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# Abortion, Hospital Admitting Privileges, and *Whole Woman's Health v. Cole*

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## Summary

At least 15 states have adopted laws or regulations that require physicians who perform abortions to have admitting privileges at a nearby hospital. In general, admitting privileges allow a physician to transfer a patient to a hospital if complications arise in the course of providing an abortion. Admitting privileges requirements have proven to be controversial, with many of the requirements being challenged by abortion providers. In *Whole Woman's Health v. Cole*, for example, an abortion provider challenged Texas's admitting privileges requirement on various grounds, including its imposition of an undue burden on the ability of women to seek abortions. Following an adverse decision by the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit"), Whole Woman's Health petitioned the U.S. Supreme Court ("Court") for review of that decision in September 2015. If the Court agrees to hear the case, it will be the first substantive abortion case to be considered by the Court since 2007.

This report discusses the Fifth Circuit's decision in *Cole*, and the application of the undue burden standard that is used to evaluate abortion regulations. In its petition, Whole Woman's Health has asked the Court to resolve a conflict between the Fifth Circuit and two other federal appellate courts over the application of the undue burden standard.

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At least 15 states have adopted laws or regulations that require physicians who perform abortions to have admitting privileges at a nearby hospital.<sup>1</sup> In general, admitting privileges allow a physician to transfer a patient to a hospital if complications arise in the course of providing an abortion. Admitting privileges requirements have proven to be controversial, with many of the requirements being challenged by abortion providers. In *Whole Woman's Health v. Cole*, for example, an abortion provider challenged Texas's admitting privileges requirement on various grounds, including its imposition of an undue burden on the ability of women to seek abortions.<sup>2</sup> Following an adverse decision by the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit"), *Whole Woman's Health* petitioned the U.S. Supreme Court ("Court") for review of that decision in September 2015. If the Court agrees to hear the case, it will be the first substantive abortion case to be considered by the Court since 2007.

In seeking review of the Fifth Circuit's decision, *Whole Woman's Health* has asked not only about the validity of the admitting privileges requirement, but has also asked the Court to resolve a conflict between the Fifth Circuit and the U.S. Courts of Appeals for the Seventh and Ninth Circuits (hereinafter referred to as the "Seventh Circuit" and "Ninth Circuit") involving the application of the undue burden standard that is used to evaluate abortion regulations. This report discusses the undue burden standard, the Fifth Circuit's decision in *Cole*, and the contrasting approaches used by the federal appellate courts to determine whether an abortion regulation imposes an undue burden on a woman's ability to have an abortion.

## The Undue Burden Standard and *Planned Parenthood of Southeastern Pennsylvania v. Casey*

The undue burden standard that is now used to evaluate abortion regulations was formally adopted by the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a 1992 decision involving five provisions of the Pennsylvania Abortion Control Act.<sup>3</sup> In a joint opinion, the Court reaffirmed the basic constitutional right to an abortion, while simultaneously allowing new restrictions to be placed on the availability of the procedure. The Court declined to overrule *Roe v. Wade*, its 1973 decision that first recognized the right to terminate a pregnancy, explaining the importance of following precedent: "The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed."<sup>4</sup>

At the same time, however, the Court refined its holding in *Roe* by abandoning the trimester framework articulated in the 1973 decision, and rejecting the strict scrutiny standard of judicial review it had previously espoused.<sup>5</sup> In *Casey*, the Court adopted a new undue burden standard

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<sup>1</sup> See Ala. Code § 26-23E-4; Ariz. Rev. Stat. § 36-449.03; Ark. Code Ann. § 20-16-1504; Fla. Stat. § 390.012; Ind. Code § 16-34-2-4.5; Kan. Stat. Ann. § 65-4a09; La. Stat. Ann. § 40:1299.35.2; Miss. Code Ann. § 41-75-1; Mo. Rev. Stat. § 188.080; N.D. Cent. Code § 14-02.1-04; Okla. Stat. tit. 63, § 1-748; Tenn. Code Ann. § 39-15-202; Tex. Health & Safety Code Ann. § 171.0031; Utah Admin. Code r. 432-600-13; Wis. Stat. § 253.095.

<sup>2</sup> *Whole Woman's Health v. Lakey*, 46 F.Supp.3d 673 (W.D. Tex. 2014), *aff'd in part, modified in part, vacated in part, and rev'd in part*, 790 F.3d 563 (5<sup>th</sup> Cir. 2015). Kirk Cole is currently serving as Interim Commissioner of the Texas Department of State Health Services following the resignation of Dr. David Lakey. Cole is now the named defendant in the case.

<sup>3</sup> 505 U.S. 833 (1992).

<sup>4</sup> *Id.* at 856.

<sup>5</sup> For additional information on *Roe v. Wade*, see CRS Report 95-724, *Abortion Law Development: A Brief Overview*, by Jon O. Shimabukuro.

that attempts to reconcile the government's interest in potential life with a woman's right to terminate her pregnancy. The Court observed:

The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.<sup>6</sup>

According to the Court, 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."<sup>7</sup>

Evaluating the Pennsylvania law under the undue burden standard, the Court concluded that four of the five provisions at issue did not impose an undue burden. The Court upheld the law's 24-hour waiting period requirement, its informed consent provision, its parental consent provision, and its recordkeeping and reporting requirements. The Court invalidated the law's spousal notification provision, which required a married woman to tell her husband of her intention to have an abortion. Acknowledging the possibility of spousal abuse if the provision were upheld, the Court maintained: "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."<sup>8</sup>

The Court's decision in *Casey* was particularly significant because it appeared that the new undue burden standard would allow a greater number of abortion regulations to pass constitutional muster. Prior to *Casey*, the application of *Roe*'s strict scrutiny standard of review resulted in most state abortion regulations being invalidated during the first two trimesters of pregnancy. For example, applying strict scrutiny, the Court invalidated 24-hour waiting period requirements and informed consent provisions in two cases: *City of Akron v. Akron Center for Reproductive Health* and *Thornburgh v. American College of Obstetricians and Gynecologists*.<sup>9</sup>

*Casey* also recognized that the state's interest in protecting the potentiality of human life extended throughout the course of a woman's pregnancy. Thus, the state could regulate from the outset of a woman's pregnancy, even to the point of favoring childbirth over abortion. Under the trimester framework articulated in *Roe*, a woman's decision to terminate her pregnancy in the first trimester could not be regulated generally by the state.

Since *Casey*, the Court has applied the undue burden standard in just two cases. *Stenberg v. Carhart* and *Gonzales v. Carhart* both involved the so-called "partial-birth" abortion procedure.<sup>10</sup> In *Stenberg*, the Court invalidated a Nebraska law that restricted the procedure, in part, because it imposed an undue burden on a woman's ability to terminate a pregnancy. Finding that the statute's plain language prohibited the performance of both the "partial-birth" abortion procedure and another more commonly used abortion procedure, the Court maintained that the law imposed an undue burden because abortion providers would fear prosecution, conviction, and imprisonment if they acted.

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<sup>6</sup> *Id.* at 876.

<sup>7</sup> *Id.* at 878.

<sup>8</sup> *Id.* at 893-94.

<sup>9</sup> 462 U.S. 416 (1983); 476 U.S. 747 (1986).

<sup>10</sup> 530 U.S. 914 (2000); 550 U.S. 124 (2007). For additional information on "partial-birth" abortion, see CRS Report RL30415, *Partial-Birth Abortion: Recent Developments in the Law*, by Jon O. Shimabukuro.

In *Gonzales*, the Court considered the validity of the federal Partial-Birth Abortion Ban Act of 2003. The Court distinguished the federal law from the Nebraska statute at issue in *Stenberg*, noting the inclusion of “anatomical landmarks” that identify when an abortion procedure will be subject to the law’s prohibitions. Because the plain language of the law did not restrict the availability of alternate abortion procedures, the Court concluded that it was not overbroad and did not impose an undue burden on a woman’s ability to terminate her pregnancy.

## **Hospital Admitting Privileges and *Whole Woman's Health v. Cole***

Texas’s admitting privileges requirement was adopted in 2013. The requirement states that a physician “performing or inducing an abortion ... must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that: (A) is located not further than 30 miles from the location at which the abortion is performed or induced; and (B) provides obstetrical or gynecological health care services.”<sup>11</sup> A physician who violates the requirement may be subject to a fine of up to \$4,000.<sup>12</sup> The Texas legislature indicated that the requirement raises the standard and quality of care for women seeking abortions, and protects their health and welfare.<sup>13</sup> Opponents maintain, however, that the requirement will likely result in the closure of numerous abortion facilities as physicians face difficulty obtaining admitting privileges.<sup>14</sup>

In 2013, Planned Parenthood challenged the constitutionality of the admitting privileges requirement, as well as a separate requirement involving the administration of abortion-inducing drugs.<sup>15</sup> In *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, the Fifth Circuit concluded that the admitting privileges requirement is facially constitutional.<sup>16</sup> The Fifth Circuit found that the requirement does not impose an undue burden despite the possibility of facility closures and increased travel distances to obtain an abortion. With regard to travel, the court maintained: “*Casey* counsels against striking down a statute solely because women may have to travel long distances to obtain abortions.”<sup>17</sup> The Fifth Circuit’s decision is commonly referred to as “*Abbott II*” because it was the second decision issued by the court in this case.

Whole Woman’s Health subsequently challenged the admitting privileges requirement as applied to two specific clinics in El Paso and McAllen, Texas. In 2014, a federal district court concluded that the requirement is unconstitutional as applied to both clinics and, when considered together with a state requirement that abortion facilities satisfy the standards set for ambulatory surgical centers (“ASC requirement”), is unconstitutional “as applied to all women seeking a previability abortion.”<sup>18</sup>

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<sup>11</sup> Tex. Health & Safety Code Ann. § 171.0031(a)(1).

<sup>12</sup> Tex. Health & Safety Code Ann. § 171.0031(b).

<sup>13</sup> See *Whole Woman’s Health v. Cole*, 790 F.3d 563, 576 (5<sup>th</sup> Cir. 2015).

<sup>14</sup> See *Cole*, 790 F.3d at 579 (“[T]he Plaintiffs offered testimony that abortion physicians were being denied admitting privileges, not because of their level of competence, but for various other reasons, including: outright denial of admitting privileges with no explanation other than that it ‘was not based on clinical competence,’ and having not completed a medical residency even though the bylaws of the hospital did not require such.”)

<sup>15</sup> See *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 951 F.Supp.2d 891 (W.D. Tex. 2013).

<sup>16</sup> 748 F.3d 583 (5<sup>th</sup> Cir. 2014).

<sup>17</sup> *Id.* at 598.

<sup>18</sup> *Lahey*, 46 F.Supp.3d at 677.

On appeal, the Fifth Circuit considered both facial and as-applied challenges to the admitting privileges requirement. In *Whole Woman's Health v. Cole*, the appeals court found that the provider's facial challenge fails on both procedural grounds and on the merits. The court maintained that the provider's facial claim violates the principle of res judicata, and should have been precluded by its decision in *Abbott II*.<sup>19</sup> The court noted: "By granting a broad injunction against the admitting privileges requirement ... the district court resurrected the facial challenge put to rest in *Abbott II*."

Even if res judicata did not bar the provider's facial challenge, the Fifth Circuit found that it would fail on the merits. In considering the merits of the facial challenge, the Fifth Circuit disputed the lower court's application of the undue burden standard to the admitting privileges requirement. After weighing the burden and medical efficacy of the requirement, the district court concluded that the requirement did not further the state's interests in maternal health and increased quality of care. This determination informed the district court's finding that the requirement imposed an undue burden.

The Fifth Circuit contended, however, that the weighing of burden and efficacy was inappropriate. Citing its decision in *Abbott II*, the Fifth Circuit observed that courts should not second guess legislative fact-finding or relitigate the facts that led to a law's enactment.<sup>20</sup> Rather, the Fifth Circuit insisted that a law should be sustained if it is rationally related to a legitimate interest. Here, the Fifth Circuit maintained that the district court "erred by substituting its own judgment for that of the legislature ... this time in the name of the undue burden inquiry."<sup>21</sup>

Although the Fifth Circuit rejected the facial challenge to the admitting privileges requirement, it affirmed an injunction of the requirement as applied to the abortion facility in McAllen. This facility is the sole abortion provider in the Rio Grande Valley. The court discussed the 235-mile distance some women in the Rio Grande Valley would have to travel to obtain an abortion, and indicated that the state would be enjoined from enforcing the requirement until another facility opens at a location that is closer than those located in San Antonio. Acknowledging its discussion of *Casey* and travel distances in *Abbott II*, the Fifth Circuit observed: "[I]n the specific context of this as-applied challenge as to the McAllen facility, the 235-mile distance presented, combined with the district court's findings, are sufficient to show that [the requirement] has the 'effect of placing a substantial obstacle in the path of a woman seeking an abortion.'"<sup>22</sup>

At the same time, however, the Fifth Circuit reversed an injunction of the requirement as applied to the abortion facility in El Paso. Citing a nearby abortion facility in Santa Teresa, New Mexico, and the fact that people travel regularly between the two cities for medical care, the court maintained that the admitting privileges requirement does not impose an undue burden. The Fifth Circuit distinguished the Texas admitting privileges requirement from a similar Mississippi requirement that it invalidated in *Jackson Women's Health Organization v. Currier*, a 2014 decision.<sup>23</sup> The Fifth Circuit explained that invalidating the Mississippi requirement would have

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<sup>19</sup> See *Cole*, 790 F.3d at 581 ("Res judicata bars any claims for which: (1) the parties are identical to or in privity with the parties in a previous lawsuit; (2) the previous lawsuit has concluded with a final judgment on the merits; (3) the final judgment was rendered by a court of competent jurisdiction; and (4) the same claim or cause of action was involved in both lawsuits.").

<sup>20</sup> *Cole*, 790 F.3d at 587.

<sup>21</sup> *Id.*

<sup>22</sup> *Cole*, 790 F.3d at 594.

<sup>23</sup> 760 F.3d 448 (5<sup>th</sup> Cir. 2014).

led to the closure of the last abortion facility in the state.<sup>24</sup> An invalidation of the Texas requirement would not have the same effect.

## Petition for Supreme Court Review

In its petition for review of the Fifth Circuit's decision, Whole Woman's Health maintains that the Fifth Circuit's refusal to consider the extent to which an abortion regulation actually promotes women's health conflicts with the approaches taken by the Seventh Circuit and Ninth Circuit.<sup>25</sup> In applying the undue burden standard, both appellate courts conducted this analysis. In *Planned Parenthood v. Humble*, for example, the Ninth Circuit explained that, in applying the undue burden standard, it compares the extent of the burden a law imposes on a woman's right to abortion with the strength of the state's justification for the law.<sup>26</sup> The court further noted: "The more substantial the burden, the stronger the state's justification for the law must be to satisfy the undue burden test; conversely, the stronger the state's justification, the greater the burden may be before it becomes 'undue.'"<sup>27</sup>

The Seventh Circuit articulated a similar approach to applying the undue burden standard in *Planned Parenthood v. Van Hollen*.<sup>28</sup> In that 2013 case, the court observed:

The cases that deal with abortion-related statutes sought to be justified on medical grounds require not only evidence ... that the medical grounds are legitimate but also that the statute not impose an "undue burden" on women seeking abortions ... The feebler the medical grounds, the likelier the burden, even if slight, to be "undue" in the sense of disproportionate or gratuitous.<sup>29</sup>

In light of the approaches taken by the Ninth and Seventh Circuits, Whole Woman's Health argues that the Fifth Circuit's interpretation of the undue burden standard is erroneous, and contends that review by the Supreme Court is needed to resolve this split in authority.

Whole Woman's Health has also asked the Court to review the Fifth Circuit's conclusion that res judicata bars it from considering newly developed facts that could have an impact on the provider's facial challenge to the ASC requirement. Whole Woman's Health argues that when a claim rests on facts that develop after a judgment is entered in a prior case, the claim is not barred by that judgment, and a court may award any remedy that is otherwise appropriate. In *Cole*, the Fifth Circuit maintained that the facial challenge to the ASC requirement was precluded by its decision in *Abbott II*. Whole Woman's Health did not challenge the requirement in *Abbott II* because regulations to implement the requirement had not yet gone into effect. Nevertheless, the Fifth Circuit found that the challenge should have been brought because that case involved the same parties and legal standards.

Whether the Court agrees to review *Cole* is not clear. Given the possibility of more than 75% of Texas's abortion facilities closing if the admitting privileges and ASC requirements are enforced,

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<sup>24</sup> *Cole*, 790 F.3d at 596-97.

<sup>25</sup> Petition for a Writ of Certiorari, *Whole Woman's Health v. Cole* (U.S. filed Sept. 2, 2015), available at <http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/2015-09-02-Cert-Petition-WWH-v-Cole.pdf>.

<sup>26</sup> 753 F.3d 905, 912 (9<sup>th</sup> Cir. 2014).

<sup>27</sup> *Id.*

<sup>28</sup> 738 F.3d 786 (7<sup>th</sup> Cir. 2013).

<sup>29</sup> *Id.* at 798.



the case has proven to be of great concern to those who support a woman's right to choose.<sup>30</sup> The different approaches taken by the Fifth, Seventh, and Ninth Circuits in applying the undue burden standard also suggest that clarification by the Court would be helpful for lower courts and state legislatures. With reports of as many as 51 new abortion regulations being enacted in 2015, a clearer understanding of how to apply the undue burden standard would help to determine whether these regulations should be upheld.<sup>31</sup>

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<sup>30</sup> Petition for a Writ of Certiorari, *supra* note 25 at 1-2.

<sup>31</sup> See, e.g., Guttmacher Inst., *Laws Affecting Reproductive Health and Rights: State Trends at Midyear, 2015* (July 1, 2015), <http://www.guttmacher.org/media/inthenews/2015/07/01/>.