protecting a woman's health and safety. These laws are often nearly identical to the Texas-style laws struck down by the Supreme Court, which would have required all physicians performing abortions to obtain admitting privileges at a local hospital and imposed onerous and unnecessary facilities requirements on abortion clinics. With the alarming exception of the U.S. Court of Appeals for the Eighth Circuit, lower courts rejected TRAP laws as medically unnecessary burdens on women's access to abortion. Advocates have seized this momentum to file new challenges, including against laws that have been on the books for years.

LOUISIANA

JUNE MEDICAL SERVICES V. KLIEBERT
(FEDERAL DISTRICT COURT, DECIDED APRIL 2017; APPEAL IN PROGRESS)

✓ TRAP: Admitting Privileges – Blocked

In 2014, abortion providers challenged a Louisiana TRAP law requiring doctors to have admitting privileges at a local hospital, a restriction that threatened to shutter clinics across the state. A district court blocked the law in 2016, but the U.S. Court of Appeals for the Fifth Circuit would have allowed the law to go into effect. However, the U.S. Supreme Court stepped in and granted an urgent request to keep the law blocked while litigation proceeded. After the decision in *Whole Woman's Health*, the Fifth Circuit sent the case back down to the district court where the Supreme Court's newly clarified legal standard would apply. In April 2017, the district court found that the law violated the right to access abortion care under the legal test set out in *Whole Woman's Health*. Remarkably—given that Louisiana's admitting privileges law is virtually identical to the one struck down in Texas—the state appealed the decision, and the case is currently pending before the Fifth Circuit.

JUNE MEDICAL SERVICES V. GEE
(FEDERAL DISTRICT COURT, FILED JUNE 2017; LITIGATION TO CONTINUE IN 2018)

❑ TRAP: Comprehensive – Challenged

On the one-year anniversary of *Whole Women's Health*, a group of abortion providers brought a challenge against a comprehensive web of TRAP laws that have been on the books in Louisiana for years. These laws include more than a thousand requirements abortion clinics are required to adhere to in order to maintain a license, including that they perform mandatory vaginal examinations on patients even when they aren't medically necessary, hire nurses to perform tasks unrelated to nursing, and provide patients with biased counseling to persuade them to carry their pregnancies to term. The case also challenged regulatory restrictions requiring abortions only be performed by physicians with certain credentials, preventing highly qualified nurse practitioners and others from providing care. This case, which is the first brought by advocates against a state's entire licensing scheme, challenged the enormous burdens the state's harsh and unnecessary regulatory regime places on women and health care providers.

MISSISSIPPI

JACKSON WOMEN'S HEALTH ORGANIZATION ET AL. V. CURRIER
(FEDERAL DISTRICT COURT, DECIDED MARCH 2017)

- ✓ Admitting Privileges Requirement – Blocked
- ❑ OB-GYN Requirement – Challenged

In 2012, the Center filed a suit on behalf of Dr. Willie Parker and the last remaining abortion clinic in Mississippi. The case challenged the state's requirements that physicians performing abortions obtain admitting privileges at a local hospital, and that only board-certified or board-eligible obstetrician or gynecologists (OB-GYNs) perform abortions. The district court preliminarily blocked the admitting privileges requirement in 2013, and the U.S. Court of Appeals for the Fifth Circuit upheld the decision in 2014. Mississippi asked the Supreme Court to lift the injunction, but they refused, citing their 2016 decision in *Whole Woman's Health*. Mississippi continued to defend its law until March 2017 when it conceded that it could not "identify any meaningful distinction" between its law and the Texas-style law struck down in *Whole Woman's Health*. The district court then entered a permanent injunction against the admitting privileges law. The Center continues to challenge the OB-GYN requirement.

TENNESSEE

ADAMS & BOYLE V. SLATERY
(FEDERAL DISTRICT COURT, DECIDED APRIL 2017)

- ✓ Admitting Privileges Requirement – Blocked
- ✓ Ambulatory Surgical Center Requirements – Blocked
- ❑ Waiting Period Requirement – Challenged

This lawsuit challenged three Tennessee measures designed to shut down abortion clinics and dissuade women from seeking the procedure, including requiring clinics meet standards comparable to ambulatory surgical centers, forcing physicians performing abortions to obtain admitting privileges at a local hospital, and making women endure a 48-hour waiting period before receiving an abortion. In 2015, the district court preliminarily blocked the ambulatory surgical center requirement. Later that year, the case was put on hold pending the outcome of *Whole Woman's Health*. Following the Supreme Court's decision, Tennessee stopped enforcing its admitting privileges requirement. In April 2017, the district court permanently blocked the admitting privileges and ambulatory surgical center requirements. The 48-hour waiting period is still being challenged.

MISSOURI

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS V. WILLIAMS

(FEDERAL DISTRICT COURT, DECIDED APRIL 2017; APPEAL IN PROGRESS)

- ✓ Admitting Privileges Requirement – Blocked
- ✓ Ambulatory Surgical Center Requirements – Blocked

Planned Parenthood clinics in Missouri challenged TRAP laws in the state nearly identical to those struck down by the Supreme Court in *Whole Woman's Health*. The laws required doctors to obtain admitting privileges from a local hospital and abortion clinics to meet the same facility standards as ambulatory surgical centers. The district court granted the clinics' request to preliminarily block the laws, citing *Whole Woman's Health* and the state's arguments that the court couldn't "support a ruling inconsistent" with the Supreme Court's decision. Missouri appealed, and the case is currently before the U.S. Court of Appeals for the Eighth Circuit.

THE EIGHTH CIRCUIT DEFIES WHOLE WOMAN'S HEALTH

While courts across the country have heeded the Supreme Court's decision in *Whole Woman's Health*, the U.S. Court of Appeals for the Eighth Circuit has contravened other circuits, misapplied the Court's precedent, and ignored other critical precedents that protect women's access to reproductive health care. In *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, the Eighth Circuit reversed an injunction against an Arkansas TRAP law requiring medication abortion providers to contract with a doctor with admitting privileges at a local hospital—a restriction similar to the one struck down by the Supreme Court in *Whole Woman's Health*. In *Planned Parenthood of Arkansas & Eastern Oklahoma v. Gillespie*, the Eighth Circuit became the first appellate court to uphold a state's attempt to defund Planned Parenthood, denying that Medicaid patients have a right to sue when prevented from seeing the health care provider of their choice. In so doing, the Eighth Circuit departed from every other appellate court considering the issue—the Fifth, Seventh, and Ninth Circuits—all of which had uniformly held that states cannot exclude Planned Parenthood as a Medicaid provider.

The Eighth Circuit's outlier decision has the potential of bringing defenders of reproductive rights back to the Supreme Court time and time again. While the constitutional right to access an abortion remains the law of the land, the Eighth Circuit shows what a hostile court can do to chip away at this fundamental right. As the Center warned in its What if Roe Fell? report, if *Roe v. Wade* were overturned, access to lawful abortion services would vanish in at least 21 states. Thus, the Supreme Court continues to stand as a vital check on hostile states and lower courts—and may soon need to reiterate its commitment to the strong line of precedent affirming women's reproductive rights and health.

As these decisions demonstrate, courts across the country have found that TRAP laws unduly burden a woman's constitutional right to abortion services following the Supreme Court's strong directive in *Whole Woman's Health*.

USING WHOLE WOMAN'S HEALTH *TO BLOCK OTHER RESTRICTIVE LAWS*

In addition to striking down health-justified laws, courts have consistently blocked abortion restrictions on other grounds. As of late, anti-abortion politicians have been especially eager to push forward laws at the state level that they say promote respect for fetal life, notably by banning one of the safest and most common methods for second trimester abortions known as a D&E procedure. Part of their strategy is also to improperly urge courts to limit the Supreme Court's decision in *Whole Woman's Health* to only health-justified laws. To defend these kinds of "fetal dignity" laws, states argue that they should be subjected to a relaxed form of the undue burden standard that requires courts to defer to legislatures—essentially asking for a blank check to pass restrictions that don't claim to protect a patient's health and safety. Luckily, so far no federal court has accepted this line of argument that there are two different types of undue burden tests.

ALABAMA

WEST ALABAMA WOMEN'S CENTER V. MILLER
(FEDERAL DISTRICT COURT, DECIDED OCTOBER 2016; APPEAL IN PROGRESS)

- ✓ Dilation and Evacuation (D&E) Ban – Blocked
- ✓ School Proximity Ban – Blocked

In 2015, a group of clinics challenged a pair of Alabama statutes prohibiting abortion clinics from operating within 2,000 feet of a public school and criminalizing one of the safest, most common methods of second trimester abortions known as a D&E procedure. In October 2016, the district court preliminarily blocked both laws. The court found that the school proximity law would shut down two of Alabama's five clinics without promoting any state interest. In evaluating Alabama's D&E ban, the court found that among the three available methods of continuing to provide abortions, one was "inadequately studied" and "potentially risky;" another was "unreliab[le]" with "unknown risks;" and the third was "unnecessary and potentially harmful" with "no counterbalancing medical benefit for the patient." Given the evidence, the court blocked the D&E ban. Alabama appealed the decision to the U.S. Court of Appeals for the Eleventh Circuit.

REPRODUCTIVE HEALTH SERVICES V. MARSHALL
(FEDERAL DISTRICT COURT, DECIDED JULY 2017; APPEAL IN PROGRESS)

✓ Adversarial Judicial Bypass for Minors – Blocked

In 2014, Alabama amended its judicial bypass law for minors who wish to obtain an abortion without parental consent. Under the 2014 amendment, minors seeking judicial permission for an abortion were required to undergo an adversarial hearing with possible intervention by the district attorney, the minors' parents, and a guardian ad litem appointed to represent the fetus. In 2014, a clinic sued to block the amended judicial bypass requirements. In July 2017, the district court permanently blocked the amended provisions writing that "the judicial bypass option is rendered meaningless if…parents or legal guardians can participate as parties under some circumstances, and if there are insufficient safeguards to protect the anonymity of the minor petitioner." Alabama has appealed the decision to the U.S. Court of Appeals for the Eleventh Circuit.

TEXAS

WHOLE WOMAN'S HEALTH V. HELLERSTEDT II
(FEDERAL DISTRICT COURT, DECIDED JANUARY 2017; APPEAL IN PROGRESS)

✓ Embryonic and Fetal Tissue Burial – Blocked

A group of abortion providers sued to block new Texas regulations requiring funeral-like rituals following an abortion or miscarriage. In January 2017, the district court preliminarily blocked the regulations, rejecting the state's argument that the Supreme Court's decision in *Whole Woman's Health* didn't apply to abortion restrictions claiming to protect fetal life. The court called the state's argument a "work of fiction, completely unsupported by reading the sections of Supreme Court opinions [Texas] cites in context." Texas appealed the decision to the U.S. Court of Appeals for the Fifth Circuit. Meanwhile, the Texas legislature enacted a nearly identical statute this year.

WHOLE WOMAN'S HEALTH V. PAXTON
(FEDERAL DISTRICT COURT, DECIDED AUGUST 2017; LITIGATION TO CONTINUE IN 2018)

✓ Dilation and Evacuation (D&E) Ban – Blocked

Abortion providers sued to block a new Texas law banning a safe, common method of second trimester abortion known as a D&E procedure. The ban would have forced providers to resort to riskier alternatives or forego providing second trimester abortions altogether. In August 2017, the district court preliminarily blocked Texas's law, rejecting the state's argument that the Supreme Court's decision in *Whole Woman's Health* didn't apply to abortion restrictions claiming to protect fetal life. In blocking the D&E ban, the district court said there was "no authority for holding that government-mandated medically unnecessary, untested, or a more invasive procedure, or a more complicated and risky procedure with no proven medical benefits over the sage and commonly used banned procedure, is a permissible means of regulating previability abortions."

ARKANSAS

HOPKINS V. JEGLEY
(FEDERAL DISTRICT COURT, DECIDED JULY 2017; APPEAL IN PROGRESS)

- ✓ Dilation and Evacuation (D&E) Ban – Blocked
- ✓ Fetal Tissue Disposal Notification – Blocked
- ✓ Medical Records Requirement – Blocked
- ✓ Law Enforcement Notification – Blocked

A physician sued to block a series of Arkansas laws that: (1) ban the most common and safest method of second trimester abortion known as a D&E procedure; (2) forced doctors to notify a woman's family members about their right to participate in the disposition of tissue from her abortion or miscarriage; (3) required physicians to try to obtain all medical records relating to a woman's entire pregnancy history before performing an abortion; and (4) required the disclosure of personal information for any abortion patient under 17 years old to local law enforcement and the preservation of fetal tissue as potential evidence in a crime.

In July 2017, the district court preliminarily blocked the challenged provisions. Like all other courts to date, the court rejected the state's argument that *Whole Woman's Health* didn't apply to abortion restrictions claiming to protect fetal life. In evaluating Arkansas's D&E ban, the court found that among the three suggestions made for providing abortions under the law, one was "unreliab[le]" with "unknown risks;" another was "unnecessary and potentially harmful" with "no counterbalancing medical benefit for the patient;" and the third was "experimental" with "no medical benefits to the woman." The court also found that the other provisions were likely unconstitutional because they provided no medical benefits and would delay abortions or block them entirely while creating other privacy and personal risks for women. Arkansas appealed the decision to the U.S. Court of Appeals for the Eighth Circuit.

INDIANA

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY V. COMMISSIONER
(FEDERAL DISTRICT COURT, DECIDED MARCH 2017; APPEAL IN PROGRESS)

- ✓ Ultrasound Waiting Period – Blocked

Indiana clinics challenged a law requiring a woman seeking an abortion receive an ultrasound at least 18 hours before the procedure. The district court preliminarily blocked the law, rejecting Indiana's argument that the Supreme Court's decision in *Whole Woman's Health* didn't apply to abortion restrictions claiming to protect fetal life. The court stated: "Not once in *Whole Woman's Health* did the Supreme Court suggest that different versions of the undue burden test apply depending on the state's asserted interest, or even that different versions of the test exist at all." The court found that the 18-hour waiting period likely posed an undue burden on low-income women based in part on the costs associated with repeat travel, missed work, and childcare expenses. Indiana appealed the decision to the U.S. Court of Appeals for the Seventh Circuit. In response, the Center filed an amicus brief with the

Seventh Circuit, arguing that *Whole Woman's Health* sets out a single undue burden standard that applies to all abortion restrictions and requires courts consider how women's lived experiences and existing restrictions contribute to the burdens a restriction would pose.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY V. COMMISSIONER (FEDERAL DISTRICT COURT, DECIDED JUNE 2017, APPEAL IN PROGRESS)

✓ Parental Consent Requirement – Blocked

Indiana amended its judicial bypass law for minors who wish to obtain an abortion without parental consent. Under the new law, a judge must notify the minor's parents that she is seeking an abortion unless the judge determines that doing so is not in the minor's best interests. The law also required doctors to obtain government-issued identification from a minor, and prohibited any person from aiding or assisting a minor in obtaining an abortion in violation of the parental consent law. Indiana clinics sued to block the amended parental consent law. In June 2017, the district court preliminarily blocked the parental consent amendment, holding that "state-mandated requirements of parental notice impose many of the same consequential burdens on young women as do state-mandated requirements of parental consent." The court also found that the law's identification and affidavit requirements were likely unconstitutionally vague.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY V. COMMISSIONER (FEDERAL DISTRICT COURT, DECIDED SEPTEMBER 2017, APPEAL IN PROGRESS)

✓ Fetal Tissue Burial Mandate – Blocked

✓ Reason Ban – Blocked

Indiana clinics challenged a law requiring abortion clinics or health care facilities arrange for the burial or cremation of embryonic or fetal tissue in cases of abortion, miscarriage, and stillbirth. The law also ban abortions sought on the account of the fetus's race, color, national origin, ancestry, sex, or disability, and required doctors to inform women about this prohibition. The district court preliminarily blocked both provisions early in litigation, and then permanently blocked them in September 2017. The court rejected the state's claim that it had a legitimate interest in "treat[ing] fetal remains with the same dignity as other human remains," noting that the Supreme Court has held unequivocally that a fetus is not a person under the law. The court also held that pre-viability bans on abortion—irrespective of the reason—have been clearly unconstitutional ever since the passage of *Roe v. Wade*.

KENTUCKY

EMW WOMEN'S SURGICAL CENTER V. BESHEAR (FEDERAL DISTRICT COURT, DECIDED SEPTEMBER 2017, APPEAL IN PROGRESS)

✓ Ultrasound Requirement – Blocked

Kentucky's last remaining abortion clinic sued to block a Kentucky law requiring physicians to perform an ultrasound on a woman prior to performing an abortion; to display and

describe the ultrasound images; and to make the fetal heartbeat audible for her to hear. The clinic argued that the law violated a woman's First Amendment rights by forcing her to engage in ideological speech. The district court agreed and blocked the law, finding that it was "designed to convey the state's ideological, anti-abortion message," and that it failed to serve the state's interests in regulating medical professionals because it "appears to inflict psychological harm on abortion patients."

This year, courts have overwhelmingly recognized that the principles laid out by the Supreme Court in *Whole Woman's Health* are not just limited to health-justified laws, but also forbid other unjustified abortion restrictions whose burdens outweigh their benefits. Courts have also unanimously recognized that states cannot evade *Whole Woman's Health* by simply concocting a new reason for their abortion restrictions.

STATE COURTS PROTECTING REPRODUCTIVE RIGHTS

In 2017, state constitutions continued to provide another source of protection for the right to abortion, separate from the U.S. Constitution. In addition to three favorable decisions interpreting a state's constitutional protection of reproductive rights, several similar cases are pending in Kansas, Alaska, and other states. However, one decision—from a district court in Iowa—declined to hold that the state's constitution protects abortion independent from the federal Constitution, prompting abortion advocates to file an in-progress appeal.

FLORIDA

GAINESVILLE WOMAN CARE, LLC ET AL. V. FLORIDA
(FLORIDA SUPREME COURT, DECIDED FEBRUARY 2017, LITIGATION TO CONTINUE IN 2018)

✓ Waiting Period – Blocked

In 2016, Florida amended its abortion restrictions to require women wait at least 24 hours after listening to state-mandated consent information before receiving an abortion, requiring two trips to her health care provider. Gainesville Woman Care and Medical Students for Choice challenged the law as a violation of Florida women's privacy rights guaranteed under the state's constitution. After the trial court preliminarily blocked the mandatory delay law, the Florida Supreme Court affirmed it, finding that the law violated Florida Constitution's right to privacy. The Florida Supreme Court applied the highest level of scrutiny to the law, holding that the state "presented no evidence of a compelling state interest, much less that the law served such an interest through the least restrictive means."

IOWA

PLANNED PARENTHOOD OF THE HEARTLAND ET AL. V. REYNOLDS ET AL.
(IOWA DISTRICT COURT, DECIDED SEPTEMBER 2017, APPEAL IN PROGRESS)

❑ Waiting Period – Upheld

In May 2017, Iowa adopted a law requiring women wait 72 hours after receiving informed consent information and an ultrasound before being permitted to obtain an abortion. The new law would require two trips to a clinic or a multi-night stay. Abortion providers challenged the mandate, arguing that it violated the state constitution's due process and equal protection clauses. The district court would have allowed the law to go into effect, but the Iowa Supreme Court blocked it until a trial could take place. After the trial, the district court upheld the law, holding that it did not violate the federal undue burden standard under the Iowa Constitution. An appeal to the Iowa Supreme Court is in progress.

OKLAHOMA

BURNS V. CLINE
(OKLAHOMA SUPREME COURT, DECIDED DECEMBER 2016)

✓ Admitting Privileges Requirement – Blocked

In this case, a physician filed a lawsuit blocking an Oklahoma law that required physicians performing abortions hold admitting privileges at a local hospital. The Oklahoma Supreme Court permanently blocked the law, holding that the admitting privileges requirement was unconstitutional under the U.S. Constitution and *Whole Woman's Health*. The court also found that the law violated the Oklahoma Constitution's single-subject rule, which requires that each act of legislation deal with only one subject.

OKLAHOMA COALITION FOR REPRODUCTIVE JUSTICE ET AL. V. CLINE ET AL.
(OKLAHOMA DISTRICT COURT, DECIDED OCTOBER 2017)

✓ Medication Abortion Restrictions – Blocked

In 2014, a clinic and nonprofit organization sued to block an Oklahoma law forcing physicians to subject women seeking medication abortion to an outdated protocol that is less safe, less effective, and more expensive than the evidence-based methods doctors currently use. In 2014, the Oklahoma Supreme Court preliminarily blocked the law. After that decision, the U.S. Food and Drug Administration (FDA) approved an updated label for the drug used in medication abortion in order to better reflect current medical practice and years of scientific evidence. Despite the FDA's new label, the state continued to defend its outdated protocol. In October 2017, an Oklahoma district court permanently blocked the law, protecting Oklahoma women's access to non-surgical methods of ending a pregnancy.

In 2017, reproductive rights made significant strides in state courts. Court after court struck down attempts by anti-abortion politicians to restrict a woman's right to abortion. The U.S. Court of Appeals for the Eighth Circuit's singular defiance of Supreme Court precedent has

led to conflicts in circuit courts. As a result, reproductive rights advocates may soon be returning to the Supreme Court to vindicate those rights yet again. Nonetheless, in the first full year since the landmark decision in *Whole Woman's Health*, the right to an abortion remains on firm ground in state courts.

JUDICIAL APPLICATIONS OF WHOLE WOMAN'S HEALTH *OUTSIDE OF REPRODUCTIVE RIGHTS*

The Supreme Court's decision in *Whole Woman's Health* required courts to strike down a wide range of abortion restrictions in 2017, some of which had been in effect for years. This was far from happenstance. The legal standard that the Supreme Court laid out—a clarified version of the undue burden test that it first adopted in *Planned Parenthood v. Casey* in 1992—led lower courts to reach such favorable conclusions promoting women's access to abortion. While the legal standard is specific to abortion, several key features make it apply across issue areas. Among these features is a requirement that when a state claims to pass a law to further a particular interest—for example, promoting women's health—courts must confirm that the law actually furthers that interest, instead of deferring to the state.

Voting rights is an area of the law that could benefit from a similar mandate, and lower courts have taken notice. States that pass voting laws—like those that require voters to present a picture ID at the polls—justify them as measures necessary to prevent widespread voting fraud. However, individual voter fraud is negligible to nonexistent, and picture ID requirements are a solution in search of a problem. While these laws do nothing to actually advance a legitimate state interest in ensuring fair elections, they do prevent people from voting if they can't overcome financial and logistical hurdles to obtain an ID.

In two recent voting rights decisions blocking voter ID laws in Wisconsin and Texas, courts cited *Whole Woman's Health* to assert that when states claim to advance a legitimate interest by passing laws that burden constitutional rights, courts must examine evidence confirming that the laws actually further the claimed interest.[3]

Government officials have relied on pretextual justifications for laws that serve no legitimate purpose in other contexts too, including national security and LGBT rights. For example, while the Trump administration claimed to impose a ban on entry to the United States for nationals of Muslim countries in order to promote national security, evidence demonstrated that the ban would not in fact provide security benefits, but instead would discriminate against Muslims.

Similarly, when school districts prohibit transgender students from using the bathrooms of their choice, they claim to be protecting other students from physical or privacy harms. However, in reality, these pretextual reasons are actually designed to justify the discrimination of trans students.

[3] *Frank v. Walker*, 196 F. Supp. 3d 893, 915 (E.D. Wis. 2016); *Veasey v. Abbott*, 830 F.3d 216, 275 (5th Cir. 2016).

ADVOCATES TAKE ON THE TRUMP ADMINISTRATION

In October 2017, the Trump administration issued new rules giving employers far-reaching control over their female employees' reproductive choices. These rules gut the Affordable Care Act's guarantee of coverage for contraceptives, and instead create a broad exemption that enables employers, health insurance providers, and universities to claim a religious or moral objection to deny their employees, students, and insurance beneficiaries contraception coverage. This new mandate threatens to curtail access to birth control for thousands of women.

Within days of the announcement, the Center filed a case challenging the Trump administration in court. The Center was joined by states and organizations across the country that mobilized to challenge these actions as well. In addition to the Center, suits were filed by California, Massachusetts, Washington, and the American Civil Liberties Union. The Center filed their suit in federal district court in the District of Columbia on behalf of Medical Students for Choice and two students at the University of Notre Dame. The Center's suit seeks to permanently block the rules, arguing that they violate the Establishment Clause of the First Amendment by allowing employers to impose their religious beliefs on their employees, the Equal Protection Clause of the Fourteenth Amendment by discriminating against women and their fundamental right to access contraception, and that they fail to adhere to several required administrative procedures for federal rulemaking. Litigation on the Center's case will continue in 2018.

While courts have not yet cited *Whole Woman's Health* in opinions rejecting such policies, a clear legal standard that requires courts to reject pretext is useful across many areas—especially in a political climate steeped in "alternative facts." In 2017, the Center joined amicus briefs urging courts to smoke out pretext within the reproductive rights context and beyond, to the benefit of women, LGBT people, immigrants, people of color, people with disabilities, and others who face thinly cloaked violations of their constitutional rights.

BUILDING POWER NEWSLETTER
A NETWORK FOR STATE LEADERS

FOR MORE INFORMATION AND TECHNICAL ASSISTANCE

The Center is proud to support independent abortion providers and state advocates around the country. For more information or technical assistance, or to sign up for our monthly e-newsletter on proactive state policy developments and resources, please contact Ashley Gray at agray@reprorights.org. For all press inquiries, please contact press@reprorights.org.

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ReproductiveRights.org

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