

THE UNDUE BURDEN STANDARD AFTER *WHOLE WOMAN'S HEALTH v. HELLERSTEDT*

The Supreme Court delivered a landmark victory in *Whole Woman's Health v. Hellerstedt* on June 27, 2016, striking down the two abortion restrictions under challenge in the case, preserving access for millions of Texas women, and signaling that similar laws across the country are also unconstitutional. The decision had an equally important effect on the constitutional law that protects the right to choose abortion. *Whole Woman's Health v. Hellerstedt* ("Whole Woman's Health") turned on whether the "undue burden" test requires courts to give meaningful review to laws that restrict abortion, instead of deferring to legislative claims. *Whole Woman's Health* demonstrated that the undue burden test is a robust check on legislatures that requires courts to examine whether abortion restrictions deliver benefits that outweigh their real-world burdens and strike down restrictions that fall short.

The *Whole Woman's Health* decision clarified that the undue burden test is a form of **heightened scrutiny**. To apply the test, courts must determine that a law that burdens the right to abortion:

- **Furthers a Valid State Interest:** A law must **actually further** a valid state interest – not just rationally relate to a state interest – and courts cannot defer to state claims about how interests are or might be furthered;
- **Confers Benefits that Outweigh Burdens:** Courts must **balance** any established benefits of an abortion restriction against burdens it creates for women, and find it unconstitutional if the burdens outweigh the benefits;
- **Is Based on Credible Evidence:** Courts must consider **evidence-based findings that rest on reliable methodology** when they assess a law's benefits and burdens.

The test is not limited to the restrictions that were challenged in Texas or similar types of laws. Its wide applicability has helped advocates push back on the surge of laws that legislatures have enacted to burden the right to abortion. In addition, some of the test's features support close constitutional scrutiny protecting rights other than abortion.

UNDUE BURDEN BEFORE *WHOLE WOMAN'S HEALTH*

Since its seminal ruling in *Roe v. Wade* (1973), the Supreme Court has recognized that the Constitution protects the fundamental right to choose abortion. The undue burden test is the legal standard that courts use to determine whether an abortion restriction violates the Constitution. The test dates back to *Planned Parenthood v. Casey* (1992), in which the Supreme Court heard a challenge to an omnibus Pennsylvania law that imposed a 24-hour waiting period on women seeking abortion, parental consent and spousal notice mandates, and other requirements.¹ Building on and modifying its earlier cases in

which it found that states may pass limited restrictions on abortion depending on the stage of pregnancy, the Court adopted the undue burden standard to separate permissible restrictions from those that are unconstitutional. The undue burden test replaced the legal framework that the Court had used in *Roe v. Wade*, which relied on a trimester system allowing more state regulation as pregnancy advanced.

To define an undue burden, the Court wrote in *Casey*:

"An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."

Applying this test it struck down the spousal notification requirement in *Casey*, finding that it would place a substantial obstacle in front of women seeking abortion care. It upheld the other Pennsylvania provisions, finding that they did not rise to the level of an undue burden based on the evidence in the record in that particular case.

Between *Casey* and *Whole Woman's Health*, the Supreme Court heard just four cases challenging abortion.² In those years anti-choice legislators passed an onslaught of harmful restrictions, in part to test what could survive judicial scrutiny under the legal standard.

The Center for Reproductive Rights began to develop a litigation strategy aimed not just at invalidating unconstitutional laws, but also at confirming that the undue burden standard provides real protection for the fundamental right to choose abortion. The Center knew that only a strong, searching, and broadly-applicable legal standard would give courts the tools they needed to separate legitimate laws from those that burden women in improper ways.

Whole Woman's Health presented the Court with a chance to show how courts should apply the undue burden test.

WHOLE WOMAN'S HEALTH V. HELLERSTEDT: HB2 IS AN UNDUE BURDEN

Whole Woman's Health v. Hellerstedt challenged two parts of the omnibus 2013 Texas law known as HB2: the “admitting privileges” provision requiring all abortion providers to obtain local hospital admitting privileges, and the “ambulatory surgical center” (ASC) provision requiring every licensed abortion facility to meet hospital-like building standards.

While the state of Texas claimed that it enacted these laws to advance its interest in women’s health by making abortion safer, trial evidence showed that they did not offer any health or safety benefits. At the same time, evidence showed that they would cause most of Texas’ clinics to close, leaving the state with just a few clinics clustered in urban areas and thousands of women without adequate access.

A federal district court blocked both provisions as unconstitutional based on this evidence, holding that the lack of bona fide health benefits, combined with the burden on women’s access, rendered them an

undue burden.³ However, the U.S. Court of Appeals for the Fifth Circuit reversed. Unlike the district court, the Fifth Circuit applied a version of undue burden that it equated with the relaxed legal standard known as “rational basis review.” The court upheld the Texas laws while refusing to assess whether they actually conferred health benefits on women as the state asserted.⁴ By this formulation, the undue burden standard required courts to essentially rubber stamp legislative claims.

The Fifth Circuit’s interpretation contradicted a number of recent district and federal circuit court opinions that considered the lack of actual health benefits conferred by similar laws when applying the undue burden test to invalidate them.

In November 2015 the Supreme Court granted certiorari in *Whole Woman’s Health*, agreeing to hear the case. The Court handed down its opinion on June 27, 2016. Reversing the Fifth Circuit, the Supreme Court struck down both the admitting privileges and ASC requirements in a 5 to 3 decision that Justice Stephen Breyer authored. In doing so, the Court emphasized key features of the undue burden test, and provided a roadmap for how judges at all levels of the system should apply the standard moving forward.

HEIGHTENED SCRUTINY

Whole Woman’s Health stressed that when courts assess benefits, they need to apply heightened scrutiny to the state’s claims about whether and how a law actually advances a valid state interest. As Justice Breyer wrote⁵:

“[The Fifth Circuit’s undue burden interpretation] is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable [in other contexts].”

This type of less strict judicial review is called “rational basis.” Rational basis review requires only that a law be “rationally related” to a “legitimate” state interest – not that it actually further the interest. States are free to provide “reasonable” justifications for why a law could advance a state interest, and courts will accept their reasoning under this most-deferential standard, even if benefits are minimal or the law is unnecessary to achieve them.

Whole Woman’s Health reaffirmed that the undue burden test is a form of heightened scrutiny that rejects judicial deference to legislative claims. The opinion laid out three key inquiries that heightened scrutiny requires:

- **State Interest** - Laws Burdening Abortion Must Actually Further a Valid State Interest:

Whole Woman’s Health held that laws burdening abortion access must actually further a valid state interest. Texas claimed that the admitting privileges and ASC laws were reasonably related to its interest in protecting women’s health, and courts could not inquire into whether that interest was actually advanced. The Court in *Whole Woman’s Health* held otherwise, finding that “there was no significant

health-related problem that the new law helped to cure,”⁶ and nothing in the record showed that “compared to prior law...the new law advanced Texas’ legitimate interest in protecting women’s health.”⁷ The law’s failure to actually advance a valid state interest was part of what made it an undue burden.

- **Balancing Test** - Benefits Must Outweigh the Burdens Imposed on Women:

Whole Woman’s Health held: “The rule announced in *Casey*...requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”⁸ In other words, even laws that (unlike the Texas provisions) actually advance a state interest need to offer benefits sufficient to justify the burdens they place on women seeking abortion. If burdens outweigh benefits, the law is unconstitutional.

In line with this test, *Whole Woman’s Health* held that the district court “weighed the asserted benefits against the burdens [and]...in so doing...applied the correct legal standard.”⁹ The lack of benefits, outweighed by the burden on women, made HB2 unconstitutional: “the surgical-center requirement, like the admitting-privileges requirement, provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an “undue burden” on their constitutional right to do so.”¹⁰

- **Evidentiary Requirement** - Evidence-Based Inquiry Based on Reliable Methodology:

Whole Woman’s Health affirmed that courts need to consider credible evidence when they apply the undue burden test. The opinion held that¹¹:

“The statement [from the Fifth Circuit] that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court’s case law.”

To evaluate HB2’s benefits and impacts, the Court examined the medical evidence in the record – echoed in amicus briefs – which included research findings concerning the safety of abortion, the failure of the admitting privileges and ASC requirements to confer health benefits, and the onerous burdens that clinic closures would impose on women. In so doing, the Court credited evidence that the district court had found to be credible and reliable based on generally-applicable evidentiary standards, and rejected evidence that the district court had found lacking in credibility or reliability.

Because legislatures have typically relied on expert testimony that uses faulty methods, or pure anecdote, to justify abortion restrictions – as have state attorneys seeking to defend them in court – evidence-based judicial review is a critical backstop against unjustified restrictions on constitutional rights. *Whole Woman’s Health* provides a model for how courts must credit reliable evidence when assessing how laws impact real people – both in the abortion context and beyond.

CONSISTENT APPLICATION TO ABORTION RESTRICTIONS

The Court’s articulation of the undue burden test in *Whole Woman’s Health* is not limited to a particular type of abortion restriction or set of facts. Instead, it shows what courts need to do each time they use the test to evaluate a law that limits women’s fundamental right to choose abortion.

The strong, searching, and broadly-applicable legal standard is a bulwark against the slew of anti-choice laws that legislators hope might survive judicial review. Federal courts have relied on *Whole Woman’s Health* in applying the undue burden balancing test to state abortion restrictions. Courts quickly invalidated laws enacted by other states similar to Texas’s admitting privileges and ASC requirements struck down in *Whole Woman’s Health*.¹² Other abortion restrictions have roundly been blocked by courts applying *Whole Woman’s Health* as well, including method-by-method bans,¹³ fetal tissue burial mandates,¹⁴ mandatory waiting periods for women,¹⁵ and school proximity clinic shutdown laws.¹⁶

By applying *Whole Woman’s Health*, courts have been able to “smoke out” pretextual state attempts to single out abortion for exceptional and burdensome regulation.¹⁷ Courts have also correctly understood *Whole Woman’s Health* to require consideration of the cumulative burden imposed by a state’s entire regulatory environment – and not just one single law or regulation – on a woman’s right to access abortion care.¹⁸ To that end, courts have considered how state restrictions interact with preexisting barriers and the real-life circumstances of women seeking an abortion, including burdens like cost and travel time, particularly for low-income women.¹⁹ Courts have also considered qualitative burdens imposed upon women, such as how abortion restrictions adversely affect the patient experience during and after an abortion.²⁰

BROAD FUTURE APPLICATION

The undue burden test has features that can also advance constitutional jurisprudence around rights other than abortion. Challenges to laws that limit individual rights often turn on whether states are actually advancing valid interests in a way that justifies the harms they place on people. Recent voting rights cases provide just one example: do voter identification laws actually reduce voter fraud, or do they merely restrict access to the polls without offering any real benefits?²¹ Questions like these require courts to actively assess whether and how state interests are furthered, instead of deferring to state claims. They call for evidence-based judicial review that credits data over junk science. They require a balanced approach that respects state interests, if valid, and also individual rights. The balancing of burdens and benefits that underpins *Whole Woman’s Health* has broad ramifications, as does the undue burden test’s guidance on how to resolve them.

ENDNOTES

- 1 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
- 2 *Mazurek v. Armstrong*, 520 U.S. 968 (1997); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006); *Gonzalez v. Carhart*, 550 U.S. 124 (2007).
- 3 *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673 (W.D. Tex. 2014).
- 4 *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015).
- 5 *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).
- 6 *Id.* at 2311.
- 7 *Id.*
- 8 *Id.* at 2309.
- 9 *Id.* at 2310.
- 10 *Id.* at 2318.
- 11 *Id.* at 2310.
- 12 See *Comprehensive Health of Planned Parenthood Great Plains v. Williams*, 263 F. Supp. 3d 729 (W.D. Mo. 2017), *appeal filed*, No. 17-1996 (8th Cir. May 4, 2017); *Juno Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27 (M.D. La. 2017), *appeal filed*, No. 17-30397 (5th Cir. May 12, 2017). Two states also conceded that their TRAP laws were indistinguishable from the laws invalidated by the Supreme Court. See *Jackson Women's Health Org. v. Currier*, No. 3:12cv436-DPJ-FKB, slip op. (S.D. Miss. Mar. 17, 2017); *Adams & Boyle v. Slattery*, No. 3:15-cv-00705, slip op. (M.D. Tenn. Apr. 14, 2017).
- 13 *Whole Woman's Health v. Paxton*, 264 F. Supp. 3d 813, 825 (W.D. Tex. 2017).
- 14 *Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d 218, 233 (W.D. Tex. 2017); *Whole Woman's Health v. Hellerstedt*, No. 16-cv-01300, slip op. at 13 (W.D. Tex. Jan. 29, 2018); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, 194 F. Supp. 3d 818, 838 (S.D. Ind. 2016).
- 15 *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, 273 F. Supp. 3d 1013, 1043 (S.D. Ind. 2017), *aff'd*, No. 17-1883 (7th Cir. July 25, 2018).
- 16 *W. Ala. Women's Ctr. v. Miller*, 299 F. Supp. 3d 1244, 1264 (M.D. Ala. 2017), *appeal filed*, No. 17-15208 (11th Cir. Nov. 22, 2017).
- 17 *Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d 218, 229 (W.D. Tex. 2017) (finding “evidence [that Texas's] stated interest is a pretext for its true purpose, restricting abortions”).
- 18 *Juno Med. Servs., LLC, et al. v. Gee*, No. 17-cv-00404-BAJ-RLB, slip op. at 10 (M.D. La. Mar. 30, 2018) (sustaining plaintiffs' cumulative burden claim, and holding that “a state is not permitted to attack abortion providers in a death-by-a-thousand cuts strategy”); see also *W. Ala. Women's Ctr.*, 231 F. Supp. 3d at 1260 (“[T]he undue-burden analysis requires an examination of the ‘real-world context’ of the challenged statute and its actual effects – and not just those circumstances that are directly attributable to the statute.”).
- 19 *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, 273 F. Supp. 3d 1013, 1022-27 (S.D. Ind. 2017), *aff'd*, No. 17-1883 (7th Cir. July 25, 2018) (blocking Indiana waiting period requirement); see also *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016) (finding that under Texas's ASC requirement, women would be forced “to travel long distances to get abortions in crammed-to-capacity superfacilities”).
- 20 *Whole Woman's Health v. Hellerstedt*, No. 16-cv-01300, slip op. at 12-13 (W.D. Tex. Jan. 29, 2018) (finding that fetal burial mandate would have “a negative effect on women's health by causing grief and shame and possibly discouraging women from obtaining gynecological care, particularly abortions and miscarriage management, from a medical facility”); see also *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016) (finding that under Texas's ASC requirement, patients were likely to receive less “individualized attention, serious conversation, and emotional support”).
- 21 See *Veasey v. Abbott*, 830 F.3d 216, 275 n.3 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017); *Frank v. Walker*, 196 F. Supp. 3d 893, 915 n.10 (E.D. Wis. 2016).