



# ABORTION AND THE SUPREME COURT

## CENTRAL QUESTION



Should the Supreme Court uphold a Louisiana law that requires doctors who perform abortions to have admitting privileges at a local hospital?

## BACKGROUND



**What Are the Constitutional Issues at Play?** In this *Close Up in Class Controversial Issue in the News*, we will examine a court case that deals with abortion, an issue that has generated intense debate for years.

So, does the Constitution protect a right to have an abortion? The Supreme Court dealt with this very question in *Roe v. Wade* (1973). Prior to this landmark case, states were entirely responsible for deciding whether, and under what circumstances, to allow, prohibit, or regulate abortion. (As of the early 1970s, only four states—Alaska, Hawaii, New York, and Washington—had fully legalized abortion.)<sup>1</sup>

*Roe v. Wade* began with a lawsuit filed on behalf of Norma McCorvey (“Jane Roe”), a pregnant woman who claimed that a Texas state law banning all abortions except those ordered by a doctor to save the life of a mother violated her constitutional rights. The Supreme Court agreed and ruled that the law infringed upon an inherent right to privacy in the 14th Amendment, which was previously recognized in *Griswold v. Connecticut* (1965).<sup>2</sup> The Court also laid out a timeline of when a state may and may not regulate a woman’s decision to have an abortion.

- During the first trimester of pregnancy, a state may not regulate the abortion decision; only a woman and her attending doctor can make the decision.
- After the first trimester through the point of fetal viability (the point at which a fetus can survive outside the womb), a state may enact regulations reasonably related to the protection of a mother’s health.
- After the point of fetal viability, a state may regulate or even outlaw abortion, except when medically necessary to save the life or health of a mother.<sup>3</sup>

In other words, *Roe v. Wade* greatly limited state power to regulate abortion, except in later-term pregnancies. Still, state legislatures retain some power to pass abortion-related regulations, creating a national patchwork of laws on the issue.



## FACTS OF THE CASE



In June 2014, the Louisiana State Legislature passed Act 620, which required that “every physician who performs or induces an abortion shall have active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced.”<sup>4</sup>

June Medical Services LLC, which operates a clinic in Shreveport, filed a lawsuit to challenge Act 620, claiming that the law placed “an unconstitutional undue burden on the right to choose abortion under the Fourteenth Amendment.” A district court issued a preliminary injunction against the law.<sup>5</sup>

As the Louisiana case was pending in district court, the Supreme Court issued a separate decision in *Whole Woman’s Health v. Hellerstedt* (2016), which struck down a similar law in Texas that required doctors who perform abortions to have admitting privileges at a local hospital. In the aftermath of *Whole Woman’s Health*, the district court hearing the challenge to Act 620 declared Louisiana’s law unconstitutional. It concluded that admitting privileges do not serve “any relevant credentialing function,” that doctors are sometimes denied admitting privileges “for reasons unrelated to [medical] competency,” and that the law would “drastically burden women’s right to choose abortions.”<sup>6</sup>

However, in September 2018, the U.S. Court of Appeals for the Fifth Circuit reversed the district court’s decision. It concluded that the lower court had overlooked significant differences between the facts in the Louisiana case and those in *Whole Woman’s Health*. The Fifth Circuit ruled that because “no clinics will likely be forced to close on account of the Act,” the law would not place an undue burden on women’s right to choose abortions.<sup>7</sup>

The case then moved to the Supreme Court, which will hear oral argument in *June Medical Services LLC v. Russo* on March 4, 2020.

## QUESTION BEFORE THE COURT



Is the U.S. Court of Appeals for the Fifth Circuit’s decision upholding Louisiana’s law requiring doctors who perform abortions to have admitting privileges at a local hospital consistent with the Supreme Court’s binding precedent in *Whole Woman’s Health v. Hellerstedt*?

## PRECEDENT CASES



When the Supreme Court considers constitutional questions, it looks to previous cases—called precedents—to help guide its decisions. Consider the following cases:

***Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992):** Several doctors and abortion clinics sued the state of Pennsylvania after its legislature passed new laws that required (1) a 24-hour waiting period before an abortion, (2) a minor seeking an abortion to obtain the consent of one parent (with a judicial bypass procedure in place), and (3) a married woman seeking an abortion to indicate that she had notified her spouse of the intention. In a 5-4 decision, the Supreme Court struck down the provision regarding married women, but it upheld the other parts of the law. The decision created a new standard for determining if an abortion law is unconstitutional—if the law imposes an “undue burden” or a “substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”<sup>8</sup>

***Whole Woman’s Health v. Hellerstedt* (2016):** In 2013, the Texas Legislature passed House Bill 2, which contained provisions (1) requiring any doctor who performs an abortion to have admitting privileges at a hospital within 30 miles of where the abortion is performed, and (2) requiring that all abortion clinics comply with standards for ambulatory surgical centers. In a 5-3 decision, the Supreme Court struck down the law as unconstitutional because it did not provide medical benefits that justified the burden it placed on women seeking an abortion. The evidence presented in the case suggested that the admitting privileges provision would force roughly half of the state’s abortion clinics to close while providing no further medical protections than those already in place. If the law took effect, only seven or eight facilities in Texas would continue to function, placing a substantial burden on women seeking an abortion because the remaining facilities would not be able to meet the demand.<sup>9</sup>



## SHOULD THE SUPREME COURT UPHOLD A LOUISIANA LAW THAT REQUIRES DOCTORS WHO PERFORM ABORTIONS TO HAVE ADMITTING PRIVILEGES AT A LOCAL HOSPITAL?



**YES: This commonsense law does not burden women; it protects them from unsafe abortions.**

Louisiana was right to pass Act 620, a law that would require doctors who perform abortions to have admitting privileges at a nearby hospital. This is a commonsense law that protects women from unqualified doctors and unsafe abortions.

"[Act 620] ensures women's well-being by guaranteeing that their abortion doctor can admit and treat them quickly at a hospital should something go wrong during the abortion procedure," wrote Denise Harle, legal counsel for the Alliance Defending Freedom Center for Life, in a brief to the Supreme Court. "Another of the law's main purposes is to screen out abortion doctors who have a track record of endangering patients. Hospitals vet the competence of doctors before granting them admitting privileges. They likely won't extend those privileges to physicians with histories of professional errors and malpractice—their own institutional reputation is on the line."<sup>10</sup>

The U.S. Court of Appeals for the Fifth Circuit agreed. In its decision upholding Act 620, the court ruled that the law was designed to ensure "a higher level of physician competence," since "hospitals perform more rigorous and intense background checks than do the clinics. The record shows that clinics, beyond ensuring that the provider has a current medical license, do not appear to undertake any review of a provider's competency. The clinics, unlike hospitals, do not even appear to perform criminal background checks."<sup>11</sup> That is not acceptable.

Meanwhile, critics of Act 620 argue that the law is identical to Texas House Bill 2, which the Supreme Court struck down in *Whole Woman's Health v. Hellerstedt*. However, there are stark differences between Louisiana's law and Texas' unconstitutional law. As the Fifth Circuit explained, "Almost all Texas hospitals required that for a doctor to maintain privileges there, he or she had to admit a minimum number of patients annually. Few Louisiana hospitals make that demand. Because Texas doctors could not gain privileges, all but 8 of 40 clinics closed. Here, only one doctor at one clinic is currently unable to obtain privileges; there is no evidence that any of the clinics will close as a result of the Act. In Texas, the number of women forced to drive over 150 miles increased by 350%. Driving distances will not increase in Louisiana. ... Finally, because of the closures, the remaining Texas clinics would have been overwhelmed, burdening every woman seeking an abortion. In Louisiana, however, the cessation of one doctor's practice will affect, at most, only 30% of women, and even then not substantially."<sup>12</sup>

It is well within the realm of a state government to promote the welfare and safety of its residents. Louisiana must be allowed to do so by enacting Act 620.



**NO: This law would unduly limit access to abortion by shuttering clinics without reason.**

Americans should not be tricked into believing that Louisiana passed Act 620 in an effort to protect women. No, this law is a thinly veiled attempt to limit access to abortion by closing clinics. The Supreme Court must strike it down.

As the district court concluded when it found Act 620 to be unconstitutional, the law could decimate access to abortion in Louisiana. At the time of the trial, the court found that in Louisiana five clinics provided abortion services (as of 2017, two of those clinics had closed) and five doctors performed all abortions in the state.<sup>13</sup> "If Act 620 were to be enforced, three of the five doctors currently providing abortions in Louisiana ... would not meet the admitting privileges requirement. If [one of the remaining doctors] quits the abortion practice, as he has testified he will, Louisiana would be left with one provider and one clinic," the district court asserted. "Two of the three remaining clinics—Hope and Delta—would have no abortion provider, with the one remaining clinic (Women's) without one of the two doctors that normally serves its patients."<sup>14</sup>

So, what would this mean for women? "This would result in a substantial number of Louisiana women being denied access to abortion in this state," the district court concluded. "A single remaining physician providing abortion services in Louisiana cannot possibly meet the level of services needed in the state."<sup>15</sup>

In other words, Act 620 would place an undue burden on women seeking abortions—something that the Supreme Court outlawed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

Furthermore, Act 620 would limit access to abortion without even providing a real medical benefit. "There is no medical benefit to a local admitting privileges requirement for abortion providers," lawyers for the American College of Obstetricians and Gynecologists wrote in a brief to the Supreme Court. "Abortion is an extremely safe procedure, and patients who obtain abortions rarely require hospitalization. Even in the rare instances in which patients require admission to a hospital, they will be admitted whether their abortion provider has admitting privileges or not, and emergency protocols can achieve the goal of continuity of care absent privileges. Further, whether a clinician has hospital admitting privileges cannot be used to judge his or her competency to perform abortions because clinicians are often denied admitting privileges for reasons unrelated to their competency."<sup>16</sup>

In the end, limiting access to abortion for non-medical reasons denies women their rights and increases the likelihood of dangerous, unlicensed abortions.

## QUESTIONS TO CONSIDER



1. How do you believe the Supreme Court would rule in *June Medical Services LLC v. Russo* if the justices followed the precedent of *Planned Parenthood of Southeastern Pennsylvania v. Casey*? How do you believe the justices would rule if they followed the precedent of *Whole Woman's Health v. Hellerstedt*? Explain your reasoning.
2. If you were a justice on the Court, how would you rule in this case? Explain your reasoning.
3. Do you believe that states should have greater power to regulate abortion? Why or why not?