Abortion Care & Birth Control

Upcoming Supreme Court Cases and Pending Legislation

Upcoming Events

Impacting Abortion Care and Birth Control

- Whole Woman's Health v. Hellerstedt
- Zubik v. Burwell
- Women's Health Protection Act
- EACH Woman Act

Case 1: Abortion Care

Background: Whole Woman's Health v. Hellerstedt

What's the issue? On March 2, The United States Supreme Court heard *Whole Woman's Health v. Hellerstedt* (formerly Cole), a case challenging Texas' notorious 2013 TRAP law, H.B. 2. The case has national implications. Without intervention by the court, anti-choice lawmakers nationwide will implement similar harsh and medically unnecessary restrictions.

In addition to other extreme regulations, H.B. 2 requires all clinics providing abortions, even non-surgical abortions, meet building standards for ambulatory surgical centers (ASC). All plaintiffs are challenging the ambulatory surgical center standards.

What are TRAP laws? TRAP stands for Targeted Regulations of Abortion Providers. These anti-choice laws impose unnecessary and burdensome regulations on doctors and clinics. They're cleverly designed to close clinics and make abortion care more expensive and difficult to obtain (NARAL).

Background *(continued)*

Under Texas House Bill 2...

- Abortion providers must have admitting privileges at a hospital within 30 miles of the abortion clinic. This provision resulted in the closure of most clinics in Texas, since nearby hospitals do not have any incentive to allow an abortion provider to admit patients.
- Abortions after 20 weeks are prohibited, except in cases of a severe fetal abnormality. The 20-week ban does not apply in cases where the post-20-week abortion is necessary to “avert the woman’s death or a serious risk of substantial and irreversible physical impairment of a major bodily function, other than a physiological condition,” in which case the abortion will be performed “in the manner that, in the physician's reasonable medical judgement, provides the best opportunity for the unborn child to survive.”
- Abortion-inducing drugs must be used according to FDA regulations (with the exception that dosages can be given according to the American Congress of OB GYN Practice Bulletin). FDA regulations require that patients visit their doctor in person for each of the two doses of the abortion pill, resulting in two separate doctor’s appointments.
- After taking abortion-inducing drugs, there must be a follow-up appointment within 14 days. Of course, the Texas 24-hour waiting period law still requires that women living within 100 miles of their nearest abortion clinic wait 24 hours between her mandatory ultrasound and her actual abortion, meaning four doctor’s appointments are necessary for many women seeking the abortion pill (Fund Texas Women).

What's at Stake

The future of clinics across the country could be at stake as the Supreme Court takes up this landmark case.

A ruling in favor of Whole Woman's Health would mean...

- a limit on the number of regulations abortion providers and clinics may face
- easier, affordable access to abortion and abortion services
- access to abortion services within a reasonable distance

A ruling in favor of Hellerstedt could mean...

- 20-week abortion bans
- doctors must have admitting privileges at a hospital within 30 miles of the clinic
- abortion inducing drugs must be used according to FDA regulations, which require women to visit a doctor prior to ingesting the drug
- after taking abortion-inducing drugs, there must be a follow-up appointment within 14 days

Case Timeline

(Source: Texas Abortion Restrictions Upheld. *My Statesman*, June 9, 2015)

July 18, 2013

H.B. 2 Signed Into Law
Texas Governor Rick Perry signs House Bill 2 into law, heralding a victory for Republican-backed restrictions on abortion after two acrimonious special legislative sessions, a filibuster, and national headlines.

September 27, 2013

Law Challenged
Women's health care providers and abortion rights groups sue to block two key provisions, arguing that the regulations would improperly limit access to the procedure and force at least thirteen clinics to shut down.

October 18, 2013

Abortion Law Blocked
A federal judge in Austin blocks Texas from enforcing a provision requiring abortion doctors to gain admitting privileges at a nearby hospital.

October 31, 2013

Ban Lifted
The 5th U.S. Circuit Court of Appeals gives Texas permission to fully enforce the new abortion regulations.

November 19, 2013

First U.S. Supreme Court Ruling
The U.S. Supreme Court rules 5-4 to allow Texas to continue enforcing House Bill 2

January 1, 2014

Clinics Suffer

Section 245 of the Texas Health and Safety Code amended to require that all abortion clinics be ambulatory surgical centers

March 6, 2014

Abortion Clinics Close After Law Takes Effect

The number of abortion clinics falls from 36 to 24.

March 27, 2014

Abortion Law Upheld

A federal appeals court upholds Texas' new laws deciding that the tighter regulations did not unconstitutionally limit access to abortion.

April 2, 2014

Second Federal Lawsuit

A second federal lawsuit is filed challenging the requirement that abortions meet the standards of an ambulatory medical center.

April 10, 2014

Request for An Appeal

Abortion providers and supporters ask the 5thU.S. Circuit Court of Appeals to review abortion law ruling.

July 31, 2014

Aftermath of the Abortion Law

An Austin abortion clinic operated why Whole Women's Health closes, blaming the trial's new restrictions. A trial challenging the law begins.

August 29, 2014

Abortion Law Restrictions Challenged
A federal judge in Austin strikes down the ambulatory surgical center restriction.

October 2, 2014

Emergency Motion Filed
The 5th Circuit lifts the Austin federal judge's injunction, which allows Texas to enforce the law. Abortion providers file an emergency motion asking the U.S. Supreme Court to stop Texas from enforcing the law.

October 14, 2014

Supreme Court Intervenes
The Supreme Court blocks Texas from enforcing the ambulatory surgical centers restrictions until the 5th Circuit rules. A handful of clinics across the state reopen.

January 7, 2015

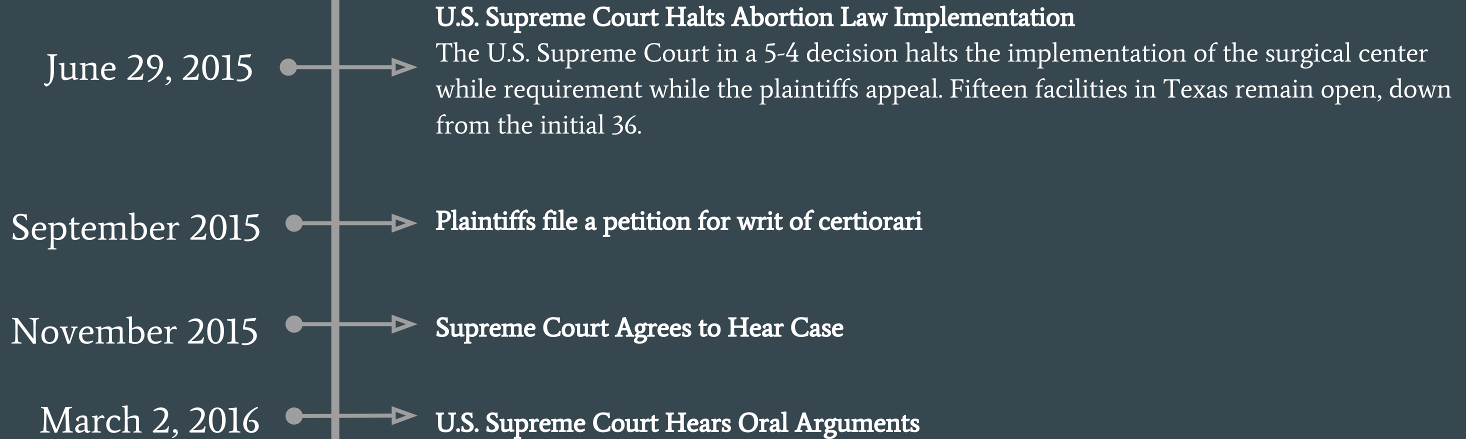
Oral Arguments Before a Three Judge Panel
A three judge panel in the 5th Circuit hears arguments in the case.

January 9, 2015

5th Circuit Court of Appeals Upholds Abortion Law
The panel upholds most of the law. As few as seven clinics are expected to remain following the decision.

June 19, 2015

Request Denied
The 5th Circuit declines request to suspend implementation of a state law that is expected to close all but nine Texas abortion clinics.



What's next?

The timing of an ultimate decision may be altered by the death Supreme Court Justice Antonin Scalia's death. If Justice Anthony M. Kennedy, a likely swing voter, sides with Texas and the court splits 4 to 4, then the existing ruling by the Fifth Circuit, permitting the law, would stand.

But a tie vote would not be a binding precedent, leaving uncertainty for other states.

If the court strikes down the Texas law by a 5 to 3 vote, Justice Scalia's absence would have no effect, and even the later appointment of a conservative would not alter the balance (The New York Times).

Case 2: Birth Control

Background: Zubik v. Burwell

What's the issue? On March 23, the United States Supreme Court will hear Zubik v. Burwell and decide whether or not the Health and Human Services mandate and its accommodation, a portion of the Patient Protection and Affordable Care Act, violate the Religious Freedom Restoration Act by preventing religious nonprofits from denying their employees birth control coverage (Congress.gov).

With the exception of churches and houses of worship, the Patient Protection and Affordable Care Act mandates that all employers and educational institutions cover contraception, including Christian hospitals, Christian charities, Catholic universities, and other enterprises owned or controlled by religious organizations that oppose contraception on doctrinal grounds (healthcare.gov). These religious non-profits and closely held corporations are eligible for an accommodation that ensure they do not have to pay for or directly provide the coverage for their employees. Instead, employees will be able to receive coverage directly from their insurers. To claim the accommodation, the non-profits may either complete a form to send to the insurers or third-party administrators or send a letter to Health and Human Services stating that they object to offering contraceptive coverage in their health plans (Women's Health Policy Report).

A number of religious organizations argue that the mandate violates the Religious Freedom Restoration Act (RFRA), which Congress enacted in 1993, because the mandate requires organizations to "facilitate" the provision of insurance coverage for contraceptive services that they oppose on religious ground (Oyez).

Background *(continued)*

Religious Freedom Restoration Act

Passed in 1993, this Act prohibits any agency, department, or official of the United States or any State from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling government interest, and (2) is the least restrictive means of furthering that compelling government interest.

The RFRA declares that: (1) nothing in this Act shall be construed or interpret the clause of the First Amendment to the Constitution prohibiting the establishment of religion; (2) the granting of government funding, benefits, or exemptions, to the extent permissible under that clause, shall not constitute a violation of this Act; and (3) as used in this Act, "granting" does not include the denial of government funding, benefits, or exemptions (Congress.gov).

Health and Human Services Mandate

The mandate includes a rule on health insurance coverage with no cost sharing for FDA-approved contraceptives and contraceptive services for women of reproductive age if prescribed by health care providers, as part of a women's preventative health services guidelines adopted by the Health Resources and Services Administration's (HRSA) for the Affordable Care Act (U.S. Department of Health and Human Services)

Regulations under the act rely on recommendations of the independent Institute of Medicine (IOM), which concluded that birth control is medically necessary to ensure women's health and well-being (Institute of Medicine)

Background *(continued)*

The case, Zubik v. Burwell, includes six other challenges:

- Priests for Life v. Burwell
- Southern Nazarene University v. Burwell
- Geneva College v. Burwell
- Roman Catholic Archbishop of Washington v. Burwell
- East Texas Baptist University v. Burwell
- Little Sisters of the Poor Home for the Aged v. Burwell

Because the birth-control cases all focus on the Religious Freedom Restoration Act, rather than the Constitution, the Justices will face questions about whether the mandate to provide free access to various forms of birth control drugs or devices, sterilization, screenings, and counseling imposes a "substantial burden" on the religious freedom of nonprofits that have a religious objection, whether the mandate serves a "compelling interest" of the government, and whether an attempt to provide an exemption from the mandate satisfies the requirement that such an accommodation is "the least restrictive means" of achieving the government's policy interest (SCOTUSblog)

What's at Stake

Favorable ruling

- Ideally, seamless access to birth control for all women, regardless of their employer

Unfavorable ruling

- Non-profit charities, schools, colleges, hospitals, and other closely bound institutions can deny their female employees health insurance that includes no-cost access to various forms of birth control
- Religious objectors in other contexts may be allowed to block the conduct of the government or third party to fill in the gap left by the objector (Sobel and Salganicoff)

What’s next?

If the Court decision is a tie, 4 to 4, then the rulings for each case heard by the lower courts of the U.S. District Court of Appeals will stand. All of the Circuits that have heard the cases of the petitioners in the consolidated case have ruled in favor of the government, meaning that the accommodation is *not* a substantial burden.

That said, the 8th Circuit ruled in two separate cases that the religiously affiliated non-profits *are* substantially burdened by the accommodation and that the accommodation is not the least restrictive means of furthering the government’s interest. These two cases, however, are not among the non-profit employers petitioning the Supreme Court. So a 4 to 4 decision by the Supreme Court would mean that all of the non-profits before the court would need to abide by the accommodation; it would *not* be upheld and enforceable in the 8th Circuit. In this case, all religiously affiliated nonprofits that object to providing contraceptive coverage would be exempt from the requirement.

Alternatively, if the Court determines that the justices are split evenly, the Court might defer a decision and order a re-argument and revisit the case in the next term when a ninth justice has been appointed (Sobel and Salganicoff)

Pending Legislation: Women's Health Protection Act

Background: Women's Health Protection Act

Goal: To ensure that "abortion providers are not singled out for medically unwarranted restrictions that harm women by preventing them from accessing safe abortion services" (S.217)

Motivation: High number of abortion restrictions implemented by state and local governments since 2010

Background *(continued)*

The Women's Health Protection Act prohibits...

- regulations on clinic facilities exceeding what is necessary to provide quality care
- requirements that specific medical tests or procedures be performed
- prohibition prior to fetal viability, and prohibitions after fetal viability when the mother's health is in danger
- waiting periods
- limits on a provider's ability to provide drugs or services via telemedicine
- restrictions based on a woman's reason or perceived reason to obtain an abortion
- limits on medical training in abortion care

Current Status: Women's Health Protection Act

House of Representatives (HR.448)

- Introduced by Rep. Judy Chu (D-CA) on January 23, 2015
- Referred to Committee on Energy and Commerce (Subcommittee on Health)

- Also introduced in the 113th Congress (HR. 3471), by Rep. Judy Chu on November 13, 2013

Senate (S.217)

- Introduced by Sen. Richard Blumenthal (D-CT) on January 21, 2015
- Referred to Committee on the Judiciary

- Also introduced in the 113th Congress (S. 1696), by Sen. Richard Blumenthal on November 13, 2013
- Judiciary Committee hearing held on July 15, 2014

Pending Legislation: Equal Access to Abortion Coverage in Health Insurance (EACH Woman) Act of 2015

Background: EACH Woman Act

Goal: To ensure that abortion coverage is affordable to all women.

Motivation:

- Hyde Amendment (1976): federal government restricts use of funds for abortion care in most circumstances (including Medicaid)
- Laws in 25 states interfere with abortion coverage by private insurance
- Restrictions disproportionately impacts immigrant women, low-income women, women of color, and younger women

Background *(continued)*

The EACH Woman Act…

- Requires the federal government to ensure coverage for abortion care in public health insurance programs (Medicaid), insurance programs for federal employees, and government-provided healthcare
- States that the federal, state, and local governments cannot interfere with coverage of abortion care by private health insurance plans
- Expresses that the federal government as an insurer, employer, and healthcare provider should be a model for abortion coverage, and that private insurance restrictions on abortion care coverage must end

Current Status: EACH Woman Act

House of Representatives (HR.2972)

- Introduced by Rep. Barbara Lee (D-CA) on July 8, 2015
- Referred to Committees on Energy and Commerce (Subcommittee on Health), Ways and Means, Oversight and Government Reform

Senate

- Currently no Senate version