Issue Brief October 2019

"We Must Not Blind Ourselves": The Supreme Court & Abortion Access for Women Living in Poverty

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This term, the Supreme Court will once again take up the issue of abortion rights. In *June Medical Services v. Gee*, the Court will decide whether to rectify a lower court's failure to abide by binding precedent in a case involving a Louisiana abortion restriction identical to one the Court struck down in Texas only three years ago, squarely putting the Court's recent abortion precedent on the line.[1] *June Medical* seeks to hold anti-abortion state legislatures accountable for laws that eviscerate abortion access, especially for women living in poverty. The Court now has the opportunity to reaffirm precedent and to demonstrate that people living in poverty can still count on the courts to vindicate their constitutional rights.

I. The Louisiana Case

The Louisiana restriction at issue in *June Medical*[2] would shut down any abortion provider who is unable to obtain admitting privileges at a local hospital. The Supreme Court has already held that admitting privileges laws impose unconstitutional burdens on women's right to abortion because they are medically unnecessary yet impede access to providers.[3] In *Whole Woman's Health v. Hellerstedt*, the Court recognized that the Texas admitting privileges law under review provided no health benefits to women and did "not serve any relevant credentialing function" because physicians are routinely denied privileges for reasons unrelated to their medical

[1] The Court is also considering a pending cert petition in a challenge to an Indiana law mandating a delay period after an ultrasound for women seeking abortion (discussed below).
[2] Petition for Writ of Certiorari at 3–5, June Med. Servs. v. Gee, No. 18–1323 (U.S. Apr. 17, 2019).
[3] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2312–2315 (2016).

credentials.[4]As a result, providers were forced to stop serving women and access in the state was drastically reduced.[5] If allowed to go into effect, Louisiana's law would close all but one of the state's three remaining abortion clinics. That's because, like in Texas, hospitals in the state can and have denied admitting privileges to a physician for reasons wholly unrelated to competency or credentials, including if the physician expects to provide few referrals or if the hospital opposes granting privileges to abortion providers.

Still, the Fifth Circuit Court of Appeals defied the Supreme Court and upheld Louisiana's admitting privileges law.[6] It did so despite extensive factual findings by the district court showing that the clinic closures caused by the law would heavily burden low-income women in Louisiana. For example:

- Women who seek abortions are disproportionately poor: 42% of women having abortions nationally live at or below the poverty line, and "another 27% ha[ve] incomes at or below 200% of the poverty line."[7]
- The closure of clinics resulting from the admitting privileges law would leave women with "longer waiting times for appointments, increased crowding"[8] and lead to "delays in care, causing a higher risk of complications."[9] These burdens from the law "would have the effect [of] increasing health risks among the State's poorer women."[10]
- Existing Louisiana abortion restrictions subject women to a mandatory waiting period before getting an abortion and force them to make two separate trips to the clinic. Many women will "have to take at least two days off from work, which has financial costs if the time off is unpaid, as is often the case in low-wage jobs."[11] Some could even lose their jobs.[12]
- The clinic closures would also force more women to travel longer distances for care. Yet many low-income women "have difficulty affording or arranging for transportation and childcare on the days of their clinic visits, in addition to the challenge of affording the abortion itself."[13]
- Even seemingly short travel distances can be burdensome because low-income women face barriers to intercity travel. They are more "likely to live in households [with] no vehicles," and must arrange

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[4] *Whole Woman's Health*, 136 S. Ct. at 2313.
[5] *Id.*
[6] June Med. Servs. v. Gee, 905 F.3d 787 (5th Cir. 2018), *cert. granted*, __ S. Ct. __, No. 18-1323, 2019 WL 4889929 (Mem) (Oct. 4, 2019). This is the second time that the Fifth Circuit has gotten the Supreme Court's abortion precedent wrong. In *Whole Woman's Health*, the Court rejected the Fifth Circuit's decision upholding Texas's clinic shutdown law as an "incorrect" articulation of the prevailing legal standard. *Whole Woman's Health*, 136 S. Ct. at 2309 (holding that the Fifth Circuit failed to apply the "rule announced in *Casey*[] [which] requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.").
[7] June Med. Servs. v. Kliebert, 250 F. Supp. 3d 27, 82–83 (M.D. La. 2017).
[8] *Id.* at 81.
[9] *Id.* at 82.
[10] *Id.* at 84.
[11] *Id.* at 83.
[12] *Id.*
[13] *Id.*

for and pay for transportation to get to and from a clinic.[14] Moreover, "[t]ravel to a different city to seek a medical procedure also imposes significant socio-psychological hurdles" for low-income women who may have rarely left their home city.[15]

- Women who cannot afford the costs to travel to a clinic and obtain an abortion "may have to make sacrifices in other areas like food or rent expenses, rely on predatory lenders, or borrow money from family members or abusive partners or ex-partners, sacrificing their financial and personal security."[16]
- Louisiana's admitting privileges law would leave the state with no provider for women seeking abortions after 16 weeks of pregnancy.[17] That would be particularly harmful for low-income women.[18]

The undue burden imposed by Louisiana's admitting privileges law is an additional hurdle on top of existing obstructions to access many women already face. Under the federal Hyde Amendment, women in Louisiana who qualify for Medicaid cannot use the program to cover the cost of abortion – a restriction that affects thousands of Louisiana women of childbearing age.[19] This means that to access abortion care, women living in poverty must pay out of pocket for the procedure, on top of paying for the additional costs from travel and delays in care incurred under Louisiana's excessive abortion regulatory scheme. Because Medicaid does not cover abortion in Louisiana, twenty-five percent of the state's Medicaid-eligible pregnant women who would have had an abortion if Medicaid covered the costs instead gave birth.[20] Research has also shown that women seeking abortion care who are unable to access it are more likely to experience future economic hardship and financial insecurity than women who are able to have abortions.[21]

Based in part on its findings that the admitting privileges requirement would substantially burden low-income Louisiana women, and relying on the Supreme Court's precedent in *Whole Woman's Health* that invalidated an identical admitting privileges law in Texas, the district court

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[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 84.

[18] *See id.* at 82 ("The heaviest burdens of Act 620 would fall disproportionately upon poor women."). Low-income women would be particularly harmed because they tend to have abortions at later gestational ages, often due to delays from collecting the funds to pay for the procedure and its related costs. *See* Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 GUTTMACHER POL'Y REV. 46, at 49 (2016); S.C. Roberts & H. Gould et al., *Out-of-pocket costs and insurance coverage for abortion in the United States*, 24 WOMEN'S HEALTH ISSUES e211 (2014).

[19] *Distribution of Nonelderly Adults with Medicaid by Gender*, KAISER FAMILY FOUND (last visited Sept. 26, 2019).

[20] Sarah Roberts & Nicole Johns et al., *Estimating the proportion of Medicaid-eligible pregnant women in Louisiana who do not get abortions when Medicaid does not cover abortion*, BMC WOMEN'S HEALTH (June 19, 2019).

[21] Diane Greene Foster & M. Antonia Biggs et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 407 (2018).

struck down the law.[22] Undeterred by that recent precedent, Louisiana appealed to the Fifth Circuit, which reversed and upheld the admitting privileges law.[23] Plaintiffs then sought an emergency stay from the Supreme Court to stop the law from taking immediate effect, which was granted.[24] The Supreme Court has now agreed to review the Fifth Circuit's decision.[25]

II. The Undue Burden Standard Includes Analysis of Real-World Circumstances

In giving meaningful consideration to the burdens Louisiana's admitting privileges law imposes on low-income women, the district court was following the lead of the Supreme Court in its landmark decisions *Whole Woman's Health*[26] and *Planned Parenthood v. Casey*.[27] Since deciding *Casey* in 1992, the Supreme Court has held that a state unlawfully impedes the constitutional right to access abortion if it creates an "undue burden" on the right, defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[28] By prohibiting such substantial obstacles, and defining them based on lack of benefits combined with a range of contextualized burdens, the Court's undue burden standard factors in the real-world circumstances of women's lives – including circumstances related to economic hardship.

In *Casey*, the Court illustrated how the undue burden standard is sensitive to real-world circumstances when it invalidated Pennsylvania's spousal notice requirement, which required a woman to certify that she had notified her spouse that she intended to undergo an abortion. The Court held that this requirement would be especially burdensome – and potentially prohibitive – for women in abusive relationships. "We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases," the *Casey* plurality stated.[29] The Court particularly worried that "the notice requirement will often be tantamount to [an unconstitutional] veto" by a husband who,

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[22] *June Med. Servs.*, 250 F. Supp. 3d 27, 905 F.3d 787, *cert. granted*, __ S. Ct. __, No. 18–1323, 2019 WL 4889929 (Mem) (Oct. 4, 2019).
[23] June Med. Servs. v. Gee, 905 F.3d 787, *cert. granted*, __ S. Ct. __, No. 18–1323, 2019 WL 4889929 (Mem) (Oct. 4, 2019).
[24] June Med. Servs. v. Gee, 139 S. Ct. 663, *cert. granted*, __ S. Ct. __, No. 18–1323, 2019 WL 4889929 (Mem) (Oct. 4, 2019).
[25] The Court also granted Louisiana's cross-petition to reconsider the legal standard for when clinics have standing to challenge abortion restrictions on behalf of their patients.
[26] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
[27] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992).
[28] *Casey*, 505 U.S. at 878.
[29] *Id.* at 894.

"through physical force or psychological pressure or *economic coercion*, prevents his wife from obtaining an abortion until it is too late . . . ."[30]

While *Casey* adopted the undue burden standard for the first time, it preserved the concern about women's real-world circumstances that earlier cases evinced. In striking down Pennsylvania's spousal notice requirement, the Supreme Court affirmed in part the earlier holding of the Third Circuit, which had invalidated that provision because it failed strict scrutiny.[31] In its decision, the Third Circuit relied on Supreme Court abortion precedents that it noted were "attuned to the real-world consequences" of state restrictions.[32] The circuit court reasoned that women were in a particularly vulnerable position in the many "households where the husband alone holds the economic power" because "[t]he husband can simply decline to pay for the abortion and/or threaten to withhold future economic support unless the woman decides to forego the abortion."[33] The court therefore "conclude[d] that the real-world consequences of forced notification in the context of wife/husband relationships impose . . . undue burdens on a woman's right to an abortion"[34] – a holding that the Supreme Court affirmed in *Casey* under its newly adopted undue burden test.

The Supreme Court's decision in *Casey* thus reflects the reality that vulnerable individual circumstances – both economic and otherwise – can be aggravated by state laws in ways that together create a substantial obstacle for women seeking to obtain an abortion.[35] *Casey* held that

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[30] *Id.* at 897 (emphasis added).

[31] Planned Parenthood of Se. Pennsylvania v. Casey, 947 F.2d 682 (3d Cir. 1991) (invalidating Pennsylvania's spousal notice requirement but upholding the remainder of the Pennsylvania Abortion Control Act), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

[32] *Id.* at 711. The Third Circuit relied on the Supreme Court's consideration of the real-world consequences of abortion restrictions at issue in *Bellotti v. Baird*, 443 U.S. 622 (1979) and *Hodgson v. Minnesota*, 497 U.S. 417 (1990). In *Bellotti*, the Court struck down a judicial bypass procedure for minors seeking abortions that was only available after the minor unsuccessfully sought consent from her parents, raising practical concerns that "young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court." 443 U.S. at 647. In *Hodgson*, the Court struck down a law requiring a minor seeking an abortion to first notify both parents without a judicial bypass option, based in part on the harm to minors in "dysfunctional families," including minors with divorced, estranged, or abusive parents. 497 U.S. at 451 & n.36.

[33] *Casey*, 947 F.2d at 712.

[34] *Id.* at 711.

[35] While the Court in *Casey* upheld a mandatory twenty-four-hour waiting period for women seeking abortions, it nonetheless found it "troubling" that "women who have the fewest financial resources" would be among those for whom the law would be "particularly burdensome." *Casey*, 505 U.S. at 886. The plurality's holding rested on the district court's incorrect application of the legal standard, and therefore left the door open for future courts to find that waiting periods and similar laws are a substantial obstacle for the most financially disadvantaged women. *Id.* at 887. This is now at issue in the pending cert petition from Indiana in *Planned Parenthood of Indiana & Kentucky v. Commissioner*, discussed

the constitutionality of an abortion law is measured by its effect upon the women most vulnerable to its burdens.[36] And *Casey* anticipated that "at some point increased cost could become a substantial obstacle" to obtaining an abortion, noting that the analysis depends on record-specific facts in a particular case.[37] Therefore, much as a spousal notice requirement can pose an unconstitutional burden for those women in abusive relationships, other abortion restrictions might pose an unconstitutional burden for women living in economic hardship (who in fact constitute a majority of all abortion patients).[38]

In *Whole Woman's Health*, the Court's analysis reaffirmed that the real-world circumstances facing women matter in the undue burden standard. To assess the burdens imposed by Texas's requirements, the Court credited the district court's finding that each requirement created "a particularly high barrier for poor, rural, or disadvantaged women."[39] The Court recognized that "Texas seeks to force women to travel long distances to get abortions,"[40] and stated that "increased driving distances do not always constitute an 'undue burden'. . . [b]ut here, those increases are but one additional burden . . . ."[41] The Court thus recognized that the ancillary costs inflicted by abortion restrictions – in time, money, and imposition on women's lives – can contribute to an undue burden. These costs, of course, are particularly burdensome for women already struggling to get by. Moreover, the Court agreed with the district court, which, as discussed above, explicitly highlighted the laws' burdens on women living in poverty:

> A financially disadvantaged woman, now living 50 miles from the nearest abortion clinic may be just as heavily burdened by practical concerns which combine with travel distance, as a woman now living 200 miles away. . . .The act's two requirements erect a particularly high barrier for poor, rural, or disadvantaged women throughout Texas, regardless of the absolute distance they may have to travel to obtain an abortion. A woman with means, the freedom and ability to travel, and the desire to obtain an abortion, will always be able to obtain one, in Texas or elsewhere.
> However, *Roe*'s essential holding guarantees to all women, not just those of means, the right to a previability abortion.[42]

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below. 273 F. Supp. 3d 1013, 1022–26 (S.D. Ind. 2017), *aff'd*, 896 F.3d 809 (7th Cir. 2018), *petition for cert. filed*, No. 18–1019 (U.S. Feb. 4, 2019).

[36] *Casey*, 505 U.S. at 894 ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.").

[37] *Id.* at 901.

[38] *See* GUTTMACHER INST., *Abortion patients are disproportionately poor and low income*, May 9, 2016.

[39] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2302 (2016) (internal quotation marks omitted).

[40] *Id.* at 2318.

[41] *Id.* at 2313.

[42] Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 683 (W.D. Tex. 2014), *aff'd in part, vacated in part, rev'd in part sub nom.* Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd and remanded sub nom.* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

The standard announced in *Casey* and reaffirmed in *Whole Woman's Health*, therefore, considers the realities facing low-income women to ensure that they are not unduly burdened in accessing abortion because of restrictive state laws. As Professor Cary Franklin has put it, the undue burden test "sometimes *requires* courts to examine how an abortion restriction will affect the ability of women without financial resources to exercise their rights."[43]

III. Federal and State Courts Have Followed the Supreme Court's Lead

In accordance with *Casey* and *Whole Woman's Health*, federal and state courts have given due consideration to ways that abortion restrictions burden low-income women.[44] Like the district court in *June Medical*, these courts have factored in burdens attendant to economic hardship, including the socioeconomic makeup of women seeking abortions, travel time, transportation costs, hotel costs, time off from work, child care costs, and time and resources spent borrowing or raising these necessary funds. The following examples from challenges to abortion restrictions in Indiana, Iowa, and Alabama are illustrative.

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[43] Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 15 (2018); *see also* Planned Parenthood Se., Inc. v. Strange, 33 F. Supp. 3d 1330, 1358 (M.D. Ala. Oct. 24, 2014) ("*Casey's* treatment of the spousal-notification requirement shows that the interaction of the state regulation and existing social conditions can create an obstacle for women.").

[44] *See* W. Ala. Women's Ctr. v. Miller, 299 F. Supp. 3d 1244, 1261 (M.D. Ala. 2017), *aff'd sub nom.* W. Ala. Women's Ctr. v. Williamson, 900 F.3d 1310 (11th Cir. 2018), *petition for cert. denied sub nom.* Harris v. W. Ala. Women's Ctr., 588 U.S. __ (2019); Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health, 273 F. Supp. 3d 1013, 1022–26 (S.D. Ind. 2017), *aff'd*, 896 F.3d 809 (7th Cir. 2018), *petition for cert. filed*, No. 18–1019 (U.S. Feb. 4, 2019); Planned Parenthood of the Heartland v. Reynolds *ex. rel.* Iowa, 915 N.W.2d 206, 232 (Iowa 2018); *see also* Whole Woman's Health Alliance v. Hill, 377 F. Supp. 3d 924 (S.D. Ind. May 31, 2019) (preliminarily enjoining Indiana's denial of license for clinic based in part on travel and other burdens imposed on low-income women), *aff'd*, No. 19–2051, at *5 (7th Cir. Aug. 22, 2019) (upholding preliminary injunction while noting that "travel and time costs led some women to skip bills, pawn belongings, or take out payday loans to cover the costs of abortion care, including not just the medical fees, but also the costs of transportation and lodgings."); EMW Women's Surgical Ctr. v. Meier, 373 F.Supp.3d 807 (W.D. Ky. May 10, 2019) (permanently enjoining Kentucky's abortion method ban based in part on burdens that were "especially pronounced for low-income women."), *appeal filed*, No. 19–5516 (6th Cir. May 15, 2019); Planned Parenthood of Ark. & E. Okla. v. Jegley, No. 4:15–CV–00784–KGB, 2018 WL 3029104 (E.D. Ark. June 18, 2018) (issuing a temporary restraining order against hospital admitting privileges requirement for physicians that provide medication abortion based in part on burdens on low-income women), *appeal dismissed by stipulation*, No. 18–02463 (8th Cir. Nov. 9, 2018); Hopkins v. Jegley, 267 F. Supp. 3d 1024, 1061 (E.D. Ark. 2017) (blocking Arkansas's abortion method ban in part because under the law, abortion "would become time and cost-prohibitive for some women," and faced with new "financial and logistical burden[s], some low income women may delay obtaining an abortion or not have an abortion at all"), *appeal filed*, No. 17–2879 (8th Cir. Aug. 28, 2017); Whole Woman's Health v. Paxton, 280 F. Supp. 3d 938, 953 (W.D. Tex. 2017) (blocking Texas's abortion method ban based in part on the fact that the law would cause "delay and extra cost [which] would be particularly burdensome for low-income women"), *appeal filed*, No. 17–51060 (5th Cir. Dec. 1, 2017).

A. Indiana

In *Planned Parenthood of Indiana & Kentucky v. Commissioner*, a district court blocked an Indiana law requiring women to undergo an ultrasound eighteen hours prior to an abortion procedure. The court based its decision in part on the burdens on "low-income women who do not live near one of [Planned Parenthood's] six health centers at which ultrasounds are available."[45] Specifically, the court found that the law inflicted burdens on low-income women through lengthy travel, child care expenses, missed work and pay, and prohibitive delays to care caused by "difficulty amassing the funds and making the necessary logistical arrangements to have an abortion."[46] The court determined that many low-income families do not have a discretionary budget large enough to afford the costs associated with complying with Indiana's ultrasound waiting period, and that many women would be forced to "delay[ ] or stop[ ] paying basic bills" or "borrow the money from family and friends."[47]

The court also credited specific examples from several low-income women who struggled to overcome these burdens. One woman did not schedule an abortion because she "could not miss work twice within the short timeframe remaining" to have the procedure.[48] Another woman living in a shelter decided not to schedule an abortion "because of the transportation and childcare difficulties two appointments would cause."[49] A third had "recently started a new job after a year of unemployment," and could not make two three-hour trips to the clinic "due to the combination of work, childcare, and transportation expenses."[50]

Based on the weight of this evidence, the court preliminarily enjoined Indiana's new ultrasound-waiting period law. On appeal, the Seventh Circuit affirmed the district court's decision. It held that the financial realities of women are essential to the undue burden inquiry under *Whole Woman's Health*, stating: "Courts must consider the impact of the new ultrasound law based on the reality of the abortion provider and its patients, not as it could if providers and patients had unlimited resources."[51]

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[45] Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health, 273 F. Supp. 3d 1013, 1022 (S.D. Ind. 2017).
[46] *Id.* at 1022–1027.
[47] *Id.* at 1028.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health, 896 F.3d 809, 824 (7th Cir. 2018).

The state has sought review of the Seventh Circuit's decision in the Supreme Court.[52]

B. Alabama

In *West Alabama Women's Center v. Miller*, a district court invalidated two Alabama abortion restrictions: one that effectively banned the standard-of-care method for abortion after about fifteen weeks of pregnancy and required a procedure that imposed additional risks and multiple trips to a clinic and another that would shut down any clinic located within 2,000 feet of a school.[53] The court determined that the laws would inflict longer travel on women seeking abortions, and would be "particularly devastating for low-income women who represent the majority of women seeking abortions in Alabama."[54]

The court recognized that large majorities of the patients served by the affected clinics are low-income women.[55] The court also noted that low-income women may be forced to go to extreme lengths to comply with Alabama's abortion restrictions: "some women who are unable to afford staying at a hotel sleep in the parking lot of the clinic."[56] Because the state banned the standard-of-care method for abortions after about fifteen weeks, undergoing the state's alternative, riskier procedure "could require a woman to miss four or even five days of work," the court found. And while state abortion restrictions need not impose absolute barriers to be unconstitutional, the court determined that because of "what will be, for many, an insurmountable financial and logistical burden, some low-income women would not be able to have an abortion at all."[57]

After the district court blocked both laws, the state appealed to a panel of the Eleventh Circuit. Though the panel voiced its open disagreement with binding Supreme Court abortion precedent, it nonetheless affirmed the district court's decision as a correct application of that precedent.[58] The panel credited the district court's factual findings around economic hardship, recognizing that "[t]hose facts matter" because "[l]ow-income patients . . . may not have the financial means to make several trips to a clinic or stay in its vicinity for an extended period of time."[59] The increased cost and delay for patients under the laws "would be especially burdensome for low-income women, who comprise a large proportion of the plaintiffs' patients.

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[52] Petition for Writ of Certiorari, Box v. Planned Parenthood, No. 18–1019 (U.S. Feb. 4, 2019).
[53] W. Ala. Women's Center v. Miller, 299 F. Supp. 3d 1244, 1261 (M.D. Ala. 2017), *aff'd sub nom.* W. Ala. Women's Ctr. v. Williamson, 900 F.3d 1310 (11th Cir. 2018), *petition for cert. denied sub nom.* Harris v. W. Ala. Women's Ctr., 588 U.S. __ (2019).
[54] *W. Ala. Women's Ctr.*, 299 F. Supp. 3d at 1261.
[55] *Id.* (finding that "82% of the Tuscaloosa clinic patients live at or below 110 % of the federal poverty level. In Huntsville, over 60% of the clinic's patients receive financial assistance from the government" (internal citations omitted)).
[56] *Id*. at 1278 n.34.
[57] *Id*. at 1279.
[58] W. Ala. Women's Ctr. v. Williamson, 900 F.3d 1310 (11th Cir. 2018).
[59] *Id.* at 1321–22.

. . . [This] support[s] the conclusion that the Act would 'place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability[.]'"[60]

At the end of last term, the Supreme Court rejected the state's request for certiorari to review the Eleventh Circuit's decision on the abortion method ban law.[61]

C. Iowa

In *Planned Parenthood of the Heartland v. Reynolds ex. rel. Iowa*, the Iowa Supreme Court held that the state's law forcing women to undergo a seventy-two-hour waiting period before having an abortion was impermissible under the Iowa Constitution.[62] The court's decision was based in part on the burdens the law imposed on low-income women. The court found that more than half of the plaintiff clinic's patients live in poverty, and many more are low-income.[63] It recognized that "[p]oor and low-income women are unlikely to have access to paid sick days or personal days and will suffer lost wages when taking time away from work." Many will struggle to schedule two days off in close succession to make the required two trips to the clinic. Many low-income women work for employers that require a doctor's note, which compromises their ability to keep their abortion confidential.[64] And the court understood that low-income women who do not own their own vehicles will struggle to access transportation, particularly those living in rural areas.[65]

Interpreting U.S. Supreme Court precedent, the Iowa Supreme Court recognized that determinations of the constitutionality of abortion laws must be sensitive to burdens imposed on low-income women, stating:

> Abortion regulations impact different women in many different ways. Womanhood is not a monolith. There are few hurdles that are of level height for women of different races, classes, and abilities. There are few impositions that cannot be solved by wealth. Women of means are surely better positioned to weather the consequences of waiting-period requirements. Yet, it is axiomatic that a right that is only accessible to the wealthy or privileged is no right at all.[66]

IV. Conclusion

Like the district court's opinion in *June Medical*, these decisions and others have faithfully applied Supreme Court precedent to recognize that economic hardship can interact with

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[60] *Id.* at 1327 (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016)).
[61] Harris v. W. Ala. Women's Ctr., 588 U.S. __ (2019).
[62] Planned Parenthood of the Heartland v. Reynolds *ex. rel.* Iowa, 915 N.W.2d 206, 232 (Iowa 2018).
[63] *Id.* at 915 N.W.2d at 227.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 232.

restrictive state policies to impermissibly infringe upon a fundamental liberty under the Constitution.

Yet if the Supreme Court were to let Louisiana's law stand, not only would it be reversing its commitment to consider real-world circumstances in its jurisprudence, but women living in poverty would, once again, be hit the hardest. Despite their economic straits, these women – as Fifth Circuit Judge James Dennis put it – "are no less entitled than other women to [their] constitutionally protected healthcare right" to decide whether to continue a pregnancy.[67]

In *Casey*, the deciding plurality of justices insisted that "[w]e must not blind ourselves" to the actual lived experiences of the women most affected by abortion restrictions.[68] That precedent, which *Whole Woman's Health* affirmed and lower courts have faithfully applied, is entitled to respect under the principles of stare decisis that are foundational to our system of law. *June Medical* is an opportunity to demonstrate that long-standing precedent still matters before today's Court – and that the real lives of real women still matter under the law.

[67] June Med. Servs., v. Gee, 913 F.3d 573, 584 (5th Cir. 2019) (Dennis, J., dissenting from denial of rehearing en banc).
[68] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833,894 (1992).

About the Author

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