Roger Williams University Law Review

Volume 26
Issue 1 *Winter 2021*

Article 5

Winter 2021

The Illusion of Victory: Access to Abortion After June Medical Services

Brittany L. Raposa
Roger Williams University School of LAw, braposa@rwu.edu

The Illusion of Victory: Access to Abortion After *June Medical Services*

Brittany L. Raposa, Esq.*

> *"This is something central to a woman's life, to her dignity. It's a decision that she must make for herself. And when government controls that decision for her, she's being treated as less than a fully adult human responsible for her own choices."*[1]
>
> Ruth Bader Ginsburg

INTRODUCTION

A woman nervously walked into an abortion clinic on July 7, 2020. She took three trains and one bus to get there for a total of traveling 161 miles. She had her entire savings in her pocket, wrapped up in an old envelope she found in her kitchen drawer. Nine hundred and sixteen dollars—the most money she had ever physically held. She kept one hand in her pocket to keep the money safe and used the other hand to touch the necklace that lay across her neck, praying that it was enough. This was the second clinic she was trying, because the one 72 miles away did not work out, as she remembers, "I was so uncomfortable. I wasn't sure if it was because my skin is black or I was stared at like I was going to

* Associate Director and Professor of Bar Support, Roger Williams University School of Law.

1. *THE SUPREME COURT; Excerpts From Senate Hearing on the Ginsburg Nomination*, N.Y. TIMES (July 22, 1993), https://www.nytimes.com/1993/07/22/us/the-supreme-court-excerpts-from-senate-hearing-on-the-ginsburg-nomination.html [https://perma.cc/ZPF6-UW4H?type=image].

murder someone, but I had to run out of there and find somewhere where I felt safe and comfortable."[2]

She was at the clinic for five hours and she was not able to get an abortion. She received an ultrasound and counseling that consisted of individuals attempting to convince her to keep the baby. Although she stated that the conversation was a blur, she recalled phrases such as "killing," "selfish," and "promiscuous." She was told to come back in two days after she had the chance to think about their counseling. Three more trains. One more bus. More money. More stares of disappointment. More shame. She said she could only think of one thing months later: "If I have the right to my own body, why do they make it so hard for me to exercise it?"[3]

We are currently in a time where women's reproductive rights, choice, and equality are under attack. Ignited by the Republican dominance of state legislatures and the pro-life movement, various states have begun to enact new and restrictive abortion regulations.[4] This attack is clearly demonstrated by Louisiana's enactment of Act 620.[5] Indeed, Act 620 was identical to the law that was struck down three years prior in the Supreme Court case *Whole Woman's Health v. Hellerstedt*, where the Court declared a Texas law requiring physicians who perform abortion to have admitting privileges unconstitutional because admitting privileges are medically unnecessary and impose an undue burden on women seeking abortion care.[6]

Despite the Supreme Court's decision in *Whole Woman's Health*, much legislation was passed in order to undermine abortion access. Under the Trump administration, attacks on abortion access have reached their zenith, with anti-abortion activists and legislators emboldened by a Supreme Court that they believe will rule in their favor to completely minimize or diminish the right to

2. Telephone Interview with anonymous (Sept. 3, 2020).

3. *Id*.

4. *See* Elizabeth Nash, *A Surge in Bans on Abortion as Early as Six Weeks, Before Most People Know They Are Pregnant,* GUTTMACHER INST. (Mar. 22, 2019), https://www.guttmacher.org/article/2019/03/surge-bans-abortion-early-six-weeks-most-people-know-they-are-pregnant [https://perma.cc/TM4T-J3J5].

5. *See* LA. REV. STAT. ANN. § 40:1061.10(A)(2)(a) (2020); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020).

6. *June Med. Servs. L.L.C.*, 140 S. Ct. at 2112; *see* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

access an abortion.[7] Attacks on abortion access have further increased since Justice Kavanagh joined Justice Gorsuch in molding the lean of the Supreme Court.[8] In 2019, seventeen states enacted a total of 58 abortion restrictions—twenty-five of which would ban all or some abortions.[9] Comparatively, states passed twenty-three restrictive laws on abortions in 2018.[10]

States continued to enact restrictive abortion regulations, and the passage of Act 620 led to *June Medical Services v. Russo*.[11] In *June Medical Services*, a plurality of the Supreme Court struck down the Louisiana law that would have thwarted abortion access to such a degree that it would have left thousands of women in Louisiana without a practical way of obtaining a safe and legal abortion.[12] The Supreme Court found Act 620's abortion restrictions unconstitutional, and pro-choice advocates saw this as a tremendous victory.[13] Although it was a victory in that a woman's right to choose was not overturned, it is not the ultimate victory.

---

7. *See* Maggie Astor, *Abortion Fight Evolves, Overshadowed in 2020 but With Huge Stakes*, N.Y. TIMES (Aug. 11, 2020), https://www.nytimes.com/2020/08/18/us/politics/abortion-2020-election.html [perma.cc/6V58-F4UQ].

8. *Id.*

9. Olivia Cappello, Lizamarie Mohammed, Sophia Naide & Elizabeth Nash, *State Policy Trends 2019: A Wave of Abortion Bans, But Some States Are Fighting Back*, GUTTMACHER INST. (Dec. 10, 2019), https://www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back [perma.cc/5JJA-4YHA].

10. *Id.*

11. *Id.*; *June Med. Servs.*, 140 S. Ct. at 2112.

12. *See June Med. Servs.*, 140 S. Ct. at 2111, 2129.

13. *E.g.*, Press Release, *Statement: Supreme Court Rules in favor of Abortion Providers in* June Medical Services v. Russo, CTR. FOR REPROD. RIGHTS (June 29, 2020), https://reproductiverights.org/press-room/statement-supreme-court-rules-favor-abortion-providers-june-medical-services-v-russo [perma.cc/32ZE-2T9Q]; Press Release, *Planned Parenthood Statement on* June Medical v. Russo *Victory*, PLANNED PARENTHOOD (June 29, 2020), https://www.plannedparenthood.org/planned-parenthood-rocky-mountains/newsroom/planned-parenthood-statement-on-june-medical-serivces-v-russo-victory [perma.cc/P825-7U9V]; Press Release, *NARAL President Ilyse Hogue Comments on Supreme Court Decision in* June Medical Services v. Russo, NARAL (June 29, 2020), https://www.prochoiceamerica.org/2020/06/29/naral-pro-choice-america-responds-scotus-junemedical/ [perma.cc/L2HC-BTRB].

This Survey will first provide a brief history of abortion precedent to demonstrate the context in which J*une Medical Services* was decided. Next, this Survey will break down the *June Medical Services* decision, explaining both the plurality opinion and Chief Justice Roberts' controlling concurrence. Finally, this Survey will discuss the implications of the *June Medical Services* decision, analyzing how it is not an utmost victory, but is instead an illustration for the need for abortion reform.

I. HOW DID WE GET HERE? A BRIEF ABORTION CASE HISTORY

The Constitutional right to an abortion, first recognized in *Roe v. Wade*, relies on a substantive due process framework that emphasizes choice and individual privacy. In *Roe*, the Supreme Court held that the substantive due process right to privacy encompasses a woman's right to choose to terminate her pregnancy.[14] However, the Court specifically commented that this right is not absolute, recognizing that states have valid interests in protecting women's health and potential human life.[15] The Court determined that states could regulate abortion for the purpose of protecting women's health only after the first trimester.[16] The Court reasoned that states' interest in potential human life became compelling after the point of fetal viability, which ample medical evidence used in the case suggested could occur as early as twenty-four weeks into a pregnancy.[17] Therefore, the Court held that states could regulate or ban abortion for the purpose of protecting fetal life during the third trimester, "except when it is necessary to preserve the life or health of the mother."[18]

Following *Roe*, the Court struck down many abortion restrictions under the trimester framework.[19] However, pro-life

14. Roe v. Wade, 410 U.S. 113, 154 (1973).
15. *Id.* at 154, 162.
16. *Id.* at 163.
17. *Id.* at 160, 163.
18. *Id.* at 163–64.
19. For example, in *City of Akron v. Akron Center for Reproductive Health*, the Court struck down multiple provisions of an Akron, Ohio ordinance including provisions requiring that abortions be performed in hospitals after the first trimester, "informed-consent," and a mandatory twenty-four-hour waiting period after signing a consent form. 462 U.S. 416, 422–24, 452 (1983). In striking down the ordinance, the Court rejected the medical and psychological claims made in support of the restrictions and noted that "safety

activists continued their efforts to disseminate the idea that abortion has negative psychological consequences and began to manufacture an evidentiary basis for this claim.[20] Then, to pro-life activists' content, there was an abrupt shift in the make-up of more conservative justices at the Supreme Court, calling the future of *Roe v. Wade* and its legacy into question.

In *Webster v. Reproductive Health Services*, the Court upheld a Missouri statute prohibiting abortion and related research in public facilities, defining the beginning of life at the point of conception, and requiring physicians to test for fetal viability before performing an abortion twenty weeks or later into a woman's pregnancy.[21] In this plurality opinion, Chief Justice Rehnquist argued that *Roe*'s trimester framework had "proved unsound in principle and unworkable in practice."[22] To many, this undoubtedly appeared to be the beginning of overturning *Roe*.

However, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court reaffirmed *Roe's* holding that "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."[23] However, *Roe's* trimester framework was replaced with the new "undue burden" standard.[24] Under the undue burden standard, states are permitted to pass pre-viability abortion restrictions that promote their recognized interest in protecting the health of the mother or protecting potential life, so long as the restrictions do not impose an "undue burden" on a woman's decision to terminate her pregnancy.[25] However, "a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of

---

of second-trimester abortions had increased dramatically" since the Court decided *Roe v. Wade*. *Id.* at 435–36.

20. *See* Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J.L. & MED. 85, 97–98 (2015).

21. Webster v. Reprod. Health Servs., 492 U.S. 490, 501, 522 (1989) (plurality opinion).

22. *Id.* at 518 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

23. 505 U.S. 833, 845 (1992).

24. *Id.* at 874.

25. *Id.* at 877.

serving its legitimate ends."[26] The Court further reasoned that any unnecessary health regulations that have a purpose or effect of placing a substantial obstacle to a woman seeking an abortion impose an undue burden on the right to have one.[27] Applying this new standard, the plurality in *Casey* upheld all but one of the challenged abortion restrictions—the spousal-notice requirement.[28] The plurality held that the requirement was an undue burden because, where spousal notification is required, it will operate as a substantial obstacle to a woman's choice to have an abortion.[29]

In *Stenberg v. Carhart*, the Court struck down a Nebraska law banning "partial birth abortions."[30] The Court held that the ban placed an undue burden on the substantive due process right to abortion because the statutory language was broad enough to also encompass the most common method of abortion after the first trimester.[31] Further, the Court held that the law was unconstitutional due to its lack of a health exception.[32]

In response to this decision, Congress passed a federal "partial birth abortion" ban, which used more specific language to describe the banned procedure but still omitted a health exception.[33] The Supreme Court upheld this ban in *Gonzales v. Carhart*.[34] Although it seemed contrary to their rationale in *Stenberg*, the Court declined to invalidate the statute for lacking a health exception on its face, but left open the possibility of an as-applied challenge.[35] The Court agreed with the purpose that Congress set forth in its legislative findings, which the Court characterized as "express[ing] respect for

26. *Id.*
27. *Id.* at 878.
28. *Id.* at 879–81, 887, 898–901 (upholding the medical emergency definition, the informed consent requirement, parental consent requirement and the record keeping and reporting requirements, and invalidating the spousal-notification requirement).
29. *Id.* at 895.
30. 530 U.S. 914, 921–22, 945–46 (2000).
31. *Id.* at 945–46.
32. *Id.* at 937.
33. Partial-Birth Abortion Plan Act of 2003, 18 U.S.C. § 1531 (2019).
34. Gonzales v. Carhart, 550 U.S. 124, 132–33 (2007).
35. *See id.* at 161–67.

the dignity of human life" and "'protecting the integrity and ethics of the medical profession.'"[36]

Following the decision in *Gonzales*, there were multiple circuit splits throughout the country. Courts were applying *Casey's* undue burden standard differently.[37] The Seventh and Ninth Circuits, along with many district courts, applied a balancing test "'weigh[ing] the burdens against the state's justification, [and] asking whether and to what extent the challenged regulation actually advances the state's interests. If a burden significantly exceeds what is necessary to advance the state's interests, it is "undue,"' which is to say unconstitutional."[38] When courts applied this approach, they considered evidence outside of the legislative record when analyzing the benefits of the regulation and the anticipated burdens imposed by the regulation.[39]

Alternatively, the Fourth, Fifth, and Sixth Circuits did not apply such a balancing test. Instead, when considering a challenge to abortion restrictions, the courts determined whether the restrictions satisfied rational-basis review, and then determined whether the restrictions had the purpose or effect of creating a substantial obstacle to obtaining an abortion.[40] Under this framework, abortion restrictions were upheld as long as they did not create a substantial obstacle and were rationally related to a legitimate government interest.[41]

---

36. *Id.* at 157 (quoting Washington v. Glucksberg, 521 U.S. 702, 731 (1997)).

37. Gillian Metzger, *Symposium: Hanging in the Balance*, SCOTUSBLOG (Jan. 6, 2016, 9:23 AM), https://www.scotusblog.com/2016/01/symposium-hanging-in-the-balance/ [perma.cc/752P-M32Q].

38. Planned Parenthood of Wis., Inc. v. Schimel, 806 F.3d 908, 919–20 (7th Cir. 2015) (quoting Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 913 (9th Cir. 2014)).

39. *See, e.g.*, Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 790–93 (7th Cir. 2013).

40. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting) (citing Gonzales v. Carhart, 550 U.S. 124, 158 (2007)). In upholding the federal ban on the procedure, the *Gonzales* majority asserted that "[w]here [the legislature] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." 550 U.S. at 158.

41. *See id.*

Pro-life advocacy groups took advantage of these inconsistencies and began legislative advocacy with American United for Life (AUL), continuously focusing on minimizing a woman's right to choose.[42] The advocacy was centered on creating burdensome regulations for abortion, entitled Targeted Regulation of Abortion Providers (TRAP) laws, which impose regulations on abortion providers that are difficult and expensive to comply with.[43] These laws typically increase the cost for abortion providers with the goal of creating widespread clinic closures.[44] Although it is likely that the purpose of this legislation was to undermine abortion, the stated purpose was to "safeguard maternal health—to protect pregnant women from dangerous providers and to ensure that abortion is performed in safe environments."[45] This prompted Texas's passage of H.B. 2 in 2013, which instituted an admitting privilege requirement for abortion providers.[46]

Texas's admitting privileges requirement was first challenged by abortion clinics and providers in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*.[47] Although the district court preliminarily enjoined the admitting privileges requirement, the Fifth Circuit stayed the injunction.[48] After the issue was fully tried, the district court permanently enjoined the admitting privileges provision because it found that it unduly burdened Texas women seeking an abortion.[49] The Fifth Circuit then reversed the lower court's decision and upheld the law as constitutional because it found that the plaintiffs could not show that abortion practitioners would be unable to comply with the requirement.[50]

---

42. Cary Franklin, Whole Woman's Health v. Hellerstedt *and What It Means to Protect Women*, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 223, 225 (Melissa Murray, Katherine Shaw & Reva B. Siegal eds., 2019).

43. *Id.* at 226.

44. *Id.*

45. *Id.* at 227.

46. *Id.*

47. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 895 (W.D. Tex. 2013).

48. *Id.* at 909; Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (*Abbott I*), 734 F.3d 406, 419 (5th Cir. 2013). The plaintiffs also challenged H.B. 2's restrictions on medication abortions. *Abbott I* at 409.

49. *Abbott*, 951 F. Supp. 2d at 909.

50. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (*Abbott II*) , 748 F.3d 583, 587, 598 (5th Cir. 2014). The plaintiffs did not file a petition for certiorari. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292,

During all of this time, nineteen of abortion clinics had closed: eight in anticipation of the admitting privileges requirement taking effect and eleven more on the day that the requirement officially took effect.[51]

The Texas requirement was then again challenged, and the Fifth Circuit again applied the two-step, rational basis/substantial obstacle analysis, further finding that the restrictions were constitutional.[52] The restriction was constitutional because it was "rationally related to a legitimate interest" in raising "the standard and quality of care for women seeking abortions and . . . protect[ing] the health and welfare of women seeking abortions."[53] The Supreme Court granted certiorari in *Whole Woman's Health v. Hellerstedt*.[54]

A five-three majority reversed the Fifth Circuit's ruling, concluding that the Fifth Circuit's application of the undue burden standard was incorrect because courts must "consider the burdens a law imposes on abortion access together with the benefits those laws confer."[55] The Court concluded that the admitting privileges provision was unconstitutional because evidence in the record indicated that many abortion doctors could not obtain privileges for many different reasons and half of Texas's abortion clinics closed since the provision went into effect.[56] The Court reasoned that these burdens, "when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the district court's 'undue burden' conclusion."[57]

The *Whole Woman's Health* majority relied heavily on the district court's findings of fact. In comparison, the *Casey* plurality gave some deference to the findings of fact by the court of appeals (not the district court) on its broad construction of the Pennsylvania abortion statute's definition of "medical emergency," as well as some degree of deference to the district court judge in his

---

2301 (2016). Some of the plaintiffs, however, joined a separate challenge brought shortly after this decision was announced. *Id.*

51. *Id.* at 2312.
52. Whole Woman's Health v. Cole, 790 F.3d 563, 566, 598 (5th Cir. 2015).
53. *Id.* at 584.
54. *Id.*, *cert. granted*, 84 U.S.L.W. 3274 (U.S. Nov. 13, 2015) (No. 15-274).
55. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).
56. *See id.* at 2312.
57. *Id.* at 2313.

determination of the effect of the spousal notification provision.[58] However, the plurality did not defer to the lower courts' factual findings in making its assessment of the constitutionality of the informed consent, twenty-four-hour waiting period, or record keeping provisions.[59]

In addition, the *Whole Woman's Health* majority did not apply the *Gonzales* "undue burden plus" standard because it provided no deference to all the Texas legislature's factual findings regarding the benefits to be derived from the admitting privileges provisions.[60] By deferring to the district court's findings of fact, rather than the Texas legislature's, the Court's application in *Whole Woman's Health* of the undue burden standard took a step away from rational basis review and back toward *Roe's* strict scrutiny, but without the benefit of clear default rules.[61]

The Court stressed that under the applicable constitutional standards set forth in *Casey* and *Whole Woman's Health*, "'[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right'" and are therefore constitutionally invalid.[62] The Court stressed that this standard requires courts to independently review the legislative findings upon which an abortion-related statute rests to weigh the law's "asserted benefits against the burdens" it imposes on abortion access.[63] The Texas statute in *Whole Woman's Health* required abortion providers to hold active admitting privileges at a hospital

58. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887–98 (1992).

59. *Id.* at 881–87, 900–01. Note that the *Casey* plurality also referenced several social science studies and concluded, "[t]his information [social science studies] and the District Court's findings reinforce what common sense would suggest. In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion." *Id.* at 892–93.

60. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310–11 (2016).

61. *See id.*

62. *Id.* at 2300 (quoting *Casey,* 505 U.S. at 878).

63. *Id.* at 2310 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)).

within thirty miles of the place where they perform abortions.[64] In *Whole Woman's Health*, the Court found that the statute did not further the State's asserted interest in protecting women's health and that the conditions on admitting privileges served no "relevant credentialing function."[65] The admitting privileges resulted in half of Texas's abortion clinics closing and this closure placed a substantial obstacle in the path of women seeking an abortion.[66] Ultimately, that obstacle, "viewed in light of the virtual absence of any health benefit," imposed an undue burden on abortion access in violation of the Constitution.[67]

II. WHERE WE ARE: JUNE MEDICAL SERVICES

A. *The Louisiana Legislation and its Impact*

In *June Medical Services*, the Court considered the constitutionality of Louisiana's Act 620. This Louisiana law required any doctor who performed abortions to hold "active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services."[68] Further, the statute defined "active admitting privileges" to mean that the doctor must be "a member in good standing" of the hospital's "medical staff . . . with the ability to admit a patient and to provide diagnostic and surgical services to such patient."[69] Failure to comply with this statute could have led to fines of up to four thousand dollars per violation, license revocation, and civil liability.[70] Act 620 was practically identical to H.B. 2, the law the Court struck down in *Whole Woman's Health*.[71] Act 620 read as follows: "On the date the abortion is performed or induced, a physician performing or inducing an abortion shall . . .

64. *Id.* at 2300 (quoting TEX. HEALTH & SAFETY ANN. CODE § 171.0031(a) (2015)).

65. *Id.* at 2311, 2313.

66. *Id.* at 2312.

67. *Id.* at 2313.

68. LA. REV. STAT. ANN. § 40:1061.10(A)(2)(a) (2016).

69. *Id.*

70. *Id.* § 40:1061.10(A)(1), § 40:1061.10(A)(2)(c); LA. REV. STAT. ANN. § 40:1061.29(C) (2016).

71. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020) (plurality opinion).

[h]ave active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced."[72] H.B. 2, on the other hand, read: "[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: . . . is located not further than 30 miles from the location at which the abortion is performed or induced."[73]

A few weeks prior to when Act 620 was to take effect, three abortion clinics and two abortion healthcare providers filed a lawsuit, alleging that the law was unconstitutional because it imposed an undue burden on the right of their patients to obtain an abortion.[74] The plaintiffs immediately requested that the district court issue a temporary restraining order (TRO), followed by a preliminary injunction that would prevent the law from taking effect.[75] In return, the State of Louisiana filed a response that opposed the plaintiff's TRO request and requested that the Court hold a hearing on the preliminary injunction as soon as possible.[76] In granting the TRO, the district court allowed the Act to go into effect but ordered that the plaintiffs not be subject to the Act's penalties or sanctions.[77]

In June 2015, the district court held a six-day bench trial on the plaintiff's request for a preliminary injunction.[78] Based on all of the evidence and testimony, the court issued a decision in January 2016 declaring Act 620 unconstitutional on its face and preliminarily enjoining its enforcement.[79] In response, "[t]he State immediately asked the Court of Appeals for the Fifth Circuit to stay the District Court's injunction. The Court of Appeals granted that stay."[80] However, the Supreme Court issued a stay at the plaintiffs' request, leaving the district court's preliminary injunction temporarily in effect.[81] Subsequently, in June 2016, the Supreme

72. LA. REV. STAT. ANN. § 40:1061.10(A)(2)(a) (2016).
73. TEX. HEALTH & SAFETY ANN. CODE § 171.0031(a)(1)(A) (2015).
74. June Med. Servs. L.L.C. v. Kliebert, 158 F. Supp. 3d 473, 481, 486 (M.D. La. 2016).
75. *Id.* at 481.
76. *June Med. Servs.,* 140 S. Ct. at 2113–14.
77. *Kliebert*, 158 F. Supp.3d at 484.
78. *Id.* at 481.
79. *Id.* 482–83.
80. *June Med. Servs.,* 140 S. Ct. at 2114.
81. *Id.*

Court issued the decision in *Whole Woman's Health*, reversing the Fifth Circuit's judgment in that case.[82]

Admitting privileges inhibit abortion access for a variety of reasons, which were alluded to in *Whole Woman's Health*. First, it is important to note that admitting privileges are extremely difficult and nearly impossible for abortion providers to secure.[83] Many hospitals only grant admitting privileges to physicians who accept full faculty appointments—a category that abortion providers do not fall under.[84] Second, some hospitals require physicians to admit a certain number of patients per year before granting admitting privileges.[85] Consequently, because abortion is an inherently safe procedure, abortion providers are unlikely to admit a sufficient number of patients, as most women do not need hospitalization or emergency hospital care after the procedure.[86] Third, some hospitals only grant admissions privileges to physicians who live within a certain radius of the hospital, making it nearly impossible for abortion providers to obtain any privilege if they do not live in close proximity to hospitals.[87] Finally, some hospitals adhere to religious directives that run in conflict with established medical standards.[88] These hospitals, therefore, may refuse to grant privileges to abortion providers.[89]

At the time the district court issued a permanent injunction against Act 620, there were only three clinics in the state that

---

82. *Id.*

83. *See, e.g.*, Brief for Am. Coll. of Obstetricians & Gynecologists et al. as Amici Curiae in Support of Petitioners at 15, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).

84. *See id.*

85. *Id.*

86. *Id.*

87. *See* Brief of Pub. Health Deans et al. as Amici Curiae in Support of Petitioners at 17, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).

88. *See generally* CATHOLICS FOR CHOICE, *Is Your Health Care Compromised? How the Catholic Directives Make for Unhealthy Choices* (2011), https://www.catholicsforchoice.org/wp-content/uploads/2017/01/2017_Catholic-Healthcare-Report.pdf [perma.cc/5C84-LLLX].

89. *See* Brief of Am. Pub. Health Ass'n as Amicus Curiae in Support of Petitioners at 15, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).

provided abortion services.[90] The district court determined that if the law went into effect, it would reduce the number of open clinics and physicians to only one, which would make it nearly impossible for women in Louisiana and women in surrounding states to access the reproductive health care they need.[91]

June Medical Services, the abortion provider that brought the case, claimed that Act 620 violated the constitutional rights of women in Louisiana because the law imposed significant burdens on abortion access without providing any benefit to women's health or safety. In their petition for certiorari, June Medical Services averred the following:

> In *Whole Woman's Health* . . . [the] Court held that a state law requiring physicians who perform abortions to have admitting privileges at a local hospital was unconstitutional because it imposed an undue burden on women seeking abortions. The U.S. Court of Appeals for the Fifth Circuit upheld an admitting privileges law in Louisiana that is identical to the one the court struck down.[92]

Therefore, June Medical Services asserted, the issue was "[w]hether the Fifth Circuit's decision upholding Louisiana's law requiring physicians who perform abortions to have admitting privileges at a local hospital conflicts with [the] Court's binding precedent in *Whole Woman's Health*."[93] Louisiana maintained that Act 620 was constitutional and that *Whole Woman's Health* was distinguishable from the controversy before the Court.[94]

B. *The District Court's Findings*

The district court found that Louisiana Act 620 does not advance health or safety or ensure that physicians are competent to provide abortion care. According to the district court, the admitting privileges law would have "reduce[d] the number of

90. *See* June Med. Servs. L.L.C. v. Kliebert, 250 F. Supp. 3d 27, 35–36 (M.D. La. 2017).

91. *See id.* at 80.

92. Petition for Writ of Certiorari at i, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (No. 18-1323).

93. *Id.*

94. *See* Respondent's Brief in Opposition at 2, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (No. 18-1323).

clinics from three to 'one, or at most two' and the number of physicians providing abortions from five to 'one, or at most two' and 'therefore cripple[d] women's ability to have an abortion in Louisiana."[95] Although the state claimed that the law was intended to ensure that physicians providing abortions had proper credentials, thereby protecting women's health, the district court concluded that the burden on abortion access severely outweighed the limited benefits that the law achieved.[96] Accordingly, the district court enjoined Louisiana from implementing the admitting privileges requirement on the ground that it unconstitutionally imposed an "undue burden" on a woman's right to an abortion.[97]

First, the district court specifically found that the admitting privileges requirement served no "relevant credentialing function."[98] Hospitals can, and do, deny admitting privileges for reasons unrelated to a doctor's ability to safely perform abortions, and a requirement that doctors obtain privileges at a hospital within thirty miles of the place where they perform abortions simply further constrains physicians for reasons that have nothing to do with their competence.[99] Further, although competency is a factor in credentialing decisions, hospitals' primary focus on credentials has to do with whether a doctor can perform hospital-based procedures and not outpatient abortions.[100]

Second, the district court found that the admitting privileges requirement "does not conform to prevailing medical standards and will not improve the safety of abortion in Louisiana."[101] Expert testimony in the case demonstrated that complications from surgical abortion are rare and also very rarely require emergency or hospital treatment, that the current transfer agreement is suitable for those who do need emergency care, and that the standard protocol when a patient experiences a complication is to send her to the nearest hospital, which is not a hospital within

95. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (plurality opinion) (quoting *Kliebert*, 250 F. Supp. 3d at 87–88).

96. *Kliebert,* 250 F. Supp. 3d at 70, 88–89.

97. *Id.* at 89–90.

98. *Id.* at 87 (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2313 (2016)).

99. *See id.* at 50.

100. *See id.* at 44.

101. *Id.* at 64.

thirty miles of the clinic.[102] Further, the State introduced absolutely no evidence that demonstrated patients have better outcomes when doctors do have admitting privileges within thirty miles.[103]

Therefore, due to the lack of a connection between the regulation and any notion of safety to women seeking an abortion, the district court held that the provision was unconstitutional.[104] However, the Fifth Circuit disagreed, finding discrepancies in facts from the district court.[105]

C. *Troubled Waters: The Fifth Circuit's Decision*

The U.S. Court of Appeals for the Fifth Circuit reversed the district court's ruling.[106] The Fifth Circuit's decision in the case was terrifying for pro-choice advocates and many women, as it opened the possibility of a radical reorientation of abortion jurisprudence. The circuit court conceded that it was "bound to apply [*Whole Woman's Health*]" and weigh the benefits of Act 620 against the burdens imposed, but it maintained that the facts of the case were "remarkably different" from *Whole Woman's Health*.[107] According to the court, "[u]nlike Texas, Louisiana presents some evidence of a minimal benefit" and "far more detailed evidence of Act 620's impact on access to abortion."[108] The circuit court reasoned that even though Louisiana's Act 620 was identical to the Texas law, it would not impose a substantial burden on abortion access in Louisiana.[109] The circuit court, based on its own fact finding, claimed that only one provider at one clinic would be unable to obtain admitting privileges, contrary to the district court's finding that the law would force all but one provider at one clinic to stop providing abortion care.[110] Indeed, the circuit court conducted

---

102. *Id.* at 62, 65.
103. *Id.* at 64.
104. *Id.* at 87.
105. June Med. Servs. L.L.C. v. Gee, 905 F.3d 787, 791 (5th Cir. 2018).
106. *Id.*
107. *Id.* at 791, 815.
108. *Id.* at 805.
109. *See id.*
110. *See id.* at 791.

its own fact finding, which is a task traditionally reserved for the district courts.[111]

Subsequently, the plaintiffs requested an emergency stay from the Supreme Court to prevent the law from going into effect while they appealed the decision, and the justices granted the stay by a five-four vote.[112] However, Justice Kavanaugh's dissent echoes an eerie warning for the future of abortion and a woman's right to choose. In his dissent, Justice Kavanaugh argued that there is no possible way of knowing whether Act 620 would impose an undue burden on abortion access if it was not allowed to go into effect.[113] He reasoned that the law's forty-five-day implementation period meant that the "question could be readily and quickly answered without disturbing the status quo or causing harm to the parties or the affected women."[114] This wait-and-see approach completely ignores the law's impact on women being forced to carry a pregnancy to term while the court waits, as illustrated in the statements of Louisiana providers and clinics who said that they would not be able to obtain admitting privileges and therefore would be forced to stop providing abortion care.[115] At least one voice on the Supreme Court, then, is working to diminish *Roe*'s promise—if there is no access to abortion, then there is absolutely no fundamental right to it.[116]

111. *See id.*

112. June Med. Servs. L.L.C. v. Gee, 139 S. Ct. 663, 663 (2019).

113. *Id.* at 663–64.

114. *Id.* at 664.

115. *See id.*

116. Justice Kavanagh's 2017 dissent in the D.C. Circuit Court case *Garza v. Hargan* further amplifies this voice. *See* 874 F.3d 735, 752–56 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). *Garza* dealt with a young, pregnant woman in the custody of the Office of Refugee Resettlement (ORR); where ORR denied the minor's request for an abortion. *Id.* at 744 (Henderson, J., dissenting). Specially, the opinion dealt with the young woman's petition for rehearing en banc of an earlier decision where the circuit court directed that ORR be given eleven days to find a supervisor to take custody of the minor. *Id.* at 745. In his dissent, Justice Kavanaugh argued that the ORR should be given more time to find a sponsor who would take the minor out of custody, which the office had not successfully done in the preceding months. *See id.* at 752–55 (Kavanaugh, J., dissenting). This decision, which was ultimately overturned, would have further delayed the minor's ability to secure abortion care. *See id.*

D. *The Supreme Court Opinion of* June Medical Services v. Russo

On review, the Court considered whether the challenged admitting privileges law was an undue burden on the right to a woman's access to abortion.[117] The Court applied the constitutional standards set forth in the earlier abortion cases, focusing on *Casey* and *Whole Woman's Health*.[118] The plurality noted that "a statute which, while furthering [a] valid state interest has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."[119] The plurality maintained that "[u]nnecessary health regulations impose an unconstitutional undue burden if they have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion."[120] In determining whether a challenged abortion restriction constitutes a substantial obstacle, "courts must consider the burdens a law imposes on abortion access together with the benefits those laws confer."[121] This inquiry requires courts to review legislative fact finding "under a deferential standard," but deference does not mean an abdication of the judicial role.[122] Importantly, the plurality cautioned, "the courts 'retai[n] an independent constitutional duty to review factual findings where constitutional rights are at stake.'"[123]

In *Whole Woman's Health*, the Court concluded that by presenting direct testimony from doctors who had been unable to secure privileges, and "plausible inferences to be drawn from the timing of the clinic closures" around the law's effective date, the plaintiffs satisfied their burden to establish that the Texas admitting-privileges requirement caused the closure of the

117. *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112–13 (2019) (plurality opinion). The Court also considered whether the abortion providers, as opposed to patients, had standing to challenge the Louisiana law. *Id.* at 2117. On that point, the plurality concluded that Louisiana had waived the standing argument and that "a long line of well-established precedents foreclose[d] [this] belated challenge to the plaintiffs' standing." *Id.* at 2120.

118. *Id.*

119. *Id.* at 2120 (quoting *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016)).

120. *Id.* (quoting *Whole Woman's Health*, 136 S. Ct. at 2309) (internal quotations omitted).

121. *Id.* (quoting *Whole Woman's Health*, 136 S. Ct. at 2324).

122. *See id.* (quoting *Whole Woman's Health,* 136 S. Ct. at 2310).

123. *Id.* at 2120 (quoting *Whole Woman's Health*, 136 S. Ct. at 2310).

clinics.[124] These inferences were further supported by submissions of amici in the medical profession.[125]

In view of *Whole Woman's Health*, Justice Breyer carefully weighed the purported benefits of Act 620 against the burdens that its enforcement would entail, concluding that the district court's determination that Act 620 "would place substantial obstacles in the path of women seeking an abortion in Louisiana" was justified.[126] Further, Justice Breyer concluded that the obstacle was high because it provided no significant health benefits.[127]

The key findings the Court relied on are as follows: The district court supervised four doctors involved in *June Medical Services* for over a year and a half and those doctors were unable to obtain conforming admitting privileges from thirteen hospitals.[128] In addition, some of the doctors' applications were denied for reasons that had nothing to do with their ability to perform abortions safely.[129] The cost of the applications was also high, and doctors in good faith then could not apply to every qualifying hospital, especially given the high risks of being denied.[130] Further, the fact that hospital admissions for abortion are incredibly rare meant that, unless the hospitals also maintain active obstetrical practices, "abortion providers in Louisiana [were] unlikely to have any recent in-hospital experience."[131] Despite this fact, hospital experience was a precondition for many of the hospitals.[132]

The evidence presented in the district court also demonstrated that many providers, even if they could initially obtain admitting privileges, would not be able to keep them because, unless they have a practice that requires regular in-hospital care, they will lose the privileges for failing to use them.[133] Due to the safety of

124. *Whole Woman's Health*, 136 S. Ct. at 2313 (2016).
125. *See id.* at 2312.
126. *See June Med. Servs.,* 140 S. Ct. at 2130 (plurality opinion).
127. *See id.* at 2132.
128. *Id.* at 2122.
129. *Id.*
130. *Id.* at 2122–23.
131. *Id.* at 2123.
132. *Id.*
133. *Id.*

abortion practices, it would be extremely difficult for any doctor to maintain admitting privileges.[134]

Interestingly, the Court further relied on evidence that demonstrated that opposition to abortion played a significant role in some hospitals' decisions to deny doctors' admitting privileges.[135] Some hospitals prohibited a doctor with admitting privileges from performing abortions, and others were unwilling to extend privileges to abortion providers in their discretion.[136] In addition, although abortion is legal, many abortion providers faced tremendous hostility in Louisiana, which, in turn, prevented them from obtaining the necessary admitting privileges.[137] Many Louisiana hospitals required applicants to identify an alternative doctor who could serve as a backup should the doctor become unavailable, and opposition to abortion can prevent that physician from getting the required backup.[138]

The Court stressed how the district court found that the law did not help to cure any "significant health-related problem."[139] The district court further found that the admitting privileges requirement did not protect women's health and provided no significant health benefits, and made no improvement to women's health compared to any prior law.[140] The Supreme Court found that these findings were not clearly erroneous.[141]

It is important to note that Louisiana has other TRAP laws in place apart from the admitting privileges provision, many of which impose barriers on patients and providers. For example, Louisiana has laws banning abortion at or after twenty weeks post-fertilization (twenty-two weeks after the last menstrual period), and banning the procedure used for abortions later in pregnancy, known as dilation and extraction.[142] There are also laws that mandate a twenty-four-hour waiting period and requirements to receive an ultrasound and biased counseling, laws requiring

134. *See id.* at 2123.
135. *See id.*
136. *Id.*
137. *Id.* at 2124.
138. *Id.*
139. *Id.* at 2130 (quoting June Med. Servs. L.L.C. v. Kliebert, 250 F. Supp. 3d 27, 86 (M.D. La. 2017)).
140. *Id.* at 2131.
141. *Id.*
142. LA. REV. STAT. ANN. § 40:1061.1.2; *id.* § 1061.1.1; *id.* § 1061.28.

parental involvement for minors, laws restricting public insurance coverage in line with the Hyde Amendment,[143] and laws banning private insurance coverage for abortion care for plans in the state health exchange.[144] Although the admitting privileges law was struck down, states like Louisiana are continuously implementing legislation that impose significant restrictions on women obtaining abortions.[145]

E. *The Irony: Chief Justice Roberts' Concurrence*

Chief Justice Roberts began by noting his views on abortion rights, and stated that he "joined the dissent in *Whole Woman's Health* and continues to believe that the case was wrongly decided."[146] However, he then explained that "[t]he legal doctrine of *stare decisis* requires [the Court], absent special circumstances, to treat the cases alike."[147] Chief Justice Roberts makes a powerful statement in his concurrence when he states that no one asked the Court "to reassess the constitutional validity" of *Casey*'s undue burden standard.[148] Chief Justice Roberts applied *Casey*'s undue burden standard in *June Medical Services*, strengthening *Casey*'s force in the area of abortion regulation.[149] Because the Louisiana law imposed "as severe" a burden on abortion access as did the Texas law invalidated in *Whole Woman's Health*, the Chief Justice concluded that it "cannot stand under our precedents."[150]

According to Chief Justice Roberts, although the majority in *Whole Woman's Health* "faithfully recit[ed]" *Casey*'s substantial obstacle standard,[151] the decision to invalidate the Texas admitting privileges law also went beyond *Casey* to "require[ ] that courts

143. The Hyde Amendment bars the use of federal funding of abortion except to either (1) save the life of the woman, or (2) if the pregnancy was the result of rape or incest.

144. *Id.* § 1061.17(B)(6); *see id.* § 1061.16; *id.* § 1061.10(D); *id.* § 1061.14(A); id. § 1061.6; LA. REV. STAT. ANN. § 22:1014(B).

145. *See Louisiana*, CTR. FOR REPROD. RIGHTS, https://reproductiverights.org/state/louisiana#footnote3_92fi3n4 [perma.cc/JXJ8-947F] (last visited Jan. 17, 2021).

146. *June Med. Servs.,* 140 S. Ct. at 2133 (Roberts, C.J., concurring).

147. *Id.* at 2134.

148. *See id.* at 2135.

149. *See id.*

150. *Id.* at 2134, 2139.

151. *Id.* at 2135.

consider the burdens a law imposes on abortion access together with the benefits those laws confer."[152] However, Chief Justice Roberts stresses that *Casey* did not suggest "that a weighing of costs and benefits of abortion regulation was a job for the courts."[153] He explained that if *Casey* required any consideration of the benefits of an abortion regulation, it was only in establishing "the threshold requirement that the State have a 'legitimate purpose' and that the law be 'reasonably related to that goal.'"[154]

Therefore, *Whole Woman's Health* was precedent only to the extent that it reiterated *Casey*'s substantial obstacle standard.[155] On the contrary, the Court's directive to reviewing courts to weigh the benefits of an abortion regulation against its burdens was, in Chief Justice Roberts' view, an inaccurate portrayal of *Casey*'s holding and rationale.[156] Therefore, if *stare decisis* dictated the outcome in *June Medical Services*, the precedent to be followed was not the full decision in *Whole Woman's Health*, as the plurality maintained, but instead only those aspects of *Whole Woman's Health* that reiterated the more specific and limited standard identified in *Casey*.[157]

In addition, Chief Justice Roberts discussed how the *Casey* plurality considered only "whether there was a substantial burden, not whether benefits outweighed burdens,"[158] including in its consideration of a twenty-four-hour waiting period that the lower court found "did not further the state interest in maternal health."[159] Consequently, Chief Justice Roberts concluded that the premise of "*Casey* is clear: The several restrictions that did not impose a substantial obstacle were constitutional, while the

152. *Id.* (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016)).

153. *Id.* at 2136.

154. *Id.* at 2138 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992)).

155. *See id*. at 2139 (noting that *Casey*'s "substantial obstacle" test was a sufficient basis for the decision in *Whole Woman's Health*).

156. *See id.* at 2136; *see also id.* at 2139 ("In neither [*June Medical Services* nor *Whole Woman's Health*], nor in *Casey* itself, was there call for consideration of a regulation's benefits, and nothing in *Casey* commands such consideration.").

157. *See id.* at 2139.

158. *Id.* at 2137 (citing *Casey*, 505 U.S. at 822).

159. *Id.* at 2136 (quoting *Casey*, 505 U.S. at 886).

restriction that did impose a substantial obstacle was unconstitutional."[160]

Once he established the correct application of *Casey*, Chief Justice Roberts then turned to apply *Casey* to Act 620, determining whether it was an unconstitutional substantial obstacle.[161] Focusing on the district court's findings that "the Louisiana law would 'result in a drastic reduction in the number and geographic distribution of abortion providers'" and "longer waiting times for appointments, increased crowding and increased associated health risk,"[162] Chief Justice Roberts concluded that the challenged law was an unconstitutional substantial obstacle in a woman's way to an abortion.[163]

Although Chief Justice relied on *stare decisis* to write his concurring opinion, he denounced the opinion of *Whole Woman's Health* as it departed from *Casey*. Chief Justice Roberts, then, followed binding precedent that he favored and abandoned precedent he did not. In fact, the dissenting justices, Justice Alito and Justice Gorsuch, argued that Chief Justice Roberts's characterization of *Whole Woman's Health* was incorrect—a remade ruling inconsistent with the actual holding of the case.[164] Further, dissenting Justice Kavanagh observed that "five Members of the Court reject the *Whole Woman's Health* cost-benefit standard."[165] Therefore, Chief Justice Roberts created the illusion of preserving precedent and instead created a precedent that agreed with the plurality, but upheld principles of the dissent and the conservative wing of the Supreme Court.

III. WHERE WE ARE HEADED: ABORTION ACCESS AND THE UNDUE BURDEN STANDARD

Although *June Medical Services v. Russo* was a very slight victory, there is still a lot of work to do in the area of reproductive equality. *June Medical Services* is seen as keeping access to

160. *Id.* at 2138.

161. *See id.* at 2139.

162. *Id.* at 2140 (quoting June Med. Servs. L.L.C. v. Kliebert, 250 F. Supp. 3d 27, 81, 87 (M.D. La. 2017)).

163. *Id.* at 2142.

164. *See id.* at 2153 (Alito, J., dissenting); *id.* at 2180–81 (Gorsuch, J., dissenting).

165. *Id.* at 2182 (Kavanaugh, J., dissenting).

abortion open, but two questions remain: (1) whether the opinion set the stage for stricter abortion regulations, and (2) whether the opinion truly kept access to abortion open. In short, *June Medical Services* definitely opened the possibility of stricter and potentially terrifying future abortion regulations. Further, although *June Medical Services* did not completely close access to abortion, it did not create access for many women, either.

A. *The Curse of the Concurrence*

Although this case was seen as opening access to abortion, Chief Justice Roberts clarified that his concurrence only covers Louisiana's admitting privileges law by endorsing Justice Samuel Alito's dissenting opinion that "the validity of admitting privileges laws 'depend[s] on numerous factors that differ from State to State.'"[166] Rather than directly holding that admitting privileges are unconstitutional and are designed to shut down abortion clinics, Chief Justice Roberts will likely have the opposite impact. Now anti-abortion politicians and advocates can strategically deploy admitting privileges laws. There will undoubtedly be more laws and more challenges, but with the current makeup of the Supreme Court with the addition of Justice Amy Coney Barrett, the challenges now have a good chance at failing.

In addition, Chief Justice Roberts' concurring opinion spent a great deal of time undermining *Whole Woman's Health*. As explained above, Chief Justice Roberts now wants to return to what he says is the correct analysis of the undue burden standard from *Casey*. In his view, when considering an abortion restriction, courts should not balance burdens against benefits, but should instead only consider whether the law imposes a substantial obstacle in the path of a person seeking an abortion, and whether the restriction simply survives rational basis review.[167] It is only if there is a substantial obstacle, or if the law somehow fails rational basis review, that then it will be invalidated.[168] The issue lies in the fact that Chief Justice Roberts' scope of what is a "substantial obstacle" is quite literally limited. In *Gonzales v. Carhart*, he did not consider a nationwide ban on an abortion procedure with no exception for

166. *Id.* at 2141 n.6 (Roberts, C.J., concurring) (quoting *id.* at 2157 (Alito, J., dissenting)).

167. *Id.* at 2136, 2139.

168. *Id.* at 2139.

women's health to be a substantial obstacle.[169] Further, in *Whole Woman's Health*, he did not believe the Texas law presented a substantial obstacle, despite half of the state's abortion clinics closing as a result of the law.[170]

Whole Woman's Health served as a large point of clarification on abortion. As lower courts were applying *Casey's* standard differently, *Whole Woman's Health* finally gave much needed clarity, only to have Chief Justice Roberts return us to the land of confusion. This will likely increase abortion litigation where there is a high chance of unconstitutional abortion provisions being upheld due to the lower federal courts being filled with judges appointed by the Trump administration.[171]

Finally, Chief Justice Roberts invited the possibility of overturning *Roe* and *Casey* when he specifically proclaimed that "[n]either party has asked [the Court] to reassess the constitutional validity of [the undue burden] standard."[172] Chief Justice Roberts makes clear that he only struck down the provision because he must follow the rule of law.[173] Now, he is inviting a challenge to the undue burden standard. In time, it raises the question of whether abortion will be outlawed all together.

B. *The Continued Existence of Reproductive Health Care Disparities*

Both before and after *June Medical Services*, severe disparities in reproductive health care and abortion exist. Approximately twenty-seven cities in the United States are called "abortion deserts," these are cities in which people have to travel at least one-

169. *See Gonzalez v. Carhart,* 550 U.S. 124, 130, 132–33 (2007) (Chief Justice Roberts joined the majority, which upheld the Partial-Birth Abortion Ban Act of 2003).

170. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2330, 2346–2350 (2016) (Alito, J., dissenting) (Chief Justice Roberts joined Justice Alito's dissenting opinion, which argued that the Texas admitting privileges law did not create a substantial burden).

171. *See* John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, PEW RES. CTR. (July 15, 2020), https://www.pewresearch.org/fact-tank/2020/07/15/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ [https://perma.cc/Z7D5-Z76Z].

172. *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring opinion).

173. *See id.* at 2133–42.

hundred miles to reach an abortion provider.[174] Further, more than eleven million women of reproductive age nationwide live more than an hour's drive from an abortion provider.[175] In addition, as of 2017, eighty-nine percent of counties in the United States have no known clinics that offer abortion care.[176]

Women living in states with TRAP laws typically have less labor mobility—the ability to transition between jobs or from unemployment to employment—and women living in states with better access to reproductive health care, including abortion access, have higher earnings.[177] Unfortunately, women who are denied an abortion face serious consequences, including the greater likelihood of living in poverty, staying in abusive relationships, and experiencing mental health issues, as well as increased chances of suffering health complications from continuing a pregnancy.[178]

People of color who need access to abortion care, particularly black women, will experience the most harm with new and existing abortion restrictions. Individuals of color disproportionately live in states affected by restrictive abortion bans and face discrimination and bias in the health care system that affects their ability to access quality care.[179] Such bias and negative treatment contributes to

---

174. *Novel study identifies 27 large U.S. cities as "abortion deserts"*, ADVANCING NEW STANDARDS IN REPROD. HEALTH, https://www.ansirh.org/news/novel-study-identifies-27-large-us-cities-%E2%80%9Cabortion-deserts%E2%80%9D [perma.cc/9VZU-RD8Q] (last visited Jan. 17, 2021).

175. K.K. Rebecca Lai & Jugal K. Patel, *For Millions of American Women, Abortion Access Is Out of Reach*, N.Y. TIMES (May 31, 2019), https://www.nytimes.com/interactive/2019/05/31/us/abortion-clinics-map.html [https://perma.cc/D5KG-GQ9F].

176. Rachel K. Jones, Elizabeth Witwer & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2017*, GUTTMACHER INST. (Sept. 2019), https://www.guttmacher.org/report/abortion-incidence-service-availability-us-2017# [https://perma.cc/2ZBL-Q7Q3].

177. Kate Bahn, Adriana Kugler, Melissa Mahoney, Danielle Corley & Annie McGraw, *Linking Reproductive Health Care Access to Labor Market Opportunities for Women*, CTR. FOR AM. PROGRESS (Nov. 21, 2017, 9:01 AM), https://www.americanprogress.org/issues/women/reports/2017/11/21/442653/linking-reproductive-health-care-access-labor-market-opportunities-women/ [https://perma.cc/693R-26WE].

178. *Turnaway Study*, ADVANCING NEW STANDARDS IN REPROD. HEALTH, https://www.ansirh.org/research/turnaway-study [https://perma.cc/LPF7-RB8Z] (last visited Jan. 17, 2021).

179. Jamila Taylor, *Women of Color Will Lose the Most if* Roe v. Wade *is Overturned*, CTR. FOR AM. PROGRESS (Aug. 23, 2018, 9:01 AM),

poor health outcomes.[180] For example, Black women in the United States are three to four times more likely than non-Hispanic white women to die from pregnancy-related causes.[181] In addition to abortion disparities, women of color also face disparities across sexual and reproductive health outcomes, including maternal health, cervical and breast cancers, and sexually transmitted infections (STIs).[182] Abortion restrictions will only further subject individuals to pregnancy-related health risks.

In addition, abortion restrictions have a different impact on low income individuals. In 2011, the rate of unintended pregnancy for women aged fifteen to forty-four was more than five times higher for women with incomes below the federal poverty level than it was for those with incomes at or above two-hundred percent of the poverty level.[183] Women with low incomes are far more likely to have to drive farther distances to reach an abortion provider.[184] Financial factors, such as transportation, travel costs, the ability to take time off of work, child care costs, and the cost of the procedure itself creates impossible barriers to abortion care for low-income individuals.[185]

Further, disparities are wide for transgender, non-binary, and gender-non-confirming individuals. These individuals face unique barriers to accessing care, such as discrimination, bias, and lack of provider knowledge about these groups' health care needs.[186] Such

---

https://www.americanprogress.org/isues/women/news/2018/08/23/455025/women-color-will-lose-roe-v-wade-overturned/ [perma.cc/V826-4HW9].

180. *Id.*

181. *Id.*

182. *Id.*

183. Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters,* 19 GUTTMACHER POL. REV. 46, 47 (2016), https://www.guttmacher.org/sites/default/files/article_files/gpr1904616_0.pdf [https://perma.cc/STP7-YPTT].

184. *See* Dan Keating, Time Meko & Danielle Rindler, *Abortion access is more difficult for women in poverty*, WASHINGTON POST (July 10, 2019), https://www.washingtonpost.com/national/2019/07/10/abortion-access-is-more-difficult-women-poverty/?arc404=true [perma.cc/CB6A-Y8Q8].

185. *See* Boonstra, *supra* note 183, at 46–47.

186. *See* Ruth Dawsom & Tracy Leong, *Not Up For Debate: LQBTQ People Need and Deserve Tailored Sexual and Reproductive Health Care*, GUTTMACHER INST. (Nov. 16, 2020), https://www.guttmacher.org/article/2020/11/not-debate-lgbtq-people-need-and-deserve-tailored-sexual-and-reproductive-health [perma.cc/WS2Y-NTMP].

mistreatment and poor quality of care create a fear and distrust of the reproductive health care system.[187] The U.S. Transgender Survey found that twenty-three percent of respondents avoided going to the doctor out of fear of being mistreated.[188] These groups already did not have a safe option for accessing abortion, and it may only be made worse by future restrictions to abortion access in these communities.

Finally, many other groups face additional barriers to access, including immigrants, children, and disabled individuals. All of these groups face discrimination, bias, and heightened scrutiny when it comes to reproductive health care in the United States.[189] However, as the other disparities discussed in this Survey, these disparities were neither addressed nor given any hope for the future in the Supreme Court *June Medical Services* opinion.

The Supreme Court and legislators must focus on the impact regulations would have on groups whose access to abortion is especially vulnerable. These groups consist of many women geographically located in the Midwest and the South, people of color, low-income people, people with disabilities, young people, and transgender and non-binary people. As policymakers examine barriers to abortion access for marginalized groups, it is important to remember that many people identify with a multiple of these groups, which further amplifies the disparities and barriers they face in receiving abortion and reproductive healthcare.

According to *Casey*, where we are strictly brought back to after the decision in *June Medical Services*, abortion regulations that have either "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"

---

187. *See id.*

188. Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People From Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018, 9:00 AM), https://www.americanprogress.org/issues/lgbtq-rights/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/ [perma.cc/8CNY-TWL8].

189. *See Reproductive Injustice: Racial and Gender Discrimination in U.S. Health Care*, CTR. FOR REPROD. RIGHTS 7–8 (2019), https://www.reproductiverights.org/sites/default/files/documents/CERD_Shadow_US.pdf [perma.cc/MK6H-MT94]; Leah H. Keller & Adam Sonfield, *More to Be Done: Individuals' Need for Sexual and Reproductive Health Coverage and Care*, 22 GUTTMACHER POL. REV. 8, 12 (2019), https://www.guttmacher.org/sites/default/files/article_files/gpr2200819.pdf [perma.cc/7J6Z-PM4E].

violate the Constitution and its protection of women's abortion rights.[190] The focus, then, is whether the restriction places an "undue burden" on a woman's ability to obtain an abortion.[191] However, if the Court does not analyze the undue burden standard from the perspective of the most marginalized individuals in society, then there will never truly be proper access to abortion. *June Medical Services* did not address these issues of disparities, nor did it make them any more equal. In fact, if it did anything, it opened the opportunity to create further disparities for individuals accessing abortion care.

CONCLUSION

Where we are headed from here is both uncertain and unsettling. The fight for reproductive rights and justice must continue stronger than ever. Voices on the Supreme Court have undoubtedly demonstrated a blatant disregard for precedent in order to further the attack on abortion rights. Although the most extreme abortion restrictions have been blocked by the courts, many restrictive laws remain in effect across the country.[192] The restrictive abortion bans currently in effect include bans on abortion at varying weeks of gestation, on certain methods of abortion procedures, or on abortions for particular reasons, such as fetal diagnosis.[193] Further, there are restrictions in place such as mandatory waiting periods and ultrasounds, mandated counseling with biased and inaccurate information, parental involvement requirements for minors, and more.[194] A recent study and analysis from the Center for Reproductive Rights found that if *Roe v. Wade* were significantly limited or overturned, abortion could potentially

190. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

191. *See id.*

192. Rick Rojas & Alan Blinder, *Alabama Abortion Ban Is Temporarily Blocked by a Federal Judge*, N.Y. TIMES (Oct. 29, 2019), https://www.nytimes.com/2019/10/29/us/alabama-abortion-ban.html [perma.cc/4UZX-HAEU].

193. Cappello et al., *supra* note 9.

194. *See An Overview of Abortion Laws*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/overview-abortion-laws [https://perma.cc/4SGM-BUMY] (last visited Jan. 17, 2021).

become illegal in as many as twenty-four states.[195] This analysis, in part, also found that many of these states are among the twenty-four states that have TRAP laws in place, including regulations for facility structure and licensing, as well as requirements for abortion providers. The restrictions and disparities continue.

Unfortunately, the future of reproductive rights and reproductive justice is in jeopardy. The Supreme Court must recognize and support both the right to abortion and access to abortion—which are not synonymous. A decision that takes into account those who are most affected by abortion restrictions is absolutely necessary. However, there is one thing that is certain: women cannot have a right to their own bodies if it is too difficult to exercise that right.

195. *What If Roe Fell?*, CTR. FOR REPROD. RIGHTS, https://reproductiverights.org/what-if-roe-fell [perma.cc/49NU-RGQD] (last visited Jan. 17, 2021).