On Abortion High Court Defers To Evidence, Not Legislatures

Law360, New York (July 1, 2016, 10:21 PM ET) --
On June 27, the U.S. Supreme Court issued a 5-3 opinion in Whole Woman’s Health v. Hellerstedt, striking down a Texas law that would have shuttered a majority of the state’s abortion clinics and, in an important win for women’s rights, reaffirming the right to an abortion.

Significantly, the Supreme Court’s decision sends a clear message that a claimed benefit to women’s health is not enough to sustain an abortion restriction; state legislatures must equip themselves with evidence, not just assertions, of a regulation’s health benefits. The court’s fact-intensive analysis, however, means that the scope of the Roe right may still be open to attack.

The Case Below

In 2013, the Texas legislature enacted House Bill 2 (H.B. 2), imposing numerous restrictions on abortion access. The two provisions of H.B. 2 at issue in Whole Woman’s Health were a requirement that a physician performing an abortion have admitting privileges at a hospital within 30 miles, and a provision requiring the minimum standards for an abortion facility to be equivalent to those for ambulatory surgical centers under Texas law. These provisions forced clinics across the state of Texas to close and threatened to leave fewer than a dozen remaining.

The District Court

After the admitting privileges requirement went into effect, a group of abortion providers mounted an as-applied challenge to the admitting privileges requirement and sought to enjoin enforcement of H.B. 2’s surgical center requirement. After a four-day bench trial with expert testimony from both sides, the district court set forth detailed factual findings and determined that the admitting privileges and surgical center requirements would, together, close almost all abortion clinics in Texas and create a constitutionally impermissible obstacle by restricting abortion access.[1] The district court enjoined enforcement of both provisions.

The Fifth Circuit

The Fifth Circuit reversed nearly all of the district court’s ruling, concluding that res judicata barred the plaintiffs’ challenges because the plaintiffs had previously filed a pre-enforcement facial challenge to the admitting privileges requirement.[2] The appellate court also held, however, that both requirements
were constitutional, reasoning that a law is “constitutional if (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to ... a legitimate state interest.” The court found that both requirements were rationally related to a compelling state interest in protecting women’s health.[3]

Undue Burdens and the Importance of Evidence

In a majority opinion drafted by Justice Stephen Breyer, the Supreme Court reversed the Fifth Circuit, holding that both provisions of H.B. 2 are unconstitutional because each constitutes an undue burden on abortion access.

After finding that res judicata did not bar either of the petitioners’ claims, Justice Breyer set forth the central holding of Planned Parenthood v. Casey as the foundation for the court’s merits analysis: “[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.”[4] From this starting point, the court found the Fifth Circuit’s deference to legislative fact finding to be inconsistent with precedent. Justice Breyer noted that, in abortion cases, the court historically placed considerable weight upon the evidence presented, and had previously explained that the “Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”[5]

Analyzing each provision in turn, the court found adequate legal and factual support for the district court’s conclusion that both requirements imposed an undue burden on a woman’s right to an abortion. In doing so, the court cited to undisputed factual information set forth in amicus briefs, including the impact of clinic closures, the inappropriateness of the requirements in the abortion context, and the relative safety of abortion as compared to other medical procedures. In light of these arguments and the district court’s factual findings, the court held that the admitting privileges and surgical center requirements “vastly increase the obstacles confronting women seeking abortions in Texas without providing any benefit to women’s health capable of withstanding any meaningful scrutiny.”[6]

Justice Ruth Bader Ginsburg, in a brief but forceful concurring opinion, called it “beyond rational belief that H.B. 2 could genuinely protect the health of women, and certain that the law ‘would simply make it more difficult for them to obtain abortions.’”[7]

Justices Samuel Alito, Clarence Thomas and John Roberts dissented. Justice Thomas argued that the majority was willing to bend the rules for different constitutional rights, such as the abortion right.[8] In a dissent joined by Chief Justice Roberts and Justice Thomas, Justice Alito took a similar tack, arguing that the rules of claim preclusion and severability had been disregarded by the majority.[9] Justice Alito also wrote that the petitioners failed to put forth sufficient evidence of the reasons why any particular clinic had closed.[10]

Evidence Beats Deference, But Questions Remain

Whole Woman’s Health clarifies that a state’s interest in women’s health can sustain a targeted abortion restriction only if it in fact achieves a women’s health benefit. Because Texas could show no appreciable medical benefits from the challenged provisions,[11] the burdens placed on women seeking abortions were deemed undue.

The direct import of the court’s decision is clear. Ten other states have enacted laws requiring doctors who provide abortions to possess hospital admitting privileges.[12] Twenty-three other states have
enacted laws requiring providers to meet the standards of ambulatory surgical centers.[13] Those state statutes, some of which were already enjoined by lower federal courts, are unlikely to withstand scrutiny after Whole Woman’s Health. These include the admitting privileges laws of Mississippi and Wisconsin, for which the court denied petitions for certiorari on June 28, the day after its decision in Whole Woman’s Health.[14]

More broadly, the court’s evidence-based approach suggests that the Roe right is pragmatic, in that it provides a viable defense against laws that do not overtly target women’s liberty, but would be lethal to abortion rights in practice. As the court’s opinion highlighted, the case involved a nearly complete mismatch between Texas’s stated aim and the anticipated effects of the statute, which involved substantial burdens on abortion but no demonstrable health benefits. Had Texas prevailed, it would have signaled that a well-crafted statement of justification could render even substantial burdens on the Roe right not “undue.” Moreover, while prior cases primarily concerned state laws that restricted when and how a woman could obtain an abortion,[15] the requirements at issue in Whole Woman’s Health impacted the Roe right indirectly, by reducing the number of available abortion providers. Whole Woman’s Health leaves no doubt that the test of Casey applies to burdens on abortion access whether or not they directly target women seeking abortions.

While marking an important victory for abortion rights, the court’s fact-focused inquiry into H.B. 2’s effects leaves some uncertainty. For one, when a different provider regulation similarly burdens the Roe right, but yields some (though not much) demonstrable health benefit, should it survive? The court does not say, and the extreme mismatch between benefits and burdens in the Texas case means Whole Woman’s Health may not be the last word. Meanwhile, the court devoted no attention to the “purpose” prong of the undue burden inquiry, which is independent from the “effects” prong upon which the court based its decision. The petitioners and amici set forth substantial evidence that Texas’s expressed desire to protect women’s health was pretextual in addition to fictional, and that burdening the Roe right was Texas’s aim rather than an ancillary consequence.[16] While courts are frequently reluctant to weigh the motives of legislative bodies, the Casey “undue burden” test that the court reaffirmed in Whole Woman’s Health expressly provides for such an analysis: “Unnecessary 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.”[17] After Whole Woman’s Health, it remains unknown whether an independent “purpose” analysis has bite.

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DISCLOSURE: Jeremy Ershow and Jessica Martinez, along with other attorneys at Jenner & Block, 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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[3] Id. at 580-84.


[5] Id. at 20 (quoting Gonzales v. Carhart, 550 U.S. 124, 163 (2007)).

[6] Id. at 37.


[8] Whole Woman’s Health, slip op. at 1 (Thomas, J., dissenting).


[10] Id. at 27 (Alito, J., dissenting).


[13] Id.


[17] Whole Woman’s Health, slip. op. at 19 (emphasis added).

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