Supreme Court Strikes Down Louisiana's Hospital Admitting Privileges Law

On June 29, the Supreme Court of the United States announced its stunningly disappointing decision in *June Medical Services v. Russo*. In a five-to-four decision, the Court struck down a Louisiana law that requires abortion doctors to have hospital admitting privileges. Archbishop Joseph Naumann, chair of the United States Conference of Catholic Bishops (USCCB) Committee on Pro-Life Activities, issued a statement saying,

> The Court's failure to recognize the legitimacy of laws prioritizing women's health and safety over abortion business interests continues a cruel precedent. As we grieve this decision and the pregnant women who will be harmed by it, we continue to pray and fight for justice for mothers and children.
>
> We will not rest until the day when the Supreme Court corrects the grave injustice of *Roe* and *Casey* and recognizes the Constitutional right to life for unborn human beings. And we continue to ask all people of faith to pray for women seeking abortion, often under enormous pressure, that they will find alternatives that truly value them and the lives of their children.[1]

There was no majority opinion in this case. Justice Stephen Breyer announced the judgment of the Court. His opinion, joined by Justices Ruth Bader Ginsburg,

1. US Conference of Catholic Bishops (USCCB), "Catholic Bishops' Pro-Life Chairman Says Supreme Court Decision Continues Cruel Precedent of Prioritizing Abortion Business Interests over Women's Health and Safety," news release, June 29, 2020, http://www.usccb.org/news/2020/20-106.cfm.

Sonia Sotomayor, and Elena Kagan, applies a balancing test used by the Court to strike down a similar Texas law four years ago in *Whole Woman's Health v. Hellerstedt*. Under this balancing test, a court must "consider the burdens a law imposes on abortion access together with the benefits those laws confer."[2] *Whole Woman's Health* claimed to derive this test from *Planned Parenthood v. Casey*, but *Casey* did not adopt or apply a balancing test. Rather *Casey* concluded that courts must consider whether a law (1) is reasonably related to a legitimate governmental objective and (2) creates a substantial obstacle to a woman's decision to have an abortion.[3] Despite this incongruity between *Casey* and *Whole Woman's Health*, Breyer concluded that the Louisiana law fails the balancing test in *Whole Woman's Health* and is invalid for that reason.

Chief Justice John Roberts filed an opinion concurring in the judgment. He rejected the balancing test in *Whole Woman's Health* but concluded nonetheless that the Louisiana law is so similar in its terms and effects to the Texas law as to necessitate striking down the Louisiana law on grounds of *stare decisis*, the legal principle in which judges follow precedent in deciding cases. Justice Samuel Alito filed a dissent that was joined in whole by Justice Neil Gorsuch and in part by Justices Clarence Thomas and Brett Kavanaugh. In addition, Gorsuch, Thomas, and Kavanaugh each filed individual dissents that were joined by no other justice.

Because he provided the fifth vote to strike down the Louisiana law, Roberts's concurrence is critical to understanding what this ruling will mean for future abortion cases. Despite its deeply disappointing result, Roberts's concurrence contains some key takeaways that provide a modest silver lining.

First, there is no majority support for the proposition that all state admitting privileges laws are unconstitutional. Roberts agreed with the four dissenters that "the validity of admitting privileges laws 'depend[s] on numerous factors that may differ from State to State.'"[4] Obviously any analysis of the constitutionality of such a law will need to take this case and *Whole Woman's Health* as its starting points.

Second, there is no majority support for the balancing test in *Whole Woman's Health*. Once again Roberts agreed with the four dissenters in rejecting the balancing test. Roberts explained at length why such balancing is inappropriate for judges, is not countenanced by *Casey*, and is "not necessary" to the holding in *Whole Woman's Health*.[5] In a portion of his opinion that was joined by all other dissenters, Alito stated that "*Casey* also rules out the balancing test adopted in *Whole Woman's Health*. … *Whole Woman's Health* should be overruled insofar as it changed the *Casey* test."[6] Kavanaugh stated that "today, five Members of the Court reject the *Whole Woman's Health* cost–benefit standard," and he agreed with the rejection of

2. *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___ (2016) at 19–20.
3. *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833 (1992) at 877–878, 882–883, 885, 900.
4. *June Medical Services v. Russo*, 591 U.S. ___ (2020), slip op. at 15n6 (Roberts, C.J., concurring).
5. *June Medical Services*, 591 U.S., slip op. at 4–12, 12n3 (Roberts, C.J., concurring).
6. *June Medical Services*, 591 U.S., slip op. at 4 (Alito, J., dissenting).

that standard.[7] Thus even though the immediate effect of the Court's ruling is to strike down Louisiana's admitting privileges law, the rejection of the balancing test in *Whole Woman's Health* by Roberts and four dissenters should make it easier in future cases to defend laws regulating abortion.

Third, there is no majority support for the proposition, endorsed in *Whole Woman's Health*, that courts not legislatures "must resolve questions of medical uncertainty" in abortion cases.[8] Roberts concluded that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty" and that this discretion is "consistent with *Casey*."[9] By voting to uphold the Louisiana law, the four dissenters demonstrated similar deference. This too should make it easier in future cases to defend laws regulating abortion.

Finally, there is no majority support for the idea that *Whole Women's Health* itself was correctly decided.[10] Roberts concurred in *June Medical Services* only because he believes that the Louisiana law imposes a burden on access to abortion that is "just as severe as that imposed by the Texas law" struck down in *Whole Woman's Health*, and he believes it necessary under principles of *stare decisis* to adhere to *Whole Woman's Health* by striking down a "nearly identical" law that has similar consequences for women seeking an abortion.[11]

This decision also begs a couple questions. First, is there majority support for the notion that that *Roe v. Wade* and *Casey* were correctly decided? We do not know. Only Thomas stated that *Roe* and *Casey* should be overruled.[12] None of the other justices took up the question, because none of the parties raised it. Second, what is the current standard for evaluating the constitutionality of an abortion law? *Casey* continues to be the governing standard, and under *Casey* a law is constitutional as long as it (1) does not create a substantial obstacle to a woman's decision to have a pre-viability abortion and (2) is "reasonably related" to a "legitimate" governmental purpose.[13] As noted above, there is no weighing or balancing of benefits against burdens, and questions of medical uncertainty are left to the legislature.

Supreme Court Rules in Favor of the Little Sisters on Contraceptive Mandate

On July 8, the Supreme Court delivered much better news in its decision in favor of the Little Sisters of the Poor. In *Little Sisters of the Poor v. Pennsylvania*, the Court ruled seven-to-two to uphold regulations of the US Department of Health and Human Services (HHS), the US Department of the Treasury, and the Internal

7. *June Medical Services*, 591 U.S., slip op. at 1–2 (Kavanaugh, J., dissenting).
8. *Whole Woman's Health*, 579 U.S. at 20.
9. *June Medical Services*, 591 U.S., slip op. at 6 (Roberts, C. J., concurring), citing *Gonzales v. Carhart*, 550 U.S. 124 (2007) at 163; and slip op. at 2–5 (Gorsuch, J., dissenting).
10. *June Medical Services*, 591 U.S., slip op. at 2 (Robert, C. J., concurring) and slip op. at 4 (Alito, J., dissenting).
11. *June Medical Services*, 591 U.S., slip op. at 2, 12 (Robert, C. J., concurring).
12. *June Medical Services*, 591 U.S., slip op. at 20 (Thomas, J., dissenting).
13. *June Medical Services*, 591 U.S., slip op. at 10n2 (Roberts, C. J., concurring), citing *Casey*, 505 U.S. at 878, 882.

Revenue Service that exempt stakeholders with religious or moral objections from a regulatory requirement that health plans cover contraceptives.[14] Thomas wrote the majority opinion, which was joined in full by Roberts, Alito, Gorsuch, and Kavanaugh. Alito filed a concurring opinion that was joined by Gorsuch. Kagan filed an opinion, joined by Breyer, concurring in the judgment. Ginsburg filed a dissenting opinion in which Justice Sotomayor joined.

If this case seems like déjà vu, it is! In 2016 the Supreme Court addressed cases brought by religious nonprofits, leaving it to the government to accommodate them with a religious exemption. However, many of the lawsuits brought by religious nonprofits remain unresolved. And regulations issued by the Trump administration, providing religious and moral exemptions from the mandate, were challenged in court, adding an additional reason for the Court to resolve the conflict.

The majority opinion in this case points to language in the Affordable Care Act (ACA) that requires a health plan to provide such "preventive care and screenings . . . *as provided for* in comprehensive guidelines supported by the Health Resources and Services Administration."[15] The Court held that this language gives HRSA the authority to establish the challenged religious and moral exemptions. In light of its holding that the ACA provides a basis for the religious and moral exemptions, the Court declined to address the departments' argument that the Religious Freedom Restoration Act *compelled* them to provide a religious exemption or at least authorized it. The Court, however, addressed and rejected the respondent states' argument that "the Departments could not even *consider* RFRA."[16]

In his concurring opinion, Alito noted that the respondent states "are all but certain to pursue their argument" in the lower courts and that "the current rule is flawed on yet another ground, namely, that it is arbitrary and capricious and thus violates the APA."[17] To avoid prolonging a legal battle that has already consumed several years, Alito (unlike the majority) addressed the question of whether the RFRA *compels* the challenged religious exemption for the Little Sisters and other employers with religious objections. He concluded that it does. Because the RFRA compels such an exemption, its adoption was not arbitrary and capricious.

The USCCB submitted two briefs in this case, one at the petition stage, urging the Court to take the case, and another at the merits stage, asking the Court to resolve the matter in favor of the Little Sisters. Naumann and Archbishop Thomas Wenski, chairman of the USCCB Committee for Religious Liberty, welcomed the ruling, saying,

> This is a saga that did not need to occur. Contraception is not health care, and the government should never have mandated that employers provide it in the first place. Yet even after it had, there were multiple opportunities for government officials to do the right thing and exempt conscientious objectors. Time after time, administrators and attorneys refused to respect the rights of the Little Sisters of the Poor, and the Catholic faith they exemplify, to

14. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. ___ (2020).
15. *Little Sisters of the Poor*, 591 U.S. at 3, citing 42 U.S.C. §300gg–13(a)(4), emphasis added.
16. *Little Sisters of the Poor*, 591 U.S. at 19, emphasis added.
17. *Little Sisters of the Poor*, 591 U.S., slip op. at 2 (Alito, J., concurring).

> operate in accordance with the truth about sex and the human person. Even after the federal government expanded religious exemptions to the HHS contraceptive mandate, Pennsylvania and other states chose to continue this attack on conscience.
>
> The Little Sisters of the Poor is an international congregation that is committed to building a culture of life. They care for the elderly poor. They uphold human dignity. They follow the teachings of Jesus Christ and his Church. The government has no right to force a religious order to cooperate with evil. We welcome the Supreme Court's decision. We hope it brings a close to this episode of government discrimination against people of faith. Yet, considering the efforts we have seen to force compliance with this mandate, we must continue to be vigilant for religious freedom.[18]

House Resolution against Assisted Suicide

On December 12, 2019, Representative Lou Correa (D-CA), along with a bipartisan group of cosponsors, introduced a nonbinding House resolution stating that "the Government has a legitimate interest in prohibiting assisted suicide." The resolution explains how assisted suicide endangers everyone, especially those least able to defend against coercion. The resolution warns that "assisted suicide … puts everyone, including the most vulnerable, at risk of deadly harm."[19]

In a letter to the House of Representatives, Naumann and Archbishop Paul Coakley, Chairman of the USCCB Committee on Domestic Justice and Human Development, expressed their strong support for the resolution, saying, "Every suicide is tragic, whether someone is young or old, healthy or sick. But the legalization of doctor-assisted suicide creates two classes of people: those whose suicides are to be prevented at any cost, and those whose suicides are deemed a positive good. Society removes weapons and drugs that can cause harm to one group, while handing deadly drugs to the other, setting up yet another kind of life-threatening discrimination. This is completely unjust. One's fundamental human rights and intrinsic human dignity do not wane with the onset of illness, age, or incapacity; all must be protected."[20]

Equal Rights Amendment

The Equal Rights Amendment (ERA) was passed by Congress in 1972 with the stated purpose of enshrining equality between the sexes in our Constitution. However, it failed to be ratified by three-fourths of the states (thirty-eight) within the seven-year time limit established by Congress. Nonetheless, efforts to resurrect the ERA have intensified in recent years as proponents assert that the failure to achieve ratification by the original 1979 deadline (or its extended 1982 deadline) does not really matter.

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18. USCCB, "USCCB Chairmen Welcome Supreme Court Decision Preserving the Religious Liberty of Little Sisters," news release, July 8, 2020, https://www.usccb.org/news/2020/usccb-chairmen-welcome-supreme-court-decision-preserving-religious-liberty-little-sisters.
19. H.Con.Res.79, 116th Cong.
20. Joseph F. Naumann and Paul S. Coakley, Letter to House on H.Con.Res. 72, December 17, 2019, https://www.usccb.org/issues-and-action/human-life-and-dignity/assisted-suicide/upload/Support-letter-for-joint-res-2020-gs.pdf.

Only thirty-five states ratified the amendment prior to the deadline, and five of those states rescinded their ratification. Nonetheless, proponents have continued pushing passage in states under the assumption that only three more states need to ratify the ERA for it to be added to the Constitution. As a result, three states, Nevada (2017), Illinois (2018), and Virginia (2020), ratified it. Meanwhile, in Congress an effort is underway to pass a joint resolution to eliminate the deadline for ratification, saying the amendment shall be part of the Constitution whenever ratified by the legislatures of three-fourths of the states. On February 13, this resolution was passed by the House on a vote of 232 to 183. It is unlikely to advance in the Senate.

Catholic social teaching and recent Popes speak very strongly about the equality of men and women based on their equal dignity as children of God. And the Church recognizes the need to do more to address inequities between women and men. However, the ERA in its current form is likely to pose very serious consequences, including the requirement of federal funding for abortions, the overturning of pro-life and conscience-protection laws, and the extension of legal prohibitions against sex discrimination to sexual orientation, gender identity, and other categories.

Whether this effort to resurrect the ERA is successful may ultimately be decided by the courts. In the meantime, on January 8, 2020, the Office of Legal Counsel at the Department of Justice, which advises all components of the executive branch on major legal issues, issued a thirty-eight-page opinion holding that the 1972 ERA has been dead for forty years, and no subsequent action by state legislatures or Congress can resurrect it. This opinion, which defines the position of the executive branch, means that the Archivist of the United States may not certify that the 1972 ERA has become part of the Constitution even though Virginia became the thirty-eighth state to purportedly ratify it.

Given that any attempt to assert ratification of the 1972 ERA would be challenged in court, a recent comment by Ginsburg, a longtime champion of the ERA, may be the final nail in the coffin preventing its resurrection: "I would like to see a new beginning. I'd like it to start over," Ginsburg said in an interview at a Georgetown Law School event to commemorate the one hundredth anniversary of women's suffrage. "There's too much controversy about latecomers," she said. "Plus, a number of states have withdrawn their ratification. So if you count a latecomer on the plus side, how can you disregard states that said 'we've changed our minds'?"[21]

Trump Administration Finalizes Separate Payments Rule for Abortions

On December 20, 2019, the Centers for Medicare and Medicaid Services announced the finalization of the Exchange Program Integrity Final Rule, which seeks to address a hidden abortion surcharge in many plans purchased on the federal and state insurance exchanges.

21. Ruth Bader Ginsberg, cited in Joseph Guzman, "Did Ruth Bader Ginsburg Just Kill the Equal Rights Amendment?," *The Hill*, February 12, 2020, https://thehill.com/changing-america/respect/equality/482744-ginsburg-says-process-to-ratify-equal-rights-amendment

The ACA permits government subsidies to fund insurance plans that cover abortion. Section 1303 of the act created abortion accounting requirements for insurance plans sold on the exchanges. It requires insurers to collect from each enrollee in the plan a separate payment to be deposited into a separate account to pay for elective abortions covered by the insurance plans. The amount must be at least one dollar per enrollee per month. However, the provisions of section 1303 have not been enforced. The Obama administration interpreted *separate* as *together*, allowing plans to embed the abortion surcharge within the monthly premium. This made it difficult for policy holders to identify whether the plan they were purchasing included coverage for elective abortion.

The final rule requires qualified health plans to "send an entirely separate monthly bill to the policy holder" for abortion coverage.[22] While this included separating mailings and postage in the proposed rule, the final rule allows health plans to include separate bills for abortion and other services in the same envelope. However, electronic communications must be sent in separate emails. In addition, health plans must instruct the policy holder to pay the elective abortion premium in a separate transaction. However, the final rule notes that if the policy holder pays the premium in a single transaction, the health plan is not permitted to refuse the combined payment. If a policy holder fails to pay the elective abortion premium, the health plan has the option to waive the individual's obligation to pay it.[23]

The USCCB submitted comments in favor of this rule, and Naumann issued a statement on December 23: "I commend the Administration for enforcing the law, for its efforts to ensure transparency in healthcare, and for attempting to respect unborn human life."[24] On July 11, 2020, a federal district judge from Maryland blocked the administration from implementing the rule.[25]

Finishing with Inspiration

March 25, 2020, marked the twenty-fifth anniversary of Pope St. John Paul II's encyclical *Evangelium vitae*, a document that he declared was "central to the whole of the Magisterium of my pontificate."[26] This magnificent document provides extraordinary insights into the roots and origins of what John Paul II called a *culture of death* as well as the key responses needed so "a new culture of human life will be affirmed, for the building of an authentic civilization of truth and love."[27]

22. Patient Protection and Affordable Care Act; Exchange Program Integrity, 84 Fed. Reg. 71674, 71684 (Dec. 27, 2019).
23. 84 Fed. Reg. at 71685.
24. USCCB, "Pro-Life Chairman Commends Final Rule Separating Abortion Payments from Health Care Coverage," news release, December 23, 2019, https://www.usccb.org/news/2019/pro-life-chairman-commends-final-rule-separating-abortion-payments-health-care-coverage.
25. Catholic News Agency, "Judge Strikes down HHS Rule on 'Abortion Surcharge' in Health Plan Exchange," July 13, 2020, http://direct.catholicnewsagency.com/news/judge-strikes-down-hhs-rule-on-abortion-surcharge-in-health-plan-exchanges-23318.
26. John Paul II, Address at the Commemoration of the Fifth Anniversary of *Evangelium vitae* (February 14, 2000).
27. John Paul II, *Evangelium vitae* (March 25, 1995), n. 6.

Among those key responses is the need to rediscover a sense of awe for human life by reflecting on it as a miraculous and sacred gift:

> Like the Psalmist, we too, in our daily prayer as individuals and as a community, praise and bless God our Father, who knitted us together in our mother's womb, and saw and loved us while we were still without form (cf. Ps. 139:13, 15–16). We exclaim with overwhelming joy: "I give you thanks that I am fearfully, wonderfully made; wonderful are your works. You know me through and through" (Ps. 139:14). Indeed, "despite its hardships, its hidden mysteries, its suffering and its inevitable frailty, this mortal life is a most beautiful thing, a marvel ever new and moving, an event worthy of being exalted in joy and glory." Moreover, man and his life appear to us not only as one of the greatest marvels of creation: for God has granted to man a dignity which is near to divine (Ps. 8:5–6). In every child which is born and in every person who lives or dies we see the image of God's glory. We celebrate this glory in every human being, a sign of the living God, an icon of Jesus Christ.[28]

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28. John Paul II, *Evangelium vitae*, n. 84, citing Paul VI, "Pensiero alla morte," *L'Osservatore Romano*, August 9, 1979.