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# **Abortion and *Whole Woman's Health* *v. Hellerstedt***

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## Summary

*Whole Woman's Health v. Hellerstedt*, a case that is currently before the U.S. Supreme Court, involves the validity of two state law provisions that apply to abortion providers and physicians who perform abortions. Under a Texas law enacted in 2013, a physician who performs or induces an abortion must have admitting privileges at a hospital within 30 miles from the location where the abortion is 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 an abortion. The Texas law also requires an abortion facility to satisfy the same standards as an ambulatory surgical center (ASC). These standards address architectural and other matters related to the physical plant, as well as operational matters such as staffing and medical records systems. Supporters of the Texas law maintain that both requirements guarantee a higher level of care for women seeking abortions. Opponents argue, however, that the requirements are unnecessary and costly, and contend that they will make it more difficult for abortion facilities to operate.

Following an adverse decision by the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit), Whole Woman's Health sought review by the Supreme Court. In seeking review of the Fifth Circuit's decision, Whole Woman's Health asked not only about the validity of the admitting privileges and ASC requirements. The abortion provider 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 involving the application of the undue burden standard that is used to evaluate abortion regulations. This report examines *Whole Woman's Health v. Cole*, the Fifth Circuit's decision, as well as the undue burden standard, 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.

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In 2013, the Texas legislature passed House Bill 2 (H.B. 2), a measure that prescribed new requirements for abortion facilities and physicians who perform or induce abortions in Texas.<sup>1</sup> Supporters of the bill maintained that these requirements would guarantee a higher level of care for women seeking abortions.<sup>2</sup> Opponents, however, characterized the requirements as unnecessary and costly, and argued that they would make it more difficult for abortion facilities to operate.<sup>3</sup>

Since its enactment, critics of H.B. 2 have focused on two of the measure's requirements, in particular. First, H.B. 2 requires a physician who performs or induces an abortion to have admitting privileges at a hospital within 30 miles from the location where the abortion is 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 an abortion. Second, H.B. 2 requires an abortion facility to satisfy the same standards as an ambulatory surgical center (ASC). These standards address architectural and other matters related to the physical plant, as well as operational matters such as staffing and medical records systems.

H.B. 2's admitting privileges and ASC requirements have been challenged by a group of abortion providers and physicians in *Whole Woman's Health v. Hellerstedt*, a case that is currently before the U.S. Supreme Court (Court). In *Whole Woman's Health*, the Court has been asked to review a decision by the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) that upheld both requirements.

In seeking review of the Fifth Circuit's decision, *Whole Woman's Health* asked not only about the validity of the admitting privileges and ASC requirements. The abortion provider 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 examines *Whole Woman's Health v. Cole*, the Fifth Circuit's decision, as well as the undue burden standard, 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>4</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

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<sup>1</sup> Act of July 12, 2013, 83<sup>rd</sup> Leg., 2<sup>nd</sup> C.S., ch. 1, §§1-12, 2013 Tex. Sess. Law Serv. 4795-4802.

<sup>2</sup> See House Research Org., Tex. House of Representatives, Bill Analysis: H.B. 2, at 8 (2013).

<sup>3</sup> *Id.* at 11.

<sup>4</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

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>5</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>6</sup> In *Casey*, the Court adopted a new undue burden standard 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>7</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>8</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.<sup>9</sup> 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.<sup>10</sup> 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>11</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: *Akron v. Akron Center for Reproductive Health, Inc.* and *Thornburgh v. American College of Obstetricians and Gynecologists*.<sup>12</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.<sup>13</sup> 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

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<sup>5</sup> *Id.* at 856.

<sup>6</sup> For additional information on *Roe v. Wade*, 410 U.S. 113 (1973), see CRS Report 95-724, *Abortion Law Development: A Brief Overview*, by (name redacted).

<sup>7</sup> *Casey*, 505 U.S. at 876.

<sup>8</sup> *Id.* at 878.

<sup>9</sup> *Id.* at 881-901.

<sup>10</sup> *Id.* at 898.

<sup>11</sup> *Id.* at 893-94.

<sup>12</sup> See *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

<sup>13</sup> *Casey*, 505 U.S. at 872-73.

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 three cases. In *Mazurek v. Armstrong*, the Court reversed a Ninth Circuit decision involving a Montana law that restricted the performance of abortions to licensed physicians.<sup>14</sup> The Ninth Circuit vacated a district court's judgment that denied a motion for a preliminary injunction based on the lower court's conclusion that a group of physicians and a physician assistant had not established a likelihood of prevailing on their claim that the law imposed an undue burden.<sup>15</sup> The Supreme Court concluded that there was no evidence that the law had an improper purpose or that it would place a substantial obstacle in the path of a woman seeking an abortion.<sup>16</sup> Although the Court did not specifically address the law's effect, it did note that it would have an impact on only a single practitioner.<sup>17</sup>

*Stenberg v. Carhart* and *Gonzales v. Carhart* both involved the so-called "partial-birth" abortion procedure.<sup>18</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.<sup>19</sup> 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.<sup>20</sup>

In *Gonzales*, the Court considered the validity of the federal Partial-Birth Abortion Ban Act of 2003.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

## Whole Woman's Health v. Cole

### Admitting Privileges

At least 15 states have adopted laws or regulations that require physicians who perform abortions to have admitting privileges at a nearby hospital.<sup>24</sup> Texas's requirement states that a physician

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<sup>14</sup> *Mazurek v. Armstrong*, 520 U.S. 968 (1997).

<sup>15</sup> *Armstrong v. Mazurek*, 94 F.3d 566, 568 (9<sup>th</sup> Cir. 1996).

<sup>16</sup> *Mazurek*, 520 U.S. at 972-74.

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

<sup>18</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Gonzales v. Carhart*, 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 (name redacted).

<sup>19</sup> *Stenberg*, 530 U.S. at 922.

<sup>20</sup> *Id.* at 945.

<sup>21</sup> *Gonzales*, 550 U.S. at 132.

<sup>22</sup> *Id.* at 148.

<sup>23</sup> *Id.* at 168.

<sup>24</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 & (continued...)

“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>25</sup> A physician who violates the requirement may be subject to a fine of up to \$4,000.<sup>26</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>27</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>28</sup>

In 2013, Planned Parenthood and a group of abortion providers and physicians, including Whole Woman's Health, challenged the constitutionality of the admitting privileges requirement, as well as a separate requirement involving the administration of abortion-inducing drugs.<sup>29</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>30</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>31</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, TX. In 2014, a federal district court concluded that the requirement is unconstitutional as applied to both clinics and, when considered together with the ASC requirement, is unconstitutional “as applied to all women seeking a previability abortion.”<sup>32</sup>

On appeal, the Fifth Circuit considered both facial and as-applied challenges to both requirements. In *Whole Woman's Health v. Cole*, the appeals court found that the provider's facial challenge to the admitting privileges requirement fails on procedural grounds. 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>33</sup> The court noted: “By granting a broad injunction

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(...continued)

Safety Code Ann. §171.0031; Utah Admin. Code r. 432-600-13; Wis. Stat. §253.095.

<sup>25</sup> Tex. Health & Safety Code Ann. §171.0031(a)(1).

<sup>26</sup> Tex. Health & Safety Code Ann. §171.0031(b).

<sup>27</sup> See *Whole Woman's Health v. Cole*, 790 F.3d 563, 576 (5<sup>th</sup> Cir. 2015).

<sup>28</sup> See *id.* 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>29</sup> See *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 951 F.Supp.2d 891 (W.D. Tex. 2013).

<sup>30</sup> *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583, 587 (5<sup>th</sup> Cir. 2014).

<sup>31</sup> *Id.* at 598.

<sup>32</sup> *Whole Woman's Health v. Lakey*, 46 F.Supp.3d 673, 677 (W.D. Tex. 2014).

<sup>33</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.”).

against the admitting privileges requirement ... the district court resurrected the facial challenge put to rest in *Abbott II*.<sup>34</sup>

Although the Fifth Circuit rejected the facial challenge to the admitting privileges requirement, it upheld an injunction of the requirement as applied to the abortion facility in McAllen, when it utilizes a specific physician.<sup>35</sup> This physician was unsuccessful at obtaining admitting privileges at local hospitals for reasons other than his competence.<sup>36</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.<sup>37</sup> 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>38</sup> The Fifth Circuit explained that invalidating the Mississippi requirement would have led to the closure of the last abortion facility in the state.<sup>39</sup> An invalidation of the Texas requirement would not have the same effect.

## Ambulatory Surgical Center Requirement

State laws that require abortion providers to satisfy the same standards as ASCs have become increasingly more common.<sup>40</sup> Texas regulations define an ASC as a facility “that primarily provides surgical services to patients who do not require overnight hospitalization or extensive recovery, convalescent time or observation.”<sup>41</sup> Under Texas law, ASCs are required to satisfy a variety of operating, fire prevention and safety, and construction standards.<sup>42</sup>

In *Cole*, the Fifth Circuit concluded that the plaintiffs’ claim involving the ASC requirement fails on both procedural grounds and on the merits. The court found that the claim was precluded by its decision in *Abbott II*.<sup>43</sup> Although the plaintiffs did not challenge the requirement in *Abbott II* because implementing regulations had not yet gone into effect, the Fifth Circuit maintained that because *Abbott II* involved the same parties and legal standards, the requirement should have been challenged in that case.<sup>44</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 596.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 697-98.

<sup>38</sup> *Jackson Women's Health Organization v. Currier*, 760 F.3d 448 (5<sup>th</sup> Cir. 2014).

<sup>39</sup> *Cole*, 790 F.3d at 596-97.

<sup>40</sup> *See, e.g.*, Mich. Comp. Laws §333.20115(2) (“The department shall promulgate rules to differentiate a freestanding surgical outpatient facility from a private office of a physician, dentist, podiatrist, or other health professional. The department shall specify in the rules that a facility including, but not limited to, a private practice office described in this subsection must be licensed under this article as a freestanding surgical outpatient facility if that facility performs 120 or more surgical abortions per year and publicly advertises outpatient abortion services.”); 35 Pa. Cons. Stat. §448.806(h)(1) (“The department shall apply the same regulations promulgated under subsection (f) to abortion facilities that are applied to ambulatory surgical facilities. These regulations include classification of the facilities in the same manner as ambulatory surgical facilities.”).

<sup>41</sup> 25 Tex. Admin. Code §135.2(5).

<sup>42</sup> *See* 25 Tex. Admin. Code §§135.1 *et seq.*

<sup>43</sup> *Cole*, 790 F.3d at 581-83.

<sup>44</sup> *Id.*



The Fifth Circuit determined that a facial challenge to the ASC requirement would also fail on the merits because the requirement does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion. The court maintained that the plaintiffs failed to show that the ASC requirement was adopted for an improper purpose.<sup>45</sup> While the lower court found an improper purpose based on what it concluded was a lack of credible evidence to support the proposition that abortions performed in ASCs lead to better health outcomes, the Fifth Circuit observed: “All of the evidence referred to by the district court is purely anecdotal and does little to impugn the State’s legitimate reasons for the Act.”<sup>46</sup>

In addition, the Fifth Circuit found that the ASC requirement does not have the effect of placing a substantial obstacle in the path of a woman seeking an abortion. In *Casey*, the Court indicated that if a law would be invalid in a large fraction of the cases in which it is relevant, it should be found to have an improper effect.<sup>47</sup> Notably, the Court considered the effect of Pennsylvania’s spousal notification requirement only on married women who did not want to notify their husbands of their plans to have an abortion, rather than its effect on all women or all pregnant women in the state.<sup>48</sup> In this equation, the Court concluded that the spousal notification requirement would have an effect in a large fraction of the relevant cases.

In *Cole*, however, the Fifth Circuit found that the ASC requirement would not have a similar effect. After considering the number of women of reproductive age in Texas and the number of women of reproductive age who would have to travel more than 150 miles to have an abortion because of the implementation of both the admitting privileges and ASC requirements, the court determined that only 16.7% of women of reproductive age would have to travel more than 150 miles to have an abortion.<sup>49</sup> The Fifth Circuit reasoned that 16.7% does not constitute a large fraction of the relevant cases, and thus, the effect of the ASC requirement is not improper.<sup>50</sup>

Although the Fifth Circuit rejected a facial challenge to the ASC requirement, it affirmed an injunction of the requirement as applied to the abortion facility in McAllen, with some modifications.<sup>51</sup> The court acknowledged that the McAllen facility is the sole abortion provider in the Rio Grande Valley and discussed the 235-mile distance some women in the Rio Grande Valley would have to travel to obtain an abortion.<sup>52</sup> In light of this distance, the court 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>53</sup>

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<sup>45</sup> *Id.* at 585-86.

<sup>46</sup> *Id.* at 586.

<sup>47</sup> *Casey*, 505 U.S. at 895.

<sup>48</sup> *Id.*

<sup>49</sup> See *Cole*, 790 F.3d at 588 (following *Abbott II* and its determination that an increase of travel of less than 150 miles would not constitute an undue burden under *Casey*).

<sup>50</sup> *Id.* at 588-90.

<sup>51</sup> *Id.* at 595. In light of the plaintiffs’ admissions that some of the ASC requirements were comparable to standards already applicable to abortion facilities, the Fifth Circuit modified the district court’s injunction to enjoin only the enforcement of the ASC physical plant and fire prevention standards.

<sup>52</sup> *Id.* at 593-94.

<sup>53</sup> *Id.* at 594.

The Fifth Circuit declined, however, to affirm the lower court's judgment involving the ASC requirement as applied to the El Paso facility. Because abortion services are available at the facility in Saint Teresa, NM, and there was evidence that many women traveled to that facility before enactment of H.B. 2, the court concluded that the ASC requirement did not place a substantial obstacle in the path of women seeking an abortion in the El Paso area.<sup>54</sup>

## *Whole Woman's Health v. Hellerstedt*

In November 2015, the Supreme Court agreed to review the Fifth Circuit's decision in *Whole Woman's Health*. The Court is considering the following questions with regard to the case, now titled *Whole Woman's Health v. Hellerstedt*:<sup>55</sup>

- 1a. When applying the undue burden standard, does a court err by refusing to consider whether and to what extent laws that restrict abortion for the stated purpose of promoting health actually serve the government's interest in promoting health?
- 1b. Did the Fifth Circuit err in concluding that the undue burden standard permits Texas to enforce, in nearly all circumstances, laws that would cause a significant reduction in the availability of abortion services while failing to advance the State's interest in promoting health—or any other valid interest?
2. Did the Fifth Circuit err in holding that res judicata provides a basis for reversing the district court's judgment in part?<sup>56</sup>

In its petition for review by the Court, Whole Woman's Health argued 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>57</sup> In applying the undue burden standard, both appellate courts conducted this analysis. In *Planned Parenthood Arizona, Inc. 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>58</sup> The court explained further: "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>59</sup>

The Seventh Circuit articulated a similar approach to applying the undue burden standard in *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*.<sup>60</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

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<sup>54</sup> *Id.* at 598.

<sup>55</sup> Dr. John Hellerstedt has replaced Kirk Cole as the Commissioner of the Texas Department of State Health Services. Hellerstedt is now the named respondent in the case.

<sup>56</sup> See 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>57</sup> *Id.*

<sup>58</sup> *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 912 (9<sup>th</sup> Cir. 2014).

<sup>59</sup> *Id.*

<sup>60</sup> *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786 (7<sup>th</sup> Cir. 2013).

medical grounds, the likelier the burden, even if slight, to be “undue” in the sense of disproportionate or gratuitous.<sup>61</sup>

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

Whole Woman’s Health also challenged 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 argued 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.

Hellerstedt, the Commissioner of the Texas Department of State Health Services, rejects the arguments made by Whole Woman’s Health.<sup>62</sup> He contends that the balancing contemplated by Whole Woman’s Health and used by the Seventh and Ninth Circuits undermines the undue burden standard established by *Casey*.<sup>63</sup> Hellerstedt argues that the undue burden standard analyzes the degree of a law’s burden on women seeking abortions and does not involve weighing medical judgments: “The undue-burden test does not reevaluate policy judgments or choose between competing testimony of medical professionals.”<sup>64</sup>

Hellerstedt also maintains that Whole Woman’s Health’s facial challenges are barred by *res judicata*.<sup>65</sup> He argues that the claim involving the admitting privileges requirement was raised, litigated, and defeated in *Abbott II*.<sup>66</sup> He also contends that the claim involving the ASC requirement is barred because it could have been brought in that case.<sup>67</sup>

Hellerstedt also argues that Whole Woman’s Health’s facial challenges should fail on the merits because the admitting privileges and ASC requirements do not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion. Not only does he assert that the requirements were not enacted to fulfill an improper purpose, he maintains that Whole Woman’s Health has failed to establish that implementation of the requirements will have an improper effect in a large fraction of cases. For example, Hellerstedt observes: “Petitioners note that the number of abortions in Texas has decreased since the admitting-privileges requirement went into effect ... But petitioners failed to introduce any analysis of causation that controls for other factors that could produce that result, such as the decreasing abortion rate nationwide.”<sup>68</sup>

Hellerstedt also maintains that both requirements will not have an effect in a large fraction of the relevant cases because an abortion facility will remain operational in each metropolitan area where Whole Woman’s Health alleges that one would close if the Fifth Circuit’s judgment is affirmed.<sup>69</sup> Citing trial evidence, he notes that if H.B. 2 took full effect, at least 86.6% of

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<sup>61</sup> *Id.* at 798.

<sup>62</sup> See Brief for Respondents, *Whole Woman’s Health v. Cole* (U.S. filed Jan. 27, 2016), available at [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs\\_2015\\_2016/15-74\\_resp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/15-74_resp.authcheckdam.pdf)

<sup>63</sup> *Id.* at 20.

<sup>64</sup> *Id.* at 27.

<sup>65</sup> *Id.* at 17.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 18.

<sup>68</sup> *Id.* at 48.

<sup>69</sup> *Id.* at 44.

reproductive-age Texas women would live within 150 miles of an operating abortion facility.<sup>70</sup> According to Hellerstedt, if such a high percentage of women have access to a facility, H.B. 2 “cannot be facially invalidated on the premise that travel distances to clinics create a ‘substantial obstacle’ to abortion access in a large fraction of cases.”<sup>71</sup>

The Supreme Court heard oral arguments in *Whole Woman's Health v. Hellerstedt* on March 2, 2016. Because of Justice Antonin Scalia's death on February 13, 2016, only eight justices were present for the arguments. Although it is not certain whether Justice Scalia would have voted to uphold the admitting privileges and ASC requirements, his steadfast criticism of *Roe* and *Casey* might arguably suggest a likelihood of support for the requirements.<sup>72</sup>

With Justice Scalia's death, Justice Anthony M. Kennedy, who coauthored the joint opinion in *Casey* and is often viewed as holding the deciding vote in close cases, could play an even more critical role in how *Whole Woman's Health* is decided. If Justice Kennedy does not join the Court's four perceived liberal Justices who are expected to invalidate the requirements, and the Justices are evenly divided on the case, the Court will likely either enter a judgment that affirms the Fifth Circuit's decision or order the case to be reargued at a later time.<sup>73</sup>

A decision in *Whole Woman's Health* is expected by June 2016.

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<sup>70</sup> *Id.* at 45.

<sup>71</sup> *Id.* at 46.

<sup>72</sup> For additional information on Justice Antonin Scalia and abortion, see CRS Report R44419, *Justice Antonin Scalia: His Jurisprudence and His Impact on the Court*, coordinated by (name redacted), (name redacted), and (name redacted)

<sup>73</sup> See CRS Report R44400, *The Death of Justice Scalia: Procedural Issues Arising on an Eight-Member Supreme Court*, by (name redacted)

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