ALABAMA POLICY INSTITUTE

GUIDE TO THE ISSUES

Whole Woman's Health v. Hellerstedt

Background

In April 2013, the people of the United States finally, sadly, began to learn—despite the media's best attempts to avoid the story[1]—about Dr. Kermit Gosnell and his "house of horrors."[2] Dr. Gosnell is the Philadelphia abortionist whose clinic preyed on poor women and featured, among other atrocities: "Infant beheadings. Severed baby feet in jars. A child screaming after it was delivered alive during an abortion procedure."[3] Dr. Gosnell is currently serving life in prison without the possibility of parole for numerous crimes, among them the manslaughter of a female patient and three counts of first-degree murder that included "the murder of a baby born alive in a botched abortion, who prosecutors said would have survived if the doctor had not 'snipped' its neck with scissors."[4]

Texas, "spurred by the case of Kermit Gosnell," swiftly passed legislation to protect both babies and their mothers by heightening the health and safety requirements for abortion providers.[5] The legislation was signed into law in July 2013 by Governor Rick Perry.[6]

A group of abortion providers (Whole Woman's Health and others) filed a lawsuit against Texas state officials (the commissioner of the Texas Department of State Health Services, John Hellerstedt, and others), claiming that the Texas abortion law was unconstitutional.[7] The district court ruled in favor of the abortion providers, blocking the law from being fully implemented.[8] The court of appeals disagreed with the district-court's decision, and largely upheld the law.[9] The abortion providers appealed to the Supreme Court.[10] That appeal is *Whole Woman's Health v. Hellerstedt*.[11]

ISSUE SNAPSHOT

- Texas enacted a law that heightened the health and safety requirements for abortion providers, in order to safeguard the state from atrocities like those that occurred in Dr. Kermit Gosnell's abortion clinic—a "house of horrors" where poor women were preyed upon and newborn babies were barbarically murdered.
- The Supreme Court struck down the Texas law, finding that it presented a "substantial obstacle" to women getting abortions and, therefore, was unconstitutional.

Decision

On June 27, 2016, the Supreme Court delivered its decision in *Whole Woman's Health v. Hellerstedt*, striking down the two provisions of the Texas law in question.[12] The first provision was an "admitting-privileges requirement": doctors who performed abortions in Texas were required to hold admitting privileges at a hospital near where the abortion was performed.[13] The second provision was a "surgical-center requirement": clinics that performed abortions in Texas were required to meet the same standards as ambulatory surgical centers.[14]

Justice Stephen Breyer wrote the majority opinion, which was joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan.[15] Justice Breyer concluded: "Neither of [the aforementioned] provisions offers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a pre-viability abortion, each constitutes

an undue burden on abortion access, and each violates the . . . Constitution."[16]

Justice Samuel Alito wrote a dissenting opinion, which was joined by Chief Justice John Roberts and Justice Clarence Thomas.[17] Justice Alito "accused the majority of going out of its way to strike down provisions in the Texas law,"[18] arguing: "Federal courts have no authority to carpet bomb state laws, knocking out provisions that are perfectly consistent with federal law."[19] Justice Alito noted that "there was good reason to think that the restrictions were meant to and did protect women,"[20] explaining: "The [Texas] law was one of many enacted . . . in the wake of the Kermit Gosnell scandal, in which a physician who ran an abortion clinic in Philadelphia was convicted for the first-degree murder of three infants who were born alive and for the manslaughter of a patient. . . . If Pennsylvania had had such a requirement [as the Texas law] in force, the Gosnell facility may have been shut down before his crimes."[21]

In addition to joining Justice Alito's dissenting opinion, Justice Thomas also added a dissenting opinion of his own.[22] Justice Thomas's dissent has been described as "something of a paean to the late Justice Scalia," as it is bookended with citations to Justice Scalia, giving voice to Justice Scalia's arguments in his absence.[23] Justice Thomas opens his opinion as follows: "Today the [Supreme] Court strikes down two state statutory provisions in all of their applications, at the behest of abortion clinics and doctors. That decision exemplifies the Court's troubling tendency [quoting Justice Scalia] 'to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue.'"[24]

Implications

The decision in *Whole Woman's Health v. Hellerstedt* is "the [Supreme Court's] most sweeping statement on abortion since *Planned Parenthood v. Casey* in 1992, which reaffirmed the constitutional right to abortion established in 1973 in *Roe v. Wade*."[25] "It means that similar requirements in other states are most likely also unconstitutional, and . . . imperils many other kinds of restrictions on abortion."[26]

This is a matter of great importance to Alabama, because *life* is a matter of great importance in Alabama.[27] A law with similar provisions, the Women's Health and Safety Act, was enacted in Alabama in 2013, only to be invalidated by a federal court in 2014.[28] With the decision in *Whole Woman's Health*—where members of Alabama's federal delegation and state officials, including the governor, the lieutenant governor, the attorney general, and state legislators, submitted briefs in support of Texas[29]—the hope that Alabama's law could be revived has now been extinguished.[30]

The implications are more significant than the constitutionality of these particular laws, however. From this point forward, *all* regulations that affect pre-viability abortions—abortions occurring before the unborn child is capable of living outside the womb—will be nearly impossible to survive as state law.[31] This has to do with the concept that the Supreme Court uses to determine whether a law regulating abortion is constitutional or unconstitutional: "undue burden."[32] Justice Antonin Scalia rightly described the "standard" of "undue burden" as being, in fact, "standardless"—and "inherently manipulable."[33] That is, "undue burden" means *whatever the justices want it to mean*. The meaning that "undue burden" now has been given by Justice Breyer essentially ensures that states will not be able to prove, to the Supreme Court's satisfaction, that *any* regulation of pre-viability abortions is anything other than an "undue burden"—that is, unconstitutional.[34]

In short, after *Whole Woman's Health v. Hellerstedt*, "laws that are enacted with the explicit (or unstated) purpose of protecting fetal life prior to viability will be difficult to sustain."[35] Consequently, human life—the lives of unborn children—will be more difficult to protect.

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[1] *See* Kirsten Powers, "Philadelphia Abortion Clinic Horror," *USA Today* (Apr. 11, 2013), http://www.usatoday.com/story/opinion/2013/04/10/philadelphia-abortion-clinic-horror-column/2072577/ [http://perma.cc/X7L4-F8DL].

[2] Jon Hurdle & Trip Gabriel, "Philadelphia Abortion Doctor Guilty of Murder in Late-Term Procedures," *New York Times*, May 14, 2013, at A12.
[3] Powers, *supra* note 1.
[4] Jon Hurdle, "Doctor Starts His Life Term in Grisly Abortion Clinic Case," *New York Times*, May 16, 2013, at A17. By "'snipped' its neck with scissors," the *Times* is being euphemistic for "beheaded the baby." *See* Powers, *supra* note 1.
[5] Jess Bravin & Brent Kendall, "Deeply Divided Supreme Court Wrestles with Texas Abortion Case," *Wall Street Journal* (Mar. 2, 2016), http://www.wsj.com/articles/supreme-court-set-to-take-up-key-abortion-case-1456914602 [http://perma.cc/XZ57-SN92].
[6] Adam Liptak, "Supreme Court Strikes Down Texas Abortion Restrictions," *New York Times* (June 27, 2016), http://www.nytimes.com/2016/06/28/us/supreme-court-texas-abortion.html [http://perma.cc/FEK3-RJPM].
[7] *See* Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 677–79 (W.D. Tex. 2014).
[8] *See id.* at 676–77.
[9] *See* Whole Woman's Health v. Cole, 790 F.3d 563, 567 (5th Cir. 2015).
[10] *See* Petition for Writ of Certiorari, Whole Woman's Health v. Cole, 135 S. Ct. 2923 (2015) (No. 15-274).
[11] Whole Woman's Health v. Hellerstedt, No. 15-274, slip op. (U.S. June 27, 2016), http://www.supremecourt.gov/opinions/15pdf/15-274_p8k0.pdf [http://perma.cc/337H-45YE].
[12] *Id.* at 1–2.
[13] *See id.*
[14] *See id.* at 2.
[15] *Id.* at 1.
[16] *Id.* at 2 (citations omitted).
[17] *Id.* at 1 (opinion of Alito, J., dissenting).
[18] Jess Bravin, "Supreme Court Rejects Texas Abortion Law as 'Undue Burden,'" *Wall Street Journal* (June 27, 2016), http://www.wsj.com/articles/supreme-court-voids-texas-abortion-regulations-1467036610 [http://perma.cc/RN7B-6Q4S].
[19] *Whole Woman's Health*, slip op. at 40 (opinion of Alito, J., dissenting).
[20] Liptak, *supra* note 6.
[21] *Whole Woman's Health*, slip op. at 19 (opinion of Alito, J., dissenting) (footnote omitted).
[22] *Id.* at 1 (opinion of Thomas, J., dissenting).
[23] Johnathan H. Adler, "Supreme Court Voids Texas Abortion Regulations as 'Undue Burden' on Abortion Providers," *Volokh Conspiracy* (June 27, 2016, 11:05 AM), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/27/supreme-court-voids-texas-abortion-regulations-as-undue-burden-on-abortion-providers/ [http://perma.cc/SLE6-KLAB].
[24] *Whole Woman's Health*, slip op. at 1 (opinion of Thomas, J., dissenting) (quoting Stenberg v. Carhart, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting)).
[25] Liptak, *supra* note 6.
[26] *Id.*
[27] *See, e.g.*, "Religious Landscape Study: Views About Abortion by State," Pew Research Center (2014), http://www.pewforum.org/religious-landscape-study/compare/views-about-abortion/by/state/ [http://perma.cc/GE97-J9LN] (reporting that, in Alabama, 58% of adults say that abortion should be "illegal" in all or most cases and 37% of adults say that abortion should be "legal" in all or most cases).
[28] Women's Health and Safety Act of 2013, Ala. Code §§ 26-23E-1 to -17, *invalidated in part by* Planned Parenthood Southeast, Inc. v. Strange (*Strange II*), 33 F. Supp. 3d 1330 (M.D. Ala. 2014) (enjoining the law's admitting-privileges requirement); *see also* Planned Parenthood Southeast, Inc. v. Strange (*Strange I*), 9 F. Supp. 3d 1272 (M.D. Ala. 2014); Planned Parenthood v. Strange (*Strange III*), 33 F. Supp. 3d 1381 (M.D. Ala. 2014).
[29] *See* Brief of Amici Curiae Bipartisan Group of 174 United States Senators and Members of the United States House of Representatives in Support of Respondents, Whole Woman's Health v. Hellerstedt, No. 15-274 (U.S. June 27, 2016), http://www.scotusblog.com/wp-content/uploads/2016/02/15-274-bsac-Bipartisan-Group-of-174-United-States-Senators-and-Members-o....pdf [http://perma.cc/6LL4-K8A8]; Brief of the Governors of Texas, Alabama, Arkansas, Iowa, Kentucky, Louisiana, Maine, Mississippi, Nebraska, and South Dakota as Amici Curiae in Support of Respondents, Whole Woman's Health v. Hellerstedt, No. 15-274 (U.S. June 27, 2016), http://www.scotusblog.com/wp-content/uploads/2016/02/15-274-bsac-Governor-of-Texas.pdf [http://perma.cc/L9E7-35VD]; Brief of Amici Curiae States of Indiana, Ohio, Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming in Support of Respondents, Whole Woman's Health v. Hellerstedt, No. 15-274 (U.S. June 27, 2016), http://www.scotusblog.com/wp-content/uploads/2016/02/15-274-bsac-IndOh21otherStates.pdf [http://perma.cc/VCE2-NZLH]; Amicus Curiae Brief of More Than 450 Bipartisan and Bicameral State Legislators and Lieutenant Governors in Support of the Respondents and Affirmance of the Fifth Circuit, Whole Woman's Health v. Hellerstedt, No. 15-274 (U.S. June 27, 2016), http://www.scotusblog.com/wp-content/uploads/2016/02/15-274-bsac-BipartisanBicameral-State-Legislators.pdf [http://perma.cc/J5QB-ASXB].
[30] For example, Attorney General Luther Strange announced that he would not continue appealing the Alabama law, explaining: "While I disagree with the [*Whole Woman's Health v. Hellerstedt*] decision, there is no good-faith argument that Alabama's law remains constitutional in light of the Supreme Court ruling." Kim Chandler, "High Court Abortion Law Ruling in Texas Ends Alabama's Fight," *Washington Times* (June 27, 2016), http://www.washingtontimes.com/news/2016/jun/27/supreme-court-abortion-ruling-could-protect-alabam/ [http://perma.cc/ZK7Z-X8LT].
[31] *See* Adler, *supra* note 23.
[32] This "standard" was first set forth, in the context of laws regulating abortion, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Cf.* Roe v. Wade, 410 U. S. 113 (1973) (setting forth the earlier test that *Casey* replaced, "trimester analysis," in which the state's ability to restrict abortion increased after each trimester of pregnancy)
[33] *Casey*, 505 U.S. at 986, 987 (Scalia, J., dissenting).
[34] *See* Adler, *supra* note 23.
[35] *Id.*