

# Abortion in the United States

*Judicial History and Legislative  
Battle*



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# **Abortion in the United States - Judicial History and Legislative Battle**

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# **Table of Contents**

**[Abortion: Judicial History and Legislative Response](#)**

**[Abortion At or Over 20 Weeks' Gestation \(FAQ\)](#)**

**[Revolutionary Ruling: Roe v. Wade Doe v. Bolton](#)**

**[Planned Parenthood v. Casey Women's Health Protection Act](#)**

[Summary](#)

[Text of the Act Proposal](#)

**[2022 Ruling: Dobbs v. Jackson Women's Health Organization](#)**

# **ABORTION: JUDICIAL HISTORY AND LEGISLATIVE RESPONSE**

## Table of Contents

Summary

Judicial History

Roe v. Wade and Doe v. Bolton

Supreme Court Decisions After Roe and Doe

Webster

Casey

Partial-Birth Abortion

Ayotte

Whole Woman's Health

June Medical Services

Public Funding of Abortions

The 1977 Trilogy-Restrictions on Public Funding of  
Nontherapeutic or Elective Abortions

Public Funding of Therapeutic or Medically  
Necessary Abortions

Legislative History

Constitutional Amendments

Statutory Provisions

Bills That Seek to Prohibit the Right to Abortion  
by Statute

Hyde-Type Amendments to Appropriations  
Measures

Other Legislation

Health Reform

Legislation in the 116th Congress

FY2020 Appropriations

FY2021 Appropriations

## Legislation in the 117<sup>th</sup> Congress

# Summary

## [Table of Contents](#)

In 1973, the U.S. Supreme Court concluded in *Roe v. Wade* that the U.S. Constitution protects a woman's decision to terminate her pregnancy. In a companion decision, *Doe v. Bolton*, the Court found that a state may not unduly burden the exercise of that fundamental right with regulations that prohibit or substantially limit access to the procedure. Rather than settle the issue, the Court's rulings since *Roe* and *Doe* have continued to generate debate and have precipitated a variety of governmental actions at the national, state, and local levels designed either to nullify the rulings or limit their effect. These governmental regulations have, in turn, spawned further litigation in which resulting judicial refinements in the law have been no more successful in dampening the controversy.

Following *Roe*, the right identified in that case was affected by decisions such as *Webster v. Reproductive Health Services*, which gave greater leeway to the states to restrict abortion, and *Rust v. Sullivan*, which narrowed the scope of permissible abortion-related activities that are linked to federal funding. The Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which established the "undue burden" standard for determining whether abortion restrictions are permissible, gave Congress additional impetus to move on statutory responses to the abortion issue, such as the Freedom of Choice Act.

Legislation to prohibit a specific abortion procedure, the so-called "partial-birth" abortion procedure, was passed in the 108th Congress. The Partial-Birth Abortion Ban Act appears to be one of the only examples of Congress restricting the performance of a medical procedure. Legislation that would prohibit the performance of an

abortion once the fetus reaches a specified gestational age has also been introduced in numerous Congresses.

Since *Roe*, Congress has attached abortion funding restrictions to various appropriations measures. The greatest focus has arguably been on restricting Medicaid abortions under the annual appropriations for the Department of Health and Human Services. This restriction is commonly referred to as the “Hyde Amendment” because of its original sponsor. Similar restrictions affect the appropriations for other federal agencies, including the Department of Justice, where federal funds may not be used to perform abortions in the federal prison system, except in cases of rape or if the life of the mother would be endangered. Hyde-type amendments also have an impact in the District of Columbia, where federal and local funds may not be used to perform abortions except in cases of rape or incest, or where the life of the mother would be endangered, and affect international organizations like the United Nations Population Fund, which receives funds through the annual Foreign Operations appropriations measure.

The debate over abortion also continued in the context of health reform. The Patient Protection and Affordable Care Act (ACA), enacted on March 23, 2010, includes provisions that address the coverage of abortion services by qualified health plans that are available through health benefit exchanges. The ACA’s abortion provisions have been controversial, particularly with regard to the use of premium tax credits or cost-sharing subsidies to obtain health coverage that includes coverage for elective or nontherapeutic abortion services. Under the ACA, individuals who receive a premium tax credit or cost-sharing subsidy are permitted to select a qualified health plan that includes coverage for elective abortions, subject to funding segregation requirements that are imposed on both the plan issuer and the enrollees in such a plan.

# Judicial History

[Table of Contents](#)

## **Roe v. Wade and Doe v. Bolton**

[Table of Contents](#)

In 1973, the Supreme Court issued its landmark abortion rulings in *Roe v. Wade* and *Doe v. Bolton*. In those cases, the Court found that Texas and Georgia statutes regulating abortion interfered to an unconstitutional extent with a woman's right to decide whether to terminate her pregnancy. The Texas statute forbade all abortions not necessary "for the purpose of saving the life of the mother." The Georgia enactment permitted abortions only when continued pregnancy seriously threatened the woman's life or health, when the fetus was very likely to have severe birth defects, or when the pregnancy resulted from rape. The Georgia statute also required that abortions be performed only at accredited hospitals and only after approval by a hospital committee and two consulting physicians.

The Court's decisions were delivered by Justice Blackmun for himself and six other Justices. Justices White and Rehnquist dissented. The Court ruled that states may not categorically proscribe abortions by making their performance a crime, and that states may not make abortions unnecessarily difficult to obtain by prescribing elaborate procedural guidelines. The constitutional basis for the decisions rested upon the conclusion that the Fourteenth Amendment right of personal privacy embraced a woman's decision whether to carry a pregnancy to term. With regard to the scope of that privacy right, the Court stated that it includes "only personal rights that can



be deemed 'fundamental' or 'implicit in the concept of ordered liberty'" and bears some extension to activities related to marriage, procreation, contraception, family relationships, child rearing, and education. Such a right, the Court concluded, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

With respect to protecting that right against state interference, the Court held that because the right of personal privacy is a fundamental right, only a "compelling State interest" could justify its limitation by a state. Thus, while it recognized the legitimacy of the state interest in protecting maternal health and the preservation of the fetus's potential life, as well as the existence of a rational connection between these two interests and a state's anti-abortion law, the Court held these interests insufficient to justify an absolute ban on abortions.

Instead, the Court emphasized the durational nature of pregnancy and found the state's interests to be sufficiently compelling to permit the curtailment or prohibition of abortion only during specified stages of pregnancy. The High Court concluded that until the end of the first trimester, an abortion is no more dangerous to maternal health than childbirth itself, and found that "[with] respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in light of present medical knowledge, is at approximately the end of the first trimester." Only after the first trimester did the state's interest in protecting maternal health provide a sufficient basis to justify state regulation of abortion, and then only to protect this interest.

The "compelling" point with respect to the state's interest in the potential life of the fetus "is at viability." Following viability, the state's interest permitted it to regulate and even proscribe an abortion except when necessary, in appropriate medical judgment, for the preservation of the life or health of the woman. In summary,

the Court's holding was grounded in this trimester framework analysis and the concept of fetal viability.

In *Doe v. Bolton*, the Court extended *Roe* by warning that just as states may not prevent abortion by making its performance a crime, they may not make abortions unreasonably difficult to obtain by prescribing elaborate procedural barriers. In *Doe*, the Court struck down Georgia's requirements that abortions be performed in licensed hospitals; that abortions be approved beforehand by a hospital committee; and that two physicians concur in the abortion decision. The Court appeared to note, however, that this would not apply to a statute that protected the religious or moral beliefs of denominational hospitals and their employees.

In *Roe*, the Court also dealt with the question of whether a fetus is a person under the Fourteenth Amendment and other provisions of the Constitution. The Court indicated that the Constitution never specifically defines the term "person," but added that in nearly all the sections where the word "person" appears, "the use of the word is such that it has application only postnationally. None indicates, with any assurance, that it has any possible pre-natal application." The Court emphasized that, given the fact that in the major part of the 19th century prevailing legal abortion practices were far freer than today, it was persuaded "that the word 'person', as used in the Fourteenth Amendment, does not include the unborn."

The Court did not, however, resolve the question of when life actually begins. While noting the divergence of thinking on this issue, it instead articulated the legal concept of "viability," defined as the point at which the fetus is potentially able to live outside the womb, with or without artificial assistance. Many other questions were also not addressed in *Roe* and *Doe*, but instead led to a wealth of post-*Roe* litigation.

# Supreme Court Decisions After Roe and Doe

## [Table of Contents](#)

Following *Roe*, the Court examined a variety of federal and state requirements that addressed different concerns related to abortion: informed consent and mandatory waiting periods; spousal and parental consent; parental notice; reporting requirements; advertisement of abortion services; abortions by nonphysicians; locus of abortions; viability, fetal testing, and disposal of fetal remains; and “partial-birth” abortions.

In *Rust v. Sullivan*, the Court upheld on both statutory and constitutional grounds the Department of Health and Human Services’ Title X regulations restricting recipients of federal family planning funding from using federal funds to counsel women about abortion. While *Rust* is probably better understood as a case involving First Amendment free speech rights rather than a challenge to the constitutionally guaranteed substantive right to abortion, the Court, following its earlier public funding cases (*Maher v. Roe* and *Harris v. McRae*), did conclude that a woman’s right to an abortion was not burdened by the Title X regulations. The Court reasoned that there was no constitutional violation because the government has no duty to subsidize an activity simply because it is constitutionally protected and because a woman is “in no worse position than if Congress had never enacted Title X.”

In addition to *Rust*, the Court decided several other noteworthy cases involving abortion following *Roe*. *Webster v. Reproductive Health Services* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* illustrate the Court’s shift from the type of constitutional analysis it articulated in *Roe*. These cases and other more recent cases, such as *Stenberg v. Carhart* and *Ayotte v. Planned Parenthood of Northern New England* have implications for future

legislative action and how enactments will be judged by the courts in the years to come. *Webster*, *Casey*, and *Ayotte* are discussed in the subsequent sections of this report. A discussion of *Stenberg* is included in the “Partial-Birth Abortion” section of this report.

# Webster

## Table of Contents

In *Webster v. Reproductive Health Services*, the Court upheld Missouri's restrictions on the use of public employees and facilities for the performance of abortions. Although the Court did not overrule *Roe*, a plurality of Justices indicated that it was willing to apply a less stringent standard of review to state abortion regulations. The plurality criticized the trimester framework established by *Roe*, noting that it "is hardly consistent with the notion of a Constitution cast in general terms[.]" The plurality also questioned *Roe*'s identification of viability as the point at which a state could regulate abortion to protect potential life:

[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.

*Webster* recognized that state legislatures retain considerable discretion to pass abortion regulations, and acknowledged the likelihood that such regulations would probably pass constitutional muster in the future. However, because *Webster* did not affect private doctors' offices or clinics, the ruling was arguably narrow in scope. Nevertheless, *Webster* set the stage for the Court's 1992 decision in *Casey*, where a real shift in direction was pronounced.

# Casey

## Table of Contents

*Webster* and *Rust* energized legislative activity at the federal and state levels. Some of the state legislative proposals that became law were later challenged in the courts. The constitutionality of Pennsylvania's Abortion Control Act was examined by the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In *Casey*, a plurality of the Court rejected the trimester framework established in *Roe*, explaining that "in its formulation [the framework] misconceives the pregnant woman's interest . . . and in practice it undervalues the State's interest in potential life[.]" In its place, the plurality adopted a new "undue burden" standard, maintaining that this standard recognized the need to reconcile the government's interest in potential life with a woman's right to decide to terminate her pregnancy. While *Roe* generally restricted the regulation of abortion during the first trimester, *Casey* emphasized that not all of the burdens imposed by an abortion regulation were likely to be undue. Under *Casey*, an undue burden exists if the purpose or effect of an abortion regulation is "to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."

In adopting the new undue burden standard, *Casey* nonetheless reaffirmed the essential holding of *Roe*, which the plurality described as having three parts. First, a woman has a right to choose to have an abortion prior to viability without undue interference from the state. Second, the state has a right to restrict abortions after viability so long as the regulation provides an exception for pregnancies that endanger a woman's life or health. Third, the state has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus.

After applying the undue burden standard in *Casey*, four provisions of the Pennsylvania law were upheld. The law's 24-hour waiting period requirement, its informed consent provision, its parental consent provision, and its recordkeeping and reporting requirements were found to not impose an undue burden. While the plurality acknowledged that these requirements, notably the 24-hour waiting period, could delay the procedure or make an abortion more expensive, it nevertheless concluded that they did not impose an undue burden. Moreover, the plurality emphasized that "under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion even if those measures do not further a health interest."

The law's spousal notification provision, which required a married woman to tell her husband of her intention to have an abortion, did not survive the undue burden analysis. A majority of the Court maintained that the requirement imposed an undue burden because it could result in spousal abuse and discourage a woman from seeking an abortion: "The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle."

The plurality's decision in *Casey* was significant because the new standard of review appeared to allow more state restrictions to pass constitutional muster. In addition, the plurality maintained that the state's interest in protecting the potentiality of human life extended throughout the course of the pregnancy. Thus, the state could regulate, even to the point of favoring childbirth over abortion, from the outset. Under *Roe*, which utilized the trimester framework, a woman's decision to terminate her pregnancy was reached in consultation with her doctor with virtually no state involvement during the first trimester of pregnancy.

In addition, under *Roe*, abortion was a “fundamental right” that could not be restricted by the state except to serve a “compelling” state interest. *Roe*’s strict scrutiny standard of review resulted in most state regulations being invalidated during the first two trimesters of pregnancy. The “undue burden” standard allowed greater regulation during that period. This is evident from the fact that the *Casey* Court overruled, in part, two of its earlier decisions which had followed *Roe*: *City of Akron v. Akron Center for Reproductive Health* and *Thornburgh v. American College of Obstetricians and Gynecologists*. In these cases, the Court, applying strict scrutiny, struck down 24-hour waiting periods and informed consent provisions; whereas in *Casey*, applying the undue burden standard, the Court upheld similar provisions.

*Casey* had its greatest immediate effect on women in the state of Pennsylvania; however, its reasoning prompted other states to pass similar restrictions that would withstand challenge under the “undue burden” standard.



# Partial-Birth Abortion

## Table of Contents

On June 28, 2000, the Court decided *Stenberg v. Carhart*, its first substantive abortion case since *Casey*. In *Stenberg*, the Court determined that a Nebraska statute that prohibited the performance of so-called “partial-birth” abortions was unconstitutional because it failed to include an exception to protect the health of the mother and because the language defining the prohibited procedure was too vague. In affirming the decision of the U.S. Court of Appeals for the Eighth Circuit, the Court agreed that the language of the Nebraska statute could be interpreted to prohibit not just the dilation and extraction (D&X) procedure that prolife advocates oppose, but the standard dilation and evacuation (D&E) procedure that is the most common abortion procedure during the second trimester of pregnancy. The Court maintained that the statute was likely to prompt those who perform the D&E procedure to stop because of fear of prosecution and conviction. The result would be the imposition of an “undue burden” on a woman’s ability to have an abortion.

After several attempts to pass federal legislation that would prohibit the performance of partial-birth abortions, Congress passed the Partial-Birth Abortion Ban Act of 2003 during the 108th Congress. The measure was signed by President George W. Bush on November 5, 2003. In general, the act prohibits physicians from performing a partial-birth abortion except when it is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. Physicians who violate the act are subject to a fine, imprisonment for not more than two years, or both.

Despite the Court's holding in *Stenberg* and past decisions concluding that restrictions on abortion must allow for the performance of the procedure when it is necessary to protect the health of the mother, the Partial-Birth Abortion Ban Act of 2003 does not include such an exception. In his introductory statement for the act, Senator Rick Santorum discussed the measure's lack of a health exception. He maintained that an exception is not necessary because of the risks associated with partial-birth abortions. Senator Santorum insisted that congressional hearings and expert testimony demonstrate "that a partial birth abortion is never necessary to preserve the health of the mother, poses significant health risks to the woman, and is outside the standard of medical care."

Within two days of the act's signing, federal courts in Nebraska, California, and New York blocked its enforcement. On April 18, 2007, the Court upheld the Partial-Birth Abortion Ban Act of 2003, finding that, as a facial matter, it is not unconstitutionally vague and does not impose an undue burden on a woman's right to terminate her pregnancy. In *Gonzales v. Carhart*, the Court distinguished the federal statute from the Nebraska law at issue in *Stenberg*. According to the Court, the federal statute is not unconstitutionally vague because it provides doctors with a reasonable opportunity to know what conduct is prohibited. Unlike the Nebraska law, which prohibited the delivery of a "substantial portion" of the fetus, the federal statute includes "anatomical landmarks" that identify when an abortion procedure will be subject to the act's prohibitions. The Court noted: "[I]f an abortion procedure does not involve the delivery of a living fetus to one of these 'anatomical landmarks'—where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother—the prohibitions of the Act do not apply."

The Court also maintained that the inclusion of a scienter or knowledge requirement in the federal statute alleviates any vagueness concerns. Because the act applies only when a doctor “deliberately and intentionally” delivers the fetus to an anatomical landmark, the Court concluded that a doctor performing the D&E procedure would not face criminal liability if a fetus is delivered beyond the prohibited points by mistake. The Court observed: “The scienter requirements narrow the scope of the Act’s prohibition and limit prosecutorial discretion.”

In reaching its conclusion that the Partial-Birth Abortion Ban Act of 2003 does not impose an undue burden on a woman’s right to terminate her pregnancy, the Court considered whether the federal statute is overbroad, prohibiting both the D&X and D&E procedures. The Court also considered the statute’s lack of a health exception.

Relying on the plain language of the act, the Court determined that the federal statute could not be interpreted to encompass the D&E procedure. The Court maintained that the D&E procedure involves the removal of the fetus in pieces. In contrast, the federal statute uses the phrase “delivers a living fetus.” The Court stated: “D&E does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix.” The Court also identified the act’s specific requirement of an “overt act” that kills the fetus as evidence of its inapplicability to the D&E procedure. The Court indicated: “This distinction matters because, unlike [D&X], standard D&E does not involve a delivery followed by a fatal act.” Because the act was found not to prohibit the D&E procedure, the Court concluded that it is not overbroad and does not impose an undue burden a woman’s ability to terminate her pregnancy.

According to the Court, the absence of a health exception also did not result in an undue burden. Citing *Ayotte v. Planned Parenthood of Northern New England*, its 2006

decision involving New Hampshire's parental notification law (discussed below), the Court noted that a health exception would be required if the act subjected women to significant health risks. However, acknowledging medical disagreement about the act's requirements ever imposing significant health risks on women, the Court maintained that "the question becomes whether the Act can stand when this medical uncertainty persists." Reviewing its past decisions, the Court indicated that it has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. The Court concluded that this medical uncertainty provides a sufficient basis to conclude in a facial challenge of the statute that it does not impose an undue burden.

Although the Court upheld the Partial-Birth Abortion Ban Act of 2003 without a health exception, it acknowledged that there may be "discrete and well-defined instances" where the prohibited procedure "must be used." However, the Court indicated that exceptions to the act should be considered in as-applied challenges brought by individual plaintiffs: "In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack."

Justice Ginsburg authored the dissent in *Gonzales*. She was joined by Justices Stevens, Souter, and Breyer. Describing the Court's decision as "alarming," Justice Ginsburg questioned upholding the federal statute when the relevant procedure has been found to be appropriate in certain cases. Citing expert testimony that had been introduced, Justice Ginsburg maintained that the prohibited procedure has safety advantages for women with certain medical conditions, including bleeding disorders and heart disease.

Justice Ginsburg also criticized the Court's decision to uphold the statute without a health exception. Justice Ginsburg declared: "Not only does it defy the Court's

longstanding precedent affirming the necessity of a health exception, with no carve-out for circumstances of medical uncertainty . . . it gives short shrift to the records before us, carefully canvassed by the District Courts.” Moreover, according to Justice Ginsburg, the refusal to invalidate the Partial-Birth Abortion Ban Act of 2003 on facial grounds was “perplexing” in light of the Court’s decision in *Stenberg* Justice Ginsburg noted: “[I]n materially identical circumstances we held that a statute lacking a health exception was unconstitutional on its face.”

# Ayotte

## Table of Contents

In *Ayotte v. Planned Parenthood of Northern New England*, the Court concluded that a wholesale invalidation of New Hampshire's Parental Notification Prior to Abortion Act was inappropriate. Finding that only a few applications of the act raised constitutional concerns, the Court remanded the case to the lower courts to render narrower declaratory and injunctive relief.

The New Hampshire law at issue in *Ayotte* prohibited physicians from performing an abortion on a pregnant minor or a woman for whom a guardian or conservator was appointed until 48 hours after written notice was delivered to at least one parent or guardian. The notification requirement could be waived under certain specified circumstances. For example, notification was not required if the attending abortion provider certified that an abortion was necessary to prevent the woman's death and there was insufficient time to provide the required notice.

Planned Parenthood of Northern New England and several other abortion providers challenged the New Hampshire statute on the grounds that it did not include an explicit waiver that would allow an abortion to be performed to protect the health of the woman. The U.S. Court of Appeals for the First Circuit invalidated the statute in its entirety on that basis. The First Circuit also maintained that the act's life exception was impermissibly vague and forced physicians to gamble with their patients' lives by preventing them from performing an abortion without notification until they were certain that death was imminent.

Declining to revisit its prior abortion decisions, the Court insisted that *Ayotte* presented a question of remedy. Maintaining that the act would be unconstitutional only in medical emergencies, the Court determined that a more

narrow remedy, rather than the wholesale invalidation of the act, was appropriate:

Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force . . . or to sever its problematic portions while leaving the remainder intact.

The Court identified three interrelated principles that inform its approach to remedies. First, the Court tries not to nullify more of a legislature's work than is necessary because a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.

Second, the Court restrains itself from rewriting a state law to conform to constitutional requirements, even as it attempts to salvage the law. The Court explained that its constitutional mandate and institutional competence are limited, noting that "making distinctions in a murky constitutional context" may involve a far more serious invasion of the legislative domain than the Court ought to take.

Third, the touchstone for any decision about remedy is legislative intent; that is, a court cannot use its remedial powers to circumvent the intent of the legislature. The Court observed that "[a]fter finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?"

On remand, the lower courts were expected to determine the intent of the New Hampshire legislature when it enacted the parental notification statute. Although the state argued that the measure's severability clause illustrated the legislature's understanding that the act should continue in force even if certain provisions were invalidated, the

respondents insisted that New Hampshire legislators actually preferred no statute rather than one that would be enjoined in the manner described by the Court. On February 1, 2007, a federal district court in New Hampshire entered a procedural order that stayed consideration of the case while a bill to repeal the Parental Notification Prior to Abortion Act was pending in the state legislature. The act was subsequently repealed by the legislature, effective June 29, 2007.

*Ayotte* illustrated the Court's willingness to invalidate an abortion regulation only as applied in certain circumstances. While it is not uncommon for federal courts to save a statute from invalidation by severing unconstitutional provisions, they have generally limited this practice to federal statutes. Observers noted that the Court's opinion represented an expansion of federal judicial power over the states.



# Whole Woman's Health

## [Table of Contents](#)

In *Whole Woman's Health v. Hellerstedt*, the Court invalidated two Texas requirements that applied to abortion providers and physicians who perform abortions. Under a Texas law enacted in 2013, a physician who performs or induces an abortion was required to have admitting privileges at a hospital within 30 miles from the location where the abortion was performed or induced. In general, admitting privileges allow a physician to transfer a patient to a hospital if complications arise in the course of providing treatment. The Texas law also required an abortion facility to satisfy the same standards as an ambulatory surgical center (ASC). These standards address architectural and other structural matters, as well as operational concerns, such as staffing and medical records systems. Supporters of the Texas law maintained that the requirements would guarantee a higher level of care for women seeking abortions. Opponents, however, characterized the requirements as unnecessary and costly, and argued that they would make it more difficult for abortion facilities to operate.

In a 5-3 decision, the Court rejected the procedural and constitutional grounds that were articulated by the U.S. Court of Appeals for the Fifth Circuit to uphold the requirements. Writing for the majority in *Whole Woman's Health*, Justice Breyer concluded that *res judicata* did not bar facial challenges to either the admitting privileges requirement or the ASC requirement. In applying the undue burden standard, Justice Breyer maintained that courts should place considerable weight on the evidence and arguments presented in judicial proceedings when they consider the constitutionality of abortion regulations. Justice Breyer also noted that the undue burden standard

requires courts to consider “the burdens a law imposes on abortion access together with the benefits those laws confer.”

The *Whole Woman’s Health* Court referred heavily to the evidence collected by the district court in its examination of the admitting privileges and ASC requirements. With regard to the admitting privileges requirement, the Court cited the low complication rates for first- and second-trimester abortions, and expert testimony that complications during the abortion procedure rarely require hospital admission. Based on this and similar evidence, the Court disputed the state’s assertion that the purpose of the admitting privileges requirement was to ensure easy access to a hospital should complications arise. The Court emphasized that “there was no significant health-related problem that the new law helped to cure.” Citing other evidence concerning the closure of abortion facilities as a result of the admitting privileges requirement and the increased driving distances experienced by women of reproductive age because of the closures, the Court maintained: “[T]he record evidence indicates that the admitting-privileges requirement places a ‘substantial obstacle in the path of a woman’s choice.’”

The Court again referred to the record evidence to conclude that the ASC requirement imposed an undue burden on the availability of abortion. Noting that the record supports the conclusion that the ASC requirement “does not benefit patients and is not necessary,” the Court also cited the closure of facilities and the cost to comply with the requirement as evidence that the requirement posed a substantial obstacle for women seeking abortions. While Texas argued that the clinics remaining after implementation of the ASC requirement could expand to accommodate all of the women seeking an abortion, the Court indicated that “requiring seven or eight clinics to

serve five times their usual number of patients does indeed represent an undue burden on abortion access.”

The majority’s focus on the record evidence, and a court’s consideration of that evidence in balancing the burdens imposed by an abortion regulation against its benefits, is noteworthy for providing clarification of the undue burden standard. Although the *Casey* Court did examine the evidence collected by the district court with respect to Pennsylvania’s spousal notification requirement, and was persuaded by it, the Fifth Circuit discounted similar evidence collected by the district court in its consideration of the two requirements. In *Whole Woman’s Health*, the Court maintained that the Fifth Circuit’s approach did “not match the standard that this Court laid out in *Casey* . . .”

# June Medical Services

## Table of Contents

In *June Medical Services v Russo*, a majority of the Court held that a Louisiana admitting privileges law imposed an undue burden on a woman's ability to obtain an abortion. Justice Breyer authored an opinion, joined by Justices Ginsburg, Sotomayor, and Kagan, that relied heavily on *Whole Woman's Health*. Justice Breyer maintained that the laws being reviewed in *June Medical Services* and *Whole Woman's Health* were "nearly identical," and that the Louisiana law "must consequently reach a similar conclusion." In a separate opinion, Chief Justice Roberts concurred in the judgment, emphasizing that the legal doctrine of stare decisis required *June Medical Services* to be decided like *Whole Woman's Health* }

The Court in *June Medical Services* considered not only the constitutionality of Louisiana's admitting privileges law, but also whether abortion providers satisfy minimum constitutional standing requirements to challenge an abortion regulation on behalf of their clients. Although plaintiffs in federal court are generally required to assert their own rights and not those of third parties, the Court has recognized third-party standing when the real party in interest cannot assert her own rights and a third party has a close relationship with her. Louisiana argued that the petitioners in *June Medical Services*—an abortion clinic and physicians who perform abortions—lacked standing because they did not have a close relationship with abortion patients. The state also contended that the petitioners' opposition to a health regulation intended to protect patients evidenced a conflict of interest with these patients, rendering them unsuitable to assert the rights of their clients.

In the plurality opinion, Justice Breyer concluded that the state waived its standing argument when it opposed the petitioners' initial request for a temporary restraining order against the admitting privileges law. In a memorandum opposing the request, Louisiana had stated that there was "no question that the physicians had standing to contest [the law.]" The plurality therefore determined that the state's "unmistakable concession" barred the Court's consideration of the argument. Nevertheless, the plurality also emphasized the Court's long-standing recognition of abortion providers invoking the rights of their actual and potential patients in challenges to abortion regulations. Citing several of the Court's past abortion decisions recognizing third-party standing, Justice Breyer indicated that the plurality would not have undone those decisions even if the state had not conceded the argument. In his concurring opinion, Chief Justice Roberts expressed agreement with this portion of the opinion. Thus, a majority of the Court concluded that the physicians had standing to assert the constitutional rights of their patients.

Addressing the merits of the admitting privileges law, Justice Breyer applied the undue burden standard, reiterating that it requires balancing an abortion regulation's benefits against any burdens it imposes. The plurality maintained that the district court faithfully engaged in this balancing, and reviewed the evidence collected by the court to determine whether its evidentiary findings were clearly erroneous. The district court found that admitting privileges are not relevant to a patient's care and do not provide a significant health benefit. The lower court also determined that the law's enforcement would reduce the number of Louisiana physicians performing abortions and cause the closure of most of the state's abortion facilities. Balancing these burdens against the absence of any notable health benefit, the district court found the law unconstitutional.

The U.S. Court of Appeals for the Fifth Circuit reversed the district court's decision, contending that the law provides a credentialing function that promotes women's health. The Fifth Circuit disputed the district court's finding that the law's enforcement would cause facility closures, explaining that several of the state's abortion providers did not make a good-faith effort to obtain admitting privileges. In the view of the Fifth Circuit, if these providers made such an effort, they could obtain admitting privileges and abortion facilities would not close. Consequently, burdens associated with facility closures, such as increased driving distances resulting from fewer facilities, would be minimized.

The plurality concluded that the district court's factual determinations were supported by ample evidence and were not clearly erroneous. With regard to any health benefit associated with an admitting privileges requirement, the plurality discussed both the district court's findings, and similar findings by the district court in *Whole Woman's Health*. Writing for the Court in *Whole Woman's Health*, Justice Breyer emphasized that deference should be given to the district court's evaluation of the record evidence. The district courts in both cases determined that an admitting privileges requirement serves no "relevant credentialing function" because privileges may be denied for reasons other than a doctor's ability to perform abortions.

The plurality also maintained that direct and circumstantial evidence supported the district court's finding that the admitting privileges law burdened abortion providers. For the plurality, this evidence refuted the Fifth Circuit's conclusion that some providers did not act in good faith to obtain admitting privileges. For example, direct evidence established that some of the providers were denied privileges for reasons other than their ability to safely perform abortions. And circumstantial evidence