



ISSUE ADVISORY: Will the Supreme Court Approve Clinic Shutdown Laws?

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The summer of 2016 could witness a defining moment in women's history. Will the Supreme Court rule that several Texas clinic requirements are constitutional, thus undermining the undue burden standard, and empowering abortion rights opponents' to use clinic shutdown laws to severely limit access to abortion? This reproductive rights case is the most important one to come before the Court in more than two decades. If the Supreme Court finds in favor of Texas, *Roe* will be seriously weakened – without the broad availability of clinics that provide abortion care, abortion rights could become a hollow guarantee.

Targeted Regulation of Abortion Providers (TRAP) Laws at Issue - Oral arguments are set for March 2 in this Texas case which seeks to impose two unnecessary restrictions on women's health clinics which have already closed more than half of the original 41. TRAP laws are intended to make operating an abortion clinic so expensive that it makes it impossible for them to remain open. The laws generally require that physicians have admitting privileges at nearby hospitals, maintain ambulatory surgical center standards, and comply with other licensing requirements. Abortion rights opponents who were instrumental in getting TRAP (read, "clinic shutdown laws" or "sham laws") laws passed in Texas and many other states assert that they are necessary to protect women's health and safety, but respected medical experts and organizations say that this is not true.

The case at hand, *Whole Women's Health v. Hellerstedt*, grows out of a draconian omnibus bill, House Bill 2 (H.B. 2), which mandated a number of requirements for abortion clinics, but the two being reviewed by the Court require clinics to have ambulatory surgical center standards and physician admitting privileges at a hospital within 30 miles.

H.B. 2 was the House counterpart to Senate Bill 5 that State Sen. Wendy Davis (D) famously filibustered in 2013 for 11 hours and with the help of hundreds of shouting protesters in the capitol, killed the bill. But Texas governor Rick Perry (R) later convened a special session and the sexist, anti-abortion rights Republican majority legislators adopted H.B. 2.

Right to Abortion Cannot be Encumbered - An essential holding in *Planned Parenthood v. Casey* in 1992 established that the constitutional right to abortion could not be encumbered by state regulations that have no real connection to a legitimate state purpose. Consequently, states may not place an "undue burden" on the right to end a pregnancy. *Whole Women's Health* is a clear challenge to those holdings in *Casey*, as will be seen later in this article.

The lawsuit challenging the Texas law was brought by the Center for Reproductive Rights (CRR) on behalf of five Texas Clinics and three physicians and their patients. A federal district court had blocked enforcement of the two measures in August, 2014 finding both measures to impose an unconstitutional undue burden on women in violation of the 14th Amendment. The U.S. Court of Appeals for the Fifth Circuit (Texas, Mississippi and Louisiana) issued a ruling in early October, 2014, that would allow both laws to be enforced while the case moved forward, but the U.S. Supreme Court lifted the Appeals Court stay in mid-October to prohibit the enforcement of the ambulatory surgical center standard requirement and the physician admitting privileges requirement for two of the plaintiff clinics.

Fifth Circuit Finds for Texas - The Fifth Circuit issued a ruling in June, 2015 in favor of the challenged requirements, allowing Texas to enforce the two challenged TRAP measures for all

Texas clinics, except for additional requirements of a McAllen clinic that included a limitation that the clinic could not treat patients from outside of four counties of the lower Rio Grande Valley (forcing women neighboring counties to travel more than 200 miles to San Antonio) and to employ only a single physician (who is past retirement age), according to a summary by CRR. At this point, the U.S. Supreme Court stopped enforcement of the law while plaintiffs prepared for the Court to review the case.

Clinic Shutdown Laws Threaten Abortion Access - Known as Targeted Regulation of Abortion Providers or TRAP laws, they are more aptly described as 'clinic shutdown' or 'sham' laws. Texas legislators backing H.B. 2 argued that these TRAP laws are necessary to protect women's health and safety, though the American Medical Association (AMA) and The American College of Obstetricians and Gynecologists (ACOG) and many other leading health care experts say that these requirements serve no valid medical purpose, interfere in the doctor/patient relationship and do nothing to protect women's health and safety.

What makes the *Whole Women's Health* case of prime importance to protection of women's reproductive rights is that 28 states now have TRAP laws; 22 of those have licensing standards equivalent or comparable to ambulatory surgical centers. Fourteen states require that physicians providing abortion services have admitting privileges with a local hospital. Should the Supreme Court find *Whole Women's Health v. Hellerstedt* constitutional, the impact nationally could be devastating for women's access to clinic-based abortion care as many more clinics would be forced to close.

Court Split Means Texas Wins - The unexpected death of Supreme Court Justice Antonin Scalia, an abortion rights opponent, on Feb. 13 makes predicting the outcome of *Whole Women's Health* more difficult, but an even split among the eight justices will mean that the Fifth U.S. Circuit Court of Appeal's ruling in favor of the Texas defendants will prevail. No Supreme Court precedent on the constitutionality of the two requirements would be established: ambulatory surgical center standards and physician hospital admitting privileges would stand.

Such an outcome would give the green light to abortion rights opponents, who will likely re-double efforts to pass the most restrictive TRAP laws in the other 28 states. Because of the considerable expense involved in establishing and operating what is essentially a miniature hospital, more clinics will be forced to close. Access to clinic abortion care then would dramatically diminish; some states would have no clinics at all.

Abortion Rights Opponents Would Win – If the Texas TRAP law is allowed to stand, those interests who oppose women's reproductive freedom and bodily autonomy will have come very close to winning. Overturning *Roe* through the courts or by federal legislation will not be necessary if, indeed, there are very few women's clinics in operation.

Two other scenarios for the Supreme Court are possible. One is that the Court postpones a decision and schedules to re-argue the case during the October term on the theory that the Court would then have an additional, possibly tie-breaking justice. Whether there would be that ninth justice for the re-argument is doubtful given that Republican leaders and Senate Judiciary Committee majority members have said that they will not allow consideration of a nominee to go forward. President Obama has said that he intends to nominate someone.

How Will Justice Kennedy Vote? - The other scenario is that the Court proceeds with the oral arguments on March 2. In this instance, NOW's concern is that the swing justice, Ronald Reagan appointee Anthony Kennedy who has been described as "shaky" on abortion rights, could side with the three conservative justices – and produce the feared 4-4 split. One analyst found that Justice Kennedy has voted to strike down only one of 21 abortion restrictions to have been reviewed by the Court. Kennedy wrote the 5-4 majority ruling in 2007 which upheld the

federal (so-called) Partial-Birth Abortion Ban Act of 2003 (*Gonzales v. Carhart*) finding that the law did not impose an undue burden. The justice often uses the language of abortion rights opponents in his writings, and appears to have accepted the view typical of anti-choice patriarchy: men must protect women against their own weaknesses and immature misjudgment.

Kennedy has been reported to have said as early as 1989 that he would not vote to overturn the *Roe* precedent, so it is also possible that he could provide a key fifth vote joining the four liberal justices to find the Texas law unconstitutional. Some speculate that the earlier vote of five justices (including Kennedy) to block enforcement of the ambulatory surgical center standards and the physician hospital admitting requirement for two of the Texas clinics suggests that there will be five votes against Texas. Obviously, this is the desired outcome and would not only halt implementation of those two TRAP measures in Texas, but also render un-enforceable similar laws elsewhere.

If the Court proceeds now with *Whole Women's Health v. Hellerstedt*, a final ruling is expected in June. Advocates for women's abortion rights are to gather at the Supreme Court on March 2 with our main message: Stop these sham laws!

TRAP LAW DEVELOPMENTS IN THE STATES

Seventh Circuit Affirms Undue Burden of TRAP Law - Other states, such as **Tennessee** and **Wisconsin**, have been blocked from implementation of TRAP laws, thanks to lawsuits brought by the Center for Reproductive Rights. In November, the U.S. Court of Appeals for the Seventh Circuit, Judge Richard Posner writing the decision for the three judge panel, affirmed a District Court's earlier decision against Wisconsin's Act 37 which mandated that doctors providing abortions in Wisconsin have admitting privileges at a nearby hospital or face felony charges. The lower court's ruling stated that the law does not enhance women's patient safety, that the law placed an undue burden on women's access to safe and legal abortion and should be permanently blocked.

Wisconsin's four abortion clinics would be affected, with at least one closure; the court found that the other three could not absorb the unmet need. Attorneys for the other side argued that women could just go to neighboring states for their abortion care. Court observers suggest that Appeals Court Judge Posner, a leading jurist whose opinions are often cited, was speaking directly to the Supreme Court justices making it clear that the justices should be finished with these nonsense laws.

In **Mississippi** where only one abortion clinic remains and the case of *Jackson v. Currier* appears to be in limbo. The Supreme Court has not yet agreed to take up the case where the state is arguing that it should be able to close its lone clinic in Jackson because patients can always travel to neighboring states such as Alabama, Arkansas and Louisiana to get abortion care. A law that imposes physician admitting privileges is enjoined and the clinic remains open.

In Tennessee, an injunction was issued by a U.S. District Court judge in August against enforcement of a state law imposing ambulatory surgical center standards. Additional challenged TRAP laws concern a required in-person meeting with the physician and a mandatory 48-hour delay following the meeting before patients can obtain an abortion, along with physician admitting privileges at a nearby hospital.

A fight in **Virginia** over imposed ambulatory surgical clinic standards continues, after a modification of some elements of the standards were made by a Virginia Board of Health review in September. New women's health centers or existing ones that expand or renovate would

have to meet the surgery clinic standards. Virginia Attorney General Mark Herring had called for existing facilities to be exempt and Gov. Terry McAuliffe (D) then ordered the review.

The U.S. Court of Appeals, Fifth Circuit, granted a stay on Feb. 24 that will allow a clinic shutdown law in Louisiana which requires abortion clinic physicians to have nearby hospital admitting privileges. As a result, three of Louisiana's four clinics will close. Additionally, in the previous week, a state judge in **Oklahoma** ruled that a state law mandating that abortion providers have hospital admitting privileges was constitutional and can take effect. The Center for Reproductive Rights has said that they plan to appeal the decision.

Federal courts have blocked similar laws in other states with Republican-controlled legislatures, including **Alabama** and **Kansas**. The most burdensome standards are in **Michigan, Missouri, Pennsylvania, Texas** and **Virginia**, according to the Guttmacher Institute.

PROBLEMS WITH TRAP LAWS

Targeted Regulations Against Abortion Providers are laws aimed at those who provide abortion services to make it nearly impossible for them to practice. Examples of TRAP laws include admitting privileges, ambulatory surgical center requirements, and licensing requirements. They can also include requirements that apply to physicians' offices where abortions are performed, certain restrictions on sites where medication abortion (mifepristone, misoprostol) is provided, requirements for providers to have agreements with local hospitals for transferring patients in the (rare) event of complications and for providers to have certain professional certifications.

Reportedly, the campaign to pass state TRAP laws has been carried out by Americans United for Life (AUL), an organization that bills itself as the nation's premier pro-life legal team and was the first of its kind being established in 1971. The group's website says that its legal team has been involved in every abortion-related case before the U.S. Supreme Court since *Roe v. Wade* and takes credit for the successful defense of the Hyde Amendment (which denies federal funding under Medicaid for poor women to obtain abortions).

Promoters of TRAP laws claim to have women's health and safety in mind, but respected medical experts and organizations have stated that adoption of such measures will not advance those objectives. In their *amicus* brief with the American Medical Association and other medical professional organizations, The American College of Obstetricians and Gynecologists (ACOG), states a fundamental position: "Recognize that abortion is an essential health care service and oppose laws regulating medical care that are unsupported by scientific evidence and that are not necessary to achieve an important public health objective."

Admitting Privileges require an abortion provider to build a relationship with a hospital no further than thirty miles away in order to have permission to admit patients. Admitting privileges are extremely hard for abortion providers to obtain because 1) Hospitals have no incentive to allow abortion doctors to admit patients—abortion doctors wouldn't bring in much business 2) Hospitals in conservative states won't grant admitting privileges to abortion doctors 3) Some hospitals require doctors to admit a certain number of patients each year—abortion care rarely leads to hospital care and 4) The application for admitting privileges is lengthy and exhaustive.

Ambulatory Surgical Center Requirements make abortion providers meet certain hospital standards. These include regulating hallway width, requiring full anesthesia machines, temperature controlled environments, and surgical equipment. These facilities cost large amounts of money and are medically unnecessary. Amy Hagstrom Miller, the CEO of the Whole Women's Health in Texas, says most abortion procedures take around five to ten minutes and require no surgery, let alone a hospital visit. Miller says that meeting the ASC requirements

costs her \$40,000 more a month to operate one clinic than a regular abortion facility. If this law passes, they cannot sustain their clinics, much like other facilities across the state, and will have to close them down.

LEGAL ANALYSIS AND BACKGROUND

Two Essential Questions to be Addressed - The main legal questions posed in *Whole Women's Health v. Hellerstedt* are:

- 1) Whether these two requirements under Texas law create an undue burden for women to obtain an abortion and,
- 2) if the laws cause a significant reduction in the availability of abortion services which fails to promote the state's interest in women's health.

The two questions are dependent upon one another because a significant reduction in the availability of abortion services, it can be argued, causes an undue burden for women to obtain an abortion. In the reproductive rights realm, the definition of undue burden is a law whose purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion. Undue burden serves as a standard for a constitutional review standard between the strict scrutiny and rational basis tests.

In August last year, a federal District Court judge in Austin, Lee Yeakel, -- a George W. Bush appointee -- held that the new law's provision violated a woman's right to terminate her pregnancy. This courageous judge wrote that "the ambulatory surgical center requirement is unconstitutional because it imposes an undue burden on the right of women throughout Texas to seek a pre-viability abortion." The judge was courageous in that the political atmosphere in Texas is over-whelmingly hostile to abortion rights.

Fewer Than 10 Clinics Would Remain - Prior to adoption of H.B. 2 Texas, one of the most populous states in the country with more than five million women of reproductive age had 41 women's clinics. The two TRAP laws -- if found constitutional -- would close down all but less than ten abortion clinics in the entire state of Texas. This answers the second legal question as less than ten abortion clinics are not enough to provide proper health care for the women of Texas. The TRAP law leaves five hundred miles between San Antonio and the New Mexico border without a single clinic. This fact in turn answers the first legal question: the shuttering of these clinics leads to a number of undue burdens placed on women seeking abortion.

Fewer clinics lead to longer wait times for women. Longer wait times sometimes lead to more complicated procedures. More complicated procedures are more expensive and can put women at a higher risk when an earlier and simpler procedure could have taken place. Fewer clinics lead to more travel for women. Longer travel leads to women taking time off from work, sacrificing pay and career advances (or perhaps losing a job), paying for childcare, and costly travel expenses. To sum it up, these two requirements lead to higher expenses, longer wait times, and more complicated medical procedures due to a lack of supply in doctors able to practice.

Hardships Experienced by Latinas - Advocates fear that women who want an abortion will have to wait until longer into pregnancy to raise the necessary funds for travel, child care, overnight stays and other costs, possibly resulting in the need for a more complicated procedure. Additionally, the number self-induced abortions will rise -- an unfortunate consequence already being observed in Texas. In fact, after the first group of clinic closures following the TRAP law adoption, a clinic in McAllen dealt with a significant increase in women seeking help following attempted self-induced abortions. Recent research has produced a well-

based estimate that in Texas alone at least 100,000 – and maybe far more -- women ages 18-49 have ever attempted to end a pregnancy on their own. (And, let's not forget that some states are arresting women for suspected self-induced abortions and charging them with murder.)

Most tragically, harmful consequences are being felt by low-income Latinas, who already face significant geographic, transportation, infrastructure and cost challenges in accessing health care services, according to the amicus brief filed by the National Latina Institute for Reproductive Health (NLIRH). Texas has the highest percentage of uninsured adults in the country and Texas Latinas are more than twice as likely as whites to be uninsured. There is also a dire shortage of health care facilities in Latino communities; two years before the adoption of H.B. 2, Texas drastically cut funding for programs that many low-income Latinas relied on for their access to contraception and other reproductive health care services.

Especially hard hit are the women – mostly low-income Latinas – in the Rio Grande Valley at the southernmost tip of the state and in the western, mostly rural counties who now must travel significant distances obtain reproductive health care. There is a dearth of public and private transportation services and many families do not have their own cars. Undocumented immigrant women must also run a gauntlet of checkpoints that are operated by Texas law enforcement and Customs and Border Patrol at various points in south Texas. The poverty rate for this area ranges from 23 to 40 percent, up to more than double the national rate.

A Possible Human Rights Violation - The dramatic lack of access to reproductive health care with a heavy racial component suggests a possible human rights violation. The NLIRH brief notes that United Nations human rights treaty bodies have recognized that racial disparities in the field of sexual and reproductive health and immigrants lack of effective access to affordable and adequate health care services in the U.S. and areas of human rights concern. Additionally, the brief stresses that legislation which operates to prevent the practical exercise of a fundamental right constitutes an impermissible deprivation of that right and has been consistently recognized by the Supreme Court and international courts and human rights bodies.

Advocates for Women's Health File Numerous Briefs - Forty-five *amicus curiae* (friend of the court) briefs on the side of striking down the two TRAP law requirements have been submitted to the Court. They represent hundreds of organizations and interests, including such groups as the Constitutional Accountability Center; American Civil Liberties Union; Sixteen Constitutional Law Professors, Human Rights Campaign; Institute for Women's Policy Research, Physicians for Reproductive Health; National Physicians Alliance with nursing associations; American Public Health Association and 50 public health experts, National Abortion Federation and Abortion Providers; Republican Majority for Choice and its National Chairs, former and current Republican state officeholders; 163 members of Congress; The Attorneys General from the States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Oregon, Vermont, Virginia and Washington and the District of Columbia as well as a brief by Janice McAvoy, Jane Shulman and Over 110 Other Women in the Legal Profession Who Have Exercised their Constitutional Right to an Abortion, and many others.

The defendants, the State of Texas in the person of John Hellerstedt, Commissioner of the Texas Department of State Health Services, et. al., and their supporters in the case submitted nearly as many *amicus* briefs.

Brief Argues Texas Law Violates Due Process, Equal Protection - The National Organization for Women Foundation joined 46 other organizations in an *amicus curiae* brief submitted by the National Women's Law Center. The brief argues that the challenged abortion restrictions constrain a woman's ability to participate equally in the economy and violate women's constitutionally protected liberty to make the intimate reproductive decisions that relate

to broader economic and social equality rights. The brief focuses on how the interplay between Due Process and Equal Protection Clauses of the Fourteenth Amendment requires the Court to have a full awareness and understanding of the hurt that results from laws that constrain women's ability to make reproductive decisions.

The NWLC brief discusses the many negative impacts that restrictions at issue in this case that impose significant costs on women's financial well-being, job security, workforce participation, educational attainment and future opportunity. Especially detrimental are the effects on low-income women, women of color, women in low-wage jobs, and women who already have children. The burdens of TRAP restrictions are compounded by women's greater poverty and overrepresentation in low wage jobs. The law perpetuates and deepens longstanding gender inequalities by disregarding the costs imposed on women, thereby impairing women's full participation in society. In short, H.B. 2 violates women's equal dignity and constitutes an undue burden on women's reproductive decision-making.

Final Note

Bloomberg Investigation Finds Clinics Closing at Record Rates – As noted in the Women's Health Policy Report, Feb. 25, a *Bloomberg News* investigation has found that an average of 31 abortion clinics are closing per year -- a rate of one clinic closing every two weeks.

According to the article, in 2011, the Guttmacher Institute found that there were 553 clinics nationwide. The Bloomberg count is an update of a survey they conducted in 2013. Overall, since 2011, 162 abortion providers in 35 states have closed or stopped offering abortion care. Those states, *Bloomberg Business* reports, are home to more than 30 million women of reproductive age. Only 21 new abortion clinics have opened in the last five years and very few clinics have re-opened.

Of the states that have lost the most clinics, Texas ranks at the top with at least 30 clinic closures since 2011, Iowa comes next with 14 clinics closed, Michigan lost 13 and California lost 12.

One-quarter of the 162 clinic closures were due to requirements that make it too costly or "logistically impossible," for them to stay open. Other reasons relate to changing demographics, industry consolidation, lower demand (yes, abortion rates have gone down), and physician retirement.

Sources:

Amicus briefs in support of Whole Women's Health, Center for Reproductive Rights,
<http://www.reproductiverights.org/document/amicus-briefs-in-support-of-whole-womans-health>

Americans United For Life,
<http://www.aul.org/about-aul/>

Anthony Kennedy,
https://en.wikipedia.org/wiki/Anthony_Kennedy

Ben Philpott, Ambulatory Surgical Center,
<http://kut.org/post/issue-texas-abortion-debate-whats-ambulatory-surgical-center>

Bloomberg: Abortion access diminishing at Record Rate, Women's Health Policy Report, Feb. 25, 2016, <http://www.womenshealthpolicyreport.org/articles/bloomberg-abortion-access.html>

Brief of the National Latina Institute for Reproductive Rights, et.al. filed,
<http://www.scotusblog.com/wp-content/uploads/2016/01/National-Latina-Institute-for-Reproductive-Health-CUNY-Law.pdf>

Brief of the National Women's Law Center, et. al. filed,
<http://www.scotusblog.com/wp-content/uploads/2016/01/National-Womens-Law-Center-Simpson-Thatcher.pdf>

Dahlia Lithwick, Anthony Kennedy's Right to Choose,
http://www.slate.com/articles/news_and_politics/jurisprudence/2015/11/kennedy_and_supreme_court_should_vote_against_texas_abortion_law_in_cole.html

D. Grossman, K. White, L. Fuentes, K. Hopkins, A. Stevenson, S. Yeatman, J. E. Potter,
Abortion Self-Induction in Texas
<https://www.utexas.edu/cola/txpep/files/pdf/TxPEP-Research-Brief-KnowledgeOpinionExperience.pdf>

Ian Millhiser, Roe V. Wade,
<http://thinkprogress.org/justice/2016/02/23/3751979/an-historic-attempt-to-kill-roe-v-wade-may-backfire-spectacularly-on-the-anti-choice-right/>

Irin Carmon, Justice Anthony Kennedy Will Have Last Word,
<http://www.msnbc.com/msnbc/abortion-justice-kennedy-will-have-last-word>

Jeffrey Toobin, the Disappearing "Undue Burden" Standard for Abortion Rights,
<http://www.newyorker.com/news/daily-comment/disappearing-undueburden-standard-abortion-rights>

Lyle Denniston, Court to Rule on Abortion Clinic Restrictions,
<http://www.scotusblog.com/2015/11/court-to-rule-on-abortion-clinic-restrictions/>

Lyle Denniston, Argument Preview: New Look at Abortion after Nine Years,
<http://www.scotusblog.com/2016/02/argument-preview-new-look-at-abortion-after-nine-years/#more-238771>

Planned Parenthood v. Casey,
https://en.wikipedia.org/wiki/Planned_Parenthood_v._Casey

Rational Basis Review,
https://en.wikipedia.org/wiki/Strict_scrutiny

Scalia's Death Could Affect Upcoming SCOTUS Rulings,
<http://www.womenshealthpolicyreport.org/articles/scalias-death.html>

Strict Scrutiny Standard,
https://en.wikipedia.org/wiki/Strict_scrutiny

Targeted Regulation of Abortion Providers,
http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf

Texas Legislature Online,
<http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=832&Bill=HB2>

Veronica Zaragovia, Admitting Privileges,

<http://kut.org/post/what-it-takes-texas-abortion-doctors-get-admitting-privileges>

Undue Burden Standard,

https://en.wikipedia.org/wiki/Undue_burden_standard

Whole Woman's Health v. Hellerstedt,

<http://www.reproductiverights.org/case/whole-womans-health-v-hellerstedt>

Whole Women's Health v. Hellerstedt SCOTUSblog,

<http://www.scotusblog.com/case-files/cases/whole-womans-health-v-cole/>