

Legal Sidebar

Supreme Court to Review Texas Abortion Case

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Last week, the Supreme Court agreed to review [*Whole Woman's Health v. Cole*](#), a June 2015 decision by the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") involving a Texas abortion law and the legal standard that is used to evaluate laws that regulate the abortion procedure. In *Whole Woman's Health*, the Fifth Circuit upheld the Texas law's requirement that physicians who perform abortions must have admitting privileges at a hospital within 30 miles of the location where the abortion is being performed. The Fifth Circuit's decision also upheld the law's requirement that abortion facilities must satisfy the same standards as ambulatory surgical centers. The Supreme Court issued a stay of the Fifth Circuit's decision shortly after it was issued. That stay will remain in place until the Supreme Court renders a final decision in the case. *Whole Woman's Health* will be the first substantive abortion case to be heard by the Supreme Court since 2007.

In its petition for review of the Fifth Circuit's decision, Whole Woman's Health asked the Supreme Court to consider whether, in applying the undue burden standard, a court should have to consider the extent to which an abortion regulation that is meant to promote health actually accomplishes that goal. The undue burden standard, articulated by the Supreme Court in [*Planned Parenthood of Southeastern Pennsylvania v. Casey*](#), considers whether the purpose or effect of an abortion regulation places a substantial obstacle in the path of a woman seeking a pre-viability abortion.

Prior to the Fifth Circuit's consideration of *Whole Woman's Health*, a federal district court [concluded](#) that Texas's admitting privileges requirement imposes an undue burden on a woman's ability to obtain an abortion. As part of its analysis, the district court weighed the medical efficacy of the requirement against the burden that would be imposed, and found that the requirement does not further the state's interests in maternal health and a greater quality of care.

The district court's approach is similar to the one used by two other federal appellate courts. In a 2014 [case](#), the U.S. Court of Appeals for the Ninth Circuit indicated 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. The court observed: "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.'" Similarly, in [*Planned Parenthood v. Van Hollen*](#), a 2013 case involving a Wisconsin admitting privileges law, the U.S. Court of Appeals for the Seventh Circuit maintained: "The feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of [being] disproportionate or gratuitous."

Whole Woman's Health also asked the Court to review 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 ambulatory surgical center requirement. Whole Woman's Health did not previously challenge the requirement because regulations to implement the requirement had not gone into effect. Nevertheless, the Fifth Circuit maintained that a facial challenge should have been brought in a prior case, [*Planned Parenthood v. Abbott*](#), because that case involved the same parties and legal standards. According to the Fifth Circuit, *Abbott* now precludes the court from considering the challenge. Whole Woman's Health argued in its petition 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.

[Some](#) contend that *Whole Woman's Health* will produce the term's "most consequential and legally significant decision." If the Court upholds the admitting privileges and ambulatory surgical center requirements, it is believed that

only ten abortion clinics will remain in operation in Texas. However, a decision that invalidates the requirements could clarify how the undue burden standard is to be applied, and would likely have an impact on future regulations of the abortion procedure.

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