

The Undue Burden Standard after *June Medical Services v. Russo*



The U.S Supreme Court decided *June Medical Services v. Russo* on June 29th, 2020, invalidating a Louisiana abortion restriction that would have shuttered most of the state’s remaining clinics. In doing so it preserved its landmark opinion from four years earlier that struck down an identical Texas law—at least for now.

In the prior Texas case, *Whole Woman’s Health v. Hellerstedt* (“*WWH*”), a five-justice majority emphatically rejected restrictions that impose burdens on access to abortion that outweigh benefits. Five justices in *June Medical Services* (“*JMS*”) agreed that *WWH* controlled and rendered the Louisiana law unconstitutional, while one of them, Chief Justice Roberts, disagreed about the application of the legal test that courts should use to evaluate abortion restrictions going forward.

In *JMS*, Justice Breyer wrote a four-justice plurality opinion striking down the Louisiana law while fully upholding *WWH* and its strong “undue burden” legal standard which considers a law’s lack of benefits alongside the burdens it imposed on abortion access. Chief Justice Roberts voted to strike down the law under *stare decisis*, since *WWH* had rejected an identical Texas statute and he agreed it controlled the result. But he would have adopted an undue burden test that does not balance benefits against burdens and instead considers whether an abortion restriction has a legitimate purpose and is reasonably related to that goal as a threshold requirement, before consideration of the restriction’s burdens. In short:

- *Whole Woman’s Health* requires a court to assess a law’s benefits, if any, along with its burdens; when burdens outweigh benefits the law is unconstitutional.
- In *June Medical Services*, four justices voted to fully uphold *WWH* and its controlling undue burden legal standard that considers benefits alongside burdens.

Prior to *WWH*, many but not all lower courts had correctly applied *Casey* to examine whether restrictions conferred sufficient benefits as part of their undue burden analysis. States meanwhile enacted an onslaught of laws that they claimed had benefits, but in fact only harmed people seeking abortion, with low-income people, people of color, young people, immigrants, people in rural areas, and others with resource constraints suffering the most. In addition to striking a blow against restrictions that burden access but confer minimal or no benefits, *WWH* reaffirmed that the real-world impacts of abortion restrictions – particularly on marginalized communities – matter in the undue burden analysis.

- Chief Justice Roberts provided a fifth vote agreeing that *WWH* controls, but criticized the plurality’s affirmation of the undue burden standard; he would not balance benefits against burdens.
- All five justices agreed that the law imposed unconstitutional burdens on abortion access in Louisiana.
- Lower courts may wrongly choose to follow Chief Justice Roberts’ concurrence even while it did not overrule *WWH* or its legal standard which remain binding law.

The Undue Burden Legal Standard – *Casey* to *Whole Woman’s Health*

The undue burden test from *Planned Parenthood v. Casey* (1992) is the legal standard that courts use to determine whether an abortion restriction violates the Constitution. In hearing a challenge to a Pennsylvania statute with multiple provisions, the *Casey* Court adopted the undue burden standard to distinguish permissible restrictions from those that are unconstitutional. It held that the undue burden test renders laws unconstitutional if they lack sufficient benefits or impermissibly impede access to abortion.¹

Almost 25 years later in *WWH* (2016), the Court applied *Casey*’s undue burden test to strike down two Texas restrictions including a mandate that doctors who provide abortions obtain admitting privileges at a local hospital. Texas claimed that the restriction advanced its interest in women’s health by making abortion safer, but trial evidence showed that it conferred no health or safety benefits. At the same time, evidence showed that it would cause most of Texas’ clinics to close and devastate access in the state.

In striking down the Texas admitting privileges law, the Supreme Court affirmed that “The rule announced in *Casey*...requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”² In other words, under *Casey*, even laws that advance the asserted state interest need to offer benefits sufficient to justify the burdens they place on people seeking abortion. Unless benefits outweigh burdens, the law is unconstitutional.

Under *WWH*’s binding precedent, lower courts across the country struck down abortion restrictions that imposed burdens that outweighed their benefits. While access remains severely restricted in many states, and marginalized people are the most impacted, courts following *WWH* rejected laws ranging from Target Regulation of Abortion Provider (TRAP) restrictions to bans on types of abortion procedures.

***June Medical Services* – What it Means for Undue Burden**

The Plurality – Affirms that Benefits must Outweigh Burdens

JMS challenged a Louisiana admitting privileges law that was identical to the Texas law struck down in *WWH*. After a trial demonstrated that the law lacked meaningful health or safety benefits but would close almost all of the clinics and drastically reduce access in the state, a Louisiana federal district court found it unconstitutional in April 2017.³ Louisiana

The plurality affirmed *WWH*'s application of the undue burden standard: it reiterated that courts must “weigh the law’s asserted benefits against the burdens” and “consider the burdens a law imposes on abortion access together with the benefits those laws confer.”

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appealed to the Fifth Circuit, which reversed in September 2018.⁴ The Court of Appeals overturned most of the district court’s evidence-based factual findings to hold that while benefits might be minimal, burdens were limited and the law was constitutional.

The Supreme Court agreed to hear the case in October 2019 (after having stepped in to keep the law blocked in the meantime) and issued a decision on June 29th, 2020. Justice Breyer’s plurality opinion (joined by Justices Ginsburg, Kagan, and Sotomayor) affirmed *WWH*’s application of the undue burden standard: it reiterated that courts must “weigh the law’s asserted benefits against the burdens”⁵ and “consider the burdens a law imposes on abortion access together with the benefits those laws confer.”⁶

Utilizing that test, the plurality found that the Louisiana facts were a “mirror” of those it had already analyzed in *WWH*.⁷ In particular, wait times and travel distances would increase; patients would face overcrowding; some would be unable to have the type of procedure they wanted; and the burdens would fall disproportionately on poor people. At the same time, the facts demonstrated that abortion in Louisiana is very safe and admitting privileges would do nothing to make it safer. The Fifth Circuit had been wrong to overturn the District Court’s factual findings which were supported by “ample” credible lay and expert testimony.⁸ The law would make abortion more difficult to access, conferred few or no benefits, and was an unconstitutional undue burden.

The Concurrence –Rejects a Balancing of Benefits with Burdens

Chief Justice Roberts, writing only for himself, agreed with the plurality that the Louisiana law was an unconstitutional undue burden. In his view, the Louisiana and Texas laws were identical in all pertinent respects, as were the evidentiary records for the two cases. Stare decisis – the legal principle that tells courts to decide similar cases the same way – compelled him to adhere to *WWH* as binding precedent and reach the same outcome, even though he still believed *WWH* was wrongly decided.⁹

In addition to agreeing that stare decisis controlled, Justice Roberts concurred with the plurality on multiple key specifics. Like Justice Breyer, he stressed that courts of appeal must defer to credible district court fact finding.¹⁰ He furthermore agreed that the Louisiana law would increase wait times and travel distances; lead to overcrowding; and impose logistical burdens on patients who struggled to afford them. And he agreed that doctors were unlikely to obtain privileges because abortion was very safe and rarely led to hospital admissions, a common requirement for privileges to be granted.¹¹

However, Justice Roberts disagreed with the plurality about how to apply the undue burden test. He wrote that *WWH* had determined the Texas law imposed unconstitutional burdens; because the Louisiana law’s burdens were equivalent, stare decisis rendered it unconstitutional. Although Justice Roberts noted that benefits are relevant under *Casey* because there is a “threshold” requirement that restrictions must be “reasonably related” to a “legitimate state purpose,” he rejected any balancing of benefits as part of the undue burden test.¹²

Endnotes

¹*Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 874, 877-889, 900-901 (1992).

²*Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

³*June Med. Servs. L.L.C. v. Kliebert*, 250 F. Supp. 3d 27 (M.D. La. 2017).

⁴*June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018).

⁵*June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

⁶*Id.* at 2120.

⁷*Id.* at 2113.

⁸*Id.* at 2132.

⁹*Id.* at 2133 (Roberts, C. J., concurring in the judgment).

¹⁰*Id.* at 2141.

¹¹*Id.* at 2140.

¹²*Id.* at 2138.

¹³*Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015).

¹⁴*Whole Woman's Health v. Cole*, 790 F.3d 563, 586 (5th Cir. 2015).

¹⁵*Am. Coll. of Obstetricians & Gynecologists v. United States Food & Drug Admin.*, No. CV TDC-20-1320, 2020 WL 3960625, at *16-17 (D. Md. July 13, 2020); *Whole Woman's Health v. Paxton*, No. 17-51060, 2020 WL 4998233, at *1 (5th Cir. Aug. 21, 2020).

¹⁶*Hopkins v. Jegley*, 2020 WL 4557687 (August 7th, 2020) (reversing and remanding a decision that blocked several restrictions under *WWH*).

Photograph on page one: Rally while the Supreme Court hears oral arguments in *June Medical Services v. Russo*. Credit: Alyssa Schuker.

***WWH* Remains Controlling Precedent - One is Not Enough**

WWH applied *Casey*'s undue burden standard to balance burdens against benefits, affirming the approach of lower courts that had interpreted it correctly,¹³ and reining in those that had gone off course.¹⁴ *WWH* made clear that a law is unconstitutional if evidence-based benefits do not outweigh burdens.

Four Justices in the *JMS* plurality voted to strike down the Louisiana law and explicitly affirmed that an abortion restriction's lack of benefits must be balanced against its burdens. Four others – Justices Alito, Gorsuch, Kavanaugh, and Thomas – would have upheld the law and wrote dissenting opinions, which by definition cannot change precedent. Chief Justice Roberts agreed that *WWH* was controlling precedent, and joined the plurality in striking down the law. But he alone called for a different application of the undue burden standard. Although he would still consider lack of benefits as a threshold inquiry before assessing a law's burdens, he would not weigh benefits against burdens to determine whether a burden is “undue.”

Chief Justice Roberts' single vote does not create a common denominator on how to apply undue burden, but instead disagrees with four other justices who explicitly affirmed the balancing from *WWH*. His concurrence cannot change the legal standard. It does no more than express his diverging view of the test, while *WWH* remains controlling precedent, unless or until the Court votes to overturn it.

Still, states seeking to defend abortion restrictions have seized on the Roberts concurrence to claim that a law's lack of benefits cannot be weighed against its burdens. While some lower courts have properly rejected those arguments,¹⁵ at least one court has relied on the concurrence to sow confusion over what standard applies and cast doubt on decisions that blocked restrictions under *WWH*.¹⁶ This ignores that five justices in *JMS*, including Justice Roberts, agreed that *WWH* has continued stare decisis effect, which neither a single vote, nor a lower court, can change. Only the Supreme Court can overturn its own precedent. *JMS* narrowly preserved the balancing test that powerfully rejects laws that impose burdens that outweigh benefits, at least for now.