

## 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 thousands 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 about how the laws function. Since adopting the undue burden test in its 1992 decision *Planned Parenthood v. Casey*, the Court had not clarified how courts should apply key features of the test. *Whole Woman's Health* supplied the missing guidance: the undue burden test is a robust check on legislatures that requires courts to examine whether abortion restrictions have tangible benefits that outweigh their real world burdens and strike them down if they 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:

- **Furtheres 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 applies to a broad range of abortion restrictions and is not limited to those that were challenged in Texas or similar types of laws. Its wide applicability will help advocates push back on the surge of laws that legislatures enacted in the years leading up to *Whole Woman's Health* when the undue burden standard's meaning was less clear. In addition, some of the test's features may advance constitutional jurisprudence around rights other than abortion.

### UNDUE BURDEN BEFORE *WHOLE WOMAN'S HEALTH v. HELLERSTEDT*

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) (“*Casey*”), 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.<sup>1</sup> 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*<sup>2</sup>:

---

*“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 a significant number of women whom it impacted. 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 restrictions, none of which provided a roadmap for how courts should determine whether laws imposed an undue burden.<sup>3</sup> 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 finally clarify how courts should apply the undue burden test.

### **WHOLE WOMAN’S HEALTH v. HELLERSTEDT: HB2 IS AN UNDUE BURDEN**

*Whole Woman’s Health* 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, after a trial, holding that the lack of bona fide health benefits, combined with the significant burden on women’s access, rendered them an undue burden.<sup>4</sup> However, the U.S. Court of Appeals for the Fifth Circuit reversed. Unlike the district court, the Fifth Circuit applied a version of the undue burden test 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.<sup>5</sup> 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 federal district and circuit court opinions that considered the lack of actual health benefits conferred by similar laws when applying the undue burden test to invalidate them. Because courts were now split on the issue, only the Supreme Court’s guidance could provide the final word on what kind of analysis the test required.

In November 2015 the Supreme Court granted certiorari in *Whole Woman's Health*. After hearing oral argument the following March, 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 clarified key features of the undue burden test, and provided a roadmap for how all judges should apply the standard moving forward.

## HEIGHTENED SCRUTINY

*Whole Woman's Health* clarified 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 wrote<sup>6</sup>:

---

*“[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 can 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* left no doubt 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,”<sup>7</sup> and nothing in the record showed that “compared to prior law...the new law advanced Texas’ legitimate interest in protecting women’s health.”<sup>8</sup> 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.”<sup>9</sup> 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.”<sup>10</sup> 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.”<sup>11</sup>

- **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 that<sup>12</sup>:

---

*“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.

## BROAD APPLICATION

The Court’s construction 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 clarifies 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 now a bulwark against the slew of anti-choice laws that legislators hoped would survive judicial review.

Importantly, the undue burden test has features that may 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 and other requirements actually reduce voter fraud, or do they merely restrict access to the polls without offering any real benefits? 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. Courts assessing these cases have begun to rely on *Whole Woman’s Health*. The legal issues that underpin *Whole Woman’s Health* are broad, as is the undue burden test’s guidance on how to resolve them. Applications within and beyond the abortion context are just starting to take shape.

---

<sup>1</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>2</sup> *Id.* at 878.

<sup>3</sup> *Mazurek v. Armstrong*, 520 U.S. 968 (1997); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006); *Gonzalez v. Carhart*, 550 U.S. 124 (2007).

<sup>4</sup> *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673 (W.D. Tex. 2014).

<sup>5</sup> *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015).

<sup>6</sup> *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

<sup>7</sup> *Id.* at 2311.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 2309.

<sup>10</sup> *Id.* at 2310.

<sup>11</sup> *Id.* at 2318.

<sup>12</sup> *Id.* at 2310.