



ISSUE BRIEF

Q&A on the Abortion Facility Regulations Decision in *Whole Woman's Health v. Hellerstedt*

1. What does Texas' H.B. 2 law say?

This basic, commonsense law required that 1) abortion facilities be held to the same standard as ambulatory surgical centers and that 2) abortionists must have admitting privileges at a local hospital not further than thirty miles from the abortion facility.

These regulations protected women from lax abortion industry safety standards by requiring that abortion centers meet necessary health and safety standards, including the presence of trained staff, corridors that could accommodate stretchers in case of an emergency, and up-to-date fire, sanitation, and safety codes. Separately, abortionists were required to have admitting privileges at a nearby hospital in the event of an emergency.

2. Why are abortion facility regulations necessary for women's health and safety?

First, there are many abortion facilities that operate currently under substandard conditions. Abortionist Kermit Gosnell employed unlicensed and untrained staff, used rusted and unsterile instruments, and operated a filthy facility. One woman, Karnamaya Mongar, died after complications in his facility. The EMS workers reportedly had to use bolt cutters to cut a padlock on an emergency exit in order to gain entrance to evacuate her; they could not fit a gurney through the narrow hallways. Gosnell's case is not an outlier.

Second, many other types of medical facilities must meet ambulatory surgical center standards. It should be noted that abortions are invasive procedures that require anesthesia, may require transfusions, and are subject to complications like the perforation of the uterus with sharp instruments or infection from an incomplete abortion. Even early abortions are serious procedures.

Third, an abortionist with hospital admitting privileges can seamlessly direct his patients to promptly receive hospital care in case of an emergency.

3. What was the Supreme Court's decision in *Whole Woman's Health v. Hellerstedt*?

On June 27, 2016, in a 5-3 decision, the Supreme Court struck down several provisions of the Texas abortion safety statute in *Whole Woman's Health v. Hellerstedt*. Justice Breyer wrote the majority opinion, and was joined by Justices Kagan, Ginsburg, Sotomayor, and Kennedy. Justice Thomas wrote one dissent. Justice Alito, joined by Chief Justice Roberts and Justice Thomas, wrote another dissent. *Whole Woman's Health* was the most important abortion case to come before the Supreme Court since *Gonzales v. Carhart* in 2007, a case which upheld the federal partial-birth abortion ban.

Sadly, once again, we saw the "abortion distortion" at work in our nation's high court. The majority opinion first bent the procedural rules in order to let the claims against the Texas law proceed, then it distorted its own abortion jurisprudence governing whether there was actually an undue burden to find one where one does not exist. The Court went out of its way to support a lower court's basis for striking down the law (and in doing so, tried to give courts authority to interfere and block state laws where they should not), when it should have

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June 2016
Issue Brief IF16F02

simply deferred to the legislature. The majority's opinion leaves the state of abortion law more muddled than ever. As the dissenting justices pointed out, there can be no doubt that our nation's high court simply does not apply the law fairly and neutrally when it comes to the issue of abortion. This can only serve to further discredit it as an institution.

4. On what basis was the law struck down?

The majority opinion held that the law imposed an "undue burden" on a woman's constitutional "right" to obtain an abortion. The justices found that neither the admitting-privileges nor surgical-center requirement "offers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a pre-viability abortion, each constitutes an undue burden on abortion access" and thus they violate the Constitution.

While the Court in *Planned Parenthood v. Casey* (1992) noted that a "particular burden is not of necessity a substantial obstacle," the Court here in practice has jettisoned that principle.

In a shocking statement by Justice Breyer, the majority also claimed that more regulation of abortion facilities will not necessarily stop wrongdoers like abortionist Kermit Gosnell. Gosnell was convicted in 2013 of first degree murder in the deaths of three infants and involuntary manslaughter in the death of a woman who had abortion complications, Karnamaya Mongar. The Court said:

Gosnell's behavior was terribly wrong. But there is no reason to believe that an extra layer of regulation would have affected that behavior. Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations.

Such an analysis has never been offered by the Court in any other area of regulation as the basis for striking down a state law or regulation.

5. How does this current decision differ from *Planned Parenthood v. Casey*?

As many problems as exist with the Court's current abortion jurisprudence, the majority does not even follow its own precedents here. As Justice Thomas notes in his dissent, the Court in *Whole Woman's Health* alters the undue burden test from *Casey* by (1) telling courts to balance burdens and benefits of the law instead of just assessing the burden, by (2) making their own medical assessments as opposed to deferring to the legislature (which is permitted to enact a law despite debate within the medical community), and by (3) scrutinizing laws for more than a reasonable relation to a legitimate state interest even when the law does not impose a substantial obstacle to obtaining an abortion.

Of course, in the face of this new ruling, states will often lose. *Whole Woman's Health* gives courts authority and power (through a vague and muddled standard) to find virtually any burden on abortion to be an "undue burden." On the other hand, *Casey* recognized that making it more difficult in some cases to obtain an abortion did not necessarily constitute an "undue burden," and upheld state restrictions on abortion (waiting periods, parental notification, etc.). Therefore, the Supreme Court's striking down these reasonable regulations has revealed that we effectively are back to a *Roe v. Wade*-like world of unfettered abortion access instead of permitting the types of limitations on abortion that *Casey* authorized. As of this point, the Court has allowed *only* partial-birth abortion to be fairly regulated – in *Gonzales v. Carhart*. Particularly shocking was the Court's current decision to eliminate the clinic safety provision.

The Court's analysis of the constitutionality of the clinic regulation provision makes clear that under *Casey* and *Whole Woman's Health* any district court judge can reject any aspect of a state's legislative determination as to what is or is not likely to advance patient safety. The justices doing this analysis have no medical training whatsoever. In short, no state can have any confidence that legislation regulating any feature of abortion

procedures will receive anything but the most-intense, quixotic second-guessing from what is likely to be an ideological, partisan finder of fact.¹ Yet lawyers and judges are not physicians, and are not equipped to make these judgments. Furthermore, courts are not established to conduct rational, detailed scientific inquiry.

6. Does *Whole Woman's Health* overturn the part of H.B. 2 banning abortion of pain-capable children after 20 weeks or any other pro-life laws?

No, the section of H.B. 2 which banned abortion on twenty-week-old pain-capable unborn children was not challenged in this litigation. Therefore, the Court's ruling did not affect that part of the law and will have no effect on other state laws banning pain-capable abortions. It will also have no effect on pro-life laws concerning matters on which the Court did not rule.

7. What are some highlights from the dissents?

Justice Thomas:

Justice Thomas criticized the majority for "perpetuat[ing] the Court's habit of applying different rules to different constitutional rights—especially the putative right to abortion."

Quoting Justice Scalia, he said this decision "exemplifies the Court's troubling tendency 'to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue.' *Stenberg v. Carhart*, 530 U. S. 914, 954 (2000) (Scalia, J., dissenting)." Thomas continued, "[u]ltimately, this case shows why the Court never should have bent the rules for favored rights in the first place. Our law is now so riddled with special exceptions for special rights that our decisions deliver neither predictability nor the promise of a judiciary bound by the rule of law."

Justice Alito, joined by Chief Justice Roberts and Justice Thomas:

Justice Alito first criticized the majority for bending procedural rules to even hear the case, something it would not have done if the case did not concern abortion: "When we decide cases on particularly controversial issues, we should take special care to apply settled procedural rules in a neutral manner. The Court has not done that here."

He also found no undue burden imposed by the law, and argued that facilities in Texas may have closed around the time of the law's enforcement for other reasons, such as: (1) H. B. 2's restriction on medication abortion, (2) the withdrawal of Texas family planning funds, (3) the nationwide decline in abortion demand, and (4) physician retirement (or other localized factors). He concluded that the Court's desire to distort the law in favor of abortion "rights" was once again in play.

8. Why should the Supreme Court have sided with women?

- Over the last six years, "more than 150 abortion providers in at least 30 states and the District of Columbia have faced criminal charges, investigations, administrative complaints, and/or civil lawsuits" related to substandard practices or substandard operation of these abortion facilities.²
- When abortion facilities are not held to the same standards as other facilities, women's lives are endangered. For example:
 - In 2011, around 24,000 women experienced abortion-related complications in the first trimester alone for surgical abortions, and about 2,900 women required post-abortion hospitalization.³
 - As Federal Judge Edith Jones noted in her opinion for the U.S. Court of Appeals for the Fifth Circuit on this case: "Planned Parenthood conceded that at least 210 women in Texas annually must be hospitalized after seeking an abortion."⁴
- States have a vested interest in protecting the health and safety of women and their children.
- Abortion facilities are not exempt from following basic health standards and those who claim to be "for women" should support such measures.

- It is necessary to regulate abortion facilities to protect women from cut-and-run abortionists at shoddy facilities, like abortionist Kermit Gosnell's facility.
- Mandating basic health and safety standards such as employing fully-trained staff, providing corridors that accommodate stretchers, and requiring abortionists to have hospital admitting privileges *is* for women's health.
- Hair and nail salons, public pools, restaurants, and tanning centers must meet basic health and safety standards. Shouldn't abortion facilities?

9. What are the effects of the Supreme Court's decision?

- *Whole Woman's Health* strikes down provisions of Texas' H.B. 2 law. Other courts will begin using the ruling to decide similar cases, although each case still stands on its own factual scenario.
- In essence, the Court said to states: We are lowering the standard of what constitutes an "undue burden" but we are not going to tell you precisely what that is. States are left to try to give it their best shot and hope their law is good enough. Lower courts have been given authority and power (through a vague and muddled standard) to find virtually *any* burden an "undue burden."
- 16 states have passed some version of hospital admitting privilege requirements for abortionists, and 25 states have enacted statutes requiring abortion facilities to meet surgical center standards.⁵
- This decision is a loss for women's health and safety and gives the abortion industry a free pass to operate with minimal health and safety standards.

10. How important is it to elect a president who will nominate pro-life justices?

Electing a president who will nominate pro-life justices to the Supreme Court is key. The next president will likely nominate two, if not three, Supreme Court justices. These justices will determine whether abortion law in America will become more permissive or limited.

11. Where do we go from here?

- The tide of abortion is turning in America, despite the Court's decision not to protect women:
 - There are nearly as many new pro-life laws enacted in the last five years (288 enacted from 2011–2015) as during the entire previous 15 years (292 enacted from 1995–2010).⁶
 - In the last five years, we have enacted more than one-quarter of all pro-life laws since *Roe v. Wade*.⁷
- We are also winning in the court of public opinion:⁸
 - Most Americans, 81%, agree there should be significant restrictions and safeguards associated with the procedure including limits to within the first three months of pregnancy, allowed only in cases of rape, incest, or to save the life of the mother, or never permitted.
 - Even 66% of pro-abortion supporters believe access should be available, at most, during the first three months of pregnancy, allowed only in cases of rape, incest, or to save the life of the mother, or never permitted.
 - Regardless of their own feelings about the legality of abortion, 60% of Americans believe abortion is morally wrong including one-third of those who identify as "pro-choice."
- We must turn our focus on other pro-life legislative priorities:
 - **The Pain-Capable Unborn Child Protection Act** (H.R. 36/S.1553) – To protect unborn pain-capable babies after 20 weeks.
 - **Defund Planned Parenthood Act of 2015** (H.R. 3134/S. 1881) – To defund Planned Parenthood and redirect funding to health care entities that do not provide abortion services.
 - **Born-Alive Survivors Protection Act** (H.R. 3504/S. 2066) – To prevent infanticide.
 - **Women's Public Health and Safety Act** (H.R. 3495/S. 2159) – Allows states to opt out of funding abortion entities.
 - **Conscience Protection Act** (H.R. 4828/S.2927) – Bars government discrimination for pro-life health care entities and providers.

- **Dismemberment Abortion Ban Act of 2015** (H.R. 3515) – Bars dismemberment (dilation and evacuation) abortions.

The pro-life movement is pro-woman and pro-child. We will continue our efforts to protect them both.

¹ One interesting aspect of the opinion needs to be noted. As the senior Associate Justice, it was Anthony Kennedy's call to assign the case. Instead of writing it himself, he farmed it out to Breyer, probably hoping that Breyer would take the heat on it and that his (Kennedy's) utter lack of principle in supporting this distortion of the "undue burden" test would go unnoticed. Recall that the "undue burden test" was announced by Justices O'Connor, Kennedy, and Souter in a plurality opinion in *Casey*, while *Whole Woman's Health* was a majority opinion maintaining its constitutionality.

² Americans United for Life, "Texas Again Could Change Law of the Land on Abortion, says AUL, as Health and Safety Standards Take Center Stage," press release, November 13, 2015, <http://www.aul.org/2015/11/texas-again-could-change-law-of-the-land-on-abortion-says-aul-as-health-and-safety-standards-take-center-stage/>.

³ Abortion providers cite that "2.5 percent of women who have a first-trimester surgical abortion undergo minor complications, while fewer than 0.3 percent experience a complication that requires hospitalization." See for example, at p. 9, *Planned Parenthood v. Abbott*, U.S. Court of Appeals (5th Cir. 2014), <http://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-51008-CV1.pdf>.

According to the Guttmacher Institute, 91% of the 1.06 million annual abortions occur in the first thirteen weeks. See "Induced Abortion in the United States," Guttmacher Institute, May 2016, accessed June 29, 2016, <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states>.

⁴ *Planned Parenthood v. Abbott*, U.S. Court of Appeals (5th Cir. 2014), <https://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-51008-CV1.pdf>.

⁵ "Targeted Regulation of Abortion Providers," Guttmacher Institute, March 4, 2016, https://www.guttmacher.org/sites/default/files/pdfs/spibs/spib_TRAP.pdf.

⁶ Elizabeth Nash, Rachel Benson Gold, Gwendolyn Rathbun and Zohra Ansari-Thomas, "Laws Affecting Reproductive Health and Rights: 2015 State Policy Review," Guttmacher Institute, accessed June 29, 2016, <https://www.guttmacher.org/laws-affecting-reproductive-health-and-rights-2015-state-policy-review>.

⁷ "More than one-quarter of the 1,074 state abortion restrictions since *Roe v. Wade* were enacted between 2011 and 2015," Guttmacher Institute, accessed June 29, 2016, <https://www.guttmacher.org/image/2016/more-one-quarter-1074-state-abortion-restrictions-roe-v-wade-were-enacted-between-2011>.

⁸ "Abortion in America – Report for 2016," Marist Poll – Marist College Institute for Public Opinion and Knights of Columbus, <http://www.kofc.org/un/en/resources/communications/abortion-america-january2016.pdf>.