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# Will the Zika Virus Enable a Transplant of *Roe v. Wade* to Brazil?

Amanda Greenberg

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# Will the Zika Virus Enable a Transplant of *Roe v. Wade* to Brazil?

Amanda Greenberg

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## I. INTRODUCTION

Mosquitos have long been a serious threat to human health. According to the World Health Organization, mosquito bites result in the deaths of more than 1 million people each year.<sup>1</sup> The majority of deaths are due to malaria.<sup>2</sup> There are somewhere between 300 and 500 million cases of malaria that occur each year.<sup>3</sup> Mosquitos also transmit West Nile Virus, Dengue fever, and yellow fever.<sup>4</sup> Recently, mosquitos have become particularly threatening to pregnant women.

The zika virus is a disease that can be transmitted through a bite from an *Aedes* species mosquito, through sexual contact, and through pregnancy from the mother to the fetus.<sup>5</sup> Pregnant women are at special risk because zika targets growing nerve cells.<sup>6</sup> Pregnant women who contract the zika virus can give birth to babies with microcephaly and other fetal brain defects.<sup>7</sup> Microcephaly is a birth defect in which babies develop abnormally small heads and underdeveloped brains.<sup>8</sup> One country that has seen an especially virulent outbreak of the zika virus is Brazil. Since the zika outbreak began in

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<sup>1</sup> *Who is the Biggest Killer on the Planet*, <http://www.hardydiagnostics.com/wp-content/uploads/2016/05/The-Most-Deadly-Animals.pdf> (last visited Oct. 10, 2017).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*; Yellow Fever, CDC, <https://wwwnc.cdc.gov/travel/diseases/yellow-fever> (last updated July 10, 2015).

<sup>5</sup> Zika Virus Transmission & Risks, CDC <http://cdc.gov/zika/transmission/index.html> (last updated Oct. 4, 2017).

<sup>6</sup> Maggie Fox, *How Bad is Zika for Babies? Study to Track 10,000 Pregnant Women*, NBC NEWS (Jun. 21, 2016, 2:15 PM), <http://www.nbcnews.com/story-line/zika-virus-outbreak/how-bad-zika-babies-study-track-10-000-pregnant-women-n596451>.

<sup>7</sup> *Id.*

<sup>8</sup> *Facts About Microcephaly*, CDC <http://www.cdc.gov/ncbddd/birthdefects/microcephaly.html> (last updated Dec. 7, 2016).

2015, Brazilian health officials have confirmed a ten-fold increase in the number of infants diagnosed with microcephaly.<sup>9</sup>

In *Roe v. Wade*, the United States Supreme Court held that the right to privacy protected by the United States Constitution's due process clause of the 14<sup>th</sup> Amendment included a woman's decision to have an abortion, subject to some regulation.<sup>10</sup> Recently, a division of Brazil's highest court, the Supreme Tribunal Federal (STF), has begun to lay the groundwork for the decriminalization of abortion. The Brazilian Penal Code, which dates back to 1940, criminalizes abortion, except when performed by a doctor in cases of rape, fetal anencephaly, or if there is no other way to save the mother's life.<sup>11</sup> However, a recent Brazilian Supreme Court opinion, issued on November 29, 2016, held that criminalization of abortion prior to the twelfth week of pregnancy was inconsistent with the Brazilian Constitution.<sup>12</sup>

The purpose of this article is to explore the current status of the effort to legalize abortion in Brazil, comparing the route taken by the United States Supreme Court to that of the Brazilian Supreme Tribunal Federal. This article pays particular attention to the influence of women's health issues, such as the rubella outbreak in the United States that preceded *Roe v. Wade*, and the zika epidemic currently plaguing Brazil. Part II of this article will discuss Brazil's current abortion laws and exceptions, zika's overall impact in Brazil, and the birth defects associated with the virus. Part III will discuss the rubella virus in the United States and how it helped shape the public's opinion of abortion and it will also discuss the role the Cath-

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<sup>9</sup> Liz Szabo, *Zika Outbreak May Have Peaked in Brazil, Researchers Say*, USA TODAY (July 14, 2016, 2:02 PM), <http://www.usatoday.com/story/news/2016/07/14/zika-outbreak-may-have-peaked-brazil-researchers-say/87078324/>.

<sup>10</sup> See generally *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>11</sup> Código Penal [C.P.] tit 1, art. 128 (Braz.), [http://www.oas.org/juridico/mla/pt/bra/pt\\_bra-int-text-cp.pdf](http://www.oas.org/juridico/mla/pt/bra/pt_bra-int-text-cp.pdf); Becky Little, *Way Before Zika, Rubella Changed Minds on Abortion*, NAT. GEO. (Feb. 5, 2016), <http://news.nationalgeographic.com/2016/02/160205-zika-virus-rubella-abortion-brazil-birth-control-womens-health-history/>.

<sup>12</sup> S.T.F., H.C. No. 124.306/RJ, Relator: Min. Marco Aurélio, 29.11.2016, Supremo Tribunal Federal Jurisprudência [S.T.F.J.] 17.03.2017, 1,19-20 (Braz.), available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docD=12580345>. [Hereinafter *H.C. No. 124.306*].

olic Church plays in Brazilian society. Part IV will conduct a comparative review of the social, political, and cultural climates of the United States in the 1960s and modern day Brazil, as well as a comparison between the rubella and zika virus. Part V will consider whether it is likely that zika will spur a revolutionary decision like *Roe v. Wade* for Brazil and the future implications if no change in abortion law is made.

## II. BACKGROUND

### A. *The Brazilian Judicial System*

The 1988 Brazilian Constitution made the STF one of the most powerful courts in the world, allowing it to act as a constitutional court, a court of last resort on appeals from both state and federal courts, and a trial court for prosecution of criminal offenses by the President of the Republic and other high-level government officials.<sup>13</sup> In Brazil, a constitutional issue may be raised by any party, the Public Ministry, or even by the court itself.<sup>14</sup> Usually, when private parties raise constitutional questions, they do so by means of a pleading called an exception or by way of defense.<sup>15</sup> Instead of attacking the constitutionality of a law or decree directly, parties typically attack the constitutionality of the offending law or decree as applied to an act or conduct.<sup>16</sup> Unlike the United States, Brazil has adopted abstract judicial review, allowing a variety of officials and organizations to bring actions to declare laws or decrees facially unconstitutional directly before the STF without need for an actual case.<sup>17</sup>

The broad jurisdictional parameters of the STF and the lack of procedural devices similar to the U.S. Supreme Court's writ of certiorari or stare decisis leaves the STF with an immense workload.<sup>18</sup>

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<sup>13</sup> Keith Rosenn, *Recent Important Decisions by the Brazilian Supreme Court*, 45 U. MIAMI INTER-AM. L. REV. 297, 298 (2014).

<sup>14</sup> Keith Rosenn, *Procedural Protection of Constitutional Rights in Brazil*, 59 AM. J. COMP. L. 1009, 1010-11 (2011).

<sup>15</sup> *Id.* at 1011.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1012. There is a limited version of stare decisis in the *súmula vinculante* and a limited version of certiorari in the general repercussions requirement

Not only does the STF decide constitutional issues, but it also decides many non-constitutional matters, most of which involve trivial or frivolous claims.<sup>19</sup> The STF is quite different from the U.S. Supreme Court. Unlike the U.S., where the entire Supreme Court normally hears a case, a large portion of STF cases are decided by just one of the eleven ministers of the court.<sup>20</sup> Even cases that are heard by the panel of five or the entire court are randomly assigned to a single minister, who serves as the reporter and is responsible for analyzing the issues and the case file.<sup>21</sup>

### B. *Brazilian Abortion Laws*

The Brazilian Penal Code, adopted in 1940, criminalizes abortion except in cases of rape or to save the life of the mother.<sup>22</sup> Women who undergo illegal abortions in Brazil are subject to one to three years in prison, and doctors who illegally provide these abortions can be punished with up to twenty years of incarceration.<sup>23</sup> However, every year an estimated 850,000 Brazilian women have illegal abortions, many under dangerous conditions.<sup>24</sup> Even in situations where abortion is legal, finding legitimate providers is time-consuming and often futile, and many women, particularly those who are young, poor, and uneducated, are forced to seek out illegal options.<sup>25</sup>

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for special appeals. Moreover, decisions declaring statutes or decrees unconstitutional in direct actions before the STF are binding on everyone.

<sup>19</sup> *Id.*

<sup>20</sup> Rosenn, *supra* note 14, at 1013.

<sup>21</sup> *Id.*

<sup>22</sup> Audacia Ray, *Brazil: Supreme Court Makes Abortion Legal in Cases of Anencephaly*, INT'L WOMEN'S HEALTH COALITION (Apr. 19, 2012), <http://iwhc.org/2012/04/brazil-supreme-court-makes-abortion-legal-in-cases-of-anencephaly/>.

<sup>23</sup> Grace Wyler, *What It Is Like to Get an Abortion in Brazil, One of the Most Restrictive Countries in the World*, BUS. INSIDER (May 4, 2013, 7:30 AM), <http://www.businessinsider.com/illegal-abortions-2013-5>.

<sup>24</sup> Stephen Eisenhammer, *Zika, Disease of the Poor, May Not Change Abortion in Brazil*, REUTERS (Feb. 10, 2016 at 1:30 AM), <http://www.reuters.com/article/us-health-zika-abortion-insight-idUSKCN0VJ0BR>.

<sup>25</sup> Wyler, *supra* note 23.

In 2012, the STF created an exception to the criminal law by permitting abortions where the fetus has anencephaly.<sup>26</sup> Anencephaly is a fetal brain disorder in which a baby is born without parts of the brain and the skull.<sup>27</sup> The case was brought by Luis Roberto Barroso, then a distinguished lawyer and constitutional law professor, as a direct action before the STF on behalf of the National Confederation of Health Workers.<sup>28</sup> Because the STF had held that other forms of direct action for unconstitutionality could not be used to challenge statutes enacted prior to the promulgation of the 1988 Constitution, Barroso utilized an action called an allegation of disobedience of a fundamental precept or *Arguição de descumprimento de preceito fundamental* (ADFP).<sup>29</sup> This is one of four types of abstract review cases in Brazil that can be filed directly with the STF; it is permitted only when there is no alternative remedy to protect a fundamental precept of the Constitution.<sup>30</sup> Instead of requesting that the STF declare any provision of the Penal Code unconstitutional, Barroso requested that the STF interpret the statute in conformity with constitutionally protected values.<sup>31</sup>

After eight years of indecisiveness and uncertainty, by a vote of eight to two, the STF finally held that the Penal Code should be interpreted to permit abortions in instances where a woman is carrying an anencephalic fetus.<sup>32</sup> The Court referred to this type of abortion as “a therapeutic anticipation of birth.”<sup>33</sup> Its opinion made it clear that by prohibiting prosecution in cases of anencephaly, the STF was not declaring a constitutional right to abortion, nor was it decriminalizing eugenic abortions.<sup>34</sup> The Court reasoned that because anencephalic fetuses lack parts of the brain and the skull, granting that fetus constitutional protection would be inappropriate because it had no chance of survival.<sup>35</sup>

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<sup>26</sup> Rosenn, *supra* note 13, at 316.

<sup>27</sup> *Facts About Anencephaly*, CDC <http://www.cdc.gov/ncbddd/birthdefects/anencephaly.html> (last updated Aug. 2, 2017).

<sup>28</sup> Rosenn, *supra* note 13, at 316.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 317.

<sup>32</sup> *Id.*

<sup>33</sup> Rosenn, *supra* note 13, at 317.

<sup>34</sup> *Id.* at 318.

<sup>35</sup> *Id.*

In 2013, Brazil took another small step towards the decriminalization of abortion when it enacted Law No. 12.845, which requires public hospitals to provide victims of sexual violence with emergency medical treatment.<sup>36</sup> Brazilian hospitals are now required to provide prophylactic treatment against pregnancy, as well as provide the victims with information about their legal rights and the availability of health services.<sup>37</sup> In addition to providing treatment and counseling, Law No. 12.845 forbids healthcare providers from requiring women to provide any verifying information about the sexual assault or abuse.<sup>38</sup>

On November 29, 2016, a panel of the STF took a large step towards the decriminalization of abortion in H.C. No. 124.306. A majority of the five judge panel held that abortion could not be criminalized prior to the twelfth week of pregnancy.<sup>39</sup> The issue originally presented in the case was the release on habeas corpus of five practitioners accused of performing illegal abortions at a clinic in Duque de Caxias.<sup>40</sup> In August 2016, Minister Marco Aurélio, the reporter for the trial court, issued an opinion granting habeas corpus because the defendants had not committed previous crimes, had permanent work and residences, and posed no risk to the public or economic order.<sup>41</sup> The trial court ordered their release on habeas corpus, but the appellate court reversed.<sup>42</sup> The abortion providers next sought habeas corpus in the Supreme Tribunal of Justice (STJ), which affirmed the appellate court.<sup>43</sup> The abortion providers next requested habeas corpus in the STF.<sup>44</sup>

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<sup>36</sup> *Id.* at 320.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See Angela Freitas & Fábio Grotz, *Brazilian Supreme Court Decision Reignites Abortion Rights Debates*, SEXUALITY POLICY WATCH (Dec. 9, 2016), <http://sxpolitics.org/brazilian-supreme-court-decision-re-ignites-the-abortion-rights-debates-2/16223>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *1<sup>st</sup> Class Dismisses Pre-Trial Detention of Accused of Abortion*, STF (NOV. 29, 2016), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=330769>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

Coincidentally, on the panel was Minister Luis Roberto Barroso, who had been appointed to the STF in 2013.<sup>45</sup> He seized the opportunity to convert the habeas corpus appeal into an issue that had never been presented by the parties – whether abortion could be criminalized during the first trimester of pregnancy.<sup>46</sup> Barroso applied the Brazilian principle of interpretation of a statute in conformity with the Constitution, the same principle he argued in the anencephaly case.<sup>47</sup>

Barroso reasoned that if interpreted literally, articles 124-126 of the Penal Code of 1940 would violate both fundamental rights and the principle of proportionality.<sup>48</sup> The fundamental rights that would be violated are as follows: (1) sexual and reproductive rights of women, (2) women's autonomy, (3) the physical and psychological integrity of the pregnant female, and (4) equality of women.<sup>49</sup>

The proportionality principle is the European analogy to balancing.<sup>50</sup> Essentially, it postulates that if the government pursues an end, it must use a means that is helpful, necessary, and appropriate to attain the end.<sup>51</sup> Barroso cited statistics that indicated that countries that permit abortion have the same or slightly fewer abortions than those that criminalize it.<sup>52</sup> He also cited Brazil's staggering abortion statistics.<sup>53</sup> These led Barroso to the conclusion that while

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<sup>45</sup> *Id.*; *Luis Roberto Barroso Takes Office as Justice of the Supreme Court*, STF INTERNACIONAL, (June 26, 2017), [http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfDestaque\\_en\\_us&idConteudo=242417](http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfDestaque_en_us&idConteudo=242417).

<sup>46</sup> H.C. No. 124.306, *supra* note 12 at 1.

<sup>47</sup> *Id.* The analogue of this principle in U.S. Constitutional Law would be the principle that if there are two interpretations of a statute, one of which makes it unconstitutional and one which makes it constitutional, the court should utilize the latter. *See Ashwander v. Tenn. Valley Auth.*, 297 US 288, 348 (1936) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1931)).

<sup>48</sup> Freitas & Grotz, *supra* note 39.

<sup>49</sup> *Id.*

<sup>50</sup> Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 75 (2008).

<sup>51</sup> *Id.* at 75-76.

<sup>52</sup> H.C. No. 124.306, *supra* note 12 at 2.

<sup>53</sup> *Id.*

valuing saving the lives of fetuses may be a legitimate end, criminalizing abortion is an inappropriate means to serve that end.<sup>54</sup> Barroso stated that if the government really wanted to pursue the end of protecting the life of a fetus, it should instead provide free prenatal care, social assistance to poor women, and counseling rather than criminalization of abortion.<sup>55</sup>

This may be Brazil's *Roe v. Wade* because it is the first decision in which a panel of the STF has expressed a comprehensive position in favor of abortion rights.<sup>56</sup> While this is a huge stride for abortion rights in Brazil, this decision does not decriminalize abortion in Brazil.<sup>57</sup> Instead, this decision establishes a non-binding precedent that can be followed by other magistrates, opening the door for restrictive abortion policies to be overturned and for more reproductive rights to be given to the women of Brazil.<sup>58</sup>

The STF is in the process of deciding a case filed on August 24, 2016 by the National Association of Public Defenders (ANDP) and

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 15-16. Unlike *Roe v. Wade*, this was not a decision of the entire STF. It represents the opinion of only three of the eleven ministers who comprise the STF.

<sup>56</sup> See Freitas & Grotz, *supra* note 39.

<sup>57</sup> *Id.* In order to become precedent binding upon all courts this decision would have to be reiterated by at least another STF decision and then enshrined in the list of súmulas vinculantes (binding precedents) by a final vote of the STF, as it would have to be the holding of the full court in a direct action.

<sup>58</sup> On May 26, 2017, in HC142011, Min. Rosa Weber, who was one of the Ministers joining Min. Barroso's opinion HC124306, denied habeas corpus to a couple accused of opening an illegal abortion clinic. Their preventive detention was made in September 2014. As to the wife, the STF (The Superior Tribunal of Justice) said her release in home custody mooted her habeas petition. The husband's habeas request was denied. He had relied on Barroso's opinion saying abortion can't be criminalized in the first 3 months, but Weber refused to consider that argument because it was not presented to the STF, the court from which the habeas appeal was taken. On May 16, 2017, appeal of the STF upheld Min. Weber's denial of habeas corpus. Min. Weber distinguished the prior habeas corpus decision of November 29, 2016, by pointing out that the defendants in this case were charged not only with abortion but with the homicide of the mother and mutilating her body to prevent identification. Moreover, the abortion was not performed in a clinic but in the home of the couple charged with the mother's death. Two ministers joined Min. Weber's opinion and the fifth, Min. Luis Roberto Barroso, was justifiably absent. See *1ª Turma Rejeita Agravo em HC de Acusados de Envolvimento em Clínica de Aborto*, NOTÍCIAS SJF, (May 16, 2017), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=343521>.

ANIS Institute of Bioethics seeking judicial relief for women infected with the zika virus.<sup>59</sup> ANIS and ANDP are asking the full court for the fulfillment of several requests, such as, interpreting the Penal Code in accordance with the constitution so as to allow women diagnosed with zika to interrupt their pregnancies, allowing for social assistance for all children and mothers who are victims of zika, and the extension of family planning methods and information in schools and hospitals.<sup>60</sup> On August 24, 2016, the case was distributed to Minister Cármen Lúcia, who would serve as the Reporter.

Because a panel of the STF has decided to decriminalize first trimester abortions, it is possible the full STF will permit abortions for those infected with zika. However, zika creates new issues, perhaps the biggest being that zika can be asymptomatic, and microcephaly can only be detected in the third trimester of pregnancy;<sup>61</sup> therefore, allowing for this exception would mean potentially decriminalizing late term abortions.

Most recently, on March, 6, 2017, the Partido Socialismo e Liberdade (a Brazilian political party) filed a direct action of disobedience of a fundamental precept, APDF No. 442, the first action filed in Brazil that directly asks the STF for a broad legalization of abortion for any pregnancy during the first 12 weeks.<sup>62</sup> This direct action relies heavily on *Roe v. Wade*, U.S. doctrine, and the fact that other countries that have legalized abortion. APDF No. 442 also relies on Barroso's arguments in the habeas corpus action of November 2016.<sup>63</sup> On March 15, 2017, this ADPF was distributed to Ministra Rosa Weber, who will serve as reporter.<sup>64</sup> Technical assistance is being provided to the Plaintiff political party by ANIS Bioethical

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<sup>59</sup> S.T.F., ADI 5.581, Relator: Min. Cármen Lúcia, S.T.F.J., 01.09.2016, 1,1 (Braz.), available at <http://www.stf.jus.br/portal/processo/verProcessoPeca.asp?id=310227487&tipoApp=.pdf>

<sup>60</sup> *Id.*

<sup>61</sup> *Microcephaly Testing and Diagnosis*, BOSTON CHILDRENS' HOSPITAL, <http://www.childrenshospital.org/conditions-and-treatments/conditions/m/microcephaly/testing-and-diagnosis> (last visited Oct. 18, 2017)..

<sup>62</sup> APDF 442 at 1, available at <https://www.conjur.com.br/dl/psol-stf-decriminalize-aborto-meses.pdf>.

<sup>63</sup> *Id.* at 15.

<sup>64</sup> *Brazil: Abortion Rights at the Supreme Court*, SEXUALITY POLICY WATCH (Apr. 11, 2017), <http://sxpolitics.org/abortion-rights-at-the-brazilian-supreme-court/16796>.

Institute.<sup>65</sup> Interestingly, this action cites excerpts from *O Direito à Vida Digna* (The Right to a Dignified Life) a book written by STF President and reporter in the zika case, Carmen Lúcia.<sup>66</sup> One notable quotation from Lucia's book used in the APDF petition is

When abortion is being debated, at the start of discussion is if the embryo and the fetus are persons, because if one answers in the affirmative, they first of all entitle them to a right to a dignified life, which, as previously noted, is untouchable and inviolate. But one cannot ignore that life is a right that one exercises with another, in the space of relations between subjects, so that one can annul, therefore, the condition of a female-person who, in her dignity is free to exercise her choice of maternity or not.<sup>67</sup>

C. *Zika's Impact in Brazil and the Birth Defects Associated*

Zika affects over 40 countries.<sup>68</sup> However, Brazil has experienced the most reported cases.<sup>69</sup> While the CDC has confirmed that the virus causes microcephaly, some infected women have given birth to healthy babies. Therefore, researchers do not know the full magnitude of the risk.<sup>70</sup>

Only one in five zika-infected individuals will develop symptoms, and there is currently no rapid test that can be performed in a doctor's office.<sup>71</sup> Instead, tests must be sent to laboratories, delaying diagnosis.<sup>72</sup> Furthermore, as previously stated, once a pregnant

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<sup>65</sup> *Id.*

<sup>66</sup> APDF 442 at 23, available at <https://www.conjur.com.br/dl/psol-stf-de-scriminalize-aborto-meses.pdf>.

<sup>67</sup> *Id.*

<sup>68</sup> Lena H. Sun, *For Zika-Infected Pregnancies, Microcephaly Risk May Be as High as 13 Percent*, WASH. POST (May 25, 2016), <https://www.washingtonpost.com/news/to-your-health/wp/2016/05/25/for-zika-infected-pregnancies-microcephaly-risk-may-be-as-high-as-13-percent/>.

<sup>69</sup> *See id.*

<sup>70</sup> *Id.*

<sup>71</sup> Donald G. McNeil, Jr., Catherine St. Louis, & Nicholas St. Fleur, *Short Answers to Hard Questions About Zika Virus*, N.Y. TIMES (last updated July 29, 2016), [http://www.nytimes.com/interactive/2016/health/what-is-zika-virus.html?\\_r=1](http://www.nytimes.com/interactive/2016/health/what-is-zika-virus.html?_r=1).

<sup>72</sup> *Id.*

woman has been diagnosed with zika, the fetus may or may not develop microcephaly. Even with state-of-the-art equipment, which is largely inaccessible to Brazilian citizens, microcephaly can only be detected from about 24 weeks—though it still remains impossible to determine how severe it may be.<sup>73</sup> Because this is a new epidemic, the full range of side effects associated with microcephaly are still largely unknown and unpredictable. Some of the babies with microcephaly seem healthy besides their slightly smaller heads.<sup>74</sup> Others develop seizures, have trouble with balance, experience mental retardation, and have speech and movement delays.<sup>75</sup> Microcephaly is not the only birth defect caused by zika. There are a number of other fetal defects, some of which are just being discovered.

Dr. Eugenio Pita, a doctor in Brazil who performed abortions for twenty years and helped with the anencephaly case, maintains that zika-caused microcephaly creates a completely different scenario than anencephaly does.<sup>76</sup> Dr. Pita argues that when a woman elects to abort an anencephalic fetus, she is simply speeding up the death because an anencephalic fetus cannot survive after birth, hence the STF's characterization of the abortion as a "therapeutic anticipation of birth."<sup>77</sup> However, a microcephalic fetus can survive after birth, albeit with potentially serious birth defects.<sup>78</sup>

Because of the uncharted waters associated with the zika virus, infected pregnant women face agonizing decisions. They can decide (1) to potentially bring a baby with microcephaly into the world; (2) to elect for a first trimester, legal abortion without knowing for sure if their baby would have developed microcephaly; (3) to await ultrasound results; if the images suggest a brain defect, and they can afford to do so, travel to another country that does not criminalize

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<sup>73</sup> Eisenhammer, *supra* note 24.

<sup>74</sup> *Microcephaly Could Be Just the Tip of the Effects of Zika Virus*, NPR (Aug. 28, 2016, 8:57 AM), <http://www.npr.org/2016/08/28/491699546/microcephaly-could-be-just-the-tip-of-the-zika-virus>.

<sup>75</sup> *Id.*

<sup>76</sup> Eisenhammer, *supra* note 24.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

abortion; or (4) to procure an illegal, potentially unsafe, late term abortion in Brazil.<sup>79</sup>

### III. RUBELLA IN AMERICA AND RELIGION IN BRAZIL

In order to better understand the possibility of abortion legalization in Brazil or an exception being made for microcephalic fetuses, it is useful to consider the role rubella played in the path to legalization of abortion in the U.S., as well as the role that the feminist movement played as a whole. However, it is also essential to note the many differences between U.S. and Brazilian culture. This section will analyze the path to abortion legalization in the U.S. and the current steps and missteps that have been taken in Brazil in regards to abortion rights.

#### A. *How the Rubella Virus Coupled With the Feminist Movement Helped Pave the Way for Abortion Legalization in America*

In 1821, Connecticut became the first state to criminalize abortion with the passage of a regulation created to protect women from a poison taken in the fourth month of pregnancy.<sup>80</sup> By 1967, abortion had been made a felony in 49 states and in Washington D.C.<sup>81</sup> In the U.S., there were numerous factors that shifted the discussion of abortion from a taboo topic to a topic of a woman's right to privacy and choice.<sup>82</sup> One of the main contributing factors in shaping the public's opinion of abortion was the rubella virus, which impacted over 12.5 million people between 1964 and 1965.<sup>83</sup>

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<sup>79</sup> *How Zika Could Spark a New Abortion Debate*, THE ECONOMIST (Aug. 24, 2016), <http://www.economist.com/blogs/democracyinamerica/2016/08/abortion-and-fetal-health>.

<sup>80</sup> *Timeline of Abortion Laws and Events*, CHICAGO TRIBUNE, <http://www.chicagotribune.com/sns-abortion-timeline-story.html> (last visited Oct. 18, 2017).

<sup>81</sup> *Id.*

<sup>82</sup> Carolyn Y. Johnson, *How a Zika-Like Illness Helped Change Americans' Views of Abortion*, WASH. POST (Feb. 5, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/05/how-a-zika-like-illness-helped-transform-american-acceptance-of-abortion/>.

<sup>83</sup> *Id.*

The rubella virus is an acute, contagious viral infection.<sup>84</sup> While generally mild when contracted as a child, this illness has serious consequences in pregnant women, causing fetal death or defects known as Congenital Rubella Syndrome (CRS).<sup>85</sup> Children who contract CRS in the womb can suffer hearing impairments, eye and heart defects, and other lifelong disabilities, including autism, diabetes mellitus, and thyroid dysfunction. Many of these side effects require expensive therapy and surgeries.<sup>86</sup> Even though there is currently no known treatment or cure for the rubella virus, it can be prevented by vaccination, a method which has been utilized for the past 40 years.<sup>87</sup>

Mid-twentieth century media emphasized the criminality and deviance of abortion. When married, middle-class, white mothers publically encountered the implications of rubella and sought abortions by the thousands, that view of abortion changed for many.<sup>88</sup> The portrayal of abortion shifted from an immoral and shameful act to an ethical, personal choice to combat the severe effects of rubella.<sup>89</sup>

However, as many women discovered in the 1950s and 1960s, the decision to carry a disease-infected pregnancy to term or to have a therapeutic abortion was not legally theirs to make.<sup>90</sup> Because of the uncertainty surrounding the legality of therapeutic abortions, many physicians refused to perform them.<sup>91</sup> In *Gleitman v. Cosgrove*, decided in 1967, the New Jersey Supreme Court dismissed the complaint of an infant born with CRS as the result of the defendant physician's failure to inform the infant's mother of the risks of maternal rubella during the early weeks of pregnancy.<sup>92</sup> Essentially,

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<sup>84</sup> Rubella, WORLD HEALTH ORGANIZATION, (<http://www.who.int/mediacentre/factsheets/fs367/en/>) (last updated March 2017).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> LESLIE J. REAGAN, DANGEROUS PREGNANCIES: MOTHERS, DISABILITIES, AND ABORTION IN MODERN AMERICA 104 (2010).

<sup>89</sup> *Id.* at 104.

<sup>90</sup> *Id.* at 105.

<sup>91</sup> *Id.*

<sup>92</sup> Gail White Sweeney, *Medical Malpractice: Wrongful Birth – Preconception Torts – Duty to Inform of Genetic Risks*, 13 AKRON L. REV. 390, 395 (1979).

the New Jersey court held that one could not measure life with defects against the “utter void of nonexistence.”<sup>93</sup> After *Gleitman*, a New York court decided *Stewart v. Long Island College Hospital*, where another plaintiff suffering from CRS filed an unsuccessful claim against a hospital for failing to perform an abortion on her mother and terminate her life.<sup>94</sup> Although these plaintiffs’ suits were defeated, these families were trailblazers in the advancement of reproductive rights.<sup>95</sup> In public legal forums, these women contended that the decision of whether to bring a pregnancy to term was legally theirs to make.<sup>96</sup>

As abortion came to be associated with respectable mothers and families in the midst of the rubella virus, doctors, religious leaders, and parents began to attack the illegality of abortion.<sup>97</sup> Rubella helped to expose a growing divide in the Catholic Church surrounding sexuality and reproductive rights and a struggle over the separation of church and state.<sup>98</sup>

In the late 1950s, the American Legal Institute (ALI) drafted a new “model law” that clarified the uncertainty surrounding the legality of therapeutic abortions in order to protect doctors and narrowly expand the practice.<sup>99</sup> However, a reaction against abortion law reform developed, and physicians felt increasingly vulnerable. In 1970, Dr. Jane Hodgson, a Minnesota OBGYN, performed a therapeutic abortion on a patient who contracted rubella during pregnancy.<sup>100</sup> Hodgson hoped the courts would interpret the law narrowly and convict her so that she could appeal her case and challenge criminal abortion law before the U.S. Supreme Court.<sup>101</sup> A Minnesota judge convicted Hodgson and sentenced her to a year of probation and a suspension of her medical license.<sup>102</sup> The Minnesota Supreme Court decided not to consider her case and instead awaited the U.S. Supreme Court’s decision in *Roe v. Wade*.

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<sup>93</sup> *Id.* at 396.

<sup>94</sup> *Id.*

<sup>95</sup> REAGAN, *supra* note 88, at 138.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 142.

<sup>98</sup> *Id.* at 159.

<sup>99</sup> *Id.* at 142.

<sup>100</sup> *Id.* at 170.

<sup>101</sup> REAGAN, *supra* note 88, at 170.

<sup>102</sup> *Id.* at 173.

On January 22, 1973, the U.S. Supreme Court announced its ruling in *Roe v. Wade*, finding the nation's criminal abortion laws to be unconstitutional, subject to some regulation.<sup>103</sup> However, *Roe* wasn't decided out of thin air; the Court decided several other cases before *Roe* that helped lead up to the decriminalization of abortion. For instance, on June 7, 1965, eight years before the decision in *Roe*, the Court held that a Connecticut law forbidding the use of contraceptives was unconstitutional because it intruded upon the right of marital privacy.<sup>104</sup> The Court found a right to privacy in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>105</sup> Then, on March 22, 1972, the Court decided *Eisenstadt v. Baird*, in which it held that a Massachusetts statute prohibiting the distribution of contraceptives to single persons violated the equal protection clause.<sup>106</sup> Creating a stepping stone to *Roe v. Wade*, Justice Brennan famously wrote, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>107</sup>

In *Roe*, the Court found that women have a constitutional right to "privacy" to make decisions concerning pregnancy and family planning without state interference in the first trimester and with only limited state intervention in the second trimester.<sup>108</sup> Following the decision in *Roe*, Dr. Hodgson's conviction was overturned and she returned to practice medicine.<sup>109</sup> What had begun as a small movement for abortion legalization in cases of fetal birth defects, rape, incest, and women's health, transformed into the total suspension of enforcement of criminal abortion laws during the first trimester of pregnancy and became an important part of the movement for the equality of women.

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<sup>103</sup> *Id.*

<sup>104</sup> *See generally* *Griswold v. Connecticut*, 381 US 479 (1965).

<sup>105</sup> *Id.* at 484.

<sup>106</sup> *Eisenstadt v. Baird*, 405 US 438, 443 (1972).

<sup>107</sup> *Id.* at 453.

<sup>108</sup> *See generally* *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>109</sup> REAGAN, *supra* note 88, at 173.

*B. The Relationship Between Brazil, Religion, the Catholic Church, and Abortion*

Brazil is the largest Catholic nation in the world.<sup>110</sup> Catholicism was the official state religion of Brazil until the Republican Constitution of 1988 established Brazil as a secular state.<sup>111</sup> Despite Brazil's status as a secular state, the Catholic Church and organized religion remain deeply intertwined with Brazil's culture, beliefs, and institutions.

The traditional doctrines of the Catholic Church oppose the use of any "artificial" methods of family planning including condoms, birth control pills, and intrauterine devices (IUDs).<sup>112</sup> Furthermore, the Church is intolerant of non-therapeutic abortions unless necessary to save the life of the mother.<sup>113</sup> While Brazil allows for abortions in the case of rape, the Catholic Church does not share this view and sometimes feels the need to intervene. For instance, in 2009, the mother of a 9-year-old Brazilian girl, who had been raped and impregnated with twins by her stepfather, procured a legal abortion for her daughter.<sup>114</sup> The local archbishop excommunicated the girl's mother for procuring the abortion, as well as the doctors, for performing the abortion; he did not, however, excommunicate the stepfather for raping his nine-year-old stepdaughter.<sup>115</sup> The archbishop, Jose Cardoso Sobrinho, proclaimed, "The law of God is above any human law, and that while rape is bad, abortion is worse."<sup>116</sup>

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<sup>110</sup> Diana Londono, *Evangelicals in Brazil*, COUNCIL ON HEMISPHERIC AFFS. (Dec. 5, 2012), <http://www.coha.org/evangelicals-in-brazil/>

<sup>111</sup> Patrick Bruha, *Relation Between Politics and Religion in Brazil*, BRAZ. BUS. (July 31, 2014), <http://thebrazilbusiness.com/article/relation-between-politics-and-religion-in-brazil>.

<sup>112</sup> Elizabeth Cohen, *Zika Tests Catholic Position on Birth Control*, CNN (Feb. 3, 2016, 10:02 AM), <http://www.cnn.com/2016/02/03/health/zika-tests-catholic-position-on-birth-control/>.

<sup>113</sup> *Id.*

<sup>114</sup> Andrew Downie, *Nine-Year-Old's Abortion Outrages Brazil's Catholic Church*, TIME (Mar. 6, 2009), <http://content.time.com/time/world/article/0,8599,1883598,00.html>.

<sup>115</sup> Alexei Barrionuevo, *Amid Abuse in Brazil, Abortion Debate Flares*, N.Y. TIMES (Mar. 27, 2009), <http://www.nytimes.com/2009/03/28/world/americas/28brazil.html>.

<sup>116</sup> *Id.*

When Pope Francis was asked about whether abortion or birth control could be considered a “lesser evil” when faced with zika-linked cases of rare birth defects such as those due to microcephaly, he responded stating “Abortion isn’t a lesser evil, it’s a crime. Taking one life to save another, that’s what the Mafia does. It’s a crime. It’s an absolute evil.”<sup>117</sup> Similarly, Bernadito Auza, the Vatican’s representative to the United Nations stated

It must be emphasized that a diagnosis of microcephaly in a child should not warrant a death sentence. Regardless of the connection to the zika virus these children deserve to be protected and cared for throughout their lives, in accordance with our obligation to safeguard all human life, healthy and disable, with equal commitment, leaving no one behind.<sup>118</sup>

C. *The Growth and Power of Evangelical Christians in Brazil*

While Brazil has the largest Catholic population in the world, in the past thirty years Protestant values have been embraced by millions of Brazilians.<sup>119</sup> Because of the increase of Protestants in this traditionally Catholic culture, Evangelical Christians have been able to gain significant political and economic influence in Brazilian society.<sup>120</sup> As to certain social issues, Evangelicals hold even more conservative values than those held by Roman Catholics.<sup>121</sup>

The 2014 election produced an extremely conservative congress, full of Evangelicals, who account for a fifth of Brazil’s population of 200 million people.<sup>122</sup> In 2015, the former speaker of the lower

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<sup>117</sup> Sarah Pulliam Bailey & Michelle Boorstein, *Pope Francis Suggests Contraception Could Be Permissible in Zika Fight*, WASH. POST (Feb. 18, 2016), <https://www.washingtonpost.com/news/acts-of-faith/wp/2016/02/17/mexico-confirms-zika-virus-cases-in-pregnant-women-as-pope-francis-exits-the-country/>.

<sup>118</sup> *Id.*

<sup>119</sup> Londono, *supra* note 110.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Eisenhammer, *supra* note 24.

house, Edward Cunha,<sup>123</sup> elected with the support of Evangelical congressmen and Evangelical Christian lawmakers, proposed legislation to make it more difficult to procure an abortion in cases of alleged rape.<sup>124</sup> The proposed legislation requires victims to submit to a police report and forensic medical exam, criminalizes anyone assisting a pregnant woman in procuring an abortion, and would make it a crime to encourage a pregnant woman to have an abortion.<sup>125</sup> Under the proposed legislation, even if a court found the abortion involved a microcephalic fetus, a woman could spend up to four-and-a-half years in jail, while the doctor who performed the abortion could face a fifteen year sentence.<sup>126</sup>

#### D. Religion and Brazilian Politics

While Brazil is officially a secular state, as of 2013, five political parties, out of a total of thirty-two, are based on religious faith.<sup>127</sup> The Evangelical Parliamentary Front, founded and organized in 2003 by the Parliamentary Association of Evangelicals, is a network that works together to collect information and provide internal and external support to politicians and those in power.<sup>128</sup> The Chamber of Deputies is a federal legislative body that consists of 513 deputies.<sup>129</sup> Of those 513 deputies, 87 depict themselves as religious leaders and/or members of a religious order.<sup>130</sup> Whenever a bill of interest to the Front is introduced to the Chamber, the Front's staff is mobilized and informs politicians both religious and not, to vote in accordance with the Front.<sup>131</sup>

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<sup>123</sup> Cunha has since been arrested and indicted on corruption charges and is no longer the speaker of the house.

<sup>124</sup> *Id.*

<sup>125</sup> See Will Carless, *Brazil's New Abortion Law Would Require Tests for Rape Victims*, GLOBALPOST (Nov. 24, 2015 1:45 PM), <https://www.pri.org/stories/2015-11-24/brazils-new-abortion-rules-would-require-tests-rape-victims>.

<sup>126</sup> Alex Zielinski, *In Response to Zika, Brazil Moves to Restrict Abortion Even More*, THINK PROGRESS (Feb. 23, 2016), <https://thinkprogress.org/in-response-to-zika-brazil-moves-to-restrict-abortion-even-more-9ee4d527c2cf#.10q3vi9qu>.

<sup>127</sup> Bruha, *supra* note 111.

<sup>128</sup> *Id.*

<sup>129</sup> *See id.*

<sup>130</sup> *Id.*

<sup>131</sup> *See id.*

The Evangelical Parliamentary Front maintains a strong stance against a right to abortion.<sup>132</sup> In 2012, the Evangelical Parliamentary Front attempted to overturn the STF's opinion that deemed anencephalic abortions an exception under Brazilian abortion law.<sup>133</sup> The Evangelical-Catholic coalition sponsored a bill that sought to limit the power of the executive branch to enforce STF decisions and a second bill that called on Congress to reverse the ruling.<sup>134</sup>

#### IV: THE CURRENT POLITICAL LANDSCAPE IN BRAZIL AND WHAT THAT MEANS FOR WOMEN'S RIGHTS DURING THE ZIKA EPIDEMIC

Before analyzing whether zika is capable of spurring abortion legalization strides in Brazil, it is first important to look at the current Brazilian political climate, those who are in power, and Brazil's tumultuous political past.

##### A. *Brazil's Recent Tumultuous Political Landscape*

In October 2010, Brazil elected Dilma Rousseff as its first female president.<sup>135</sup> Rousseff followed President Luiz Inácio Lula da Silva (Lula), who served from January 2003 to December 2010.<sup>136</sup> Both Lula and Rousseff belong to the Workers' Party.<sup>137</sup> Formed in 1980, the Workers' Party is one of the largest left-wing movements in Latin America.<sup>138</sup> During his two terms as president, Lula instituted numerous social programs and, as a result, Brazil's poverty

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<sup>132</sup> *Id.*

<sup>133</sup> Felipe Pena, *Religion: Evangelicalism in Brazil*, AMERICAS QUARTERLY, Summer 2012, <http://www.americasquarterly.org/node/3823>.

<sup>134</sup> *Id.*

<sup>135</sup> Alexei Barrionuevo, *In a First, Brazil Elects a Woman as President*, N.Y. TIMES (Oct. 31, 2010), <http://www.nytimes.com/2010/11/01/world/americas/01brazil.html>.

<sup>136</sup> *Luiz Inácio Lula da Silva: The Rise and Fall of a Brazilian Leader*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/world/americas/luiz-inacio-lula-da-silva-the-rise-and-fall-of-a-brazilian-leader.html?mcubz=1>; Marina Lopes & Dom Phillips, *Brazilian President Dilma Rousseff Ousted in Impeachment Vote*, WASH. POST (Aug. 31, 2016) [https://www.washingtonpost.com/world/the\\_americas/brazilian-president-dilma-rousseff-faces-final-impeachment-vote/2016/08/30/c85173d4-6ee7-11e6-993f-73c693a89820\\_story.h](https://www.washingtonpost.com/world/the_americas/brazilian-president-dilma-rousseff-faces-final-impeachment-vote/2016/08/30/c85173d4-6ee7-11e6-993f-73c693a89820_story.h).

<sup>137</sup> Lopes & Phillips, *supra* note 136.

<sup>138</sup> See Andrew Jacobs, *Brazil Workers' Party, Leaders 'Intoxicated by Power,' Falls from Grace*, N.Y. TIMES (May 12, 2016), <http://www.nytimes.com/>

rate fell between 2003 and 2009 from 22 percent to 7 percent, bringing many who had been previously poverty stricken into the working class.<sup>139</sup> Lula headed one of the largest parties in the Brazilian Congress.<sup>140</sup> In order to strengthen his political coalition, he began to pay the representatives of other parties a monthly allowance called the *mensalão*.<sup>141</sup> This led to a large problem with corruption and scandal surrounding the Workers' Party.

In 2005, Lula appointed Rousseff as his chief of staff.<sup>142</sup> Though a growing economy and shrinking poverty rate had boosted Lula's popularity, because he faced a two-term constitutional limit, he began to mold Rousseff in hopes that she would become his successor.<sup>143</sup> In the first round of voting in early October of 2010, Rousseff failed to acquire the 50 percent of votes needed to avoid a runoff. In the second round later that month, she won by capturing 56 percent of votes.<sup>144</sup>

When assessing why Rousseff initially failed to capture 50 percent of the vote, it is important to look at the change in her stance on abortion rights and the decriminalization of abortion. The question of whether abortion should be legalized had become a hot button issue in the campaign for the October 31<sup>st</sup> runoff between Rousseff of the Workers' Party and her opponents, José Serra of the Brazilian Social Democracy Party, and Marina Silva, a staunch Evangelical Christian.<sup>145</sup> In the first round of voting, Rousseff at-

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2016/05/13/world/americas/brazil-workers-party-dilma-rousseff-impeachment-vote.html.

<sup>139</sup> Dan La Botz, *Brazil: Lula, Rouseff, and the Workers Party Establishment in Power*, NEW POL. (Winter 2015), <http://newpol.org/content/brazil-lula-rousseff-and-workers-party-establishment-power>.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Jeff Wallenfeldt & Michael Ray, *Dilma Rouseff: President of Brazil*, ENCYCLOPAEDIA BRITANNICA (Mar. 15, 2017), <https://www.britannica.com/biography/Dilma-Rouseff>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Fabiana Frayssinet, *Brazil: Abortion, a Bargaining Chip in Campaign for Runoff*, INTER PRESS SERV. (Oct. 15, 2010), <http://www.ipsnews.net/2010/10/brazil-abortion-a-bargaining-chip-in-campaign-for-runoff/>.

tained 47 percent of the vote; Serra, 33 percent; and Silva, a surprising 19 percent.<sup>146</sup> Brazilian analysts attributed Silva's ability to attain 19 percent of the vote to the fact that Evangelical churches called on their congregations to support Silva because of her opposition to abortion, and because many left leaning voters were disappointed with the corruption scandals recently associated with the Workers' Party.<sup>147</sup> In response to her inability to obtain 50 percent of the vote, Rousseff's campaign backtracked on her previous abortion stance and began to broadcast that she was personally against the practice and legalization of abortion in Brazil but saw it more as a public health issue.<sup>148</sup> The press then discovered that Serra's wife had procured an abortion in New York.<sup>149</sup> Only then, after the change in stance on abortion and the scandal surrounding Serra's wife's abortion was unveiled was Rousseff able to secure 56 percent of Brazil's vote.<sup>150</sup> While it is impossible to say definitively what role abortion and religious beliefs played in the election, it is clear that they did play a role in helping Rousseff get elected.

Dilma Rousseff became Brazil's first female president in 2011.<sup>151</sup> She was reelected in 2014 but was impeached and removed from office in 2016.<sup>152</sup> Throughout 2011, Rousseff's administration faced numerous accusations of corruption, and by the end of the year investigations helped spur the resignation of five cabinet ministers.<sup>153</sup> The political landscape in Brazil began to shift dramatically from one of high approval ratings for those in political power to one consisting of violent street protests and angry demonstrations.<sup>154</sup> The demonstrations were organized mainly by a growing middle-class who was increasingly anxious about government corruption,

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<sup>146</sup> *Id.*

<sup>147</sup> James N. Green, *Brazil: Dilma Rousseff's Victory*, NACLA, <https://nacla.org/article/brazil-dilma-rousseff%E2%80%99s-victory> (last visited Oct. 19, 2017).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See id.*

<sup>151</sup> Wallenfeldt & Ray, *supra* note 142.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

the country's debilitated economy, and the exorbitant spending on the World Cup and Olympic Games.<sup>155</sup>

By March 2015, dozens of high-level businesspeople and politicians had been indicted in connection with an extensive investigation alleging millions of dollars in kickbacks to Petrobras officials.<sup>156</sup> The alleged scandal surrounded billions of dollars being kicked back to Petrobras, the Workers' Party and its members, and the members of the Workers' Party coalition partner, by prominent Brazilian corporations in return for contracts with Petrobras.<sup>157</sup> Soon an outcry began calling for Rousseff's impeachment. Rousseff tried to characterize the efforts to impeach her as a coup because hundreds of members of Brazil's congress faced accusations of wrongdoing and misconduct.<sup>158</sup>

Rousseff's impeachment trial began on August 25, 2016, with her testimony before the Senate in which she defended her actions regarding the budget and said that she had done nothing that previous Brazilian presidents had not already done.<sup>159</sup> Furthermore, she warned that the administration of Temer (her vice president) whose cabinet, she noted, had no women or people of color in it, would limit public spending and only defend the interests of the wealthy elite.<sup>160</sup> However, her impassioned testimony proved unpersuasive and on September 1, 2016, the Senate voted 61-20 to convict Rousseff and remove her from office.<sup>161</sup>

#### B. *What the Temer Administration Means for Women's Rights*

Rousseff's impeachment allowed Vice President Michel Temer to assume power as Brazil's new president. Temer is a member of the conservative Brazilian Democratic Movement Party (PMDB) and is set to serve out the remainder of Rousseff's term, which will

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* Petrobras is a multinational petroleum corporation controlled by the Brazilian government.

<sup>157</sup> Wallenfeldt & Ray, *supra* note 142.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

last until Brazil's 2018 elections.<sup>162</sup> In his first days as president Temer promised to fight corruption and introduced new policies to reduce the fiscal deficit and combat the devastating recession currently afflicting Brazil.<sup>163</sup> Temer also named a new cabinet of ministers that is devoid of women representatives.<sup>164</sup> All of the ministers in his cabinet identify as white males, which makes Temer the first president since Ernesto Geisel, who served from 1974 to 1979, to not include women in his cabinet.<sup>165</sup> Temer's critics proclaim that his new cabinet is not representative of Brazil's makeup which is 51 percent female and 53 percent non-white.<sup>166</sup> Additionally, advocates of women's rights worry that the new cabinet is a step backward for Brazil, especially as it comes after Rousseff, Brazil's first female president.<sup>167</sup>

Temer has also eradicated the Ministries of Racial Equality, Human Rights, and Women and instead folded them into the Ministry of Justice.<sup>168</sup> This eradication is cause for concern for women's rights groups because it eliminates the key post in charge of promoting and protecting their rights, as well as closing down any policy negotiations that the previous Ministry of Women was engaged in.<sup>169</sup> Before the eradication of the Ministry of Women, the feminist organization Marcha Mundial de las Mujeres (World March of Women, MMM) had been negotiating for more progressive policies with the Ministry of Women, particularly on the issues of legalizing abortion and prostitution.<sup>170</sup> While these negotiations were advancing slowly under the Workers' Party government, the MMM fears

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<sup>162</sup> Grasielle Castro & Nick Robins-Early, *Brazil Now Has a President No One Voted For*, HUFFINGTON POST (Sept. 1, 2016, 6:09 PM), [huffingtonpost.com/entry/Michel-temer-president-brazil\\_us\\_57c8788ce4b0a22de094ced7](http://huffingtonpost.com/entry/Michel-temer-president-brazil_us_57c8788ce4b0a22de094ced7).

<sup>163</sup> Marina Koren, *Who's Missing From Brazil's Cabinet?*, ATLANTIC (May 25, 2016), [theatlantic.com/international/archive/2016/05/brazil-cabinet-rousseff-temer/483372/](http://theatlantic.com/international/archive/2016/05/brazil-cabinet-rousseff-temer/483372/).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Kimberley Brown, *Is Brazil's Government Rolling Back Women's Rights?*, AL JAZEERA (Aug. 21, 2016), <http://www.aljazeera.com/indepth/features/2016/07/brazil-government-rolling-women-rights-160704090348170.html>

<sup>167</sup> Koren, *supra* note 163.

<sup>168</sup> Brown, *supra*, note 166.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

that the new administration will leave no room for negotiating more progressive policies.<sup>171</sup>

*C. Comparing Rubella and Zika and the Environments They Were Born Into*

As previously discussed, rubella affected the United States between 1963 and 1965 infecting an estimated 12.5 million people, while the symptoms were generally mild (like those associated with zika), pregnant women faced a harsher reality.<sup>172</sup> A New England Journal of Medicine study published in March 2016, found that many aspects of the zika and rubella viruses are similar.<sup>173</sup> Both seem to cross the placental border into the fetus and restrict organ development, causing defects like deafness, blindness, and other developmental delays.<sup>174</sup> However, there are also key differences between the two.<sup>175</sup> One major difference between zika infections in Brazil and rubella infections in the U.S. is the level of population immunity.<sup>176</sup> Today, none of the population has antibodies to zika whereas, in the U.S. during the rubella epidemic only 17.5 percent of women of childbearing age lacked rubella antibodies.<sup>177</sup> Another difference is that rubella is airborne; whereas, zika is spread through mosquito bites and sexual transmission.<sup>178</sup> Furthermore, there are numerous uncertainties about how zika might actually affect babies as they develop.<sup>179</sup> For example, children with CRS are more prone to thyroid problems and diabetes, but researchers do not yet know the particular health problems that might be caused by zika as the child ages.<sup>180</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> Jessica Ravitz, *Before Zika: The Virus that Helped Legalize Abortion in the US*, CNN (Aug. 11, 2016, 4:26 PM), <http://www.cnn.com/2016/08/09/health/rubella-abortion-zika/>.

<sup>173</sup> Adrienne Lafrance, *What Zika Researchers Can Learn from the Rubella Outbreak of 1964*, ATLANTIC (Apr. 6, 2016), <http://www.theatlantic.com/health/archive/2016/04/zika-rubella/477165/>.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Lafrance, *supra* note 173.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

As historian Leslie Reagan argued in her book “Dangerous Pregnancies,” the accidental combination of pregnancy and rubella put women in the complicated position of having to confront the legal and social uncertainties associated with either terminating a pregnancy or carrying it to term.<sup>181</sup> Not all medical practitioners agreed that a rubella diagnosis warranted an abortion, although many did concede that termination of pregnancy had become the recognized treatment for maternal rubella for at least a decade before *Roe v. Wade* allowed for legal abortions.<sup>182</sup> Awareness of rubella and its debilitating effects shifted the view of abortion from one of criminality, deviance, and shame to one that any pregnant woman, of any class, might undergo if faced with a rubella diagnosis.

Unlike rubella, zika is regarded as a tropical disease.<sup>183</sup> Like other mosquito-transmitted diseases such as malaria, zika is associated with historical burdens of colonialism, poverty, and underinvestment that have shaped the experience of these diseases.<sup>184</sup> While the rubella virus was able to shift the abortion conversation from one of criminality to one of ethics, this may not be the case for the zika virus.

While Benedito Fonseca, a professor of infectious medicine at the University of Sao Paulo, calls the *Aedes aegypti* mosquito “democratic” because it will suck anyone’s blood, regardless of socioeconomic status, the mosquito thrives best in tropical areas that tend to be densely populated and poor.<sup>185</sup> Another contributing factor to the zika virus being more prevalent in poverty-stricken areas of Brazil is the inadequate public services in these areas, which allows stagnant water to collect in rooftop tanks or old tires where zika-

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<sup>181</sup> Salim Al-Gailani, *From Rubella to Zika: Pregnancy, Disability, Abortion and the Spectre of an Epidemic*, GUARDIAN (Jan. 29, 2016, 3:26 PM), <https://www.theguardian.com/science/the-h-word/2016/jan/29/rubella-zika-pregnancy-disability-abortion-epidemic>.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Alex Cuadros, *Zika Exposes Class Differences in Brazil, Where Most Victims Are Poor*, WASH. POST (Feb. 24, 2016), [https://www.washingtonpost.com/news/world/wp/2016/02/24/zika-exposes-class-differences-in-brazil-where-most-victims-are-poor/?utm\\_term=.3ff361d19e38](https://www.washingtonpost.com/news/world/wp/2016/02/24/zika-exposes-class-differences-in-brazil-where-most-victims-are-poor/?utm_term=.3ff361d19e38).

infecting mosquitos can best lay their eggs.<sup>186</sup> While Brazil is currently experiencing an epidemic that exposes the extreme class differentials between the rich and the poor, the U.S. experienced an epidemic that united the country over a mutual fear that anyone could contract this virus, and that the rich ran the same risk as the poor. Without the unification of the classes and races to help change public opinion of abortion, especially in a country that promotes religious ideology so staunchly, it is hard to imagine any change in abortion law being made based on public opinion.

During the rubella epidemic in the U.S., leaders in the Roman Catholic Church led the opposition to abortion law reform, much like the Church leaders in Brazil have done.<sup>187</sup> The Church's leadership also encouraged grassroots opposition to abortion law reform.<sup>188</sup> The rubella virus exposed a divide within the Catholic Church over reproductive rights and the separation of church and state.<sup>189</sup> Mothers began writing in the thousands to their legislators to advocate for abortion law reform and to combat the thousands of Catholics who were writing to keep abortion criminalized.<sup>190</sup>

Brazil has yet to experience a large-scale grass roots movement like the one experienced in the U.S. in the 1960s. Since those primarily affected by zika are not middle-class white women like those who were affected by rubella, it is much more difficult for these poor minority women to have a voice to add to the conversation. While there are many progressive men and women in Brazil working to decriminalize abortion in light of zika, they have yet to expose a fracture in the Church in the same way that the grassroots movements in the U.S. did.

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<sup>186</sup> *Id.*

<sup>187</sup> REAGAN, *supra* note 88, at 158.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 159.

<sup>190</sup> *Id.* at 178.

V. WILL ZIKA HELP LAY MORE GROUNDWORK TO SHAPE  
ABORTION LAW IN BRAZIL?

A. *Religion, Brazilian Politics, and Zika*

As previously discussed, the Catholic Church views abortion as a sin equal to murder and believes that life starts at conception. The Catholic Church has publically denounced the idea of relaxing abortion laws in the face of zika and microcephaly. In response to ANIS Institute of Bioethics' petition to the STF, Auxiliary Bishop Leonardo Ulrich Steiner, secretary general of Brazilian Bishops' Conference stated, "Microcephaly has been occurring in Brazil for years. They are taking advantage of this moment to reintroduce the abortion topic. Abortion leads to eugenics, the practice of selecting perfect people."<sup>191</sup> This position demonstrates the Catholic Church's unwavering stance on abortion even in the face of a serious disease such as zika.

Bishop Steiner has urged couples living in zika-infected areas to practice chastity or "natural family planning," a method in which women monitor their menstrual cycles and practice abstinence while they are fertile.<sup>192</sup> Catholic scholars cite a study that depicts the accuracy of natural family planning as equal to that of the success of birth control.<sup>193</sup> However, the United States Department of Health and Human Services reports that the failure rate for natural planning is twenty-five out of 100 women whereas, the failure rate for the pill is five out of 100.<sup>194</sup>

With around 65 percent of the country identifying as Catholic and with Brazil having the most conservative congress since 1964,

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<sup>191</sup> Matt Sandy, *Brazilian Legislators Look to Increase Abortion Penalties in the Wake of Zika Outbreak*, TIME (Feb. 22, 2016), <http://time.com/4230975/brazil-abortion-laws-zika-outbreak/>.

<sup>192</sup> Laurie Goodstein, *Catholic Leaders Say Zika Doesn't Change Ban on Contraception*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/world/americas/catholic-leaders-say-zika-doesnt-change-ban-on-contraception.html>.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

it is unlikely that any new legislation will be passed favoring an exception to abortion law for those infected with zika.<sup>195</sup>

*B. ANIS Institute of Bioethics' and the Brazilian National Association of Public Defenders' Proposal to the STF*

As previously stated, ANIS Institute of Bioethics and the Brazilian National Association of Public Defenders (ANADP) have filed a direct action of unconstitutionality ADI No. 5581 with the STF, asserting that the Brazilian government has failed to provide adequate assistance to ensure access to health information and care and support services.<sup>196</sup> ANADP has also filed an allegation of noncompliance with a fundamental precept direct action, based on the reports of the United Nations Human Rights Council, stating that women with zika should be allowed to interrupt their pregnancies.<sup>197</sup> The STF was expected to rule on the request for a preliminary injunction in this case on December 7, 2016, but has still yet to do so.<sup>198</sup>

In 2012, the STF ruled that abortions are legal when the fetus has anencephaly, a serious birth defect, in which portions of the brain and/or skull are missing.<sup>199</sup> There, the fetus has a zero percent chance of survival because it is missing vital portions of the brain and skull; thus, the Court found that the fetus did not have a right to constitutional protection.<sup>200</sup> When analyzing whether the STF will make a similar decision in regards to microcephalic fetuses for those diagnosed with zika it is important to fully understand the similarities and differences between microcephaly and anencephaly.

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<sup>195</sup> See Adriana Brasileiro, *Zika virus sparks abortion debate in Brazil*, ABC NEWS (Feb. 5, 2016, 4:07 PM), <http://www.abc.net.au/news/2016-02-05/zika-virus-sparks-abortion-debate-in-brazil/7142834>.

<sup>196</sup> Shena Cavallo, *Brazil's Women Activists Tackle an Enduring Threat*, INT'L WOMEN'S HEALTH COALITION (Dec. 5, 2016), <https://iwhc.org/2016/12/brazils-women-activists-tackle-enduring-threat/>.

<sup>197</sup> S.T.F., ADI 5581, Relator: Min. C armen L ucia, [Vol. Number], S.T.F.J., 01.09.2016, [page number] (Braz.), available at <http://www.stf.jus.br/portal/processo/verProcessoPeca.asp?id=310227487&tipoApp=.pdf>.

<sup>198</sup> *Id.*

<sup>199</sup> Simon Romero, *Surge of Zika Virus Has Brazilians Re-examining Strict Abortion Laws*, N.Y. TIMES (Feb. 3, 2016), <https://www.nytimes.com/2016/02/04/world/americas/zika-virus-brazil-abortion-laws.html>.

<sup>200</sup> *Id.*

Not all mothers who contract zika during pregnancy will give birth to babies with microcephaly.<sup>201</sup> In fact, researchers are still uncertain as to what proportion of women infected during pregnancy pass the virus onto the fetus and, of those, what proportion contract microcephaly.<sup>202</sup> Mothers who had symptoms of zika, but gave birth to healthy babies may have either had zika before their pregnancy began or, if they contracted zika during pregnancy, the virus apparently did not pass the placenta.<sup>203</sup> However, for now, researchers are not sure how to deduce which scenario is accurate.

Unlike anencephaly, which is detectable at 11-14 weeks of gestation by ultrasound scan<sup>204</sup>, microcephaly is usually not detectable until toward the end of the second trimester of pregnancy at about 24 weeks.<sup>205</sup> Even in the U.S., abortion is generally legal only before the fetus is viable outside of the womb, which can range from about 24 to 26 weeks.<sup>206</sup>

Therefore, in order for the STF to agree to create a fourth exception to the current abortion laws, to allow abortion in the instance of a zika diagnosis, the Court would have to allow late term abortions and/or consent to abortion of fetuses that have a chance of developing microcephaly but may turn out completely healthy. The STF was very clear in the 2012 anencephaly case that the only reason it was creating a new exception to the abortion law was because there was a zero percent chance that these fetuses could survive without portions of their brains or skulls.<sup>207</sup>

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<sup>201</sup> *Microcephaly and Other Birth Defects*, CDC Aug. 9, 2017), [https://www.cdc.gov/zika/healtheffects/birth\\_defects.html](https://www.cdc.gov/zika/healtheffects/birth_defects.html).

<sup>202</sup> Sun, *supra* note 68.

<sup>203</sup> *See id.*

<sup>204</sup> Monika Jaquier, *Frequently Asked Questions About Anencephaly*, ANENCEPHALY.INFO (Mar. 23, 2015), <http://www.anencephaly.info/e/faq.php#11>

<sup>205</sup> Catherine Saint Louis, *Microcephaly, Spotlighted by Zika Virus, Has Long Afflicted and Mystified*, N.Y. TIMES (Jan. 31, 2016), [https://www.nytimes.com/2016/02/01/health/microcephaly-spotlighted-by-zika-virus-has-long-afflicted-and-mystified.html?\\_r=0](https://www.nytimes.com/2016/02/01/health/microcephaly-spotlighted-by-zika-virus-has-long-afflicted-and-mystified.html?_r=0).

<sup>206</sup> *Id.*

<sup>207</sup> *Rapporteur Votes on Possibility of Interruption of Pregnant of Anencephalic Fetus*, STF (Apr. 11, 2012), <http://www.stf.jus.br/portal/cms/verNoticia-Detalhe.asp?idConteudo=204680>.

If a liberalization in Brazilian abortion law is to occur, it will be through the STF rather than through the extremely conservative Brazilian legislature. In the STF's November 29<sup>th</sup> decision, Barroso was able to convince two other ministers to join his opinion decriminalizing abortion up until the twelfth week of pregnancy.<sup>208</sup> While this is an extremely promising decision, only three out of eleven members of the STF have accepted this position.<sup>209</sup> In the November 29<sup>th</sup> case, Barroso utilized a similar technique to the anencephaly case contending that the Penal Code had to be interpreted to allow abortion during the first trimester in order to make it consistent with fundamental principles, such as the constitution's explicit guarantee of equality of the sexes.<sup>210</sup> Title II, Chapter 1, Art.5. of the Brazilian Constitution states, "men and women have equal rights and duties under the terms of the Constitution."<sup>211</sup>

While Barroso's November 29<sup>th</sup> opinion technically has no precedential value, there are still several routes by which decisions of the STF declaring a law unconstitutional can be converted into a decision that essentially nullifies the law. One is a senate suspension. The president of the STF can request that the Senate suspend the statute that the STF has declared unconstitutional. Article 52(X) of the 1988 Constitution confers on the Federal Senate the power to suspend enforcement "in whole or in part, of laws declared unconstitutional by a final decision" of the Supreme Federal Tribunal.<sup>212</sup> This type of senate resolution converts the STF decision into one having *erga omnes* (valid for all) effects.<sup>213</sup> When asked, the Senate will usually perform such a resolution; however, they also have the discretion not to issue such a resolution.<sup>214</sup> Another way an STF decision declaring a law unconstitutional may become *erga omnes* is for the STF to render reiterated decisions declaring a law unconstitutional and then, by a two-thirds vote of its eleven members, decide to make this decision one of its binding precedents, called a *súmula*

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<sup>208</sup> Freitas & Grotz, *supra* note 39.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.).

<sup>212</sup> C.F. art. 52(X) (Braz.).

<sup>213</sup> Augusto Zimmermann, *How Brazilian Judges Undermine the Rule of Law: A Critical Appraisal*, 11 INT'L TRADE & BUS. L. REV. 179, 188 (2008).

<sup>214</sup> *See id.*

vinculante.<sup>215</sup> Súmula vinculante is a device that was created by Constitutional Amendment No. 45 of December 8, 2004, which added Article 103-A to the 1988 Constitution.<sup>216</sup> However, very few decisions upon constitutionality make their way into the relatively few binding precedents list published by the STF.<sup>217</sup>

ADI No. 5581 also includes an ADPF (direct action of disobedience of a fundamental precept).<sup>218</sup> The ADI is directed at Law No. 13.301 of 2016, which adopts health measures for zika.<sup>219</sup> The ADPF, however, attacks Penal Code Article 124 on the criminalization of abortion as applied to pregnant women with the zika virus.<sup>220</sup> A majority deciding on the merits in either form of direct action may be binding *erga omnes*.<sup>221</sup>

Therefore, while the November 29<sup>th</sup> decision alone is not binding precedent, there is hope that the ADI and the accompanying ADPF will be decided in a way that would decriminalize abortion as a binding precedent. If a similar decision is not repeated in the ADI case, there is still a chance that there could be a *de facto* precedent, in which lower courts would still choose to follow the November 29<sup>th</sup> decision regardless of its nonbinding nature, but they would not be required to do so.

The STF's November 29<sup>th</sup> decision legalizing abortion in the first trimester has certainly shifted the abortion analysis in Brazil. The STF's 2012 anencephaly decision emphasized the "therapeutic anticipation of birth," while the STF's 2016 decision emphasized the equality of men and women under the Brazilian Constitution.<sup>222</sup> It is also important to note that the 2016 decision was decided and written by Roberto Barroso, the constitutional lawyer turned STF

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<sup>215</sup> C.F. art. 103-A, amend. 45, art. 1, 9 (Braz.).

<sup>216</sup> C.F. art. 103-A, amend. 45, art. 1, 9 (Braz.); *see also* Zimmermann, *supra* note 213 at 206.

<sup>217</sup> Rosenn *supra* note 14, at 1035.

<sup>218</sup> *Aspectos da ADI Sobre Zika Virus, Microcefalia, Políticas Públicas e Aborto*, JORNAL DO BRASIL (Sept. 21, 2016, 4:46 PM), <http://www.jb.com.br/sociedade-aberta/noticias/2016/09/21/aspectos-da-adi-sobre-zika-virus-microcefalia-politicas-publicas-e-aborto/>.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> C.F. art. 101, 102 (Braz.); Lei No. 9.882, art. 11, de 3 de dezembro de 1999 (Braz.).

<sup>222</sup> Freitas & Grotz, *supra* note 39.

minister who brought the anencephaly case in 2012. Furthermore, while we do not yet know which judges will be on the panel that decides ADI No. 5581, we do know that the minister who is the reporter in this case is the president of the STF, a woman by the name of C armen L ucia Autunes Rocha.<sup>223</sup> While we do not know how she will rule in this case, it is important to note that she was one of the judges who voted in favor of decriminalizing abortions in situations of anencephaly.<sup>224</sup> Also, the fact that she is a woman is not inconsequential, especially because of how heavily equal rights were emphasized as a basis for first trimester legalization in the 2016 case.

Furthermore, the attorney general, who is the head of the public ministry in Brazil, has issued a report to assist C armen L ucia in rendering her opinion.<sup>225</sup> In his report he stated that requiring proof of poverty for continuing payments and requiring a medical exam from the institution of social security for those with birth defects is fundamentally unconstitutional.<sup>226</sup> Also, he stated that it is constitutional to interrupt pregnancy when there has been a diagnosis of zika.<sup>227</sup> While it is impossible to know exactly how much weight the Attorney General's report will have on the Court, it is clear that his report favors a woman's ability to choose whether to obtain an abortion if she has contracted zika. It seems that now is the time, more than ever in Brazilian history, for the possibility of the STF to lay groundwork towards the legalization of abortion.

### C. *The Disparate Impact Zika and Microcephaly have in Brazilian Society*

While the response to the rubella virus helped to pave the way for the 1973 Supreme Court decision of *Roe v. Wade*, abortion still remains a highly contested topic of debate in the U.S.<sup>228</sup> For instance, Florida Senator Marco Rubio recently proclaimed

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<sup>223</sup> See A co Direta De Inconstitucionalidade No. 5.581, Associa o Nacional dos Defensores P ublicos-Anadep (2016) (Braz.).

<sup>224</sup> According to the Minister Carmen L ucia, *Interuption of Pregnancy of Anemophic Fetuses Does Not Constitute Crime*, SUPREMO TRIBUNAL FEDERAL (April 11, 2012), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=204756>.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> Ravitz, *supra* note 172.

I understand a lot of people disagree with my view, but I believe that all human life is worthy of protection of our laws. And when you present it in the context of zika or any prenatal condition it's a difficult question and a hard one. But if I'm going to err, I'm going to err on the side of life.<sup>229</sup>

As a Florida Senator, Rubio represents the state with the most confirmed cases of zika in the U.S.<sup>230</sup> A STAT-Harvard poll indicates however, that Rubio and his fellow conservatives may have voiced opinions that conflict with public opinion.<sup>231</sup> According to the STAT-Harvard poll, only 23 percent of Americans favor access to abortions after 24 weeks in general; however, that rate soars to 59 percent when a pregnant woman is infected with the zika virus and there is a serious risk her baby will be born with microcephaly.<sup>232</sup>

The difference between the U.S. and Brazil in terms of drawing parallels between zika and rubella is the fact that while rubella affected people across the country, the zika virus disparately impacts the poor and poverty stricken. The Osvaldo Cruz University hospital in Recife, Brazil, located in the poverty-stricken Northeast, has seen the most cases of microcephaly in the entire country.<sup>233</sup> Infectious disease pediatrician, Angela Rocha, estimates that the Recife hospital has treated over 300 babies with microcephaly.<sup>234</sup> The poor regions of Brazil have experienced the most cases of the zika virus for a variety of reasons. First, the Northeastern region of Brazil is particularly arid and drought-stricken, which causes locals to keep water supplies at home in tanks, which can create mosquito breeding

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<sup>229</sup> *Id.*

<sup>230</sup> James Rosen & Tony Pugh, *Senate Approves Zika Money, but Obama, Rubio Say it's not Enough*, MIAMI HERALD (May 17, 2016 7:52 PM), <http://www.miamiherald.com/news/politics-government/article78201072.html>.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> Bruce Douglas, *City at Centre of Brazil's Zika Epidemic Reeling from Disease's Insidious Effects*, GUARDIAN (Jan. 25, 2016, 12:54 PM), <https://www.theguardian.com/global-development/2016/jan/25/zika-virus-mosquitoes-countries-affected-pregnant-women-children-microcephaly>.

<sup>234</sup> *Id.*

grounds if even minimally damaged.<sup>235</sup> Second, the poorer neighborhoods have improper infrastructure that allows for rainwater and debris to collect on the streets, which creates the perfect breeding ground for zika-infecting mosquitos.<sup>236</sup> Also, modern conveniences such as, air conditioning and screens on the windows, are not prevalent in areas where there have been zika outbreaks.<sup>237</sup>

Had rubella been a discriminating disease in the way that zika is, it is hard to say if opinions would have shifted in the way that they did. As evidenced by Marco Rubio's above quote, even in a country where abortion is legal, there is still tremendous controversy surrounding zika-related abortions and abortion in general. Therefore, it is unlikely in Brazil, a country that has some of the most stringent abortion laws in Latin America, that zika alone will be able to have the same effect as rubella did in changing the view of abortion for the masses.

*D. Implications for Brazilian Society if No Change in Abortion Law is Made*

An estimated 850,000 women in Brazil have illegal abortions every year.<sup>238</sup> While criminal prosecution of women who have illegal abortions is extremely rare, the current fourth highest cause of maternal death in Latin America is unsafe abortions.<sup>239</sup> In 2013, about 200,000 women were hospitalized due to complications from such abortions.<sup>240</sup> Because zika more heavily impacts women living in poverty, and because it can usually not be detected during the first

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<sup>235</sup> Sam Cowie, *In Brazil, Are the Poor More Likely to Contract Zika?*, AL JAZEERA (Feb. 12, 2016), <http://www.aljazeera.com/indepth/features/2016/02/brazil-poor-contract-zika-160210072338596.html>.

<sup>236</sup> *Id.*

<sup>237</sup> Rosalind Bentley, *Zika's Spread in Brazil: Equivalent to One Mile Every Hour*, ATLANTA J.-CONST. (Sept. 13, 2016, 5:37 PM), <http://www.ajc.com/news/national/zika-spread-brazil-equivalent-one-mile-every-hour/L7ukjM8uDeq8Ufev5DUfZI/>.

<sup>238</sup> Eisenhammer, *supra* note 24.

<sup>239</sup> Alexandra Minna Stern, *Zika and Abortion: Will the Virus Prompt Latin America to Rethink Abortion and Birth Control?*, INST. FOR RES. ON WOMEN & GENDER (Mar. 21, 2016), <http://irwg.umich.edu/news/zika-and-abortion-will-virus-prompt-latin-america-rethink-abortion-and-birth-control>.

<sup>240</sup> Downie, *supra* note 114.

trimester, the number of hospitalizations and illegal abortions is sure to rise if a change in abortion law is not made.

Health officials in Brazil have currently suggested that women avoid pregnancy until the zika crisis is over.<sup>241</sup> However, because there are still significant class and regional divides when dealing with access to contraception and family planning advice, it is unlikely that abstinence alone is a viable option to combat zika and microcephaly.<sup>242</sup> Furthermore, because zika is relatively new, physicians do not yet know all of the potential implications associated with it. A growing concern among pediatricians is that zika could harm developing brain tissue in ways other than the obvious microcephaly.<sup>243</sup> According to Isabel Madeira, the president of the State Pediatrics Society in Rio de Janeiro, microcephaly could simply be the “tip of the iceberg” for a variety of neurological problems, some of which might not appear or be diagnosed for years to come.<sup>244</sup>

#### IV. CONCLUSION

Overall, it is very likely that zika will be able to help further expand the newly developing law of abortion in Brazil. The rubella and zika viruses are incredibly similar in their effects, but they differ in terms of when they can be diagnosed, the certainty with which they will be transmitted to the fetus, and the population that is affected. Between Brazil’s new conservative administration and the pervasive nature of religion in Brazilian culture, politics, and society, it is improbable that Brazil’s Congress will pass legislation to allow for zika-related abortions. However, the recent STF strides in regards to the legalization of first trimester abortions and the attorney general’s report to the STF’s President are promising signs that another step will be taken in favor of the legalization of abortion.

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<sup>241</sup> Stern, *supra* note 239.

<sup>242</sup> *Id.*

<sup>243</sup> Dom Phillips, Nick Miroff, and Julia Symmes Cobb, *Zika Prompts Urgent Debate About Abortion in Latin America*, WASH. POST (Feb. 8, 2016), [https://www.washingtonpost.com/world/the\\_americas/zika-prompts-urgent-debate-about-abortion-in-latin-america/2016/02/07/b4f3a718-cc6b-11e5-b9ab-26591104bb19\\_story.html?utm\\_term=.d18e64ca93de](https://www.washingtonpost.com/world/the_americas/zika-prompts-urgent-debate-about-abortion-in-latin-america/2016/02/07/b4f3a718-cc6b-11e5-b9ab-26591104bb19_story.html?utm_term=.d18e64ca93de).

<sup>244</sup> *Id.*

While it remains unseen whether the STF will take that step to alleviate those who are pregnant and affected by zika, it is definitely exciting to see the way that medical developments can push constitutional decisions both in Brazil and the U.S.