



1-1-2016

Abortion and Birth Control—United States Supreme Court Declares Texas’ Restrictions on Abortion Facilities Unconstitutional: Impact on States with Similar Abortion Restrictions Whole Women’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016)

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Available at: <https://commons.und.edu/ndlr/vol92/iss1/10>

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ABORTION AND BIRTH CONTROL—UNITED STATES
SUPREME COURT DECLARES TEXAS’ RESTRICTIONS ON
ABORTION FACILITIES UNCONSTITUTIONAL: IMPACT ON
STATES WITH SIMILAR ABORTION RESTRICTIONS
Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016)

ABSTRACT

In *Whole Woman’s Health v. Hellerstedt et al.*, the United States Supreme Court *held* unconstitutional two controversial provisions of a Texas law, which subjected abortion clinics to ambulatory surgical center standards and required their physicians to obtain admitting privileges at nearby hospitals. The Court reasoned that both the surgical center requirement and the admitting privileges requirement provided few, if any, health benefits to women, posed a substantial obstacle in the path of women seeking abortions, and constituted an “undue burden” on abortion access. The Court concluded that the provisions were unconstitutional. Additionally, the Court held that *res judicata* did not bar the petitioners’ challenge to either the admitting privileges requirement or the surgical center requirement. Last, the Court considered Texas’ three additional arguments and deemed none persuasive. *Whole Woman’s Health* is likely the most significant abortion case in a quarter-century. This case reaffirms the “undue burden” standard provided in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and will likely impact abortion restrictions in numerous other states, including North Dakota.

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I. FACTS

In July 2013, the Texas Legislature enacted House Bill 2 (“H.B. 2”), which contained two controversial restrictions on abortion facilities in Texas.¹ The “admitting privileges requirement” provided that “[a] physician performing or inducing an abortion . . . must, on the date [of service], have active admitting privileges at a hospital . . . located not further than 30 miles from the” abortion facility.² The “surgical center requirement” mandates that an abortion facility meet the “minimum

1. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300-01 (2016).

2. *Id.* at 2300 (citing TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West 2015)).

standards . . . for ambulatory surgical centers” under Texas law.³ The petitioners, a group of Texas abortion providers, challenged the restrictions as unconstitutional.⁴ The petitioners claimed the restrictions violated the Fourteenth Amendment to the Constitution as interpreted in *Planned Parenthood of Southeastern Pa. v. Casey*.⁵ In *Casey*, the Court concluded that a provision of law is constitutionally invalid if the “purpose or effect” of the provision “is to place a substantial obstacle in the path of a woman seeking an abortion.”⁶

The respondents, the State of Texas and its elected officials, argued both the admitting privileges requirement and the surgical center requirement protected women’s health and were, thus, constitutional.⁷ A “[s]tate has a legitimate interest in seeing to it that abortion . . . is performed under circumstances that insure maximum safety for the patient.”⁸ The respondents contended that the petitioners’ constitutional claims were barred by *res judicata*.⁹ Lastly, respondents made three additional arguments for why the invalidation of both challenged provisions was precluded.¹⁰

Before H.B. 2 took effect, a group of Texas abortion providers filed an action in federal district court, *Planned Parenthood of Greater Tex. Surgical Health Serv. v. Abbott*, seeking facial invalidation of the law’s admitting privileges provision.¹¹ The district court granted an injunction in favor of the abortion providers.¹² The Fifth Circuit Court of Appeals subsequently vacated the injunction and upheld the admitting privileges provision.¹³ The abortion providers did not file a petition for certiorari to the United States Supreme Court.¹⁴

One week after the Fifth Circuit’s decision in *Abbott*, the petitioners (many of whom were plaintiffs in *Abbott*) filed the present lawsuit in federal district court.¹⁵ The district court ruled in favor of the petitioners

3. *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (West 2015)).

4. *Id.* at 2301.

5. *Id.*

6. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878 (1992).

7. *Whole Woman’s Health*, 136 S. Ct. at 2311, 2315.

8. *Id.* at 2296 (citing *Roe v. Wade*, 410 U.S. 113, 150 (1973)).

9. *Id.* at 2305.

10. *Id.* at 2318.

11. *Id.* at 2300.

12. *Id.* (citing *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 901 (WD Tex. 2013)).

13. *Whole Woman’s Health*, 136 S. Ct. at 2300 (citing *Abbott*, 734 F.3d at 419).

14. *Id.* at 2301.

15. *Id.*

and enjoined the enforcement of the two provisions.¹⁶ The Fifth Circuit later reversed the district court's ruling, holding that the admitting privileges requirement and the surgical center requirement were unconstitutional.¹⁷ As a result, the petitioners filed a petition for certiorari and the United States Supreme Court granted review.

II. LEGAL BACKGROUND

The constitutionality of laws regulating abortion is one of the most controversial issues in American law.¹⁸ In *Roe v. Wade*, the seminal 1973 abortion case, the United States Supreme Court ruled that women possess a fundamental right to decide whether to terminate a pregnancy by having an abortion.¹⁹ In *Roe*, the Court explained that this fundamental right springs from the constitutional rights of privacy and liberty arising under the Due Process Clause of the Fourteenth Amendment.²⁰ The *Roe* Court concluded that the government could restrict the right to abortion, if the restriction was necessary to fulfill a "compelling" government interest.²¹ The Court explained that the right must be measured against the state's interests in safeguarding health, maintaining medical standards, and in protecting life.²²

Approximately twenty years after *Roe*, the Supreme Court modified its view on government regulation of abortion.²³ In *Casey*, the Court said the government could regulate abortion, but only to protect women's health, not to limit access to abortion.²⁴ Any restriction must not impose an "undue burden" on a woman seeking an abortion, and the restriction will be struck down if it has the purpose or effect of creating a "substantial obstacle" to the woman attempting to access an abortion.²⁵

Approximately twenty-five years after *Casey*, *Whole Woman's Health* helps clarify when a state's regulation of abortion becomes an "undue burden" on a woman.²⁶ But, before answering this constitutional question, the Court first considered whether the petitioners were barred from bringing their constitutional challenges by result of *res judicata*.²⁷ The doctrine of

16. *Id.* at 2303.

17. *Id.*

18. *Id.* at 2330 (Alito, J., dissenting).

19. *Roe v. Wade*, 410 U.S. 113, 152-54 (1973).

20. *Id.* at 153

21. *Id.* at 154.

22. *Id.*

23. *See* *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992).

24. *Id.* at 877-78.

25. *Id.*

26. *Whole Woman's Health*, 136 S. Ct. at 2309-18.

27. *Id.* at 2304.

claim preclusion, an aspect of *res judicata*, prohibits ““successive litigation of the very same claim’ by the same parties.”²⁸ “[P]ublic policy dictates that there be an end of litigation[,] that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled between the parties.”²⁹ But, the development of new material facts can mean that a new case, and an otherwise similar previous case, do not present the same claim.³⁰

The Supreme Court next considered the constitutional issues. In *Casey*, the Court laid out “undue burden,” the relevant level of scrutiny.³¹ The “[s]tate has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient.”³² But, “a statute, which while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.”³³ “[U]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”³⁴ Accordingly, the rule announced in *Casey*, requires courts to consider the burdens that a law imposes on abortion access together with the benefits that the law confers.³⁵ Courts then must consider whether any burden imposed on abortion access is “undue.”³⁶

The Court finally considered Texas’ argument regarding the effect of H.B. 2’s severability clause. Generally, a severability clause provides that if any provision of an act is found to be invalid, the remaining provisions shall be severed and shall not be affected.³⁷ Severability clauses express the enacting legislature’s preference for a narrow judicial remedy.³⁸

In recent years, many states have passed laws restricting abortion. In fact, in 2016, antiabortion advocates in fourteen states passed thirty laws in

28. *Id.* at 2305 (citing *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)).

29. *Id.* at 2331 (citing *Baldwin v. Iowa State Traveling Men’s Assn.*, 283 U.S. 522, 525 (1931)).

30. *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. f (1980)).

31. *Id.* at 2309; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992).

32. *Roe v. Wade*, 410 U.S. 113, 150 (1973).

33. *Whole Woman’s Health*, 136 S. Ct. at 2309 (citing *Casey*, 505 U.S. at 877).

34. *Id.* (citing *Casey*, 505 U.S. at 878).

35. *Id.* (citing *Casey*, 505 U.S. at 887-98).

36. *Id.* at 2310.

37. *See Severability Clause*, BLACK’S LAW DICTIONARY (10th ed. 2014).

38. *Whole Woman’s Health*, 136 S. Ct. at 2319. According to the Court, “a severability clause is an aid merely; not an inexorable command.” *Id.* (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884-85 (1997)).

an attempt to make obtaining an abortion difficult.³⁹ The heated debate continues regarding how far the government can go in regulating abortion and when the regulation becomes unconstitutional. As such, the Supreme Court granted the petitioners' writ for certiorari and addressed this controversial question.

III. ANALYSIS

In *Whole Woman's Health*, the Supreme Court ruled the petitioners' constitutional claims were not barred by *res judicata*.⁴⁰ The Court ruled both the admitting privileges requirement and the surgical center requirement placed a substantial obstacle in the path of women seeking abortions and constituted an "undue burden" on abortion access.⁴¹ The Court concluded that both H.B. 2 requirements violated the Constitution.⁴² The Court then looked at Texas' three additional arguments, particularity Texas' severability clause argument, and found them unpersuasive.⁴³

A. THE MAJORITY OPINION: TEXAS' HOUSE BILL 2 IS UNCONSTITUTIONAL

On June 27, 2016,⁴⁴ the Supreme Court voted 5-3 in favor of the petitioners in *Whole Woman's Health*.⁴⁵ Justice Breyer wrote for the majority.⁴⁶ Justices Ginsburg, Kagan, Kennedy, and Sotomayor joined in the majority opinion.⁴⁷

1. *Res Judicata and Petitioners' Claims*

First, the Court held *res judicata* neither bars the petitioners' challenges to the admitting privileges requirement nor prevents the Court from awarding facial relief.⁴⁸ The doctrine of claim preclusion, the relevant aspect of *res judicata*, does not apply even though several of the petitioners previously brought an unsuccessful facial challenge to the admitting

39. Amber Phillips, *14 states have passed laws this year making it harder to get an abortion*, THE WASHINGTON POST (June 1, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/06/01/14-states-have-passed-laws-making-it-harder-to-get-an-abortion-already-this-year/#>.

40. *Whole Woman's Health*, 136 S. Ct. at 2309.

41. *Id.* at 2318.

42. *Id.* at 2319.

43. *Id.*

44. *Id.* at 2292.

45. *Id.* at 2299.

46. *Whole Woman's Health*, 136 S. Ct. at 2299.

47. *Id.*

48. *Id.* at 2304.

privileges requirement in *Abbott*.⁴⁹ Claim preclusion prohibits “successive litigation of the very same claim” by the same parties.⁵⁰ The Court reasoned that the *Abbott* plaintiffs’ constitutional claim regarding the admitting privileges requirement was not the same claim the petitioners brought in this case.⁵¹ The Court explained that the *Abbott* plaintiffs brought their challenge to the admitting privileges requirement prior to its enforcement—before many abortion clinics had closed and while it was still unclear how many clinics would be affected.⁵² In this case, the petitioners brought a challenge to the requirement after its enforcement—after a large number of clinics had in fact closed.⁵³ Changed circumstances showing that a constitutional harm is concrete may give rise to a new claim.⁵⁴ Thus, the Court concluded that the challenge brought by the petitioners in this case and the one brought by the plaintiffs in *Abbott* were not the exact same claim.⁵⁵ The doctrine of claim preclusion did not bar a new challenge to the admitting privileges requirement.⁵⁶

The Court determined that *res judicata* did not preclude facial relief even though the petitioners did not specifically request it.⁵⁷ In addition to asking for as-applied relief, the petitioners asked for any further relief as the Court deemed just, proper, and equitable.⁵⁸ The Court explained that the Federal Rules of Civil Procedure state that a “final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.”⁵⁹ The Court had previously held if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is “proper”.⁶⁰ The Court concluded that nothing prevents it from awarding facial relief as the appropriate remedy for the petitioners’ claims.⁶¹

Second, the Court also held that claim preclusion did not bar the petitioners’ challenge to the surgical center requirement.⁶² The petitioners

49. *Id.* at 2309.

50. *Id.* at 2305 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)).

51. *Id.* at 2304-07.

52. *Whole Woman’s Health*, 136 S. Ct. at 2306.

53. *Id.*

54. *Id.* at 2305.

55. *Id.* at 2307.

56. *Id.*

57. *Id.*

58. *Whole Woman’s Health*, 136 S. Ct. at 2307.

59. *Id.* (citing FED. R. CIV. P 54(c)).

60. *Id.* (citing *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 333 (2010)).

61. *See id.*

62. *Id.* at 2309.

were not required to bring their challenge to the surgical center provision when they challenged the admitting privileges provision in *Abbott*.⁶³ The Court first explained that it has never suggested that challenges to two distinctive statutory provisions serving two different functions must be brought in a single suit.⁶⁴ Lower courts normally treat challenges to distinct regulatory requirements as separate claims even when they are part of a larger regulatory scheme.⁶⁵ At the time that the petitioners filed *Abbott*, the Texas Department of State Health Services had not issued any rules implementing the surgical center requirement.⁶⁶ It was unclear whether the rules would contain provisions granting special waivers to existing abortion clinics, similar to those afforded to non-abortion surgical centers.⁶⁷ In addition, relevant factual circumstances changed between *Abbott* and the present lawsuit; many abortion clinics had closed as a result of H.B. 2.⁶⁸ For all of these reasons, the Court concluded that the doctrine of claim preclusion did not prevent the petitioners from bringing a challenge to the surgical-center requirements.⁶⁹ As such, none of the petitioners' constitutional claims were barred by res judicata.⁷⁰

2. *The Admitting Privileges Requirement*

The Supreme Court held that the admitting privileges requirement placed a substantial obstacle in the path of women seeking an abortion and constituted an undue burden on abortion access.⁷¹ The purpose of the admitting privileges requirement was to help ensure women had easy access to a hospital should complications arise during an abortion procedure.⁷² Before the enactment of the admitting privileges requirement in H.B. 2, doctors who provided abortions were required to “have admitting privileges or a close working arrangement with a physician(s) who has admitting privileges at a local hospital.”⁷³ Prior to the passage of H.B. 2, abortions in Texas were considered very safe because there was a considerably low rate

63. *Id.*

64. *Whole Woman's Health*, 136 S. Ct. at 2308.

65. *Id.* (The surgical-center requirement and the admitting privileges requirement are two distinct provisions of H.B. 2, which even have different enforcement dates.).

66. *Id.*

67. *Id.*

68. *Id.* at 2306-07.

69. *Id.* at 2309.

70. *Whole Woman's Health*, 136 S. Ct. at 2297.

71. *Id.* at 2296.

72. *Id.* at 2311.

73. *Id.* at 2310 (citing 25 TEX. ADMIN. CODE §139.56 (2009)).

of serious complications.⁷⁴ There was no significant health-related problem that the admitting privileges requirement helped cure.⁷⁵ No evidence in the record existed to depict that, compared to the prior law, the new law advanced Texas' interest in protecting women's health.⁷⁶

The evidence did, however, indicate that the admitting privileges requirement placed a "substantial obstacle in the path of a woman's choice" to have an abortion.⁷⁷ For example, the number of facilities providing abortions dropped by half, from about forty to about twenty, after Texas began enforcing the admitting privileges requirement.⁷⁸ The closures meant "fewer doctors, longer waiting times, and increased crowding" at the remaining clinics.⁷⁹ After the admitting privileges provision went into effect, many women had to drive further distances to get to an abortion provider.⁸⁰ These burdens, when viewed in light of the absence of any health benefit, led the Court to conclude that the admitting privileges requirement placed a substantial obstacle on a woman's choice to have an abortion.⁸¹ As such, the admitting privileges requirement constituted an "undue burden" on abortion access.⁸²

3. *The Surgical-Center Requirements*

The Court concluded that "the surgical-center requirement, like the admitting privileges requirement, provide[d] few, if any, health benefits for women and pose[d] a substantial obstacle to women seeking abortions."⁸³ The Court held that the surgical-center requirements constituted an "undue burden" on women's constitutional right to have abortions.⁸⁴

Prior to the enactment of the surgical-center requirements, Texas law already "required abortion facilities to meet a host of health and safety requirements."⁸⁵ "H.B. 2 added the requirement that an 'abortion facility' meet the minimum standards . . . for ambulatory surgical centers under

74. *Id.* at 2311 (citing *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Texas 2014)).

75. *Id.*

76. *Whole Woman's Health*, 136 S. Ct. at 2311.

77. *Id.* at 2309 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992)).

78. *Id.* at 2312 (citing *Lakey*, 46 F. Supp. 3d at 681).

79. *Id.* at 2313.

80. *Id.*

81. *Id.*

82. *Whole Woman's Health*, 136 S. Ct. at 2313.

83. *Id.* at 2318.

84. *Id.*

85. *Id.* at 2314.

Texas law.”⁸⁶ The surgical-center requirements included, among other things, detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements.⁸⁷ The Court reasoned that the evidence in the record indicated the new requirements did not benefit patients and were, therefore, unnecessary.⁸⁸ The district court was correct in determining that the “risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities.”⁸⁹ The Court explained that the evidence indicated that abortions taking place in an abortion facility were “safe – in fact, safer than numerous procedures that took place outside of hospitals” and to which Texas did not apply surgical-center requirement.⁹⁰ Many surgical-center requirements were inappropriate as applied to surgical abortions.⁹¹ For these reasons, the Court agreed with the district court in determining that many of the surgical-center requirements had such a tangential relationship to patient safety in the context of abortion as to be arbitrary.⁹² Because the surgical-center requirements did not provide better care or more frequent positive outcomes, they were deemed unnecessary.⁹³

The surgical-center requirements placed a substantial obstacle in the path of women seeking an abortion.⁹⁴ Expert testimony suggested that the surgical-center requirements would increase by a factor of five, the number of abortions to be performed by the remaining facilities.⁹⁵ The Court explained that an existing abortion facility could not likely perform five times as many abortions as it currently does without increasing the size of its facility and staff.⁹⁶ The facilities would have to incur other considerable costs to meet all of the surgical-center requirements.⁹⁷ Women would likely have to travel longer distances to get abortions in crammed-to-capacity superfacilities, which meet the surgical center requirements.⁹⁸ In addition, women seeking abortions would be less likely to receive individualized attention, serious conversation, and emotional support

86. *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 245.010 (West 2015)).

87. *Id.*

88. *Whole Woman’s Health*, 136 S. Ct. at 2315.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 2316.

93. *Id.*

94. *Whole Woman’s Health*, 136 S. Ct. at 2316.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 2318.

doctors.⁹⁹ As such, the Court inferred that quality of care would decline as a result of the surgical-center requirements, which would be harmful to, not supportive of, women's health.¹⁰⁰ The Court concluded that the surgical-center requirements made it much more difficult for women to access abortion services;¹⁰¹ and, like the admitting privileges requirement, provided few, if any health benefits for women.¹⁰² Therefore, the Court held that the surgical-center requirements were unconstitutional.¹⁰³

4. *Texas' Three Additional Arguments*

The Court was not persuaded by Texas' three additional arguments.¹⁰⁴ First, Texas argued that facial invalidation of both challenged provisions was precluded by H.B. 2's severability clause.¹⁰⁵ Texas contended that any portion of H.B. 2 that was invalid must be severed and the remaining portion must not be affected.¹⁰⁶ The Court explained that when it has been confronted with a facially unconstitutional statutory provision, it has never been required to parse through the entire provision and determine whether any single application of the provision may be valid.¹⁰⁷ If a severability clause could impose such a requirement on courts, legislatures would be able to insulate unconstitutional statutes from most facial review.¹⁰⁸ The Court's judicial remedy would involve quintessentially legislative work.¹⁰⁹ Such an approach would inflict enormous costs on both courts and litigants.¹¹⁰ The Court rejected Texas' invitation to pave the way for legislatures to immunize their statutes from facial review.¹¹¹

Second, Texas claimed that, although required by *Casey*, the challenged provisions "do not impose a substantial obstacle because the women affected are not a 'large fraction' of Texan women 'of reproductive age . . .'"¹¹² The Court explained that *Casey* used the language "large fraction" to refer to a large fraction of cases in which the provision was

99. *Id.*

100. *Whole Woman's Health*, 136 S. Ct. at 2318.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Whole Woman's Health*, 136 S. Ct. at 2319.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Whole Woman's Health*, 136 S. Ct. at 2320.

relevant.¹¹³ In this case, as in *Casey*, the relevant denominator was women for whom the provision was an actual, rather than an irrelevant, restriction.¹¹⁴ The Court determined that the provisions should be judged by the effect they have on women seeking abortions in Texas that would be deterred by the provisions.¹¹⁵

Third, Texas looked for support in *Simopoulos v. Virginia*,¹¹⁶ a case in which the Court upheld the surgical-center requirements as applied to second-trimester abortions.¹¹⁷ The Court explained that unlike *Simopoulos*, this case involved restrictions applicable to all abortions.¹¹⁸ The petitioner in *Simopoulos*, unlike the petitioners here, waived any argument that the regulation did not protect women's health.¹¹⁹ The Court concluded *Simopoulos* did not provide clear guidance in this case.¹²⁰

5. Majority's Conclusion

For the reasons above, the Court ruled the petitioners' constitutional claims were not barred by res judicata.¹²¹ Because they created an undue burden, the Court ruled the admitting privileges requirement and the surgical-center requirements violated the Constitution.¹²² Finally, the Court looked at Texas' three additional arguments and found them all unpersuasive.¹²³

B. THE CONCURRING OPINION

Justice Ginsburg joined Justice Breyer's majority opinion.¹²⁴ Justice Ginsburg also filed a separate concurring opinion.¹²⁵ In her concurrence, Justice Ginsburg lifted the veil on Texas' H.B. 2 laws and called them what she believed they truly were—targeted regulation of abortion providers laws.¹²⁶

113. *Id.*

114. *Id.*

115. *Id.*

116. 462 U.S. 506 (1983)

117. *Whole Woman's Health*, 136 S. Ct. at 2320.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 2309.

122. *Id.* at 2318.

123. *Whole Woman's Health*, 136 S. Ct. at 2318.

124. *Id.* at 2299.

125. *Id.* at 2320.

126. *Id.* at 2321.

1. *Justice Ginsburg's Concurrence: House Bill 2's Restrictions Are Targeted Regulation of Abortion Providers Laws*

In a two-page concurrence, Justice Ginsburg explained it was “beyond rational belief that H.B. 2 could genuinely protect the health of women.”¹²⁷ In truth, complications resulting from abortions are rare and typically not dangerous.¹²⁸ Many medical procedures, including childbirth, are far more dangerous than abortion, yet are not subject to admitting privileges requirement or surgical-center requirements.¹²⁹ Justice Ginsburg reasoned that when a state limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed practitioners.¹³⁰ Justice Ginsburg concluded that targeted regulation of abortion providers laws, like H.B. 2 that “do little or nothing for health, but rather strew impediments to abortion” could not survive judicial inspection.¹³¹

C. THE DISSENTING OPINIONS

Two Justices wrote dissents in *Whole Woman's Health*. Each dissenting Justice disagreed with and criticized the majority for bending basic rules because abortion was the subject at issue. Justice Thomas dissented separately to criticize the Court's habit of applying different rules to different constitutional rights—especially the right to abortion.¹³² Justice Alito, joined by Chief Justice Roberts and Justice Thomas, filed a second dissenting opinion accusing the majority of disregarding basic jurisprudential rules that apply in all other cases.¹³³

1. *Justice Thomas's Dissent: Court Bends the Rules For Abortion Cases*

In the first *Whole Woman's Health* dissent, Justice Thomas wrote about his concerns with the Court's tendency “to bend the rules when any effort to limit abortion, or even speak in opposition to abortion, is at issue.”¹³⁴ According to Justice Thomas, “A plaintiff either possesses the constitutional right he is asserting or not – and if not, the judiciary has no

127. *Id.* at 2321 (Ginsburg, J., concurring).

128. *Id.* at 2320 (Ginsburg, J., concurring) (quoting *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 912 (7th Cir. 2015)).

129. *Id.*

130. *Id.* at 2321 (Ginsburg, J., concurring).

131. *Id.* (quoting *Schimel*, 806 F.3d at 921).

132. *Whole Woman's Health*, 136 S. Ct. at 2321 (Thomas, J., dissenting).

133. *Id.* at 2330 (Alito, J., dissenting).

134. *Id.* at 2321 (Thomas, J., dissenting) (quoting *Stenberg v. Carhart*, 530 U.S. 914, 954 (2000)).

business creating ad hoc exceptions so that others can assert rights that seem especially important to vindicate.”¹³⁵ For example, Justice Thomas contended that the Court had erroneously allowed doctors and clinics to vicariously vindicate the constitutional right of women seeking abortions.¹³⁶ Ordinarily, plaintiffs could not file suits to vindicate the rights of others.¹³⁷ However, Justice Thomas noted that over time, the Court has shown a particular willingness to undercut restrictions on third-party standing when the right to abortion is at stake.¹³⁸

Justice Thomas explained, “A law either infringes a constitutional right, or not; there is not room for the judiciary to invent tolerable degrees of encroachment.”¹³⁹ Justice Thomas, for example, argued that whatever level of scrutiny the majority applied to H.B. 2, it was not the undue-burden test the Court articulated in *Casey* and its successors.¹⁴⁰ Justice Thomas argued the majority radically rewrote *Casey*’s undue-burden test.¹⁴¹ To Justice Thomas, the majority’s undue-burden test looked less like the Court’s post *Casey* precedents and far more like the strict scrutiny standard that *Casey* rejected, under which only the most compelling rationales justified restrictions on abortion.¹⁴² Justice Thomas explained that the majority’s reconfiguration of the standard of scrutiny applicable to abortion pointed to a deeper problem.¹⁴³ “[T]he Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat.”¹⁴⁴

Ultimately, Justice Thomas warned that unless the Court abided by one set of rules to adjudicate constitutional rights, the Court would continue reducing constitutional law to policy-driven value judgments.¹⁴⁵ To Justice Thomas, the majority’s embrace of a jurisprudence of rights-specific exceptions and balancing tests was a concession of defeat.¹⁴⁶

135. *Id.* at 2329 (Thomas, J., dissenting).

136. *Id.* at 2321 (Thomas, J., dissenting).

137. *Id.*

138. *Whole Woman’s Health*, 136 S. Ct. at 2322 (Thomas, J., dissenting).

139. *Id.* at 2329-30 (Thomas J., dissenting).

140. *Id.* at 2321 (Thomas, J., dissenting).

141. *Id.* at 2324 (Thomas, J., dissenting).

142. *Id.* at 2326 (Thomas, J., dissenting).

143. *Id.*

144. *Whole Woman’s Health*, 136 S. Ct. at 2327 (Thomas, J., dissenting).

145. *Id.* at 2330 (Thomas, J., dissenting).

146. *Id.*

*2. Justice Alito's Dissent: Court Fails to Apply Basic
Jurisprudential Principles*

In the second *Whole Woman's Health* dissent, Justice Alito, joined by Chief Justice Roberts and Justice Thomas, wrote about his concern that the majority disregarded basic rules that apply in all other cases.¹⁴⁷ In his lengthy dissent, Alito explained that the Court had an obligation to apply basic jurisprudential rules in a neutral fashion, regardless of the subject of the suit.¹⁴⁸ “If anything, when a case involves a controversial issue, we should be especially careful to be scrupulously neutral in applying such rules.”¹⁴⁹

First, Alito contended that claim preclusion should have barred the petitioners from bringing their challenge to H.B. 2's admitting privileges provision.¹⁵⁰ The petitioners had already lost their admitting privileges challenge in *Abbott*.¹⁵¹ Under rules that apply in regular cases, the petitioners could not relitigate the exact same claim in a second suit.¹⁵² Justice Alito explained that claim preclusion does not contain a “better evidence” exception.¹⁵³ A plaintiff who loses in a first case cannot later bring the same case simply because it has now gathered better evidence—in this case, additional abortion clinics closing.¹⁵⁴ To Justice Alito, the *Abbott* petitioners lost on the merits and chose not to petition the Supreme Court for review.¹⁵⁵ Justice Alito explained that the majority awarded a victory to the petitioners on the very same claim that they unsuccessfully pressed in *Abbott*.¹⁵⁶

Second, Justice Alito explained that the doctrine of claim preclusion also barred claims that were closely related to the claims unsuccessfully litigated in a prior case.¹⁵⁷ To Justice Alito, “it [was] evident that the petitioners’ challenges to the admitting privileges requirement and the ASC requirement [were] part of the same transaction or series of connect transactions.”¹⁵⁸ Justice Alito argued that the petitioners’ facial attack on

147. *See id.* at 2330 (Alito, J., dissenting).

148. *Id.*

149. *Id.*

150. *See Whole Woman's Health*, 136 S. Ct. at 2330 (Alito, J., dissenting).

151. *See id.*

152. *Id.*

153. *Id.* at 2335 (Alito, J., dissenting).

154. *See id.*

155. *See id.*

156. *Whole Woman's Health*, 136 S. Ct. at 2330 (Alito, J., dissenting).

157. *See id.* at 2340 (Alito, J., dissenting).

158. *Id.* (Alito, J., dissenting).

the ambulatory surgical-center requirements, like the facial attack on the admitting privileges requirement, should be precluded by *res judicata*.¹⁵⁹

Next, Justice Alito suggested that while there was no doubt that H.B. 2 caused some abortion clinics to close, other clinics may have closed for different reasons.¹⁶⁰ Justice Alito pointed to a lack of evidence regarding the capacity of the clinics that were able to comply with H.B. 2's requirements.¹⁶¹ He criticized the majority for inferring the surgical centers that performed abortions after H.B. 2's enactment lacked the necessary capacity to perform all the abortions sought by women in Texas.¹⁶²

Finally, Justice Alito argued that the majority was wrong to conclude that the admitting privileges requirement and surgical-center requirements must have been enjoined in their entirety.¹⁶³ Any responsible application of the H.B. 2 severability provision would leave much of the law intact.¹⁶⁴ Justice Alito suggested that if the Court was unwilling to undertake the careful severability analysis required, it should have remanded to the lower courts for a remedy tailored to the specific facts shown in the case.¹⁶⁵ To Justice Alito, there was no reason to strike down all applications of the challenged provisions.¹⁶⁶

Justice Alito's dissent highlighted his concern that the Court applies basic rules inconsistently. He suggested that when the Court decides cases on controversial issues, the Court should take special care to apply settled procedural rules in a neutral manner.¹⁶⁷ To Justice Alito, the majority failed to apply basic jurisprudential principles in a neutral fashion.¹⁶⁸

IV. IMPACT

The *Whole Woman's Health* decision has a direct impact on states with similar abortion laws to Texas' H.B. 2. The *Whole Woman's Health* ruling will likely lead to abortion providers challenging their state's admitting privileges and surgical center laws. This case sets the national legal precedent regarding admitting privileges and surgical-center requirements. Because the Supreme Court concluded H.B. 2 was unconstitutional, other

159. *Id.* at 2342 (Alito, J., dissenting).

160. *See id.* at 2344-45 (Alito, J., dissenting).

161. *Id.* at 2346 (Alito, J., dissenting).

162. *See Whole Woman's Health*, 136 S. Ct. at 2346-47 (Alito, J., dissenting).

163. *Id.* at 2350 (Alito, J., dissenting).

164. *Id.* at 2352 (Alito, J., dissenting).

165. *Id.* at 2353 (Alito, J., dissenting) (citing *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006)).

166. *See id.* at 2352-53 (Alito, J., dissenting).

167. *Id.* at 2353 (Alito, J., dissenting).

168. *Whole Woman's Health*, 136 S. Ct. at 2353 (Alito, J., dissenting).

states' admitting privileges and surgical-center laws will likely also be found unconstitutional. North Dakota, for example, has an admitting privileges requirement that is very similar to H.B. 2. North Dakota Century Code Section 14-02.1-04 (1) states in relevant part: "All physicians performing abortion procedures must have admitting privileges at a hospital located within thirty miles of the abortion facility and staff privileges to replace hospital on-staff physicians at that hospital. These privileges must include the abortion procedures the physician will be performing at abortion facilities."¹⁶⁹

The *Whole Woman's Health* decision does not automatically nullify North Dakota's admitting privileges law, which was passed in 2013.¹⁷⁰ Because North Dakota's admitting privileges provision is so similar to Texas' unconstitutional admitting privileges provision, North Dakota's law will likely be challenged. In fact, soon after the Court's decision in *Whole Woman's Health*, Tammi Kromenaker, director of the Red River Women's Clinic in Fargo, North Dakota's lone abortion clinic, said, "[W]e'll certainly take a look at it and figure out how to move forward."¹⁷¹ She said, "At this point, because it's so fresh, our attorneys are still analyzing the decision. But the bottom line is the fight does not end today."¹⁷²

If and when North Dakota's admitting privileges law is challenged, North Dakota's courts will likely rely on *Whole Woman's Health*. Ultimately, North Dakota's courts will have to decide whether the admitting privileges law creates an "undue burden" on a woman's right to have an abortion. In making this determination, the courts must consider the effect the law has on women seeking abortions. In 2014, 1,264 abortions were performed in North Dakota.¹⁷³ Furthermore, unlike in Texas, only one provider performs abortions in North Dakota.¹⁷⁴ If the lone abortion clinic were forced to close, North Dakota women would have to travel outside of the State to obtain safe and legal abortions. The court will also have to determine if the burdens associated with the admitting privileges law, when

169. N.D. CENT. CODE § 14-02.1-04(1) (2016).

170. Mike Nowatzki, *SCOTUS Abortion Ruling Could Revive Challenge to ND Admitting Privileges Law*, THE JAMESTOWN SUN (June 28, 2016, 7:23 AM), <http://www.jamestownsun.com/news/state/4063507-scotus-abortion-ruling-could-revive-challenge-nd-admitting-privileges-law>.

171. *Id.*

172. *Id.*

173. *North Dakota Occurrence Induced Termination of Pregnancy Data 2014*, DIVISION OF VITAL RECORDS, N.D. DEP'T OF HEALTH (2014), <http://ndhealth.gov/vital/pubs/ITOP%202014.pdf>.

174. *Still Blooming in a Red State*, RED RIVER WOMEN'S CLINIC, <http://www.redriverwomensclinic.com> (last visited Nov. 24, 2016).

viewed in light of any health benefits, place a substantial obstacle on a woman's choice to have an abortion.

Whole Woman's Health does not necessarily dictate that North Dakota's admitting privileges requirement is unconstitutional. North Dakota Attorney General Wayne Stenehjem said,

[I]t doesn't guarantee a challenge to North Dakota's law would succeed because the clinic would have to show the law creates an "undue burden" on a woman's right to an abortion. "It might be a challenge for them to claim an undue burden when in fact they asked for and obtained admitting privileges."¹⁷⁵

In 2013, soon after North Dakota's admitting privileges requirement passed, the Center for Reproductive Rights ("the Center") filed a lawsuit on behalf of Fargo's abortion clinic.¹⁷⁶ The Center claimed that the admitting privileges requirement effectively made abortion illegal in North Dakota.¹⁷⁷ The lawsuit was subsequently removed from the docket, after a settlement was reached between the State and the Fargo abortion clinic.¹⁷⁸ Sanford Health ("Sanford") granted the Red River Women's Clinic's physicians admitting privileges.¹⁷⁹ Sanford agreed to "maintain admitting privileges for the clinic's physicians as long as they maintain certain training, education, and certification requirements."¹⁸⁰ Because Sanford granted the Red River Women's Clinic's physicians admitting privileges, North Dakota's admitting privileges law does not currently interfere with the abortion clinic's services. However, if for any reason Sanford decides to deny the Red River Women's Clinic's physicians admitting privileges, North Dakota's admitting privileges law would likely cause North Dakota's lone abortion clinic to close.

Only time will tell if and when abortion providers will bring a lawsuit challenging North Dakota's admitting privileges law. If the law is challenged, North Dakota courts will have to decide if the admitting privileges law creates an undue burden on a woman's right to have an abortion. *Whole Woman's Health* provides guidance on this question.

175. Nowatzki, *supra* note 169.

176. *Pact Reached to Keep Open Only Clinic in N.D. Providing Abortions*, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES (Mar. 17, 2014), <http://go.nationalpartnership.org/site/News2?page=NewsArticle&id=43916>.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

V. CONCLUSION

In *Whole Woman's Health et al. v. Hellerstedt et al.*, the United States Supreme Court held two controversial provisions of a Texas law, which subjected abortion clinics to ambulatory surgical center standards and required their physicians to obtain admitting privileges at nearby hospitals, violated the Constitution. The Court held that *res judicata* did not bar the petitioners' challenges to either the admitting privileges requirement or the surgical-center requirements. *Whole Woman's Health* is likely the most significant abortion case in the last twenty-five years, by reaffirming the "undue burden" standard and likely impacting abortion restrictions in other states, including North Dakota.

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