

## Gestational Age Bans: Harmful at Any Stage of Pregnancy

By Megan K. Donovan

States hostile to abortion ushered in an unprecedented wave of abortion bans in 2019, and legislatures across the South and Midwest are expected to pursue more of the same in 2020. One of the biggest trends to emerge from the initial onslaught was gestational age bans: laws that prohibit abortion after a specific point in pregnancy. Gestational age bans were enacted in nine states in 2019, ranging from a total ban on abortion in Alabama to bans at 18 weeks in Arkansas and Utah.<sup>1</sup>

These laws are harmful to people seeking abortion care, and the lawmakers behind them are increasingly obvious in their intent to eliminate abortion outright. Yet states like Oregon and Vermont offer a counter-model to this cruelty, having recently enacted laws that prohibit government interference in abortion care throughout pregnancy.

**Gestational age bans are nothing more than a smokescreen.** Gestational age bans have long been a favored tactic of antiabortion activists and politicians as they seek to undermine and ultimately overturn the constitutional right to abortion. In the past, such efforts were usually cloaked in supposed justifications that obscured the end goal. For example, bans on abortion at or around 22 weeks after the last menstrual period (LMP) have been propped up with unscientific claims about that stage of pregnancy, such as that a fetus can feel pain or that ending the pregnancy will result in mental health complications.<sup>2</sup> Antiabortion advocates also misleadingly refer to these restrictions as “20-week bans,” reflecting their ideological preference for dating pregnancy from the supposed date of conception instead of the standard medical practice of using LMP.

### HIGHLIGHTS

- *Efforts to ban abortion by gestational age surged in 2019, helping to expose antiabortion lawmakers’ true agenda to eliminate abortion rights entirely.*
- *Using gestational age as a legal cutoff for abortion care is harmful at any point in pregnancy.*
- *States such as Oregon and Vermont are leading the way in enacting laws that prohibit government interference in abortion care throughout pregnancy.*

Whatever the purported reason, bans based on gestational age have always represented little more than an attempt to cut off access to abortion wherever antiabortion lawmakers and activists perceived an opportunity. Now, these lawmakers have largely abandoned the pretenses of years past, and the range of bans enacted in 2019 makes it abundantly clear that these policies are intended as stepping stones on the path toward eliminating abortion outright. In 2019:<sup>1</sup>

- Alabama enacted a total ban on abortion, at any point in pregnancy;
- Georgia, Kentucky, Louisiana, Mississippi and Ohio banned abortion when a fetal heartbeat can be detected, which could be interpreted to be as early as six weeks of pregnancy;
- Missouri banned abortion at eight weeks; and
- Arkansas and Utah banned abortion at 18 weeks.

Fortunately, courts have stepped in to block these laws from going into effect while litigation proceeds. But these examples demonstrate two important things about lawmakers’ intentions and tactics. First, they lay bare the underlying goal

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of eliminating abortion rights and services altogether. Second, they reveal the extent to which antiabortion legislators are willing to essentially try anything, passing a range of bans and playing politics with people's health in a blatant effort to reach the newly conservative Supreme Court and present it with the opportunity to walk back earlier decisions. Missouri is perhaps the most telling example in this regard: Not content to simply ban abortion at eight weeks, the state legislature enacted additional bans at three other gestational ages in anticipation of litigation.

**Banning abortion at any gestational age harms pregnant people and their families.** Despite the many restrictions making it difficult to access, one in four women in the United States will have an abortion in her lifetime.<sup>3</sup> People who decide to have an abortion should be able to do so affordably, with dignity and on the timeline that meets their needs. Anything less is a fundamental violation of reproductive freedom and autonomy.

Gestational age bans are a particularly blunt instrument in this regard, establishing a point in pregnancy after which the state replaces an individual's reproductive decision making with its own agenda. Nor are gestational age bans the clear lines in the sand they at first appear. Pregnancy dating is not exact and gestational age is an estimate: Only about 5% of births occur on the estimated due date.<sup>4</sup> Thus, any firm legal line outlawing abortion after a specific point in pregnancy can create a chilling effect on abortion care for anyone approaching that point because providers must make judgment calls about gestational age and legal liability. As a result, the autonomy and health of those seeking an abortion can be compromised even earlier in pregnancy than called for under a ban, a consequence that aligns well with proponents' antiabortion agenda.

In addition, when someone seeking an abortion is denied care, the consequences for her health and well-being and that of her family can be profound. The landmark Turnaway Study conducted by researchers at the University of California, San Francisco (UCSF) followed women for a period of five years after they sought abortion care at a clinic.<sup>5</sup> Some of the women they interviewed

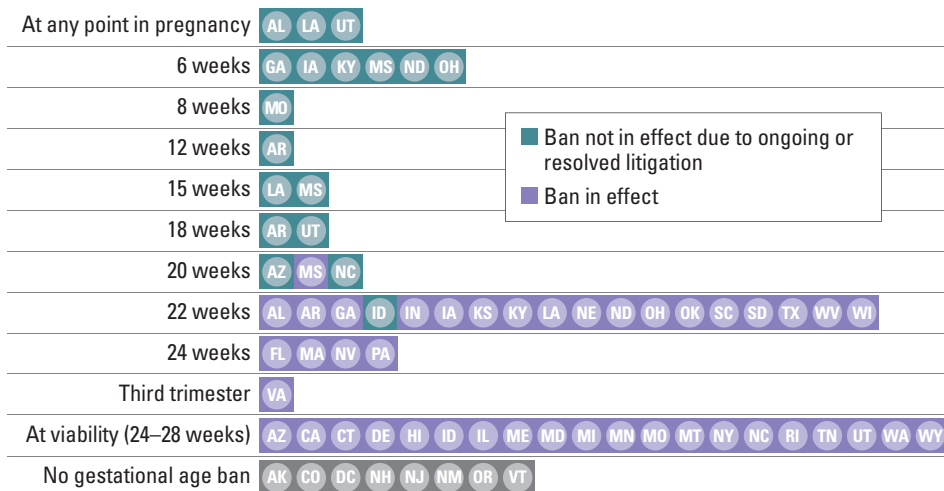
received abortion care and others were turned away and carried their pregnancy to term because they were past the clinic's gestational limit. The study revealed that women denied abortions are more likely than those who receive abortion care to experience loss of self-esteem, short-term anxiety and ongoing exposure to intimate partner violence. Of course, pregnancy and childbirth are inherently risky, and the UCSF researchers also confirmed that women who are turned away from abortion facilities are more likely to experience serious complications associated with the later stages of pregnancy, such as eclampsia and death, than women who receive abortion care.

The UCSF study also demonstrated that women denied a wanted abortion are more likely than their counterparts who received one to experience financial hardship and economic insecurity.<sup>6</sup> For example, six months after being denied a wanted abortion, women in the study had more than three times the odds of being unemployed and almost four times higher odds of having a household income below the federal poverty level than women who received abortion care. They were also more likely to be enrolled in public programs such as Temporary Assistance for Needy Families and the Special Supplemental Nutrition Program for Women, Infants, and Children and to report not having enough money to cover basic needs.

In particular, experiencing greater odds of having a household income below the poverty level and being more likely to report not being able to meet basic living expenses persisted for these women over a period of several years.<sup>7</sup> In contrast, women who obtained an abortion were more likely to report positive one-year life plans one week after the procedure—and to go on to achieve them—than women who were turned away from a wanted abortion.

When someone is denied a wanted abortion, the consequences for her physical, mental and economic well-being likely extend to additional family members as well: Six in 10 abortion patients are already parents.<sup>8</sup> In addition to the litany of harms noted above, all of which could have obvious effects on a patient's existing family, women denied abortion care in the UCSF study

## State abortion bans by gestational age



Notes: Laws in effect as of 1/1/2020. All gestational age bans are listed using the medical standard for pregnancy dating, which is based on the patient's last menstrual period. Source: Guttmacher Institute.

experienced poorer maternal bonding with their new children than women who were able to end unwanted pregnancies and later had children from subsequent pregnancies.<sup>9</sup>

In sum, there is abundant evidence that denying wanted abortion care causes real harm to pregnant people and their families, in addition to fundamentally violating their reproductive freedom and autonomy. Gestational age bans, at any point in pregnancy, represent a knowing and willful use of state power to compel childbearing without regard for the consequences. Simply put, they are a blunt and devastating tool in the antiabortion toolbox.

**Congress could stop the bans by enacting the Women's Health Protection Act.** State bans on abortion prior to fetal viability are unconstitutional, according to the U.S. Supreme Court. Viability is the point in pregnancy at which a fetus can survive after birth. It typically occurs between 24 and 28 weeks LMP but is not defined by a specific gestational age. Rather, viability must be determined on a case-by-case basis by a health care provider. States may opt to ban abortion after viability but must provide exceptions for pregnancies that threaten the life or health (including mental health) of the pregnant person.

State lawmakers have enacted previability abortion bans despite and in defiance of these constitutional protections. Currently, 22 states have previability bans based on gestational age in effect, most of which are at or around 22 weeks LMP (see figure).<sup>10</sup> While the intention has always been to challenge constitutional precedent, the recent wave of bans that extend even earlier in pregnancy represents a brazen effort to tee up court cases that will present the U.S. Supreme Court with the opportunity to significantly roll back abortion rights. Fortunately, all of the 2019 bans are currently blocked by courts, but their passage has nonetheless contributed to misinformation and confusion about the legal status of abortion.

This collection of bans at the state level exists alongside hundreds of other restrictions on abortion that together create a landscape in which an individual's ability to get timely and affordable abortion care depends on where she lives. The Women's Health Protection Act (WHPA) is a federal bill that would put an end to medically unnecessary restrictions by creating a statutory right for providers to deliver abortion care free from such limitations. Often thought of as a response to laws that target abortion providers with overly burdensome regulations (TRAP laws), WHPA would also address unconstitutional abortion bans, including

previability gestational age bans and postviability bans that do not include the required exceptions. Led by Reps. Judy Chu (D-CA), Lois Frankel (D-FL) and Marcia Fudge (D-OH) and Sens. Richard Blumenthal (D-CT) and Tammy Baldwin (D-WI), WHPA would go a long way toward ensuring that people are able to access abortion care regardless of where they live in the United States, as should be the case for any constitutional right.

**States can and should expand access to abortion throughout pregnancy.** Even without congressional action, there is a lot that state lawmakers could do. While states across the South and Midwest have raced to restrict abortion, others in the Northeast and West have moved in the opposite direction, seeking to protect and expand access to reproductive health.<sup>1</sup> Nearly a dozen states now have laws in place intended to reflect and reaffirm existing constitutional standards, protecting the right to abortion up to viability and whenever a pregnancy threatens a woman's life or health.<sup>11</sup> In the face of relentless efforts to undermine existing protections and eliminate abortion access, these protective measures are a welcome counterbalance.

Yet states can and should go further. When the Supreme Court handed down the *Roe v. Wade* decision legalizing abortion nationwide in 1973, it was a momentous step forward for abortion rights. Even then, however, the framework established in *Roe* was widely viewed by supporters of abortion rights as an imperfect compromise, and it is important to remember that the existing constitutional framework of protections is a floor and not a ceiling when it comes to abortion access.

For example, constitutional law permits states to ban abortion after viability (with certain exceptions), but they are under no obligation to do so. In fact, the laws of seven states and the District of Columbia are silent with respect to gestational age.<sup>10</sup> Two of these states—Oregon and Vermont—have enacted laws since 2017 that protect the right to abortion throughout pregnancy.<sup>12,13</sup> Both states' laws include abortion within a broader spectrum of reproductive health care and prohibit the government from restricting or interfering with the right to end a

pregnancy, regardless of gestational age. In both cases, the prohibition explicitly extends to interference by public entities through “the regulation or provision of benefits, facilities, services or information” at both the state and local levels.

In recognition that cost and insurance coverage restrictions have been among the most pernicious barriers to abortion access over time, the Oregon law also goes beyond prohibiting interference in abortion care by affirmatively requiring health insurance plans to cover abortion and creating a new state program that covers abortion for people who are excluded from the Medicaid program based on their immigration status.

This patient-centered approach rejects the premise that there is a point in pregnancy at which the government should step in and restrict access to abortion. Instead, these states have reoriented their laws to respect and protect the fundamental rights and autonomy of those seeking abortion, recognizing that decision making around abortion care is best left to patients and providers instead of politicians. ■

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