



Court Stays Enforcement of Louisiana Abortion Law

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The U.S. Supreme Court has [stayed](#) the enforcement of a Louisiana law that requires physicians who perform abortions to have admitting privileges at a hospital within thirty miles of the location where the procedure is performed. The stay will continue until the Court acts on a petition to review a [decision](#) by the U.S. Court of Appeals for the Fifth Circuit that previously upheld the state's Unsafe Abortion Protection Act (UAPA). The plaintiffs in *June Medical Services v. Gee*, two physicians who perform abortions and a clinic where the procedure is provided, challenged the law arguing that it would impose an undue burden on women seeking abortions by prompting the closure of most of Louisiana's abortion clinics. The plaintiffs maintained that the law is identical to a Texas admitting privileges requirement that was found unconstitutional by the Supreme Court in 2016.

In *June Medical Services*, however, the Fifth Circuit emphasized that admitting privileges are easier to obtain in Louisiana and that only one of the six physicians who performs abortions in the state's abortion clinics might be unable to obtain such privileges. The Fifth Circuit concluded that if the remaining doctors obtained admitting privileges, abortion clinics would not close and women in Louisiana would not suffer the same kinds of burdens that were identified in Texas, such as fewer abortion facilities and increased driving distances to obtain the procedure. The plaintiffs in *June Medical Services* are expected to file their petition for writ of certiorari in the near future.

Abortion and the Undue Burden Standard

Courts reviewing the constitutionality of abortion regulations apply a standard that was formally adopted by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a 1992 decision involving various abortion restrictions in Pennsylvania. In *Casey*, a plurality of the Court maintained that an abortion regulation should be invalidated 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

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regulation is “to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”

In 2016, the Court provided additional guidance on how the undue burden standard should be applied. In *Whole Woman’s Health v. Hellerstedt*, the Court emphasized that the standard requires a reviewing court to consider the burdens an abortion regulation imposes on abortion access together with the benefits that are conferred by the regulation. Applying the undue burden standard to two Texas requirements – an admitting privileges requirement and a requirement that abortion facilities satisfy the same architectural and operational standards as ambulatory surgical centers – the Court relied heavily on the evidence collected by the district court to balance the requirements’ benefits and burdens.

With regard to the admitting privileges requirement, in particular, the Court cited expert testimony that complication rates for first- and second-trimester abortions are low and rarely require hospital admission. Based on this and similar evidence, the Court disputed the state’s assertion that the purpose of the admitting privileges requirement was to ensure easy access to a hospital should complications arise. Rather, the Court maintained that the requirement did not cure a significant health-related problem and did not provide any health benefit. At the same time, the requirement prompted the closure of abortion facilities and resulted in longer wait times for an abortion and increased driving distances for women seeking the procedure. Ultimately, the Court concluded that the record evidence “indicates that the admitting-privileges requirement places a ‘substantial obstacle in the path of a woman’s choice.’”

In *June Medical Services*, the Fifth Circuit reversed a district court [decision](#) that invalidated the UAPA. After reviewing the efforts of the six Louisiana physicians to obtain admitting privileges, the district court concluded that only two of the doctors would be able to perform abortions if the law went into effect. According to the court, this reduction in providers would substantially burden a large fraction of women seeking an abortion in Louisiana.

On appeal, the Fifth Circuit maintained that the district court erred in finding that the doctors put forth a good-faith effort to obtain admitting privileges. The Fifth Circuit contended that a majority of the doctors “sat on their hands, assuming that they would not qualify.” According to the court, the evidence indicated that only one of the six doctors might be unable to obtain admitting privileges. If the remaining doctors obtained admitting privileges, clinic closures would likely not occur, and women seeking abortions would not be burdened by longer wait times or increased driving distances.

In a dissenting opinion, one of the court’s judges criticized the majority for failing to accept the district court’s factfinding. The dissent maintained that the district court’s findings were “well-supported in the record and not clearly erroneous.” Moreover, the dissent contended that a proper application of the undue burden standard would establish that the admitting privileges requirement imposed substantial burdens, while providing “no demonstrable medical benefit.”

Staying the UAPA

The Supreme Court stayed the enforcement of the UAPA by a vote of 5-4, with Chief Justice Roberts, and Justices Breyer, Ginsburg, Kagan, and Sotomayor in the majority. In a written dissent, Justice Kavanaugh indicated that he would have denied the stay in favor of a more expeditious approach. Acknowledging the parties “competing predictions” about the doctors’ ability to obtain admitting privileges, Justice Kavanaugh maintained they could “act expeditiously and in good faith to reach a definitive conclusion” during a 45-day regulatory transition period in which the status quo would otherwise be preserved. If the doctors were unable to obtain admitting privileges during this period, Justice Kavanaugh indicated that they could then challenge the UAPA as applied to them.

If the Court decides to review the Fifth Circuit’s decision, it seems possible that additional guidance on the application of the undue burden standard will be provided. A decision that invalidates Louisiana’s

admitting privileges requirement could also prompt officials in three other states to halt enforcement of their admitting privileges [requirements](#). Missouri, North Dakota, and Utah continue to require physicians who perform abortions to have hospital admitting privileges.