

High Court Should Look At Texas House Bill 2 In Context

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If a state purportedly justifies an abortion regulation on the basis that it protects women’s and children’s health, shouldn’t we look carefully at the state’s track record to see if its overall policy choices indeed help women and their families?

Three organizations committed to advancing the health and welfare of women and children nationally and in the state of Texas — the Institute for Women’s Policy Research, Re:Gender (formerly the National Council for Research on Women), and the National Association of Social Workers and its Texas chapter — sought to answer that question in their amicus brief to the U.S. Supreme Court in support of the petitioners in *Whole Woman’s Health v. Hellerstedt*, a case concerning Texas’s ability to restrict abortion access in order to (allegedly) protect women’s health.

On March 2, 2016, the Supreme Court will hear argument in *Whole Woman’s Health* to determine whether the Texas restrictions constitute an “undue burden” on a woman’s right to obtain an abortion, the standard set forth in the seminal case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.^[1] *Casey* held that any restriction on a woman’s right to end a pregnancy before viability is unconstitutional if it imposes an undue burden, i.e., if “its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion.”^[2] According to Supreme Court precedent, states cannot enact “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle,” and regulations that do so must be struck down.^[3]

The Whole Woman’s Health Appeal

The *Whole Woman’s Health* appeal addresses the undue burden standard in the context of Texas House Bill 2 (“H.B. 2”), legislation which places several restrictions on abortion providers. The two restrictions at issue — which are not grounded in any proven medical need or benefit — require physicians

performing abortions to have hospital admitting privileges within 30 miles of their clinic and require clinics performing abortions to meet the standards of an ambulatory surgery center.[4] The implementation of these regulations would force over 75 percent of the abortion facilities in Texas to close, which, in turn, would increase wait times at the few remaining abortion clinics and force many Texas women to travel hundreds of miles to find their nearest abortion provider.[5]

The U.S. Court of Appeals for the Fifth Circuit upheld the abortion regulations in almost all applications by accepting, but not scrutinizing, Texas's stated purpose of improving women's health. The petitioners contend that the Fifth Circuit's application of the undue burden standard — in which any health rationale, whether weak or pretextual, is sufficient to justify significant impositions on the abortion right — is unfaithful to Casey. For Casey to protect abortion access, which it recognized as a fundamental liberty right, the undue burden standard must have teeth; that is, a court must be prepared to meaningfully examine the purpose and effect of the legislation to determine if any burden is, in fact, undue. This largely requires the court to balance the severity of the obstacle imposed by the legislation with the weight of the state's justification for it.[6]

And that's where the amicus brief comes in. Since it is often difficult to divine what any legislature was thinking or intending when it passed a law, it can be useful to examine whether a state — which purportedly passed a bill to raise the standards of women's health — has actually sought to improve women's health and health care access in other arenas. And, in fact, the brief makes clear that Texas has largely failed to do so. This failure speaks volumes in terms of whether H.B. 2 was actually intended to improve women's health or strew impediments to — and unconstitutionally encroach upon — the right to abortion access.

The State of Women's and Children's Health in Texas

As Amici curiae learned, women and children in the state of Texas are struggling. Women in Texas have a lower life expectancy than the national average[7] and are more likely to die from heart disease[8] and cervical cancer,[9] to be obese or overweight,[10] and to suffer from diabetes, Chlamydia, and AIDS than the average American woman.[11] Only three states have a higher percentage of women reporting that they have not seen a doctor in the last year due to cost,[12] and just one state has a higher percentage of adult women reporting that they have no personal doctor or health care provider.[13] In 2013, Texas had the highest percentage of births to women — 10 percent overall — who received no or late prenatal care.[14] According to the Texas Department of State Health Services, inadequate prenatal care may lead to low birth weight babies and preterm deliveries as well as infant and maternal mortality.[15]

The poor health of a mother affects children's well-being long after infancy. Poor maternal health can contribute to a family's risk of falling into low food security, marked by inadequate food quantity and quality;[16] Texas, in fact, has a higher food insecurity rate than the national average.[17] Childhood poverty is also cited as a health challenge for children,[18] and nearly one-quarter of all children in Texas lived in poverty in 2014.[19] Poverty likewise impacts access to health care: children from low-income families with uninsured parents are three times more likely to be eligible for insurance but remain uninsured than children in families with insured parents.[20] It comes as no surprise then that Texas has the greatest number of children of any state who are insurance-eligible but unenrolled.[21] Lack of access to health care and poverty have also translated into poor health outcomes for children. Texas child and teen mortality rates are higher than the national average,[22] and Texas high school students have the fifth-highest obesity rate in the nation.[23]

The Impact of Texas Legislative Policy

These poor outcomes in part reflect policy choices of the Texas legislature. Nearly two million adult Texas women under age 65 lack health insurance, a higher percentage of uninsured women than any other state.[24] Although many of these women would normally turn to Medicaid, Texas restricts Medicaid coverage to a small fraction of its low-income population.[25] Consequently, over 400,000 adult Texas women who fall below the federal poverty level and are ineligible for federal tax credits lack basic health coverage.[26] Unlike states of similar political stripes,[27] Texas has failed to adopt any alternative proposal or mechanisms to expand Medicaid to these women.[28]

Without health insurance access, women often rely on state-funded family planning programs to obtain core family planning and women's health services,[29] such as breast and cervical cancer screenings, pap tests, contraception, and sexually transmitted infection testing and treatment. But the Texas legislature — the same one to pass H.B. 2 — has weakened this safety net significantly. In 2011, it slashed its family planning budget by nearly two-thirds[30] and established a tiered funding system that placed specialized family planning providers — those that do not provide comprehensive primary and preventive care services[31] — in its lowest tier, effectively ensuring that these clinics receive little of the money designated for family planning services.[32] The adoption of the Texas affiliate rule — preventing any state family planning dollars from going to providers perceived to have an affiliation with any entity that provides or promotes abortion services[33] — also led to the loss of federal funding.[34]

These spending cuts forced 82 medical facilities in Texas to close or discontinue family planning services.[35] Minority communities were hit particularly hard, and routine tests such as mammograms and ultrasounds have become considerably more expensive and less available.[36] Texas made a partial about-face in 2013 and increased its primary health care budget, with an expectation that a portion of the funds would be earmarked for family planning services.[37] But the funding — even if it were to meet its target — would still not cover all of the more than one million Texas women who need publicly supported preventive health and family planning services.[38]

The Supreme Court should take into account Texas's sustained failure to help women and children when evaluating whether Texas's stated purpose in passing H.B. 2 withstands constitutional scrutiny. Providing this context to the Supreme Court is crucial; if the restrictions in H.B. 2 do not serve their stated purpose, place a disproportional burden on women seeking abortions, or were intended to serve their actual effect — the closure of abortion clinics — they are unconstitutional. If the state of women's health in Texas is any indicator of Texas's true (improper) purpose, the Supreme Court should agree and reverse the decision of the Fifth Circuit.

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Alison Stein and Jenna Ross, along with other attorneys at Jenner & Block LLP, represented the Institute for Women's Policy Research, Re:Gender, the National Association of Social Workers, and the Texas Chapter of the National Association of Social Workers in the filing of their amicus brief in Whole Woman's Health v. Hellerstedt.

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[1] 505 U.S. 833 (1992).

[2] Id. at 878.

[3] Id.

[4] See Brief for Petitioners, *Whole Woman's Health v. Hellerstedt*, No. 15-274, at 2, 3, 39 (S. Ct. 2015).

[5] Id. at 25-26, 49, 56.

[6] See, e.g., *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 921 (7th Cir. 2015) (“The statute may not be irrational, yet may still impose an undue burden—a burden excessive in relation to the aims of the statute and the benefits likely to be conferred by it—and if so it is unconstitutional.”).

[7] Haidong Wang et al., Inst. for Health Metrics & Evaluation, *Left behind: widening disparities for males and females in US county life expectancy, 1985-2010* (July 2013), <http://www.healthdata.org/research-article/left-behind-widening-disparities-males-and-females-us-county-life-expectancy-1985> (Texas spreadsheet, 2010 life expectancy figures).

[8] Cynthia Hess et al., Inst. for Women's Policy Research, *The Status of Women in the States 2015*, 220 (May 2015), <http://statusofwomensdata.org/app/uploads/2015/02/Status-of-Women-in-the-States-2015-Full-National-Report.pdf>.

[9] Henry J. Kaiser Family Found., *Cervical Cancer Deaths per 100,000 Women*, State Health Facts, <http://kff.org/other/state-indicator/cervical-cancer-death-rate> (last visited Dec. 21, 2015). Rates for Hispanic women in Texas are most dire. While nationally 2.7 of every 100,000 Hispanic women die of cervical cancer, in Texas the rate is 3.9 of every 100,000. See Henry J. Kaiser Family Found., *Cervical Cancer Deaths per 100,000 Women by Race/Ethnicity*, State Health Facts, <http://kff.org/other/state-indicator/cervical-cancer-death-rate-by-re> (last visited Dec. 21, 2015).

[10] Henry J. Kaiser Family Found., *Overweight and Obesity Rates for Adults by Gender*, State Health Facts, <http://kff.org/other/state-indicator/adult-overweightobesity-rate-by-gender> (last visited Dec. 21, 2015).

[11] Hess et al., *supra* note viii, at 195, 224.

[12] Henry J. Kaiser Family Found., *Percent of Adult Women Who Did Not See a Doctor in the Past 12 Months Due to Cost, by Race/Ethnicity*, State Health Facts, <http://kff.org/womens-health-policy/state-indicator/percent-of-adult-women-who-did-not-see-a-doctor-in-the-past-12-months-due-to-cost-by-raceethnicity/#table> (last visited Dec. 21, 2015).

[13] Henry J. Kaiser Family Found., *No Personal Doctor/Health Care Provider for Adults by Gender*, State Health Facts, <http://kff.org/disparities-policy/state-indicator/no-personal-doctorhealth-care-provider-for-adults-by-gender> (last visited Dec. 21, 2015).

[14] Annie E. Casey Found., *Births to Women Receiving Late or No Prenatal Care*, Kids Count Data Center, <http://datacenter.kidscount.org/data/Tables/11-births-to-women-receiving-late-or-no-prenatal-care#ranking/2/any/true/36/any/266> (last visited Dec. 21, 2015) (evaluating 40 states in total). Nationally, only 6% of children were born to mothers who either did not receive prenatal care until their third trimester or received no care at all.

[15] Tex. Dep't of State Health Servs., The Health Status of Texas 2014, 19 (Oct. 2014), <http://www.dshs.state.tx.us/chs/HealthStatusTexas2014.pdf>.

[16] Marisa Ramirez, UH Research: Healthy Mom = Healthy Family, Univ. of Houston (Apr. 27, 2015), <http://www.uh.edu/news-events/stories/2015/April/427MothersDay.php>.

[17] Alisha Coleman-Jensen et al., Household Food Security in the United States in 2014, ERR-194, U.S. Dep't of Agric. Econ. Research Serv., 18, 20 (Sept. 2015), <http://www.ers.usda.gov/media/1896841/err194.pdf>.

[18] America's Health Rankings, United Health Found., State Data: Texas, <http://www.americashealthrankings.org/TX> (Measures tab) (last visited Dec. 21, 2015).

[19] U.S. Census Bureau, Under Age 18 in Poverty, Small Area Income and Poverty Estimates, http://www.census.gov/did/www/saipe/data/interactive/saipe.html?s_appName=saipe&map_yearSelector=2014&map_geoSelector=u18_c&s_measures=u18_snc&s_state=48&menu=grid_proxy (last visited Dec. 21, 2015).

[20] Ctr. on Budget and Policy Priorities & Georgetown Univ. Health Policy Inst. Ctr. for Children and Families, Expanding Coverage for Parents Helps Children: Children's Groups Have a Key Role in Urging States to Move Forward and Expand Medicaid, 1, <http://www.cbpp.org/sites/default/files/atoms/files/expanding-coverage-for-parents-helps-children7-13.pdf> (last visited Dec. 21, 2015).

[21] Genevieve M. Kenney et al., Urban Inst., Medicaid/CHIP Participation Rates Among Children: An Update, 3 (Sept. 2013), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2013/rwjf407769.

[22] Annie E. Casey Found., Child And Teen Death Rate: 2013, Kids Count Data Center, <http://datacenter.kidscount.org/data/tables/7243-child-and-teen-death-rate?loc=45&loct=2#detailed/2/45/true/36/any/14285,17513> (last visited Dec. 21, 2015).

[23] Trust for America's Health & Robert Wood Johnson Found., The State of Obesity in Texas: Childhood Obesity, The State of Obesity, <http://stateofobesity.org/states/tx> (last visited Dec. 21, 2015). As of 2011, Texas also had the tenth-highest obesity rate in the nation among 10- to 17-year-olds. Id.

[24] Henry J. Kaiser Family Found., Health Insurance Coverage of Women 19-64, State Health Facts, <http://kff.org/other/state-indicator/nonelderly-adult-women> (last visited Dec. 21, 2015).

[25] Ctr. for Medicaid and CHIP Servs., State Medicaid and CHIP Income Eligibility Standards (Oct. 1, 2014), <http://www.medicaid.gov/medicaid-chip-program-information/program-information/downloads/medicaid-and-chip-eligibility-levels-table.pdf>; Ctr. for Medicaid and CHIP Servs., State Medicaid and CHIP Income Eligibility Standards Expressed in Monthly Income, Household Size of Three (Oct. 1, 2014), http://www.medicaid.gov/medicaid-chip-program-information/program-information/downloads/medicaid-and-chip-eligibility-levels-table_hhsize3.pdf.

[26] Rachel Garfield & Anthony Damico, Henry J. Kaiser Family Found., The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid – an Update, 7 tbl.1, 8 tbl.2 (Oct. 2015), <http://files.kff.org/attachment/issue-brief-the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid-an-update>.

[27] MaryBeth Musumeci & Robin Rudowitz, Henry J. Kaiser Family Found., The ACA and Medicaid Expansion Waivers, 1 (Nov. 2015), <http://files.kff.org/attachment/issue-brief-the-aca-and-medicaid-expansion-waivers>; see also Associated Press, Louisiana's financing plan for Medicaid expansion receives final passage, Times-Picayune (June 2, 2015), http://www.nola.com/politics/index.ssf/2015/06/louisiana_medicaid_finance_pla.html; Brian Lyman, Bentley task force backs expanded Medicaid, Montgomery Advertiser (Nov. 18, 2015), <http://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2015/11/18/bentley-task-force-expand-medicaid-alabama/75992648>.

[28] Robert T. Garrett, Zerwas: Bill to push 'Texas solution' on Medicaid is dead, Dallas Morning News: Trail Blazers Blog (May 7, 2013), <http://trailblazersblog.dallasnews.com/2013/05/zerwas-bill-to-push-texas-solution-on-medicaid-is-dead.html>; Marcia Davis, Texas stalls on Medicaid funding, Daily Trib. (Apr. 29, 2015), http://www.dailytribune.net/news/texas-stalls-on-medicaid-funding/article_6d4e0bbe-eecd-11e4-9cfe-C7f786f81066