



Abortion, Justice Kennedy, and Judge Kavanaugh

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In 1992, nearly 20 years after it concluded in *Roe v. Wade* that the Constitution protects a woman's decision to terminate her pregnancy, the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* adopted a new standard for reviewing the constitutionality of abortion regulations. Under this new standard, announced in a joint [opinion](#) written by Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter, a reviewing court must consider whether an abortion regulation imposes an "undue burden" on a woman's ability to have an abortion before fetal viability, the gestational point when a fetus is able to live outside the mother's womb with or without artificial assistance. In the years that have followed, the Court has applied and further explained the undue burden standard in several subsequent cases. With the recent [retirement](#) of the last remaining Justice on the Court from the *Casey* plurality, questions have arisen about the future of the Court's abortion jurisprudence.

This Legal Sidebar addresses these questions by first reviewing the undue burden standard and generally discussing Justice Kennedy's views on the standard in the case law that has developed since *Casey*. The Sidebar then, in light of President Trump's July 9, 2018 [nomination](#) of Judge Brett Kavanaugh to replace Justice Kennedy, examines Judge Kavanaugh's only substantive abortion opinion: a dissent in the 2017 case from the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), *Garza v. Hargan*. Finally, as lower courts continue to apply the undue burden standard to new abortion regulations, the Sidebar concludes by noting some of the abortion cases that the Supreme Court could possibly review in the near future.

***Casey* and the Undue Burden Standard.** While the Supreme Court in *Roe* recognized that a woman has a constitutionally protected right to decide to terminate her pregnancy, it also maintained that this right was not unqualified and had to be considered against important state interests in promoting maternal health and protecting potential life. The *Roe* Court held that at certain points during a woman's pregnancy these interests become sufficiently compelling to sustain regulation of the procedure, establishing a trimester framework to examine such regulations. Finding that an abortion is no more dangerous to maternal health than childbirth in the first trimester of a woman's pregnancy, the Court concluded that the compelling point for regulating abortion to further a state's interest in maternal health was at approximately the end of the first trimester. Until that point, the abortion decision and its effectuation was left exclusively to the medical judgment of the pregnant woman's doctor. The compelling point with respect to the state's interest in potential life was at viability. At that point, the Court indicated that a state

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could regulate and even proscribe the availability of an abortion, except when necessary to preserve the life or health of the mother.

In *Casey*, a plurality of the Court rejected the trimester framework established in *Roe*, explaining that “in its formulation [the framework] misconceives the pregnant woman’s interest . . . and in practice it undervalues the State’s interest in potential life[.]” In its place, the plurality adopted the undue burden standard, maintaining that the standard recognized the need to reconcile the government’s interest in potential life with a woman’s right to decide to terminate her pregnancy. While *Roe* generally restricted the regulation of abortion during the first trimester, *Casey* emphasized that not all of the burdens imposed by an abortion regulation were likely to be undue. Under *Casey*, an undue burden exists if the purpose or effect of an abortion regulation is “to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”

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

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

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

In the wake of *Casey*, Justice Kennedy’s voice in the Court’s abortion cases was particularly notable. In his abortion opinions, Justice Kennedy, continued to emphasize the government’s “critical and legitimate role in legislating on the subject of abortion[.]” For example, eight years after *Casey*, in dissent in *Stenberg v. Carhart*, Justice Kennedy maintained that a Nebraska law prohibiting the so-called “partial-birth” abortion procedure was legitimate and did not impose an undue burden. In *Stenberg*, the Court invalidated the law on the grounds that it (1) lacked an exception that would allow the procedure to protect a woman’s health and (2) imposed an undue burden by appearing to prohibit both the “partial-birth” abortion procedure and the “dilation and evacuation” (D&E) procedure, the most common second trimester abortion procedure. In his [dissent](#), however, Justice Kennedy questioned the Court’s understanding of what abortion procedures the Nebraska law prohibited, maintaining that a “commonsense understanding of the statute’s reference to ‘partial-birth abortion’ demonstrates its intended reach and provides all citizens the fair warning required by the law.” Criticizing the Court’s decision, Justice Kennedy contended that it stemmed “from misunderstanding the record, misinterpretation of *Casey*, outright refusal to respect the law of a State, and statutory construction in conflict with settled rules.”

The government's ability to regulate the "partial-birth" abortion procedure was examined again seven years later in *Gonzales v. Carhart*. In *Gonzales*, the Court considered whether the federal [Partial-Birth Abortion Ban Act](#) (PBABA) imposed an undue burden on a woman's ability to obtain an abortion. Writing for the Court, Justice Kennedy once again acknowledged that the government has a "legitimate and substantial interest in preserving and promoting fetal life[.]" Justice Kennedy emphasized, however, that this interest could not lead to the adoption of regulations that have the purpose or effect of placing a substantial obstacle in the path of a woman seeking to terminate a pre-viable fetus. Discussing *Casey* and the undue burden standard, Justice Kennedy explained: "*Casey*, in short, struck a balance. The balance was central to its holding."

Applying the undue burden standard to the PBABA, the Court concluded that the law did not impose such a burden because it restricted only the "partial-birth" abortion procedure and other alternative procedures remained available to women seeking an abortion. Moreover, the Court maintained that the government "may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." Notably, the Court did not find that the PBABA, by lacking an exception to protect a woman's health, imposed an undue burden. The Court acknowledged that such an exception would be required if the PBABA subjected women to significant health risks. However, because there was medical uncertainty about the law ever imposing such risks, the Court maintained that there was a sufficient basis to conclude, at least in a facial challenge of the PBABA, that the law did not impose an undue burden.

In the Court's most recent substantive abortion case from 2016, *Whole Woman's Health v. Hellerstedt*, Justice Kennedy joined a majority that, like *Gonzales*, emphasized the need to balance the benefits and burdens of an abortion regulation when applying the undue burden standard. In *Whole Woman's Health*, the Court evaluated two Texas requirements that applied to physicians who perform abortions and to facilities where the procedure is performed: a hospital admitting privileges requirement for abortion doctors and a requirement that an abortion facility satisfy the same standards as an ambulatory surgical center (ASC). Writing for the Court, Justice Stephen Breyer maintained that "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." In *Whole Woman's Health*, the Court evaluated these benefits relative to Texas's preexisting abortion regulations for doctors and facilities.

The Court in *Whole Woman's Health* heavily relied on the district court's factual findings when balancing the Texas law's benefits and burdens. With regard to the admitting privileges requirement, the Court weighed (1) the potential benefit that the requirement would ensure easy access to a hospital if there were complications *against* (2) the concerns that the requirement would result in the closure of abortion facilities and increased driving distances for those seeking an abortion. Because the record evidence indicated that complications were rare, the Court concluded that the requirement did not help to cure a significant health-related problem. Rather, the Court determined that the requirement placed a substantial obstacle in the path of a woman seeking an abortion by closing approximately half of Texas's abortion facilities.

After considering the record concerning the ASC requirement, the Court concluded that this requirement also imposed an undue burden. Citing the district court's determination that the requirement did "not benefit patients and [was] not necessary," the Court also described the cost of complying with the requirement, the closure of numerous abortion facilities, and the inability of the remaining facilities to accommodate an increased number of patients. As a result of these burdens, the Court maintained that the ASC requirement posed a substantial obstacle to women seeking abortions.

Since *Roe*, the Court has continued to recognize both a constitutionally protected right to decide to terminate a pregnancy and the government's ability to regulate the availability of abortion in a manner that does not impose an undue burden on a woman seeking the procedure. *Whole Woman's Health* provided guidance to courts that must evaluate whether an abortion regulation actually imposes an undue

burden. Based on the Court's decision, it appears that record evidence and the effect a regulation has on the procedure's availability will be critical in weighing the regulation's benefits and burdens relative to existing regulations, and determining whether it is constitutional. However, given the Court's limited abortion jurisprudence since *Casey* and the newness of *Whole Woman's Health*, additional decisions may be needed to further clarify the balancing test the undue burden standard requires.

Garza v. Hargan. Judge Kavanaugh's nomination to replace Justice Kennedy on the Supreme Court has focused attention on Judge Kavanaugh's writing and speeches on abortion. Judge Kavanaugh has commented on *Roe* and *Casey* in some of his speeches, including a 2017 [address](#) at the American Enterprise Institute. Perhaps most notably, however, in October 2017, Judge Kavanaugh authored a dissenting [opinion](#) in *Garza v. Hargan*, a case involving abortion access for a detained unaccompanied alien minor. In the fall of 2017, the Department of Health and Human Services (HHS) denied 17-year-old Jane Doe (J.D.) access to an abortion, citing its policy that federally funded detention shelters are prohibited from taking any action to "facilitate" an abortion without the approval of the Director of HHS's Office of Refugee Resettlement (ORR). Although the government would not have been responsible for paying for the procedure or transporting J.D. to obtain it, the ORR Director indicated that she could have an abortion under only two circumstances: following her release into the custody of an HHS-approved sponsor or by voluntarily returning to her home country. Abortion is prohibited in J.D.'s home country, however, and efforts to locate a sponsor for J.D. were unsuccessful. Consequently, J.D. filed a lawsuit in the D.C. federal district court, arguing that the HHS policy imposed an undue burden on her ability to obtain an abortion.

The federal district court granted J.D.'s application for a temporary restraining order (TRO) and directed HHS to transport her or allow her to be transported to an abortion provider. The government filed an emergency motion to stay the TRO, and a divided three-judge panel of the D.C. Circuit (with Judge Kavanaugh in the majority) [vacated](#) the order, stating that HHS's sponsorship requirement did not impose an undue burden "so long as the process of securing a sponsor . . . occurs expeditiously." While the government made other arguments on appeal, including that the policy prevented the facilitation of abortion by the government and that the policy did not violate J.D.'s rights because she was free to return to her home country, no judge appeared to accept that argument. Instead, the panel directed the district court to issue an 11-day deadline for HHS to secure a sponsor for J.D.

In a dissenting [opinion](#), Judge Patricia Millett contended that the government's actions imposed an undue burden on J.D.'s ability to obtain an abortion: "The government's refusal to release J.D. from custody is not just a substantial obstacle; it is a full-on, unqualified denial of and flat prohibition on J.D.'s right to make her own reproductive choice." Judge Millett maintained that the government's unwillingness to release J.D. because it could not locate a sponsor for her increased health risks, likely making it more difficult for J.D. to obtain an abortion because of the fetus's advancing age. Judge Millett also questioned the need for a sponsor when J.D. had (1) already been appointed a guardian ad litem who likely was involved in her abortion decision, and (2) satisfied state law requirements that permit a minor to have an abortion without parental involvement.

J.D. requested a rehearing en banc shortly after the panel decision was issued. In a per curiam opinion, the D.C. Circuit vacated the panel decision "substantially for the reasons set forth" in Judge Millett's dissent. In a concurring opinion, Judge Millett reiterated her position that the sponsorship requirement imposed an undue burden on J.D.'s ability to obtain an abortion. In particular, Judge Millett criticized the panel's determination that there was no such burden when the requirement occurs "expeditiously." Citing HHS's nearly seven-week, unsuccessful search for a sponsor, Judge Millett contended: "Tacking on another eleven days to an already nearly seven-week sponsorship hunt – that is, enforcing an almost nine week delay before J.D. can even start again the process of trying to exercise her right – is the antithesis of expedition."

Judge Kavanaugh [dissented](#) from the D.C. Circuit's en banc decision in *Garza*, criticizing what he maintained was the majority's recognition of a new "right for unlawful immigrant minors in U.S. Government detention to obtain [an] immediate abortion on demand[.]" Judge Kavanaugh contended that the sponsorship requirement did not impose an undue burden on J.D. "so long as the transfer is expeditious." Because J.D. was expected to be transferred to a sponsor within 11 days after the three-judge panel's decision, and the government agreed that she could obtain an abortion immediately after the transfer, Judge Kavanaugh determined that the sponsorship requirement was sufficiently expeditious. Notably, Judge Kavanaugh also indicated that the government could not use the transfer process "as some kind of ruse to unreasonably delay the abortion past the point where a safe abortion could occur."

Judge Kavanaugh recognized the involvement of a sponsor in the unaccompanied minor's abortion decision as its primary benefit:

The minor is alone and without family or friends. She is in a U.S. government detention facility in a country that, for her, is foreign. She is 17 years old. She is pregnant and has to make a major life decision. Is it really absurd for the United States to think that the minor should be transferred to her immigration sponsor – ordinarily a family member, relative, or friend – before she makes that decision?

While acknowledging that *Garza* presented the court with a "new situation not yet directly confronted by the Supreme Court," the nominee's opinion cited a variety of cases in which the Court has upheld abortion regulations that "entail some delay," such as mandatory waiting periods and parental notification requirements aimed at promoting the state's interest in potential life. According to Judge Kavanaugh, the panel decision allowing the government additional time to find a sponsor for J.D. was analogous to these kinds of regulations, at least to the extent they could delay the availability of an abortion. Ultimately, the nominee viewed the majority decision to be "inconsistent with the precedents and principles of the Supreme Court . . . allowing the Government to impose reasonable regulations so long as they do not unduly burden the right to abortion that the Court has recognized."

Nonetheless, it is unclear whether the panel's allowance for an additional 11 days for the government to act is the only factor that should be considered under the undue burden test. In this vein, the concurring opinion viewed the undue burden calculus in a very different way from Judge Kavanaugh. Judge Millett's concurring opinion considered the "clock" for the undue burden consideration with respect to J.D. starting long before the panel's allowance of additional time for the government to find a sponsor. Moreover, Judge Millett also viewed the additional challenges associated with finding a sponsor as relevant to the undue burden analysis. For example, Judge Millett's concurrence noted the burdens that could be imposed if a sponsor cannot be located, such as the possible health risks associated with a prolonged pregnancy. In addition, the concurrence recognized that in Texas, where J.D. was detained, an abortion is generally prohibited once a fetus reaches a post-fertilization age of 20 weeks, and the abortion facility closest to J.D. would not perform the procedure once she was 17- or 18-weeks pregnant. Judge Millett noted that another abortion facility that would perform the procedure later in a woman's pregnancy was [reportedly](#) hundreds of miles away, amounting to a similar burden as the one created by the law invalidated in *Whole Woman's Health*.

J.D. obtained an abortion soon after the D.C. Circuit's en banc decision. Nevertheless, in light of ongoing litigation involving abortion access and other detained unaccompanied alien minors, the government petitioned the Supreme Court for review of that decision. In June, the Court vacated the decision on the grounds that J.D.'s abortion rendered the relevant claim moot: "When a civil case from a court in the federal system . . . has become moot while on its way here, this Court's established practice is to reverse or vacate the judgment below and remand with a direction to dismiss." (internal quotation marks omitted).

Ultimately, it is very difficult to draw firm conclusions about Judge Kavanaugh's views on *Casey* and the undue burden standard from his only opinion on the subject. On one hand, Judge Kavanaugh in *Garza* came down on the side of upholding HHS's policy based on the Court's older precedent upholding laws

promoting the state's interests in protecting potential life, perhaps suggesting a willingness to grant the government more leeway in regulating abortion. At the same time, while newer cases like *Whole Woman's Health* suggest that an abortion regulation's benefits and burdens should be viewed collectively in determining whether the government has imposed an undue burden on the right to terminate a pregnancy, it is unclear how *Whole Woman's Health* should be squared with the Court's older case law that largely approves of abortion regulations that provide for short-term delays for reasons of promoting child birth over abortion. *Garza*, as noted by Judge Kavanaugh was a "novel and highly fraught case" that came to the D.C. Circuit in an "emergency posture." Moreover, the D.C. Circuit had to interpret how the Court's abortion jurisprudence applied with respect to how the government was treating one individual, even though this jurisprudence has tended to involve facial challenges to state or federal abortion regulations. As a result, it is difficult to make any firm pronouncements about Judge Kavanaugh's views on abortion jurisprudence based on *Garza* alone.

Abortion and a New Supreme Court. Justice Kennedy's retirement has prompted questions about how a newly composed Supreme Court might evaluate abortion regulations in the future. It should be noted that only one member of the current Roberts Court has criticized *Roe*, *Casey*, and the undue burden standard. In a dissenting [opinion](#) in *Stenberg*, Justice Clarence Thomas described the standard as "illegitimate" and "fabricated," noting "[t]he standard is a product of its authors' own philosophical views about abortion . . . and has no origins in or relationship to the Constitution[.]" In [dissent](#) in *Whole Woman's Health*, Justice Thomas likewise described the right to abortion as "invented" by the Court in *Roe*. Nonetheless, as demonstrated by the narrow majorities in *Stenberg*, *Gonzales*, and *Whole Woman's Health*, the Court tends to divide closely on issues related to abortion, and it is conceivable that the addition of a new Justice could alter how the Court adjudicates abortion matters going forward.

Although the Court has not substantively examined an abortion regulation since *Whole Woman's Health*, lower courts have continued to review a variety of state laws that regulate the procedure. In June 2018, for example, a federal district court [enjoined](#) an Arkansas law that requires doctors who perform medication abortions to contract with a physician who has admitting and gynecological/surgical privileges at designated hospitals. The court's decision has been appealed to the Eighth Circuit, and it may be possible that the appellate court's decision is further appealed to the Supreme Court.

Lower courts have also ruled on state laws that prohibit the performance of an abortion once a fetal heartbeat is detected or the fetus reaches a specified gestational age. In general, these laws restrict the procedure at gestational ages younger than 24 weeks, a point in fetal development that was associated with viability in *Roe*. The Eighth and Ninth Circuits have respectively invalidated laws from [Arizona](#), [Arkansas](#), and [Idaho](#), citing the principle that viability is the earliest point at which a state's interest in fetal life may justify a wholesale ban on abortions. In *Isaacson v. Horne*, for example, the Ninth Circuit invalidated an Arizona law that prohibited the performance of an abortion once the fetus reached a gestational age of 20 weeks, stating: "The twenty-week law is . . . unconstitutional under an unbroken stream of Supreme Court authority, beginning with *Roe* and ending with *Gonzales*. Arizona simply cannot proscribe a woman from choosing to obtain an abortion before the fetus is viable." Notably, the Ninth Circuit contended that the "'undue burden'/'substantial obstacle' mode of analysis has no place" where the state is *prohibiting* pre-viability abortions and not just imposing conditions on the procedure.

Although the Supreme Court declined to review *Isaacson* and the Eighth Circuit's invalidation of Arkansas's fetal heartbeat law, it is conceivable that a pre-viability abortion ban might soon be before the Court again. A federal district court in Mississippi recently [ordered](#) discovery in a case involving a Mississippi law that prohibits the performance of an abortion once the gestational age of the fetus is 15 weeks. The plaintiffs in *Jackson Women's Health Organization v. Currier* limited discovery in the case to evidence concerning whether viability occurs before or after 15 weeks. The defendants had also sought evidence related to possible pain experienced by a pre-viable fetus. Nevertheless, a determination that viability occurs at a gestational age as early as 15 weeks could prompt other states to adopt a similar ban

on the procedure. Such a determination might also invite review by the Court given its prior identification of viability at between 24 and 28 weeks in *Roe*. In short, Judge Kavanaugh, if he were to be elevated to the Supreme Court, could soon hear a number of cases that further explore the Constitution and the right to an abortion.

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