

# The U.S. Supreme Court's New Abortion Case: Be Careful What You Ask for

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"Be careful what you ask for" can be sage cautionary advice for those who seek more than they deserve. Sometimes an over-the-top demand by an attorney boomerangs on him. A variation on this theme is an admonition familiar to all trial attorneys who cross-examine witnesses: "Don't ask a question if you don't know the answer!"

Litigation is an endeavor filled with strategy, intrigue, and uncertainty. In trials this includes decisions about whom to call as witnesses, what questions to ask, and what arguments to make to a jury.

At the Supreme Court the legal maneuvering is just as important but takes a different form. Tactical decisions must be made about whether to "petition for cert," i.e., *certiorari*, in order to seek a ruling by the Supreme Court to overturn a lower court ruling. Usually there is no downside risk to filing a petition for cert.

But occasionally in a high-profile case it can be a mistake for one side to request review and a decision by the Supreme Court. On politically charged issues like abortion, a petition for cert to the Supreme Court can make matters worse for the petitioners if the Court rules against them in a nationwide precedent.

Our federal appellate courts are politically divided just as Congress and our States are. Courts such as the Fourth and Ninth Circuits are predominantly liberal and typically rule in favor of abortion. In contrast, federal circuits located in the middle of our country, such as the Sixth Circuit, are predominantly conservative now, particularly after numerous appointments to these courts by President Trump. The conservative circuits typically rule against abortion.

Abortion is the most divisive issue in the judiciary, and the Supreme Court has been evenly divided on abortion for the last quarter century. The outcome in abortion cases before the Supreme Court has typically been a 5-4 decision for one side or the other (it was 5-3 when there was a vacancy due to the death of Justice Scalia before his seat was filled). There is a bitterness about this issue, which makes the Supreme Court strive to avoid it in order to maintain collegiality among the justices.

Yet complete avoidance of this issue has been impossible for the Supreme Court ever since *Roe v. Wade* in 1973, when the Court thought it was resolving the matter based on the issue of privacy. The Court has been nearly paralyzed by a stream of enigmatic cases concerning abortion, the beginning of life, and the authority of states. In 2018 the Court was tied in knots for months about an abortion performed on a teenage illegal alien, which was done in the middle of the night in order to evade Court review of the issue by rendering the dispute moot, in *Azar v. Garza*.

When the Supreme Court does take an abortion case, it often consumes the Court until the very last day of its term before it adjourns for its summer recess. The justices keep responding to each other in the majority opinion, concurrences, and dissents until they run out of time. Disagreements extend to even the basic language used, as when Justice Ruth Bader Ginsburg recently objected to Justice Clarence Thomas's use of the term "mother" to describe a woman having an abortion.

Meanwhile, confirmation hearings for new Supreme Court justices have nearly ground to a halt due to the realization that a new justice would tilt the balance of power on the Court about *Roe v. Wade*. It was not Brett Kavanaugh's high school yearbook that really interested the opponents to his confirmation, but the potential Kavanaugh had for shifting the power concerning *Roe v. Wade* that sparked the intense opposition.

Kavanaugh was, of course, confirmed over the protests by a razor-thin vote in the U.S. Senate. If his opponents were right, then they would not want to bring an abortion case before the Supreme Court with Kavanaugh on it.

But his opponents then did exactly that. They subsequently petitioned for cert to the Supreme Court for it to review a decision by the U.S. Court of Appeals for the Fifth Circuit that upheld a Louisiana law restricting abortion clinics. If now-Justice Kavanaugh is on the side of limiting abortion as his critics feared, then why did his opponents ask the Court, including Kavanaugh, to issue a major ruling about abortion?

To understand this paradox, it is first necessary to review the "Rule of 4," which dictates how the Supreme Court decides to "grant cert" on petitions filed with it for review.

## "Rule of 4"

There are nine justices on the Supreme Court, and a vote by a simple majority of five of them is typically required in order to render a ruling deciding the outcome in a case. But under the "Rule of 4," only four out of nine justices is sufficient for the Court to grant cert in order to hear an appeal.

The resulting strategy and intrigue over petitions for cert may remind some of the "prisoners' dilemma," in which a prisoner's decision whether to plead guilty depends on his prediction of whether his co-conspirator is also going to plead guilty. Both would be better off if both denied the crime, but if a prisoner adopts that approach and his co-conspirator separately turns against him, then the prisoner is far worse off. The dilemma requires anticipation of the likely position of potential allies and adversaries before picking the optimal approach. Similarly, anticipation by litigants and even by Supreme Court justices themselves about the position of

other justices is essential when deciding whether to seek a grant of cert on a high-profile case.

An illustration of the mishandling of this dynamic occurred in an important voter ID case arising from Indiana, captioned *Crawford v. Marion County Election Board*.<sup>1</sup> The Seventh Circuit presides over Indiana, Illinois, and Wisconsin and sits in Chicago, perhaps the most notorious city for voter fraud in the entire country. The appellate judges were not sympathetic to a challenge to an Indiana law requiring photo identification in order to vote, and the Seventh Circuit upheld the law as constitutional even though they admitted the law may hinder the Democratic Party more than the Republican Party. In contrast, liberal judges on many other circuits, mostly notably the vast Ninth Circuit, which includes California, view voter ID laws as unconstitutional.

The Indiana Democratic Party, fearing that the law would interfere with its ability to win elections, faced a decision whether to appeal the Seventh Circuit decision against it to the Supreme Court. The Indiana Democratic Party could have left the ruling intact, taken a loss on the issue for Indiana, and not risked affecting the rest of the country. Instead, they ignored the admonition of “be careful what you ask for,” and petitioned for cert by the U.S. Supreme Court.

Cert was granted, which requires only four votes, but then there were not five votes on the High Court to rule as the petitioners wanted. As a result, the Democratic Party suffered a big loss when the Supreme Court ruled against them, setting a nationwide precedent for the constitutionality of voter ID laws.

Supreme Court rulings apply to the entire country, including all the pockets of Leftism in California, Virginia, Massachusetts, and everywhere else. In the voter ID case, the Supreme Court upheld the Indiana law, which then meant every State could pass a similar law. Some such as California would not, but others such as Idaho, Montana, and Wyoming could, when previously the Ninth Circuit would have forbidden them from doing so. Opponents of voter ID were furious at how a small setback in Indiana, which is mostly Republican anyway, became a nationwide precedent because the losing party ineptly appealed to the Supreme Court and lost again.

### **Cert Denied!**

Ever since *Roe v. Wade* there have been at least four justices on the Supreme Court who are solidly in favor of abortion rights. Thus, for nearly 50 years they have had enough votes to grant cert on any petition seeking expansion of abortion. Indeed, since *Roe*, virtually every time that an abortion clinic or Planned Parenthood has filed a petition for cert, the Supreme Court has granted it. This has been true even though the Court grants only about 1 percent of petitions filed by anyone else.

But with two new justices joining the Supreme Court since the last major abortion decision, tactical considerations become significant before pulling the lever of granting cert. Presumably the four justices who favor abortion would not want to grant cert if they doubt there will be a fifth vote to deliver a desired ruling.

An illustration of this occurred last fall. A petition for cert to the Supreme Court was filed by an abortion clinic on a ruling that upheld a Kentucky law requiring that informed consent include an ultrasound before an abortion, in *EMW Women’s Surgical Center v. Beshear*.<sup>2</sup> Four justices on the Supreme Court surely disagreed with the law, and probably felt it was unconstitutional. Only four votes were needed to grant the request to hear the challenge to that law’s constitutionality. But on Dec 9, the Supreme Court shocked observers by denying this petition for cert by an abortion clinic.

This was a surprising denial because generally the Supreme Court grants cert whenever Planned Parenthood or similar groups request it. No one doubts that there were (and are) four votes on the Supreme Court to strike down the Kentucky law as unconstitutional. But somehow this time the four votes were not there for the abortion clinic. In fact, no justice even dissented from this denial of cert. This baffled many in the media.

Most likely the four justices who side with abortion did not think any of the other five justices, including Gorsuch and Kavanaugh, would join them to forge a majority to strike down the Kentucky law. If the Kentucky law were then upheld as constitutional, then this would establish a new precedent to apply to all 50 states and territories of the United States, and prevent the Fourth, Ninth, and other liberal Circuits from invalidating this type of law.

So, the Kentucky law goes into effect in Kentucky and can be enacted in every other State within the Sixth Circuit (Michigan, Ohio, and Tennessee), but legal challenges can still be brought against such laws in states outside the Sixth Circuit.

### **Cert Granted!**

Meanwhile another abortion case did make its way for full review on the merits by the Supreme Court. Prior to denying cert in the Kentucky case, the U.S. Supreme Court granted cert in a case arising from Louisiana captioned *June Medical Services v. Russo (formerly Gee)* (No. 18-1323). This case becomes the most important abortion case to be heard by the Supreme Court on abortion in more than a decade.

Louisiana passed a law, Act 620, which requires that abortion clinics comply with the same rule applicable to ambulatory surgery centers: The physician performing the operation must have medical staff privileges at a hospital located within 30 miles of the procedure. Abortion clinics claim that this requirement is unconstitutional for them, even though it is constitutional when applied to ambulatory surgery centers. When there is an emergency complication, the requirement helps ensure continuity of care for the benefit of the patients.

The U.S. Court of Appeals for the Fifth Circuit, which presides in New Orleans over Louisiana, Mississippi, and Texas, upheld the law against the challenge to its constitutionality by abortion clinics.

Ignoring the aphorism “be careful what you ask for,” the abortion clinics appealed this case to the Supreme Court in

the hope that it would summarily reverse the decision by Fifth Circuit which upheld the Louisiana law, Act 620. The abortion clinics felt that a decision in 2016, which was rendered when Justice Anthony Kennedy was still on the Supreme Court and during the vacancy left by Justice Antonin Scalia's sudden death, required the invalidation of the Louisiana law.

Justice Kennedy cast his last major vote on abortion in its favor in that case, *Whole Woman's Health v. Hellerstedt*. Subsequently Justice Kennedy resigned and was replaced by Justice Brett Kavanaugh, and the Court today is not the same Court as the one that decided *Hellerstedt*.

The Court in *Hellerstedt* struck down as unconstitutional a Texas law that was virtually identical to the Louisiana one. To some, that meant the Louisiana law was automatically unconstitutional, and they expected the Supreme Court to strike it down without even bothering to schedule oral argument in the Louisiana case.

But the outcome has not been as hoped. The Court did grant the petition for cert as sought by the abortion clinics, but also granted a cross-petition by Louisiana which argues that the abortion clinics do not even have legal standing to challenge the law. After all, how can abortion clinics represent the interests of women in this case when the clinics are objecting to a law that would make abortion safer? The clinics want to cut costs by not having hospital admitting staff privileges, while their patients would be better off if complications could be handled quickly with continuity of care by the physician who performed the operation.

### Abortion Complications

No one credibly denies that complications, sometimes deadly ones, arise from abortion. Ambulances are routinely observed taking patients from abortion clinics to hospitals. At the Margaret Sanger Center Planned Parenthood in New York City, which is presumably one of the safer abortion clinics in the country, five women were apparently sent directly to a nearby hospital from the clinic in less than two months in early 2019. Louisiana Act 620 would ensure that when such emergencies happen, the abortionist can also go to the hospital in order to facilitate continuity of care.

The abortion clinics do not deny that **major** complications occur from abortion, and that those complications are costly and sometimes life-threatening. Given that Louisiana already requires that physicians who do procedures in ambulatory surgery centers have hospital medical staff privileges nearby, why shouldn't the same requirement apply to abortions? It is difficult to see a constitutional argument for cheap abortion, unsafe abortion, or public payment for abortion complications. Women are protected, not harmed, by laws ensuring compliance by abortion clinics with the same rules that apply to ambulatory surgery centers.

Even if the complication rate from abortion is small, no one denies that serious complications do occur, and that care in a hospital is often necessary for them. The complication rate from abortion may be comparable to that of colonoscopies, but some insurance companies require that even safe procedures

like colonoscopies be performed in a hospital setting in the small chance that a complication does occur.

Too often abortion clinics tell injured patients to "call 911" or "just go to the nearest emergency room" for their complications. Abortionists thereby evade liability and accountability for the harm they cause to the woman, in addition to the fatal harm they cause to the unborn child. Kermit Gosnell would not have been able to perpetrate his "House of Horrors" if Pennsylvania had required nearby hospital privileges in connection with abortion, because he would have not been able to maintain medical staff privileges while he committed his atrocities. Gosnell was convicted of first-degree murder in the deaths of three infants born alive in the course of attempted late-term abortions, and of involuntary manslaughter of a woman who died of a sedative overdose. Filthy, unsafe conditions prevailed at his clinic.<sup>3</sup>

### Hellerstedt Decision

The *Hellerstedt* decision, on which the abortion clinics rely in trying to strike down Louisiana Act 620, actually affirmed the desirability of enacting laws to protect abortion safety. "[T]he 'State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that ensure maximum safety for the patient.'"<sup>4</sup>

In *Hellerstedt*, the Supreme Court considered the legal record to be inadequate to sustain the Texas law, but the record is far more robust in defense of the Louisiana law. An expert witness, Doctor Robert Marier, testified at length about the benefits of the Louisiana law. At one point he exclaimed in connection with the importance of continuity of care, "**How much can you write down?** .... [P]hysicians like to talk to the doctors who are caring for a patient to make sure they really understand it and not rely simply on a written document."<sup>5</sup> Ensuring that abortionists have nearby hospital privileges helps promote salutary continuity of care.

### Question Presented

At the time of this writing, the Supreme Court is scheduled to hear oral arguments on the following specific question on Mar 4: Whether Louisiana's law requiring physicians who perform abortions to have admitting privileges at a local hospital is unconstitutional.

This issue seems so simple, and yet it sparked the filing of 27 amicus curiae briefs in opposition to Louisiana Act 620, which prohibits an abortion unless the abortionist has admitting medical staff privileges at a hospital within 30 miles of the abortion. A larger number of amicus briefs, 42 in all, were timely filed in support of this Louisiana law.

Chief Justice John Roberts had issued a stay of the decision by the U.S. Court of Appeals for the Fifth Circuit, which had upheld the constitutionality of this law. This stay prevents this law from going into effect until the Supreme Court renders its final decision.

Abortion clinics thought that this case would be an easy win for them, and they even requested that the Supreme Court

enter a judgment in their favor without bothering to hold oral argument. Their petition for cert stated that “the Court should grant the petition for a writ of cert and summarily reverse” the Fifth Circuit decision that upheld the Louisiana law.

The Supreme Court did not grant judgment as requested by the abortion clinics and abortionists who challenge Louisiana Act 620. Instead, the Court welcomed full briefing by both sides, and pro-life amicus briefs then poured in.

The State of Idaho was the first to file an amicus brief in support of the Louisiana law. Included in the amicus briefs was the United States itself, under the Trump Administration, whose Solicitor General Noel Francisco both filed a strong amicus brief and requested time to argue on Mar 4. The Supreme Court subsequently granted his motion, and so he is arguing in defense of the Louisiana law too.

In addition to the question above, the Court will also consider whether abortion clinics even have proper legal standing to challenge this type of statute, supposedly on behalf of women seeking an abortion. The Louisiana statute benefits women, while forcing the clinics to bear more of the costs and to have some availability to help the women if there are complications caused by abortion. The clinics are adverse to the women in this situation, so how can the clinics pretend to represent the women? This would not be allowed in other legal situations, and the Supreme Court may rule against the clinics for lack of proper legal standing.

### **Externalizing the Costs of Abortion**

Abortion clinics shift their own costs onto others by avoiding being on nearby hospital medical staffs. This is known as “externalizing” costs, a trick used by polluters until government limits them from continuing to do so. For example, a factory that simply dumps its waste into a nearby river is externalizing the full costs of its business onto the public.

Abortion clinics stay in business by externalizing the costs of their complications onto the public. If abortion clinics paid the true costs caused by their procedures, most or all could be out of business.

For example, most abortion clinics, unlike hospitals, do not carry malpractice insurance, so when a woman is harmed by an abortion clinic, she is deprived of the protection of insurance to pay her claims. Instead, the abortion clinic cuts corners and reduces its costs by not carrying insurance, to the detriment of the women whom the clinics victimize.

Yet, abortion clinics told the Court that they would go out of business if the Louisiana law went into effect. That seems doubtful, but even if true, it is a fact of life that companies go out of business every day. Surely there is no constitutional right for someone to stay in business.

In essence the abortion clinics seek a constitutional right to externalize their costs onto the public. But no other business has that right. Environmentalists work hard against companies that externalize the costs of their business activities that harm the environment. If a business had a constitutional right to externalize its costs, many harmful businesses would still be in

operation, to the public’s detriment.

There has never been a constitutional right to compel the public to pay the costs of abortion. This was established in *Harris v. McRae* in 1980, and no decision since then has changed that fundamental rule. The abortion clinics sought to bypass this well-established holding, but nothing in *Hellerstedt* justifies circumventing the longstanding principle that there is no constitutional right to force the public to support abortion, in this case by paying all the costs of complications.

The “30-mile rule” assures that abortionists have the competence and accountability needed to maintain nearby hospital medical staff privileges, as Gosnell or others like him could not attain. This approach is essentially self-enforcing, as violations would be too obvious to the public for any abortionist to risk his medical license by practicing contrary to this bright-line rule. Any clinic that violated this law would have no legal defense against closure or penalties. No inspection is required under this approach. In contrast, the approach used in Pennsylvania where Gosnell maintained his House of Horrors was that on-site inspections were possible, but not timely done. On-site inspections cost taxpayer money, and require political will. Abortion clinics can also easily hide evidence of misconduct from inspectors if they ever did schedule a visit.

Instead of requiring taxpayers to fund costly and ineffective inspections of abortion clinics that allow operators like Gosnell to work, the 30-mile rule solves the problem without burdening the taxpayers. Gosnell would have been out of business promptly, and without imposing costs on taxpayers to try to police his misconduct.

### **No Real Problem Obtaining Privileges**

Abortion clinics insisted that their physicians, who are referenced in the case by “Doe \_\_\_” to preserve their anonymity, could not obtain the required hospital admitting staff privileges. But is the issue whether they could not obtain privileges, or simply did not want to? As discussed above, the clinic shirks costs and accountability by avoiding such privileges.

The Fifth Circuit reviewed the evidence and found that there was a lack of a bona fide, good-faith attempt to obtain hospital admitting staff privileges by nearly all of the abortionists:

Given the evidence, only Doe 1 has put forth a good-faith effort to get admitting privileges. Doe 2, Doe 5, and Doe 6 could likely obtain privileges. Doe 3 is definitively not burdened.

At least three hospitals have proven willing to extend privileges. On the entire evidence, we are left with the definite and firm conviction that the district court erred in finding that only Doe 5 would be able to obtain privileges and that the application process creates particular hardships and obstacles for abortion providers in Louisiana.<sup>6</sup>

After initial briefing before the Supreme Court, the Louisiana solicitor general filed an additional motion suggesting that

abortionists can be hired who have or can obtain medical staff privileges at nearby hospitals. While supplementing the record is unusual on appeal, it is sometimes necessary to correct any misperceptions the Court may have.

Moreover, there is plenty of money among billionaires and others to keep all abortion clinics open. Mike Bloomberg, for example, who is worth more than \$50 billion, is an outspoken advocate of abortion who could easily fund hiring numerous physicians with medical staff privileges to staff the clinics. Indeed, he could construct new hospitals nearby to satisfy the Louisiana requirement! Many other billionaires also favor expansive abortion access.

The inescapable inference is that there is not a lack of funding, but rather that the abortion industry does not want to be involved in handling complications from its abortions. The industry does not want the costs or the accountability that would result if they were on staff at the hospitals where the complications are treated. By avoiding medical staff privileges for their physicians, the clinics avoid the repercussions of those complications, both financially and politically.

Kermit Gosnell thrived precisely because he did not have medical staff privileges at a nearby hospital. His facility would have been shut down long before he committed his murders if Pennsylvania had required abortionists to have medical staff privileges. His clinic would not have closed because a good physician could not satisfy the requirement, but because of the accountability it would impose on the unscrupulous abortionist.

## Conclusion

With oral argument scheduled on Mar 4, this case will occupy the media until a decision is rendered in late June. Initially confident of a victory, the abortion clinics may instead wish they had been more careful about what they ask for.

*June Medical Services v. Russo* is more about the economics of abortion than any right of access to it. Abortion clinics have been shifting the costs of and accountability for their complications onto other physicians and the public, and there is no constitutional right to do that.

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**Disclosure:** the author filed an amicus brief with the Supreme Court in the *June Medical Services v. Russo* (formerly *Gee*) case discussed herein. The Association of American Physicians and Surgeons also filed an amicus brief in this landmark case.

## REFERENCES

1. 553 U.S. 181 (2008).
2. Sup. Ct. No. 19-417 (Dec 9, 2019).
3. Hurdle H, Gabriel T. Philadelphia abortion doctor guilty of murder in late-term procedures. *New York Times*, May 13, 2013. Available at: <https://www.nytimes.com/2013/05/14/us/kermit-gosnell-abortion-doctor-found-guilty-of-murder.html>. Accessed Feb 15, 2020.
4. *Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quoting *Roe v. Wade*, 410 U.S. 113, 150 (1973)).
5. *June Medical Services v. Russo* (formerly *Gee*) (No. 18-1323), Joint Appendix 822.
6. *June Med. Servs., L.L.C. v. Gee*, 905 F.3d 787, 810 (5th Cir. 2018)

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