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US Supreme Court upholds abortion rights, for now

The court's decision means that Louisiana's three abortion clinics will remain open. Susan Jaffe reports.

The US Supreme Court delivered the Trump administration's third defeat in as many weeks when it overturned a Louisiana law requiring physicians who provide abortions to have local hospital-admitting privileges.

In an opinion written by Justice Stephen Breyer, the court declared on June 29 that "enforcing the admitting-privileges requirement would drastically reduce the number and geographic distribution of abortion providers, making it impossible for many women to obtain a safe, legal abortion in the State and imposing substantial obstacles on those who could".

The decision means that Louisiana's three abortion clinics, which provide abortion services to about 10 000 women a year, will remain open. But its impact will reach well beyond the state.

The court rejected Louisiana's claim that doctors must have admitting privileges at hospitals within 30 miles of their abortion clinic to protect a woman's health in the event of complications and to provide continuity of care. Doctors at other ambulatory surgical centres are not required to have similar arrangements. The state's "local admitting-privileges requirements for abortion providers offer no medical benefit and do not meaningfully advance continuity of care", Breyer wrote.

He cited the amicus curiae ("friend of the court") legal brief from the American College of Obstetricians and Gynecologists, the American Medical Association, and 11 other provider groups. They argued that a hospital's decision to grant admitting privileges is irrelevant since it is based on "a doctor's ability to perform the inpatient, hospital-based procedures for which the doctor seeks privileges—not outpatient abortions".

A doctor who has permission from a specific hospital can admit a patient to that hospital and care for that patient inside the hospital. However, anyone with serious medical problems can go to a hospital emergency department where a doctor known as a hospitalist usually employed by the facility decides whether patients should be admitted or can be treated and released.

> "…'the admitting-privileges requirement would drastically reduce the number and geographic distribution of abortion providers, making it impossible for many women to obtain a safe, legal abortion'…"

Despite the addition of President Donald Trump's two nominees to the court, it reached the same conclusion that overturned a similar Texas law 4 years ago. Both states had enacted nearly identical requirements that physicians at abortion clinics hold hospital-admitting privileges. Joining the court's liberal wing—Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan, and Breyer—Chief Justice John Roberts cast the decisive vote needed to invalidate the Louisiana law. But writing in a separate opinion, Roberts explained why he was voting to overturn Louisiana's law even though he had voted to uphold the Texas law in 2016. Because the two cases involved such similar laws, he said that he was now bound by "respect for precedent" to invalidate the Louisiana law.

"The Chief Justice openly acknowledges that the [Texas] case was wrong but then applies it anyway", said Jeff Landry, Louisiana's attorney general. Landry criticised Roberts for "putting precedent over patients".

Roberts's equivocation "muddies the waters and will lead to more litigation, not less", predicted Julie Rikelman, litigation director at the Center for Reproductive Rights, who represented abortion providers. "But Chief Justice Roberts' opinion is clear that a law is unconstitutional if it doesn't serve a valid state interest, if it imposes a substantial obstacle to abortion access—and this law in Louisiana did so—and that's why he agreed that it should be struck down", she told reporters shortly after the decision was announced.

Abortion has been legal in the USA since the 1973 landmark decision in *Roe v Wade*, when the Supreme Court ruled that a woman has a constitutional right to end a pregnancy before viability. In a 1992 decision, the court added that state measures to protect the patient's health must not create insurmountable barriers to access.

Abortion providers sued the state after Louisiana passed the law in 2014. By the time the case, known as *June Medical Services v Russo* (the interim secretary of the Louisiana Department of Health and Human Services), was argued before the Supreme Court in March, it had attracted sharply divided political support.

Hoping to sway the court, 21 Democratic states and the District of Columbia filed amicus briefs on

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behalf of the providers, along with 197 members of Congress, Planned Parenthood, the American Civil Liberties Union, and 13 medical associations, among others. Another 20 Republican states and 207 members of Congress submitted legal arguments supporting Louisiana, as well as the National Right to Life Committee, United States Conference of Catholic Bishops, Americans United for Life, and other groups. The Trump administration's solicitor general also defended Louisiana and took a turn presenting oral arguments.

But the *June Medical* decision's most tangible impact is likely to occur in November, when Americans choose a president. The next occupant of the White House is expected to appoint one Supreme Court vacancy and perhaps another. The prospect of shifting the court's ideological balance will drive at least some voters to the polls, if they are not already motivated by COVID-19 pandemic concerns and the resulting economic crisis.

"We're not giving up and going home", said Steven Aden, chief legal officer and general counsel at Americans United for Life. "*June Medical* has just stoked the fire in us for this fight."

In addition to the *June Medical* decision, the Supreme Court set back two other priorities on the Trump agenda, frustrating social conservatives who relied on him to turn the court solidly to the right after he vowed to appoint pro-life, conservative justices. The justices refused to let the administration end protection under the Deferred Action for Childhood Arrivals programme for 700 000 illegal immigrants brought to the USA as children—including some 30 000 health-care providers. Another high-profile decision against the administration prohibits employers from discriminating against gay and transgender workers, in a strong 6–3 opinion that was all the more surprising because Trump nominee Justice Neil Gorsuch wrote it.

Doctors' right to sue

The Louisiana decision could have reached a different conclusion had a majority of the justices accepted another Louisiana claim that health-care providers should not be allowed to file lawsuits on behalf of their patients seeking abortions. Since providers are paid for their services, the state argued that this financial advantage conflicts with the patients' best interests.

During oral arguments before the Supreme Court, Louisiana's solicitor general explained that the law was necessary for patients' health and safety, and therefore "these doctors should not be able to challenge a regulation that protects people, that is intended to protect a class of people from a certain type of activity".

Justice Breyer reminded Louisiana's lawyer that doctors had filed lawsuits on behalf of female patients in at least eight other abortion cases. "It was a very odd argument to make because the providers are the ones who have to go out and get admitting privileges", said Elizabeth Nash, a policy analyst at the Guttmacher Institute. "If we had to rely on patients, it would hamstring [abortion] cases", she added, since lawsuits can take years to resolve—much longer than a woman's pregnancy.

Shifting battlegrounds

According to the Guttmacher Institute, 43 states prohibit abortion after a certain time in the pregnancy, 45 states allow health-care providers to refuse to assist or perform the procedure, 18 states require women to receive counselling about potential adverse consequences, 26 states require women to wait usually 24–48 h before getting an abortion, and 37 states require parental consent or notification for minors. Several states also set requirements for where the abortion must take place, including certain building specifications and qualifications for providers. Since 2011, states have passed 450 laws affecting access to abortion.

Attorneys at the Center for Reproductive Rights, who represented the clinics, said Louisiana still has more abortion restrictions than any other state. The group has filed several other lawsuits against Louisiana to overturn other laws, including one that requires patients to wait 72 h before receiving abortions.

"Unfortunately, in the last few years we have seen some states continuing to pass laws that create burdens for patients", said Skye Perryman, chief legal officer at the American College of Obstetricians and Gynecologists. "Our hope is that the Supreme Court decision will motivate states to focus on providing evidence-based health care for women and dispense with these needless rules."

This is not likely to happen anytime soon. Dozens of legal challenges of state laws regulating abortion access are still working their way through state and federal courts. Several are expected to come before the Supreme Court in the next few years. Aden, at Americans United for Life, said the court can and should decline to consider such cases.

"The Supreme Court should get out of the business of being a national abortion control board and return this issue to the states, where it belongs", said Aden. Such a prospect has renewed efforts by congressional Democrats to advocate legislative solutions.

The right to an abortion needs stronger protections than the courts can provide, said Senator Richard Blumenthal, a Connecticut Democrat and a lead sponsor of the Women's Health Protection Act that would prohibit state restrictions on abortion, which do not apply to similar medical procedures. It would "safeguard reproductive rights no matter where women may live", he said.

Susan Jaffe