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Legal Sidebar

Court Revisits Abortion and Hospital Admitting-Privileges Requirement

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On March 4, 2020, the Supreme Court is to hear oral arguments in *June Medical Services LLC v. Russo*, a case involving a Louisiana law requiring physicians who perform abortions to have admitting privileges at a hospital within thirty miles of the location where the procedure is performed. Under the law, abortion facilities that employ or contract with physicians who do not have such privileges are subject to having their licenses revoked by the state Department of Health and Hospitals. In September 2018, the U.S. Court of Appeals for the Fifth Circuit upheld the law, distinguishing a 2016 Supreme Court decision—*Whole Woman's Health v. Hellerstedt*–that had invalidated a nearly identical Texas law on the grounds that it unconstitutionally imposed an undue burden on a woman's ability to obtain an abortion. In so doing, the Fifth Circuit emphasized that admitting privileges are easier to obtain in Louisiana and that only one of the state's six physicians who perform abortions might be unable to obtain admitting privileges. The appellate court reasoned that if the remaining physicians obtained admitting privileges, existing facilities would remain open and Louisiana residents would not suffer the same kinds of burdens the Court identified in *Whole Woman's Health*, such as fewer abortion clinics and longer wait times at remaining facilities.

This Sidebar provides an overview of *June Medical Services*, beginning with a discussion of the undue burden standard used by courts to evaluate the constitutionality of abortion regulations. The Sidebar then reviews the arguments made by both parties concerning not only the merits of the dispute, but whether abortion providers can have third-party standing to challenge abortion regulations on behalf of their patients. The Sidebar concludes with some considerations of the potential implications of the Court's latest abortion case.

Abortion and the Undue Burden Standard

Courts reviewing the constitutionality of abortion regulations apply a standard that was adopted by a plurality of the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a 1992 decision involving several Pennsylvania abortion restrictions. In *Casey*, a plurality of the Court concluded that an abortion regulation violates the substantive component of the Fourteenth Amendment's Due Process Clause if it imposes an undue burden on a woman's ability to obtain the procedure. The plurality

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indicated that an undue burden exists if the purpose or effect on an abortion regulation is to "place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."

In *Whole Woman's Health*, the Court further explained that the undue burden standard requires a reviewing court to consider the burdens an abortion regulation imposes on abortion access together with the health benefits conferred by the regulation for women seeking the procedure. Ultimately, the Court concluded in *Whole Woman's Health* that Texas's admitting-privileges requirement imposed an undue burden, noting the burdens created by the requirement and the absence of any health benefit. Citing expert testimony collected by the district court concerning low complication rates for first- and second-trimester abortions and little need for hospital admission, the Court maintained that the requirement did not cure a significant health-related problem and did not provide any health benefit. At the same time, however, the Court emphasized evidence showing that the requirement prompted the closure of abortion facilities and resulted in longer wait times for the procedure and increased driving distances for women seeking an abortion. Notably, in evaluating the requirement's burdens and benefits, the Court emphasized that deference was owed to the record as evaluated by the district court and not the findings of the Texas legislature.

June Medical Services v. Russo

As a threshold issue separate from the merits of the challenge to the abortion law, the *June Medical Services* Court is set to also hear arguments on whether abortion providers have standing to challenge abortion regulations on behalf of their patients. Typically, under Article III of the Constitution, plaintiffs in federal court must assert their own rights and not those of third parties. However, the Court has recognized third-party standing when the real party in interest cannot assert her own rights and a third party has a close relationship with her. In *June Medical Services*, the Interim Secretary of the Louisiana Department of Health argues that the presumption that abortion providers have third-party standing to challenge health and safety regulations on behalf of their patients does not apply unless the providers have a close relationship with their patients and the patients' ability to challenge the regulations is limited. Here, the Interim Secretary contends that June Medical Services, an abortion clinic, and the two Louisiana physicians challenging the Louisiana law do not have a close relationship with patients because their interactions are limited and transitory. The Interim Secretary also argues that the parties' opposition to a health regulation intended to protect patients evidences not only the absence of a close relationship, but a conflict of interest. In response, June Medical Services and the physicians contend that the Court has long recognized that abortion providers that would be affected by the enforcement of abortion regulations are appropriate parties to challenge such regulations.

On the merits of the Louisiana law, the petitioners maintain that the law confers no health or safety benefits to women seeking abortions. Citing the findings of the district court, which declared the law unconstitutional, the petitioners also contend that the law would burden abortion access for women by leaving just one physician to perform early-stage abortions at a single clinic in the state. The petitioners argue that the Fifth Circuit not only discounted the burdens imposed by the law, but that the appellate court did not balance these burdens against the lack of benefits conferred by the law, as the petitioners view *Whole Woman's Health* to require. Moreover, according to the petitioners, the Fifth Circuit should have deferred to the district court's findings and not adopted its own interpretation of the law's benefits and burdens.

The Interim Secretary makes several arguments in response to those made by the petitioners. He contends that the petitioners' emphasis on simply balancing the law's benefits and burdens "overreads" *Whole Woman's Health* by eliminating the need for proof that the law actually imposes a substantial obstacle to abortion access, which he views as a threshold requirement of *Casey*. Nevertheless, considering the law's benefits and burdens, he maintains that the hospital admitting-privileges law addresses serious safety concerns by serving as a kind of credential for physicians who perform abortions. He contends that five of

the state's physicians who perform abortions could obtain admitting privileges under the Louisiana law, and that *Whole Woman's Health* permits a fact-specific review that considers whether the physicians acted in good faith to obtain the privileges. If the five physicians obtained admitting privileges, he argues that abortion clinics would likely not close and women's access to abortion would not be burdened.

Implications of *June Medical Services*

The Court's disposition of *June Medical Services* could affect the future regulation of abortion and how abortion regulations are challenged. Although several admitting-privileges requirements were invalidated following *Whole Woman's Health*, it seems possible that states may once again consider requiring such privileges if the Louisiana law is upheld. A decision on the merits of the law may also illustrate how a reconstituted Supreme Court would interpret and apply the undue burden standard. Justice Anthony Kennedy joined the five-Justice majority in *Whole Woman's Health*, but retired in 2018. Since then, Justices Neil Gorsuch and Brett Kavanaugh have joined the Court, but neither has written a substantive opinion on the Court's abortion jurisprudence. Even if the Court does not reach the merits on the constitutionality of the Louisiana law, a ruling on third-party standing could have important implications. Specifically, if the Court were to conclude that abortion providers do not have third-party standing to challenge abortion regulations, such a challenge would necessarily have to be brought by patients seeking an abortion. The Interim Secretary has noted that such patients have challenged abortion regulations in their own names or under pseudonyms. The petitioners maintain, however, that a challenge may be difficult for some patients because of a stigma associated with abortion, which could functionally place abortion regulations beyond the scope of judicial review.

Decisions from the Court are expected later this spring.

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