A Woman's Fundamental Right to Choose and Its Threatened Extinction

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In 1973, the Supreme Court recognized that the right of privacy inherent in the Fourteenth Amendment's guarantee of due process encompasses a woman's right to choose to have an abortion.[2] Since then, states have continually attempted to infringe upon women's established fundamental right to reproductive choice.[3] Currently, twenty-four different states across the United States have passed laws limiting access to abortion and are outwardly hostile to this particular right of privacy.[4]

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[2] *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (detailing constitutional right of privacy).

[3] *See What if Roe Fell?*, CTR. FOR REPROD. RTS., https://reproductiverights.org/what-if-roe-fell [https://perma.cc/9S8M-6A43]; Jennifer Spinosi, *The End of* Roe v. Wade *Is Coming. But States Like Ohio Have Rolled Back Abortion Rights for Years*, NBC NEWS: THINK (July 5, 2018, 5:11 PM), https://www.nbcnews.com/think/opinion/end-roe-v-wade-coming-states-ohio-have-rolled-back-ncna889056 [https://perma.cc/GMA5-XCBJ].

[4] *See What if Roe Fell?*, *supra* note 3. Some states explicitly denigrate and mischaracterize a woman's right to choose, such as Louisiana, which

In *June Medical Services LLC v. Gee*,[5] three clinics and several doctors collectively challenged Louisiana's Unsafe Abortion Protection Act, which requires every doctor who performs abortions "to have admitting privileges at a hospital located within thirty miles of the clinic where they perform abortions."[6] The Fifth Circuit majority, after engaging in a twenty-page fact-finding endeavor, held that the law passed constitutional muster because it did not impose an undue burden on women.[7]

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has a statute that expressly states: "[I]f those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions shall be enforced." LA. REV. STAT. § 40:1061.8 (2019).

[5] 905 F.3d 787 (5th Cir. 2018).

[6] *See id.* at 790-91 (describing Louisiana law and litigants); § 40:1061.10 (outlining admitting privileges requirement). After a bench trial, the lower court entered a preliminary injunction against the law's enforcement, and during appeals, the Supreme Court decided a separate case, *Whole Woman's Health v. Hellerstedt*. *See June Med. Servs. LLC*, 905 F.3d. at 792. *Whole Woman's Health* declared a similar Texas law unconstitutional, and so the Fifth Circuit remanded *June Medical Services* in light of the Supreme Court's application of the "undue burden" test. *See id.* at 791-93; *see also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016) (describing Texas law).

[7] *See June Med. Servs. LLC*, 905 F.3d at 811-12.

The court reasoned that because the "admitting-privileges" requirement did not itself prevent doctors from obtaining those privileges, the law did not impose an undue burden on women through clinic closures, increased driving time for women, or decreased access as a result of fewer doctors.[8] The court principally concluded that the individual doctors were to blame for any obstacles in the path of women obtaining abortions in Louisiana because *the doctors* failed to put forth a good faith effort to comply with the law and obtain the admitting privileges—a conclusion completely opposite to the factual findings of the lower court.[9]

This reasoning is difficult to square with the Supreme Court's undue burden test because the test revolves around whether the law's purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion, not whether

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[8] *See id.*

[9] *See id.* at 802-03, 807. Specifically, the court states:

> [T]here is insufficient evidence to conclude that, had the doctors put forth a good-faith effort to comply with [the law], they would have been unable to obtain privileges. Instead, . . . the vast majority largely sat on their hands, assuming that they would not qualify. Their inaction severs the chain of causation.

Id. at 807.

the individual actors' compliance or noncompliance with that law created a substantial obstacle.[10] The court further failed to recognize that the imposition of the admitting-privileges requirement itself, and not the physician's failure to subjectively try hard enough to obtain those privileges, created obstacles to women seeking an abortion.[11] The law imposed these additional burdens on the doctors, which, in turn, created obstacles to obtaining an abortion. The majority also misapplied the undue burden test by failing to accurately evaluate the health benefits of the law compared to the obstacles the law imposes.[12] Where health

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[10] *See Whole Woman's Health*, 136 S. Ct. at 2309 (explaining undue burden test).

[11] *See* June Med. Servs. LLC v. Gee, 905 F.3d 787, 812 (5th Cir. 2018). The court stated that "there is an insufficient basis in the record to conclude that the law has prevented most of the doctors from gaining admitting privileges[,]" when the question is not whether the law itself prevents compliance with the law. *See id.*

[12] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300, 2309 (2016). The Court clarified the undue burden test, stating that the lower courts must balance abortion legislation's burdens and benefits to evaluate whether it creates a substantial obstacle to abortion, thereby imposing an undue burden. *See id.* The Fifth Circuit, however, determined that "even regulations with a minimal benefit are unconstitutional only where they present a substantial obstacle to

regulations pose little to no benefit, it logically follows that almost any burden the law imposes is, comparatively, substantial.

The dissenting judge keenly emphasized the majority's flagrant disregard for the basic axiom that appellate courts are not triers of fact, and must give due regard to the trial court's factual findings when, as in this case, they are based upon oral testimony.[13] Based upon the dissent's iteration of the district court's decision, as a result of the admitting-privileges requirement, only two doctors and clinics would remain available in the entire state, leaving approximately half of Louisiana's women seeking abortions without medical access.[14] This result flies in the face of a woman's fundamental right to choose.

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abortion." *See June Med. Servs. LLC*, 905 F.3d at 803. The majority acknowledged that the admitting privileges requirement posed a minimal benefit to women's health and welfare, but failed to acknowledge and appreciate how burdensome the application for admitting privileges was to doctors; considering that a great number of hospitals simply would not reply to the doctor's applications, and only three hospitals in the entire state were willing to extend privileges. *Id.* at 807, 810.

[13] *See June Med. Servs. LLC*, 905 F.3d at 819 (Higginbotham, J., dissenting).

[14] *See id.* at 830-31. The dissenting judge also reveals the majority's logical fallacy, stating that he cannot understand how "a statute with no

The Supreme Court stayed the Fifth Circuit's decision in *June Medical Services*, and Justice Kavanaugh dissented to granting the stay, with Justices Thomas, Alito, and Gorsuch joining him.[15] Eight months after staying the Fifth Circuit's decision, the Court granted certiorari and will hear oral argument in March of 2020.[16] Since *Whole Woman's Health*—the most recent Supreme Court abortion jurisprudence—the composition of the bench has changed as Justice Gorsuch replaced Justice Scalia (who dissented in the 2016 decision), and Justice Kavanaugh replaced Justice

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medical benefit that is likely to restrict access to abortion can be considered anything but 'undue.'" *Id.* at 829.

[15] *See* June Med. Servs. LLC v. Gee, 139 S. Ct. 663, 663-65 (2019) (mem.) (Kavanaugh, J., dissenting). Justice Kavanaugh dissented to granting the stay, reasoning that the Court should wait to see if the law will indeed prevent the three doctors in question from obtaining admitting privileges, which would, in his opinion, be the determining fact for whether the law unduly burdens a woman's right to an abortion. *See id.* at 663-64.

[16] *See* June Med. Servs. LLC v. Gee, 140 S. Ct. 35 (2019) (mem.) (granting certiorari); *Supreme Court of the United States Granted & Noted List–October Term 2019 Cases for Argument*, SUPREMECOURT.GOV (Jan. 14, 2020), https://www.supremecourt.gov/orders/19grantednotedlist.pdf [https://perma.cc/VF8G-M4Z6] (listing oral argument date).

Kennedy (who joined the 2016 majority).[17] Chief Justice Roberts, expected to be the swing vote, joined Justice Alito's dissent in *Whole Woman's Health*, which focused on the applicability of res judicata and other procedural issues, but did not state an opinion on the merits.[18] Although, Chief Justice Roberts did vote in favor of the stay of the Fifth Circuit's decision in *June Medical Services*, indicating some level of disagreement with the Fifth Circuit's undue burden analysis.[19]

The Supreme Court is consistently unwilling to analyze a woman's fundamental right to choose against the same strict scrutiny standard applied to all other fundamental rights of privacy under the Fourteenth Amendment's Due Process Clause, and as a result, the Court has eroded and diluted the right to choose with

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[17] *See* Lyle Denniston, *Where Is the Supreme Court Going on Abortion?*, NAT'L CONST. CTR.: CONST. DAILY (Oct. 5, 2019), https://constitutioncenter.org/blog/where-is-the-supreme-court-going-on-abortion [https://perma.cc/T38G-5QH6]; *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. at 2300, 2321, 2330 (showing composition of majority and dissenting opinions).

[18] *See Hellerstedt*, 136 S. Ct. at 2353.

[19] *See June Med. Servs. LLC*, 139 S. Ct. at 663; Denniston, *supra* note 17 (explaining Chief Justice Roberts's possible role on new bench).

each new abortion legislation case.[20] Only seventeen years ago, Justice Blackmun predicted a woman's right to choose was hanging in the balance, at terrible risk of being extinguished like a "single, flickering flame[,]" stating "I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light."[21] In the name of personal liberty and the fundamental right of privacy, may the current Court heed Justice Blackmun's warning and continue to uphold women's fundamental rights under the Constitution as the supreme law of the land.

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[20] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 926 (1992) (Blackmun, J., concurring in part and dissenting in part) (advocating for strict judicial scrutiny on abortion legislation). *Compare* Eisenstadt v. Baird, 405 U.S. 438, 447 & n.7, 453 (1972) (describing strict scrutiny applied to particular statute infringing on fundamental right), *with Whole Woman's Health*, 136 S. Ct. at 2309 (outlining undue burden standard).

[21] *See Casey*, 505 U.S. at 922-23 (Stevens, J., concurring in part and dissenting in part).