



# Court Invalidates Louisiana Admitting Privileges Law

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In a recent decision, the U.S. Supreme Court struck down a Louisiana [law](#) that required physicians who perform abortions to have admitting privileges at a hospital within 30 miles of the location where the procedure is performed. In *June Medical Services v. Russo*, a majority of the Court concluded that the law imposed an undue burden on a woman’s ability to obtain the procedure. Justice Breyer authored an opinion, joined by Justices Ginsburg, Sotomayor, and Kagan, that relied heavily on *Whole Woman’s Health v. Hellerstedt*—the Court’s 2016 decision that invalidated Texas’s admitting privileges law. Justice Breyer maintained that the laws being reviewed in *June Medical Services* and *Whole Woman’s Health* were “nearly identical” and that the Louisiana law “must consequently reach a similar conclusion.” In a separate [opinion](#), Chief Justice Roberts concurred in the judgment, emphasizing that the legal doctrine of stare decisis required *June Medical Services* to be decided like *Whole Woman’s Health*. At the same time, however, the Chief Justice reiterated his belief that *Whole Woman’s Health* was wrongly decided and criticized how the undue burden standard used to evaluate abortion regulations was applied in both cases.

This Sidebar provides background on the undue burden standard and *Whole Woman’s Health*, and examines the opinions of Justice Breyer and Chief Justice Roberts in *June Medical Services*. The Sidebar also reviews some of the dissenting opinions filed in the case.

## The Undue Burden Standard and *Whole Woman’s Health*

The undue burden standard used to evaluate the constitutionality of an abortion regulation was adopted by a plurality of the Supreme Court in 1992. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the plurality determined that an abortion regulation violates the substantive component of the Fourteenth Amendment’s Due Process Clause if it imposes an undue burden on a woman’s ability to obtain the procedure. The plurality explained that 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.” Applying the undue burden standard to five provisions of the Pennsylvania Abortion Control Act, the *Casey* plurality upheld the law’s 24-hour waiting period requirement, its informed consent provision, its parental consent provision, and its recordkeeping and reporting requirements. The plurality invalidated the law’s spousal notification provision, which required a married woman to tell her husband of her intention to have an abortion. The plurality explained that the requirement created a

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substantial obstacle for a significant number of women seeking an abortion because of the possibility of spousal abuse.

Evaluating Texas’s admitting privileges law in *Whole Woman’s Health*, the Court provided additional guidance on the undue burden standard. The Court, with former Justice Anthony Kennedy joining the four Justices in the *June Medical Services* plurality, maintained that the standard **requires** a reviewing court to balance the health benefits conferred by an abortion regulation for women seeking the procedure against any burdens imposed on abortion access. After examining the Texas law and considering the evidence collected by the district court, the Court concluded that the law did not cure a significant health-related problem or provide any health benefit. At the same time, however, the law resulted in the closure of abortion facilities, increased driving distances for women seeking abortions, and longer wait times for the procedure. Balancing these burdens against the absence of any health benefit, the Court concluded that the law imposed an undue burden. The Court also invalidated a separate requirement for abortion facilities to satisfy the same standards as ambulatory surgical centers after similarly balancing the benefits and burdens of that requirement.

### *June Medical Services v. Russo*

In *June Medical Services*, the Court considered not only the constitutionality of Louisiana’s admitting privileges law, but a procedural question involving standing and whether abortion providers can challenge an abortion regulation on behalf of their clients. In general, under **Article III of the U.S. Constitution**, plaintiffs in federal court must assert their **own** rights and not those of third parties. The Court, however, has **recognized** third-party standing when the real party in interest cannot assert her own rights and a third party has a close relationship with her. In *June Medical Services*, the state argued that the petitioners – an abortion clinic and physicians who perform abortions – did not have standing because they did not have a close relationship with abortion patients. Louisiana also contended that the petitioners’ opposition to a health regulation intended to protect patients evidenced a conflict of interest with these patients, making them an unsuitable party to assert the rights of their clients.

**Plurality Opinion.** In the plurality opinion, Justice Breyer **concluded** that the state waived its standing argument when it opposed the petitioners’ initial request for a temporary restraining order against the admitting privileges law. In a memorandum opposing the request, Louisiana had stated that there was “no question that the physicians had standing to contest [the law.]” Accordingly, the plurality **determined** that the State’s “unmistakable concession” barred the Court’s consideration of the argument. Nevertheless, the plurality also emphasized the Court’s longstanding recognition of abortion providers invoking the rights of their actual and potential patients in challenges to abortion regulations. Citing several of the Court’s past decisions from both the abortion context and beyond in which third-party standing was recognized even with seeming conflicts of interest at stake, Justice Breyer indicated that the plurality would not have undone those decisions even if the state had not conceded the argument. Chief Justice Roberts, in a **footnote** in his concurring opinion, indicated his agreement with this portion of the opinion.

Addressing the merits of the admitting privileges law, Justice Breyer **applied** the undue burden standard, reiterating that the standard requires balancing an abortion regulation’s benefits against any burdens it imposes. The plurality maintained that the district court faithfully engaged in this balancing, and reviewed the evidence collected by the court to determine whether its evidentiary findings were clearly erroneous. The district court found that admitting privileges are not relevant to a patient’s care and do not provide a significant health benefit. The lower court also determined that the law’s enforcement would reduce the number of Louisiana physicians performing abortions and result in the closure of most of the state’s abortion facilities. Balancing these burdens against the absence of any notable health benefit, the district court concluded that the law was unconstitutional.

The U.S. Court of Appeals for the Fifth Circuit [reversed](#) the district court's [decision](#), contending that the law provides a credentialing function that promotes women's health. The Fifth Circuit disputed the district court's finding that the law's enforcement would result in facility closures, explaining that several of the state's abortion providers did not make a good faith effort to obtain admitting privileges. In the [view](#) of the Fifth Circuit, if these providers made such an effort, they could obtain admitting privileges and abortion facilities would not close. Consequently, any burdens associated with facility closures would be minimized.

The plurality [concluded](#) that the district court's factual determinations were supported by ample evidence and were not clearly erroneous. With regard to any health benefit associated with an admitting privileges requirement, Justice Breyer [discussed](#) both the district court's findings, as well as similar findings by the district court in *Whole Woman's Health*. Writing for the Court in *Whole Woman's Health*, Justice Breyer emphasized that deference should be given to the district court's evaluation of the record evidence. Both district courts determined that an admitting privileges requirement serves no "relevant credentialing function" because privileges may be denied for reasons other than a doctor's ability to perform abortions. Both courts also found that the background vetting for admitting privileges does not add significantly to what is already conducted by state medical examination boards.

The plurality also [maintained](#) that direct and circumstantial evidence supported the district court's finding that the admitting privileges law burdened abortion providers. For the plurality, this evidence refuted the Fifth Circuit's conclusion that some providers did not act in good faith to obtain admitting privileges. For example, direct evidence established that some of the providers were denied privileges for reasons other than their ability to safely perform abortions. And circumstantial evidence illustrated how application costs and reputational risks that accompany rejection could prevent the providers from seeking privileges at some hospitals. According to the plurality, the evidence collected by the district court also supported its conclusion that enforcement of the admitting privileges law would result in the closure of most of the state's abortion facilities. For the plurality, fewer abortion facilities would create additional burdens for women seeking abortions, such as longer wait times and increased driving distances.

Accepting the district court's findings, including its balancing of the burdens imposed by the admitting privileges law against the absence of any real health benefit, the plurality [agreed](#) with the lower court's conclusion that the Louisiana law imposed an undue burden on a woman's ability to obtain an abortion. For the plurality, because the district court applied the undue burden standard in the same manner as the district court in *Whole Woman's Health*, the same result was required.

**Chief Justice Roberts's Concurrence.** Concurring in the judgment, Chief Justice Roberts [agreed](#) that the Louisiana law and the Texas law at issue in *Whole Woman's Health* were nearly identical. Although he dissented in *Whole Woman's Health* and indicated in his concurrence that the Texas case was wrongly decided, he nevertheless [maintained](#) that stare decisis requires the Louisiana law to be invalidated:

*Stare decisis* instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical law. The Louisiana law burdens women seeking previability abortions to the same extent as the Texas law, according to factual findings that are not clearly erroneous.

The Chief Justice [emphasized](#) that adherence to precedent is necessary to avoid arbitrary decision making in the courts and promotes the "predictable and consistent development of legal principles."

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Despite his concurrence in the judgment, Chief Justice Roberts expressed skepticism over how the undue burden standard is now applied as a result of *Whole Woman's Health*. Discussing the balancing of an abortion regulation's benefits and burdens, the Chief Justice **contended** that nothing in *Casey* suggested that courts should engage in this kind of weighing of factors. **According to the Chief Justice**, *Casey* focused on the existence of a substantial obstacle as sufficient to invalidate an abortion regulation and did not "call for consideration of a regulation's benefits[.]" Reviewing the burdens imposed by the Louisiana law, such as fewer abortion providers and facility closures, the Chief Justice **agreed** with the plurality that "the determination in *Whole Woman's Health* that Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law." However, the Chief Justice further **observed** that "the discussion of benefits in *Whole Woman's Health* was not necessary to its holding."

Because only four Justices in *June Medical Services* viewed *Casey* to require courts to balance an abortion regulation's benefits and burdens, one might suggest that Chief Justice Roberts's formulation of the undue burden standard should be controlling. The Supreme Court has **maintained** that when a fragmented Court decides a case and five Justices do not agree to a single rationale for the decision, its holding may be viewed as the position taken by those who concurred in the judgment on the narrowest grounds. Here, the Chief Justice's concurrence in the judgment, applying the undue burden standard with a focus only on the burdens imposed by the Louisiana law, could be viewed as the narrowest position supporting the judgment and could be informative for future challenges to abortion regulations.

**Dissenting Opinions.** In his dissenting **opinion**, Justice Alito also questioned the use of a balancing test to determine whether an abortion regulation imposes an undue burden on the ability to obtain an abortion. Justice Alito maintained that *Whole Woman's Health* "simply misinterpreted *Casey* . . . [and] should be overruled insofar as it changed the *Casey* test." In a separate dissenting **opinion**, Justice Gorsuch criticized the balancing test not so much as a misinterpretation of *Casey*, but as an unpredictable test that will produce different results based on the factors considered by a given judge and the weight accorded to each of them. Rather than provide helpful guidance to courts, Justice Gorsuch **contended**:

The plurality's test offers no guidance. Nor can it. The benefits and burdens are incommensurable, and they do not teach such things in law school. When judges take it upon themselves to assess the raw costs and benefits of a new law or regulation, it can come as no surprise that '[s]ome courts wind up attaching the same significance to opposite facts,' and even attaching the opposite significance to the same facts.

Justice Gorsuch also rejected the Chief Justice's formulation of an undue burden standard that considers only whether the burdens imposed by an abortion regulation place a substantial obstacle in the path of a woman seeking an abortion. Under that standard, Justice Gorsuch reasoned, even the most compelling and narrowly tailored medical regulation would be invalidated if it was found to place a substantial obstacle in a woman's path. Justice Gorsuch **noted** that such a standard could "prove [to be] stricter than strict scrutiny"—a legal standard disavowed by *Casey*.

In another dissenting **opinion**, Justice Thomas reiterated his view that *Roe v. Wade* and its progeny were wrongly decided. Contending that the Constitution does not constrain the states' ability to regulate or even prohibit abortion, Justice Thomas observed: "[T]he putative right to abortion is a creation that should be undone." Justice Kavanaugh, also in dissent, **maintained** that additional fact finding was needed to assess whether Louisiana's admitting privileges law imposed a similar burden as the Texas law at issue in *Whole Woman's Health*.

## After *June Medical Services*

Justice Kennedy's retirement and the confirmation of Justices Gorsuch and Kavanaugh in the years since *Whole Woman's Health* was decided fueled interest in *June Medical Services*. Some [believed](#) that the reconstituted Court might interpret and apply the undue burden standard in a different manner. However, because of its similarity to *Whole Woman's Health*, Chief Justice Roberts concurred in the judgment of the Court, and *June Medical Services* did not ultimately produce a different outcome from the 2016 decision. Nevertheless, the opinions of the Chief Justice and various dissenting justices illustrate a skepticism with the balancing test used in *Whole Woman's Health*. As a result, the *June Medical Services* dissenters could join the Chief Justice to adopt a different test in a future abortion case, such as an undue burden standard, as suggested by the Chief Justice, that focuses only on an abortion regulation's burdens and not its benefits. Applying the undue burden standard in *Casey*, before the adoption of the *Whole Woman's Health* balancing test, the plurality invalidated just one of the five challenged requirements of the Pennsylvania Abortion Control Act. The *Casey* plurality concluded that only the act's spousal notification requirement placed a substantial obstacle in the path of a woman seeking an abortion.

As states continue to adopt a variety of new laws regulating abortion, it seems likely that new legal challenges will occur. In light of *Whole Woman's Health* and *June Medical Services*, courts evaluating these laws are to continue to consider their related health benefits and burdens. When such a case next appears before the Court is uncertain. However, in his dissent, Justice Gorsuch [suggested](#) that another case should be expected: "Some judges have thrown up their hands at the task put to them . . . If everything comes down to balancing costs against benefits, they have observed, 'the only institution that can give an authoritative answer' is this Court[.]"

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