

Legal Sidebar

New State Abortion Requirements Post-*Whole Woman's Health*

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The invalidation of two Texas abortion-related requirements by the U.S. Supreme Court earlier this year in [*Whole Woman's Health v. Hellerstedt*](#) has not slowed the adoption of new provisions of law by state legislatures and regulators. Last week, Ohio Governor John Kasich signed [legislation](#) that prohibits the performance of an abortion when the probable post-fertilization age of the fetus is twenty weeks or greater. The new law recognizes as an affirmative defense to liability abortions that are necessary to prevent the death of the pregnant woman and those that are necessary to prevent the substantial and irreversible impairment of a major bodily function. The law does not permit, however, abortions that are otherwise necessary to protect a woman's health, as contemplated by the Court in [*Roe v. Wade*](#).

The new Ohio law is only the latest example of state efforts to regulate those who either perform the procedure or are involved with the decision to terminate a pregnancy. For example, new [regulations](#) promulgated by the Texas Department of State Health Services earlier this month require health care facilities to bury fetal tissue that is the product of a spontaneous or induced abortion. The treatment of such tissue differs from how other biological medical waste may be handled in the State of Texas. Under Texas law, some human pathological waste may be deposited in a sanitary landfill. In addition to Texas's new abortion tissue regulations, a recently enacted Florida [law](#) that is scheduled to take effect in January will require any person, group, or organization that provides advice or help to an individual with regard to obtaining an abortion to register with the state's Agency for Health Care Administration. The law imposes a number of requirements, including that applicants pay a registration fee, and registrants include their registration numbers in any advertising material. In addition, the law also requires registration to be renewed with the Administration biennially.

The new state requirements have prompted criticism from abortion rights organizations, medical associations, and others. In Texas, for example, some have argued that the regulations unduly burden women seeking abortions while providing no health or safety benefit to patients. In Florida, a group of clergy members and advocacy organizations have filed a lawsuit to enjoin the enforcement and operation of the Florida law. The plaintiffs in that case, [*Fulwider v. Senior*](#), are also seeking a declaratory judgment that the law is unconstitutional under the U.S. Constitution.

The new provisions of law in Florida, Texas, and Ohio, if challenged, will likely require a reviewing court to apply the undue burden standard that is used to evaluate the constitutionality of abortion regulations. The undue burden standard was formally adopted by the Court in [*Planned Parenthood of Southeastern Pennsylvania v. Casey*](#), a 1992 decision involving abortion requirements in Pennsylvania. In *Casey*, the Court maintained 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."

In *Whole Woman's Health*, the Court's June 2016 decision, the Court emphasized that the undue burden 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, the Court looked skeptically at the benefits purported by the Texas legislature, and relied instead on the plaintiffs' evidence that, in the Court's view, illustrated how the requirements made abortion access more difficult in Texas. In so doing, the Court indicated that a

reviewing court should place considerable weight on the evidence and arguments presented in judicial proceedings when it evaluates the constitutionality of an abortion regulation. Ultimately, the Court concluded that the Texas requirements provided “few, if any, health benefits for women, [and posed] a substantial obstacle to women seeking abortions . . .”

Following *Whole Woman’s Health*, the Court may more skeptically scrutinize laws that regulate abortion, rather than accept the findings and assertions of state legislatures. Whether the Florida, Texas, and Ohio requirements can survive such an examination is not certain and may ultimately depend upon the evidence presented before a trial court. At the very least, however, the adoption of these requirements seems to illustrate continued action by the states after the Court’s decision in *Whole Woman’s Health*.

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