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Abortion and *Whole Woman's Health v. Hellerstedt*

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July 26, 2016

Congressional Research Service
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R44205

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

In *Whole Woman's Health v. Hellerstedt*, the U.S. Supreme Court (Court) invalidated two Texas requirements that applied to abortion providers and physicians who perform abortions. Under a Texas law enacted in 2013, a physician who performs or induces an abortion was required to have admitting privileges at a hospital within 30 miles from the location where the abortion was performed or induced. In general, admitting privileges allow a physician to transfer a patient to a hospital if complications arise in the course of providing treatment. The Texas law also required an abortion facility to satisfy the same standards as an ambulatory surgical center (ASC). These standards address architectural and other structural matters, as well as operational concerns, such as staffing and medical records systems. Supporters of the Texas law maintained that the requirements would guarantee a higher level of care for women seeking abortions. Opponents, however, characterized the requirements as unnecessary and costly, and argued that they would make it more difficult for abortion facilities to operate.

In *Hellerstedt*, the Court concluded that the admitting privileges and ASC requirements placed a substantial obstacle in the path of women seeking an abortion, and imposed an undue burden on the ability to have an abortion. In applying the undue burden standard that is now used to evaluate abortion regulations, the Court explained that a reviewing court must consider the burdens a law imposes on abortion access together with the benefits that are conferred by the law. The Court also indicated that courts should place considerable weight on the evidence and arguments presented in judicial proceedings when they consider the constitutionality of abortion regulations.

Hellerstedt has been recognized both for its impact in Texas and for its perceived refinement of the undue burden standard. Because at least 25 states are believed to have either an admitting privileges or ASC requirement, *Hellerstedt* is expected to have an impact in other jurisdictions. This report examines *Hellerstedt* and discusses how the decision might affect the application of the undue burden standard in future abortion cases.

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In 2013, the Texas legislature passed House Bill 2 (H.B. 2), a measure that prescribed new requirements for abortion facilities and physicians who perform or induce abortions in Texas.[1] Supporters of the bill maintained that these requirements would guarantee a higher level of care for women seeking abortions.[2] Opponents, however, characterized the requirements as unnecessary and costly, and argued that they would make it more difficult for abortion facilities to operate.[3]

Since its enactment, critics of H.B. 2 focused on two of the measure's requirements, in particular. First, H.B. 2 required a physician who performs or induces an abortion to have admitting privileges at a hospital within 30 miles from the location where the abortion was performed or induced. In general, admitting privileges allow a physician to transfer a patient to a hospital if complications arise in the course of providing treatment. Second, H.B. 2 required an abortion facility to satisfy the same standards as an ambulatory surgical center (ASC). These standards address architectural and other structural matters, as well as operational concerns, such as staffing and medical records systems.

In June 2016, the U.S. Supreme Court (Court) invalidated both requirements, finding that "[e]ach places a substantial obstacle in the path of women seeking a previability abortion ... [and] constitutes an undue burden on abortion access[.]"[4] In *Whole Woman's Health v. Hellerstedt*, the Court reversed a decision by the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) that upheld the requirements on both constitutional and procedural grounds.[5] In *Hellerstedt*, the Court rejected the Fifth Circuit's analysis, stating that neither requirement "offers medical benefits sufficient to justify the burdens upon access that each imposes."[6]

Hellerstedt has been recognized both for its impact in Texas and for its perceived refinement of the undue burden standard that is used to evaluate the constitutionality of abortion regulations.[7] Because at least 25 states are believed to have either an admitting privileges or ASC requirement, *Hellerstedt* is also expected to have an impact in other jurisdictions.[8] This report examines *Hellerstedt*, as well as *Whole Woman's Health v. Cole*, the Fifth Circuit's June 2015 decision. The report also discusses the undue burden standard and explores how *Hellerstedt* could change how the standard is applied in future cases.

The Undue Burden Standard and *Planned Parenthood of Southeastern Pennsylvania v. Casey*

The undue burden standard that is now used to evaluate abortion regulations was formally adopted by the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a 1992

[1] Act of July 12, 2013, 83rd Leg., 2nd C.S., ch. 1, §§1-12, 2013 Tex. Sess. Law Serv. 4795-4802.

[2] *See* House Research Org., Tex. House of Representatives, Bill Analysis: H.B. 2, at 8 (2013).

[3] *Id.* at 11.

[4] Whole Woman's Health v. Hellerstedt, No. 15-274, slip op. at 2 (U.S. June 27, 2016).

[5] Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015).

[6] *Hellerstedt*, slip op. at 2.

[7] *See, e.g.*, Mary Ziegler, *Where the Pro-Life Movement Goes Next*, N.Y. Times (July 2, 2016), http://www.nytimes.com/2016/07/03/opinion/sunday/where-the-pro-life-movement-goes-next.html.

[8] *See* Amber Phillips, *Three States' Abortion Laws Just Fell Thanks to the Supreme Court. These States Could Be Next* (June 28, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/06/27/how-many-states-could-see-their-abortion-restrictions-struck-down-after-the-supreme-courts-big-ruling/.

decision involving five provisions of the Pennsylvania Abortion Control Act.[9] In a joint opinion, the Court reaffirmed the basic constitutional right to an abortion, while simultaneously allowing new restrictions to be placed on the availability of the procedure. The Court declined to overrule *Roe v. Wade*, its 1973 decision that first recognized the right to terminate a pregnancy, explaining the importance of following precedent: "The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed."[10]

At the same time, however, the Court refined its holding in *Roe* by abandoning the trimester framework articulated in the 1973 decision, and rejecting the strict scrutiny standard of judicial review it had previously espoused.[11] In *Casey*, the Court adopted a new undue burden standard that attempts to reconcile the government's interest in potential life with a woman's right to terminate her pregnancy. The Court observed:

> The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.[12]

According to the Court, an undue burden exists if the purpose or effect of an abortion regulation is "to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[13] The Court further indicated that unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion would impose an undue burden.[14]

Evaluating the Pennsylvania law under the undue burden standard, the Court concluded that four of the five provisions at issue did not impose an undue burden. The Court upheld the law's 24-hour waiting period requirement, its informed consent provision, its parental consent provision, and its recordkeeping and reporting requirements.[15] The Court invalidated the law's spousal notification provision, which required a married woman to tell her husband of her intention to have an abortion.[16] Acknowledging the possibility of spousal abuse if the provision were upheld, the Court maintained: "The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle."[17]

The Court's decision in *Casey* was particularly significant because it appeared that the new undue burden standard would allow a greater number of abortion regulations to pass constitutional muster. Prior to *Casey*, the application of *Roe*'s strict scrutiny standard of review resulted in most state abortion regulations being invalidated during the first two trimesters of pregnancy. For example, applying strict scrutiny, the Court invalidated 24-hour waiting period requirements and

[9] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[10] *Id.* at 856.

[11] For additional information on *Roe v. Wade*, 410 U.S. 113 (1973), *see* CRS Report 95-724, *Abortion Law Development: A Brief Overview*, by (name redacted) .

[12] *Casey*, 505 U.S. at 876.

[13] *Id.* at 878.

[14] *Id.*

[15] *Id.* at 881-901.

[16] *Id.* at 898.

[17] *Id.* at 893-94.

informed consent provisions in two cases: *Akron v. Akron Center for Reproductive Health, Inc.* and *Thornburgh v. American College of Obstetricians and Gynecologists*.[18]

Casey also recognized that the state's interest in protecting the potentiality of human life extended throughout the course of a woman's pregnancy.[19] Thus, the state could regulate from the outset of a woman's pregnancy, even to the point of favoring childbirth over abortion. Under the trimester framework articulated in *Roe*, a woman's decision to terminate her pregnancy in the first trimester could not be regulated generally by the state.

Following *Casey*, the Court applied the undue burden standard in just three cases prior to *Hellerstedt*. In *Mazurek v. Armstrong*, the Court reversed a decision by the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) involving a Montana law that restricted the performance of abortions to licensed physicians.[20] The Ninth Circuit vacated a district court's judgment that denied a motion for a preliminary injunction based on the lower court's conclusion that a group of physicians and a physician assistant had not established a likelihood of prevailing on their claim that the law imposed an undue burden.[21] The Supreme Court concluded that there was no evidence that the law had an improper purpose or that it would place a substantial obstacle in the path of a woman seeking an abortion.[22] Although the Court did not specifically address the law's effect, it did note that it would have an impact on only a single practitioner.[23]

Stenberg v. Carhart and *Gonzales v. Carhart* both involved the so-called "partial-birth" abortion procedure.[24] In *Stenberg*, the Court invalidated a Nebraska law that restricted the procedure, in part, because it imposed an undue burden on a woman's ability to terminate a pregnancy.[25] Finding that the statute's plain language prohibited the performance of both the "partial-birth" abortion procedure and another more commonly used abortion procedure, the Court maintained that the law imposed an undue burden because abortion providers would fear prosecution, conviction, and imprisonment if they acted.[26]

In *Gonzales*, the Court considered the validity of the federal Partial-Birth Abortion Ban Act of 2003.[27] The Court distinguished the federal law from the Nebraska statute at issue in *Stenberg*, noting the inclusion of "anatomical landmarks" that identify when an abortion procedure will be subject to the law's prohibitions.[28] Because the plain language of the law did not restrict the availability of alternate abortion procedures, the Court concluded that it was not overbroad and did not impose an undue burden on a woman's ability to terminate her pregnancy.[29]

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[18] *See* Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

[19] *Casey*, 505 U.S. at 872-73.

[20] Mazurek v. Armstrong, 520 U.S. 968 (1997).

[21] Armstrong v. Mazurek, 94 F.3d 566, 568 (9th Cir. 1996).

[22] *Mazurek*, 520 U.S. at 972-74.

[23] *Id.*

[24] Stenberg v. Carhart, 530 U.S. 914 (2000); Gonzales v. Carhart, 550 U.S. 124 (2007). For additional information on "partial-birth" abortion, *see* CRS Report RL30415, *Partial-Birth Abortion: Recent Developments in the Law*, by (name r edacted) .

[25] *Stenberg*, 530 U.S. at 922.

[26] *Id.* at 945.

[27] *Gonzales*, 550 U.S. at 132.

[28] *Id.* at 148.

[29] *Id.* at 168.

Admitting Privileges Requirement

At least 15 states have adopted laws or regulations that require physicians who perform abortions to have admitting privileges at a nearby hospital.[30] Texas's requirement provided that a physician "performing or inducing an abortion ... must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that: (A) is located not further than 30 miles from the location at which the abortion is performed or induced; and (B) provides obstetrical or gynecological health care services."[31] A physician who violated the requirement could be subject to a fine of up to $4,000.[32] The Texas legislature indicated that the requirement raised the standard and quality of care for women seeking abortions, and protected their health and welfare.[33] Opponents maintained, however, that the requirement would likely result in the closure of numerous abortion facilities as physicians faced difficulty obtaining admitting privileges.[34]

In 2013, Planned Parenthood and a group of abortion providers and physicians, including Whole Woman's Health, challenged the constitutionality of the admitting privileges requirement and a separate requirement involving the administration of abortion-inducing drugs.[35] In *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, the Fifth Circuit concluded that the admitting privileges requirement was facially constitutional.[36] The Fifth Circuit found that the requirement did not impose an undue burden despite the possibility of facility closures and increased travel distances to obtain an abortion. With regard to travel, the court maintained: "*Casey* counsels against striking down a statute solely because women may have to travel long distances to obtain abortions."[37]

Whole Woman's Health subsequently challenged the admitting privileges requirement as applied to two specific clinics in El Paso and McAllen, Texas. In *Whole Woman's Health v. Lakey*, a federal district court concluded that the requirement was unconstitutional as applied to both clinics and, when considered together with the ASC requirement, was unconstitutional "as applied to all women seeking a previability abortion."[38]

On appeal, the Fifth Circuit considered both facial and as-applied challenges to both requirements. In *Whole Woman's Health v. Cole*, the appeals court found that the provider's facial challenge to the admitting privileges requirement failed on procedural grounds.[39] The court maintained that the provider's facial claim violated the principle of res judicata, and should have

[30] *See* Ala. Code §26-23E-4; Ariz. Rev. Stat. §36-449.03; Ark. Code Ann. §20-16-1504; Fla. Stat. §390.012; Ind. Code §16-34-2-4.5; Kan. Stat. Ann. §65-4a09; La. Stat. Ann. §40:1299.35.2; Miss. Code Ann. §41-75-1; Mo. Rev. Stat. §188.080; N.D. Cent. Code §14-02.1-04; Okla. Stat. tit. 63, §1-748; Tenn. Code Ann. §39-15-202; Tex. Health & Safety Code Ann. §171.0031; Utah Admin. Code r. 432-600-13; Wis. Stat. §253.095.

[31] Tex. Health & Safety Code Ann. §171.0031(a)(1).

[32] Tex. Health & Safety Code Ann. §171.0031(b).

[33] *See* Whole Woman's Health v. Cole, 790 F.3d 563, 576 (5th Cir. 2015).

[34] *See id*. at 579 ("[T]he Plaintiffs offered testimony that abortion physicians were being denied admitting privileges, not because of their level of competence, but for various other reasons, including: outright denial of admitting privileges with no explanation other than that it 'was not based on clinical competence,' and having not completed a medical residency even though the bylaws of the hospital did not require such.")

[35] *See* Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 951 F.Supp.2d 891 (W.D. Tex. 2013).

[36] Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 748 F.3d 583, 587 (5th Cir. 2014).

[37] *Id*. at 598.

[38] Whole Woman's Health v. Lakey, 46 F.Supp.3d 673, 677 (W.D. Tex. 2014).

[39] Dr. Kirk Cole became Interim Commissioner of the Texas Department of State Health Services in February 2015 following the resignation of David Lakey. Dr. Cole became the named respondent in the case.

been precluded by its decision in *Abbott*.[40] The court noted: "By granting a broad injunction against the admitting privileges requirement ... the district court resurrected the facial challenge put to rest in *Abbott* ..."[41]

Although the Fifth Circuit rejected the facial challenge to the admitting privileges requirement, it upheld an injunction of the requirement as applied to the abortion facility in McAllen, when it utilized a specific physician.[42] This physician was unsuccessful at obtaining admitting privileges at local hospitals for reasons other than his competence.[43]

At the same time, however, the Fifth Circuit reversed an injunction of the requirement as applied to the abortion facility in El Paso. Citing a nearby abortion facility in Santa Teresa, New Mexico, and the fact that people travel regularly between the two cities for medical care, the court maintained that the admitting privileges requirement did not impose an undue burden.[44] The Fifth Circuit distinguished the Texas admitting privileges requirement from a similar Mississippi requirement that it invalidated in *Jackson Women's Health Organization v. Currier*, a 2014 decision.[45] The Fifth Circuit explained that invalidating the Mississippi requirement would have led to the closure of the last abortion facility in the state.[46] An invalidation of the Texas requirement would not have the same effect.

Ambulatory Surgical Center Requirement

State laws that require abortion providers to satisfy the same standards as ASCs have become increasingly more common.[47] Texas regulations define an ASC as a facility "that primarily provides surgical services to patients who do not require overnight hospitalization or extensive recovery, convalescent time or observation."[48] Under Texas law, ASCs are required to satisfy a variety of operating, fire prevention and safety, and construction standards.[49]

In *Cole*, the Fifth Circuit concluded that the plaintiffs' claim involving the ASC requirement failed on both procedural grounds and on the merits. The court found that the claim was precluded by its decision in *Abbott*.[50] Although the plaintiffs did not challenge the requirement in

[40] *See* Whole Woman's Health v. Cole, 790 F.3d 563, 581 (5th Cir. 2015) ("Res judicata bars any claims for which: (1) the parties are identical to or in privity with the parties in a previous lawsuit; (2) the previous lawsuit has concluded with a final judgment on the merits; (3) the final judgment was rendered by a court of competent jurisdiction; and (4) the same claim or cause of action was involved in both lawsuits.").

[41] *Id.*

[42] *Id.* at 596.

[43] *Id.*

[44] *Id.* at 697-98.

[45] Jackson Women's Health Organization v. Currier, 760 F.3d 448 (5th Cir. 2014).

[46] *Cole*, 790 F.3d at 596-97.

[47] *See, e.g.*, Mich. Comp. Laws §333.20115(2) ("The department shall promulgate rules to differentiate a freestanding surgical outpatient facility from a private office of a physician, dentist, podiatrist, or other health professional. The department shall specify in the rules that a facility including, but not limited to, a private practice office described in this subsection must be licensed under this article as a freestanding surgical outpatient facility if that facility performs 120 or more surgical abortions per year and publicly advertises outpatient abortion services."); 35 Pa. Cons. Stat. §448.806(h)(1) ("The department shall apply the same regulations promulgated under subsection (f) to abortion facilities that are applied to ambulatory surgical facilities. These regulations include classification of the facilities in the same manner as ambulatory surgical facilities.").

[48] 25 Tex. Admin. Code §135.2(5).

[49] *See* 25 Tex. Admin. Code §§135.1 *et seq*.

[50] *Cole*, 790 F.3d at 581-83.

Abbott because implementing regulations had not yet gone into effect, the Fifth Circuit maintained that because *Abbott* involved the same parties and legal standards, the requirement should have been challenged in that case.[51]

The Fifth Circuit determined that a facial challenge to the ASC requirement would also fail on the merits because the requirement did not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion. The court maintained that the plaintiffs failed to show that the ASC requirement was adopted for an improper purpose.[52] Although the lower court found an improper purpose based on what it concluded was a lack of credible evidence to support the proposition that abortions performed in ASCs lead to better health outcomes, the Fifth Circuit observed: "All of the evidence referred to by the district court is purely anecdotal and does little to impugn the State's legitimate reasons for the Act."[53]

In addition, the Fifth Circuit found that the ASC requirement did not have the effect of placing a substantial obstacle in the path of a woman seeking an abortion. In *Casey*, the Court indicated that if a law would be invalid in a large fraction of the cases in which it is relevant, it should be found to have an improper effect.[54] Notably, the Court considered the effect of Pennsylvania's spousal notification requirement only on married women who did not want to notify their husbands of their plans to have an abortion, rather than its effect on all women or all pregnant women in the state.[55] In that equation, the Court concluded that the spousal notification requirement would have an effect in a large fraction of the relevant cases.

In *Cole*, however, the Fifth Circuit found that the ASC requirement would not have a similar effect. After considering the number of women of reproductive age in Texas and the number of women of reproductive age who would have to travel more than 150 miles to have an abortion because of the implementation of both the admitting privileges and ASC requirements, the court determined that only 16.7% of women of reproductive age would have to travel more than 150 miles to have an abortion.[56] The Fifth Circuit reasoned that 16.7% did not constitute a large fraction of the relevant cases, and thus, the effect of the ASC requirement was not improper.[57]

Although the Fifth Circuit rejected a facial challenge to the ASC requirement, it affirmed an injunction of the requirement as applied to the abortion facility in McAllen, with some modifications.[58] The court acknowledged that the McAllen facility is the sole abortion provider in the Rio Grande Valley and discussed the 235-mile distance some women in the Rio Grande Valley would have to travel to obtain an abortion.[59] In light of this distance, the court indicated that the state would be enjoined from enforcing the requirement until another facility opened at a location that was closer than those located in San Antonio. Acknowledging its discussion of *Casey* and travel distances in *Abbott*, the Fifth Circuit observed: "[I]n the specific context of this as-applied challenge as to the McAllen facility, the 235-mile distance presented, combined with the district

[51] *Id.*

[52] *Id.* at 585-86.

[53] *Id.* at 586.

[54] *Casey*, 505 U.S. at 895.

[55] *Id.*

[56] *See Cole*, 790 F.3d at 588.

[57] *Id.* at 588-90.

[58] *Id.* at 595. In light of the plaintiffs' admissions that some of the ASC requirements were comparable to standards already applicable to abortion facilities, the Fifth Circuit modified the district court's injunction to enjoin only the enforcement of the ASC physical plant and fire prevention standards.

[59] *Id.* at 593-94.

court's findings, are sufficient to show that [the requirement] has the 'effect of placing a substantial obstacle in the path of a woman seeking an abortion.'"[60]

The Fifth Circuit declined, however, to affirm the lower court's judgment involving the ASC requirement as applied to the El Paso facility. Because abortion services are available at the facility in Saint Teresa, New Mexico, and there was evidence that many women traveled to that facility before enactment of H.B. 2, the court concluded that the ASC requirement did not place a substantial obstacle in the path of women seeking an abortion in the El Paso area.[61]

Whole Woman's Health v. Hellerstedt

In its petition for review of the Fifth Circuit's decision, Whole Woman's Health asked the Court to consider the extent to which the Texas requirements actually supported women's health.[62] Whole Woman's Health maintained that the Fifth Circuit's refusal to consider the promotion of women's health conflicted with the approaches taken by other federal courts of appeals.[63]

Whole Woman's Health also challenged the Fifth Circuit's conclusion that res judicata barred it from considering newly developed facts that could have an impact on the provider's facial challenges to the requirements. Whole Woman's Health argued that when a claim rests on facts developed after a judgment is entered in a prior case, the claim is not barred by that judgment, and a court may award any remedy that is otherwise appropriate.[64]

In a 5-3 decision, the Court rejected both the procedural and constitutional grounds for the Fifth Circuit's decision in *Cole*.[65] Writing for the majority in *Hellerstedt*, Justice Breyer found that res judicata did not bar facial challenges to either the admitting privileges requirement or the ACS requirement.[66] Justice Breyer also concluded that the requirements provide "few, if any, health benefits for women, pose[] a substantial obstacle to women seeking abortions, and constitute[] an 'undue burden' on their constitutional right to do so."[67] Justice Breyer noted that the undue burden standard requires courts to consider "the burdens a law imposes on abortion access together with the benefits those laws confer."[68] Moreover, Justice Breyer maintained that courts should place considerable weight on the evidence and arguments presented in judicial proceedings when they consider the constitutionality of abortion regulations.[69]

In addressing the admitting privileges requirement and res judicata, the Court distinguished the pre-enforcement challenge in *Abbott* with the post-enforcement challenge at issue. Citing the Restatement (Second) of Judgments, the Court noted that the development of new material facts,

[60] *Id.* at 594.

[61] *Id.* at 598.

[62] Petition for Writ of Certiorari at 2, Whole Woman's Health v. Cole (U.S. filed September 2, 2015) (No. 15-274), *available at* http://www.scotusblog.com/wp-content/uploads/2015/09/2015-09-02-Cert-Petition.pdf. Dr. John Hellerstedt replaced Kirk Cole as the Commissioner of the Texas Department of State Health Services in January 2016, and became the named respondent in the case.

[63] Petition for Writ of Certiorari, *supra* note 62 at 15-16 (citing, e.g., Planned Parenthood Arizona, Inc. v. Humble, 753 F.3d 905 (9th Cir. 2014)).

[64] *Id.* at 28.

[65] Whole Woman's Health v. Hellerstedt, No. 15-274, slip op. at 2 (U.S. June 27, 2016).

[66] *Id.* at 18.

[67] *Id.* at 36.

[68] *Id.* at 19-20.

[69] *Id.* at 20.

such as the large number of clinics that closed after H.B. 2 began to be enforced, could mean that a new case and a prior similar case do not present the same claim.[70] The Court observed: "When individuals claim that a particular statute will produce serious constitutionally relevant adverse consequences before they have occurred—and when the courts doubt their likely occurrence—the factual difference that those adverse consequences have in fact occurred can make all the difference."[71]

In addition, the Court found that res judicata did not preclude a facial challenge to the ASC requirement. The Court emphasized that the ASC and admitting privileges requirements were separate and distinct, and that the Fifth Circuit failed to account for their differences when it concluded that the challenge to the ASC requirement was precluded by *Cole*: "This Court has never suggested that challenges to different statutory provisions that serve two different functions must be brought in a single suit."[72] The Court also indicated that the decision not to bring a facial challenge to the ASC requirement in *Abbott* was reasonable in light of the absence of regulations to implement the ASC requirement and the possibility that some abortion facilities might receive a waiver from the requirement.[73]

In its application of the undue burden standard to the admitting privileges and ASC requirements, the *Hellerstedt* Court referred heavily to the evidence collected by the district court. With regard to the admitting privileges requirement, the Court cited the low complication rates for first and second trimester abortions, and expert testimony that complications during the abortion procedure rarely require hospital admission.[74] Based on this and similar evidence, the Court disputed the state's assertion that the purpose of the admitting privileges requirement was to ensure easy access to a hospital should complications arise. The Court emphasized that "there was no significant health-related problem that the new law helped to cure."[75] Citing other evidence concerning the closure of abortion facilities as a result of the admitting privileges requirement and the increased driving distances experienced by women of reproductive age because of the closures, the Court maintained: "[T]he record evidence indicates that the admitting-privileges requirement places a 'substantial obstacle in the path of a woman's choice.'"[76]

The Court again referred to the record evidence to conclude that the ASC requirement imposed an undue burden on the availability of abortion. Noting that the record supports the conclusion that the ASC requirement "does not benefit patients and is not necessary," the Court also cited the closure of facilities and the cost to comply with the requirement as evidence that the requirement poses a substantial obstacle for women seeking abortions.[77] While Texas argued that the clinics remaining after implementation of the ASC requirement could expand to accommodate all of the women seeking an abortion, the Court indicated that "requiring seven or eight clinics to serve five times their usual number of patients does indeed represent an undue burden on abortion access."[78]

[70] *Id*. at 11.

[71] *Id*. at 14.

[72] *Id*. at 16.

[73] *Id*. at 17.

[74] *Id*. at 22-23.

[75] *Id*. at 22.

[76] *Id*. at 24 (quoting *Casey*, 505 U.S. at 877).

[77] *Id*. at 29-30.

[78] *Id*. at 35.

The majority's focus on the record evidence, and a court's consideration of that evidence in balancing the burdens imposed by an abortion regulation against its benefits, is noteworthy for providing clarification of the undue burden standard. Although the *Casey* Court did examine the evidence collected by the district court regarding Pennsylvania's spousal notification requirement, and was persuaded by it, the Fifth Circuit discounted similar evidence collected by the lower court in *Abbott* and *Lakey*.[79] In *Hellerstedt*, the Court maintained that the Fifth Circuit's approach did "not match the standard that this Court laid out in *Casey* ..."[80]

In a dissenting opinion joined by Chief Justice Roberts and Justice Thomas, Justice Alito maintained that the petitioners' claims should have been barred by res judicata. With regard to the ACS requirement, in particular, Justice Alito contended that the claim should have been brought in *Abbott* because it imposed the same kind of burden on the availability of abortion.[81] Justice Alito also criticized the absence of "precise findings" to support the argument that the admitting privileges and ASC requirements caused the closure of abortion facilities.[82] If such facilities closed for reasons other than the requirements, he contended, "the corresponding burden on abortion access may not be factored into the access analysis."[83]

Whether *Hellerstedt* should be interpreted to guarantee the invalidation of all of the other state admitting privileges and ASC requirements is not certain. The Court's emphasis on balancing the burdens imposed by an abortion regulation with its benefits, and its reliance on the record evidence, seems to suggest that each regulation would have to be examined on its own terms. Nevertheless, because of the similarities between the Texas requirements and the other admitting privileges and ASC requirements, it seems possible that other courts will also conclude that these requirements do not provide an appreciable benefit to women.[84]

The impact of *Hellerstedt* will likely become clearer as courts apply the decision to other cases. Notably, following the issuance of its decision in *Hellerstedt*, the Court declined to review two other cases involving state admitting privileges requirements. In *Jackson Women's Health Organization v. Currier* and *Planned Parenthood of Wisconsin v. Schimel*, the Fifth Circuit and the U.S. Court of Appeals for the Seventh Circuit determined that admitting privileges requirements in Mississippi and Wisconsin imposed an undue burden on the availability of abortion.[85] In addition, in light of *Hellerstedt*, the Attorney General of Alabama indicated that he

[79] *See* Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 748 F.3d 583, 598 (2014) (stating that the district court's finding that "there will be abortion clinics that will close" was too vague); Whole Woman's Health v. Cole, 790 F.3d 563, 590 (5th Cir. 2015) (finding the district court's determination that the ASCs that perform abortions could not accommodate patients affected by the closure of non-ASC facilities was "unsupported by evidence" and "clearly erroneous").

[80] *Hellerstedt*, slip op. at 20.

[81] *Id*. at 22 (Alito, J., dissenting).

[82] *Id*. at 30.

[83] *Id*.

[84] *See id*. at 23 (majority opinion) ("We have found nothing in Texas' record evidence that shows that, compared to prior law (which required a 'working arrangement' with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health."); *id*. at 29 ("There is considerable evidence in the record supporting the District Court's findings indicating that the statutory provision requiring all abortion facilities to meet all surgical center standards does not benefit patients and is not necessary.").

[85] Planned Parenthood of Wisconsin v. Schimel, 806 F.3d 908 (7th Cir. 2015), *cert. denied*, 84 U.S.L.W. 3548 (U.S. June 28, 2016) (No. 15-1200); Jackson Women's Health Organization v. Currier, 760 F.3d 448 (5th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3705 (U.S. June 28, 2016) (No. 14-997).

would dismiss his appeal of *Planned Parenthood Southeast v. Strange*,[86] a 2014 decision that concluded that the state's admitting privileges requirement imposed an undue burden.[87]

Hellerstedt appears to have prompted groups that oppose abortion to explore other legislative options that would restrict the procedure by promoting the health of the fetus rather than the health of the woman.[88] For example, legislation that would prohibit the performance of an abortion once a fetus has reached a gestational age of 20 weeks, a point in development when some contend that the fetus can experience pain, has been considered by state legislatures[89] and the U.S. Congress.[90] It should be noted, however, that fetal pain laws in Idaho, Arizona, and Utah have already been invalidated by the Ninth Circuit and the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit).[91] In 2014, the Court declined to review the Ninth Circuit's decision in *Isaacson v. Horne*, a 2013 case that invalidated Arizona's fetal pain law.

Even if the Court were to review a case involving a fetal pain law, it seems possible that it could apply the undue burden standard in a manner that deviates from its analysis in *Hellerstedt*. Unlike the admitting privileges and ASC requirements, which seek to promote women's health, the fetal pain laws were enacted to protect fetuses.[92] Whether the Court would balance the burdens and benefits of a fetal pain law like it did in *Hellerstedt* is not entirely certain. Notably, the Ninth and Tenth Circuits focused on the Court's discussion of viability in *Roe* and *Casey* when they examined the Idaho, Arizona, and Utah fetal pain laws.[93] In *Casey*, the Court emphasized that a state may not unduly interfere with a woman's right to terminate a pregnancy prior to viability: "Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."[94] Because the state fetal pain laws banned most abortions after a specified gestational age, regardless of whether a fetus had attained viability, the Ninth and Tenth Circuits concluded that the laws were unconstitutional.[95] Like the appellate courts, the Supreme Court may focus on viability, rather than a balancing of burdens and benefits, in an examination of a fetal pain law.

[86] 33 F.Supp.3d 1330 (M.D. Ala. 2014).

[87] News Advisory, Office of the Attorney General, State of Alabama, Attorney General Strange Comment on Impact of U.S. Supreme Court Abortion Decision on Alabama (June 27, 2016), *available at* http://www.ago.state.al.us/news/863.pdf.

[88] *See* Erik Eckholm, *Anti-Abortion Group Presses Ahead Despite Recent Supreme Court Ruling*, N.Y. Times, July 10, 2016, at A-10.

[89] *See, e.g.*, Ala. Code §§26-23B-1 *et seq*.; Idaho Code §§18-501 *et seq*.

[90] H.R. 36, 114th Cong. (2015).

[91] McCormack v. Herzog, 788 F.3d 1017 (9th Cir. 2015); Isaacson v. Horne, 716 F.3d 1213 (9th Cir. 2013), *cert. denied*, 82 U.S.L.W. 3193 (U.S. January 13, 2014) (No. 13-402); Jane L v. Bangerter, 102 F.3d 1112 (10th Cir. 1996).

[92] For additional discussion of state fetal pain laws, see CRS Legal Sidebar WSLG1293, *Ninth Circuit Invalidates Another State Fetal Pain Law*, by (name redacted) .

[93] The term "viability" refers to the stage in a fetus's development when the fetus is "potentially able to live outside the mother's womb" with or without artificial assistance. *Roe*, 410 U.S. at 160.

[94] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

[95] *Herzog*, 788 F.3d at 1029; *Horne*, 716 F.3d at 1217; *Bangerter*, 102 F.3d at 1117.

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