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## Unduly Burdening Women's Health: How Lower Courts Are Undermining Whole Woman's Health v. Hellerstedt

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## Unduly Burdening Women's Health: How Lower Courts Are Undermining Whole Woman's Health v. Hellerstedt

### Cover Page Footnote

Work published prior to Prof. Litman joining the MLaw faculty.

# UNDULY BURDENING WOMEN'S HEALTH: HOW LOWER COURTS ARE UNDERMINING WHOLE WOMAN'S HEALTH V. HELLERSTEDT

*Leah M. Litman*<sup>\*</sup>

## INTRODUCTION

At the end of the Supreme Court's 2016 Term, the Court issued its decision in *Whole Woman's Health v. Hellerstedt*.<sup>1</sup> One of the more closely watched cases of that Term, *Hellerstedt* asked whether the Supreme Court would adhere to its prior decision in *Planned Parenthood v. Casey*, which reaffirmed that women have a constitutionally protected right to decide to end a pregnancy.<sup>2</sup>

The state of Texas had not formally requested that the Court revisit *Casey* or the earlier decision *Casey* had affirmed, *Roe v. Wade*,<sup>3</sup> in *Hellerstedt*. But that was what Texas was, in effect, asking the Court to do. If Texas were correct in *Hellerstedt* that the challenged abortion restrictions were valid,<sup>4</sup> the right to decide to end a pregnancy would have amounted to little more than a fiction. The Texas restrictions at issue in *Hellerstedt* required doctors providing abortions to have admitting privileges at hospitals within thirty miles of where the doctor performed abortions and required facilities providing abortions to comply with the litany of restrictions applicable to ambulatory surgical centers.<sup>5</sup> There was no evidence that either of the restrictions made abortion safer, and their combined effect was to reduce the number of clinics in the state of Texas from over forty to seven, all of which would have been concentrated in the Dallas/Fort Worth, Houston, Austin, and San Antonio metropolitan regions.<sup>6</sup> If states could enact such severe restrictions without having to establish that the restrictions actually serve a val-

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1. 136 S. Ct. 2292 (2016).
2. 505 U.S. 833 (1992).
3. 410 U.S. 113 (1973).
4. See *Whole Women's Health*, 136 S. Ct. at 2300–01, 2319–20.
5. *Id.* at 2300.
6. *Id.* at 2301–02.

id purpose, it is not hard to imagine that the right to decide to end a pregnancy would have become a right in name only.

That's not the path the Supreme Court took. Instead, in *Hellerstedt*, the Court affirmed that women have a constitutionally protected liberty interest in deciding to end a pregnancy.<sup>7</sup> And because women have a constitutionally protected liberty interest to decide to end a pregnancy, the Court also reaffirmed that restrictions on abortions are invalid if they place an "undue burden" on a woman's decision to have an abortion.<sup>8</sup> That standard, the Court explained, requires courts to consider "the burdens a law imposes on abortion access together with the benefits" when determining if an abortion restriction imposes an undue burden.<sup>9</sup> It also requires courts to assess whether an abortion restriction furthers a valid purpose rather than to defer to any justification that the state claims is reasonable.<sup>10</sup>

For whatever reason, states and the federal courts of appeals do not seem to have gotten the message, or they are just refusing to hear it. States and courts of appeals are seeking to cabin *Hellerstedt* in a variety of unpersuasive ways and recycling—occasionally with success—many of the arguments that *Hellerstedt* rejected. This Essay outlines how they are doing so before touching on why it may be occurring.

#### ARTIFICIAL LIMITS

It is unlikely that any one case will end legislative and legal challenges to women's ability to decide whether to have a child. Writing on the heels of the election, one commentator wrote that "[t]he threat to abortion rights . . . is from politicians who, with the help of lawyers, will continue to try . . . and drain the legal standards governing abortion of any meaning."<sup>11</sup> Consider some of the ways they are doing so now.

##### A. *Limiting the Framework's Applicability*

Several states have attempted to limit *Hellerstedt* by insisting the framework the Court affirmed in that case does not apply to other cases involving other kinds of abortion restrictions. In response to challenges to questionable laws that include a requirement that fetal tissue be buried or cremated, a requirement that women view an ultrasound eighteen hours before an abortion, and bans on a safe and common type of procedure, state attorneys general are arguing that the *Hellerstedt* explanation of the undue burden standard does not apply where an abortion restriction purportedly protects fetal

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7. *See id.* at 2298.

8. *Id.*

9. *Id.* at 2309.

10. *Id.* at 2309–10.

11. Leah M. Litman, *Potential Life in the Doctrine*, 95 TEX. L. REV. SEE ALSO 204, 204–05 (2017), <http://www.texaslrev.com/wp-content/uploads/2017/09/Litman-Vol95-SeeAlso.pdf> [https://perma.cc/3M96-2YNH].

life as opposed to protecting women's health.<sup>12</sup> In *Hellerstedt*, they note, the state argued its laws protect women's health, and so, they insist, the standard applied by *Hellerstedt* does not apply to laws that serve other purposes.<sup>13</sup>

While it may be more difficult to assess the relative benefits and burdens where a law purports to protect fetal life,<sup>14</sup> it hardly follows that courts should not apply the undue burden standard to such laws. It would make little sense if courts applied different standards depending on what interest a state invoked; states could merely declare that an abortion restriction serves a different purpose in order to have the law reviewed under a more lenient standard. Indeed, there is evidence that Texas has done just that, both in *Hellerstedt*, and in another case arising out of Texas that is currently before the Fifth Circuit Court of Appeals. In *Hellerstedt*, Texas offered shifting rationales for its restrictions. The law invoked maternal health, and the state initially did the same in the early stage of the litigation.<sup>15</sup> Later on, however, Texas added to what the law said, and argued that its restrictions both promote women's health and protect fetal life.<sup>16</sup> It strains credulity to think that the Supreme Court would have applied an entirely different standard had the state, in its brief to the Court, recited the words "protecting fetal life." Similarly, in a more recent case out of Texas, also captioned *Whole Woman's Health v. Hellerstedt*, Texas initially claimed in its regulations that it was protecting maternal health,<sup>17</sup> but after some time passed following the Supreme

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12. Brief for Defendant-Appellant at 5, 17–18, *Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health*, No. 17-1883 (7th Cir. June 27, 2017); Brief for Defendant-Appellant at 5, 19–20, *Whole Woman's Health v. Hellerstedt*, No. 17-50154 (5th Cir. May 30, 2017); Brief of the Attorneys General of the States of Louisiana et al. by and Through Their Governors in Support of Appellants and Reversal at 1–2, 17–22, *W. Ala. Women's Ctr. v. Miller*, No. 16-17296 (11th Cir. Mar. 17, 2017); Defendant's Response to Plaintiff's Motion for a Temp. Restraining Order at 2, 11, *Whole Woman's Health v. Paxton*, No. 1:17-CV-00690-LY (W.D. Tex. Aug. 11, 2017); Defendant's Response to Motion for Preliminary Injunction at 2, 37, *Hopkins v. Jegley*, No. 4:17-CV-00404-KGB (E. D. Ark. July 11, 2017).

13. Brief for Defendant-Appellant at 17–18, *Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health*, No. 17-1883 (7th Cir. June 27, 2017); Brief for Defendant-Appellant at 19–20, *Whole Woman's Health v. Hellerstedt*, No. 17-50154 (5th Cir. May 30, 2017).

14. Litman, *supra* note 11, at 207–10.

15. TEX. S. RESEARCH CTR., BILL ANALYSIS OF H.B. 2, HB 83-2, 3d Sess. (2013), <http://www.legis.state.tx.us/tlodocs/832/analysis/html/HB00002E.htm> [<https://perma.cc/9LL6-JK6K>]; State Defendants' Trial Brief at 42, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott I)*, 951 F. Supp. 2d 891 (W.D. Tex. 2013) (No. 1:13-cv-00862) ("HB 2 was enacted to protect the health and safety of patients . . .").

16. Appellants' Brief at 2, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott II)*, 748 F.3d 583 (5th Cir. 2013) (No. 13-51008); *see also* Appellants' Reply Brief at 6, *Abbott II*, 748 F.3d 583 (5th Cir. 2013) (No. 13-51008) ("The admitting-privileges requirement was enacted to make abortions safer for patients who choose abortion and to protect fetal life for those patients who do not.").

17. *See* 41 Tex. Reg. 4772, 4773 (July 1, 2016); *see also* Tex. Reg. 7659, 7660 (Sept. 30, 2016) (clarifying the health and safety interest as preventing the spread of disease).

Court's decision in *Hellerstedt*, Texas began arguing that its restriction actually protected fetal life.<sup>18</sup>

Perhaps for these reasons, the Supreme Court has, since *Casey*, only ever announced there to be *one* standard that governs the constitutionality of restrictions on abortion access—the undue burden standard. That is the standard the Court referred to in *Casey* and all subsequent cases involving restrictions on patients, doctors, and clinics.<sup>19</sup> And that is the standard the Court reaffirmed in *Hellerstedt*. *Hellerstedt* reaffirmed that standard for all cases, not merely ones where a state recites an interest in maternal health.<sup>20</sup> That's not surprising, given that *Casey* announced the undue burden standard as one standard.<sup>21</sup> *Casey* also applied the undue burden standard to restrictions that did not purport to promote maternal health, but instead purported to protect potential life.<sup>22</sup> That's the very same standard that the Court reaffirmed in *Hellerstedt*, and there's no basis to say that standard does not apply to other kinds of abortion restrictions.

While no court so far has accepted the argument for two legal standards, states unable to succeed in the district courts have filed appeals that are pending in the Fifth, Seventh, Eighth, and Eleventh Circuits. The courts of appeals now have the chance to rule on the issue. Any decision recognizing two tests would disregard the Supreme Court's clear holding to the contrary.

#### B. Requiring Unnecessary Findings of Fact

If states were just making arguments artificially cabining *Hellerstedt*, it would be one thing. But courts are accepting some of those arguments, and, in doing so, reaching decisions that are hard to square with *Hellerstedt*.

Consider the Eighth Circuit Court of Appeals' recent decision in *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, which upheld an Arkansas requirement that medication-abortion providers must

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18. 41 Tex. Reg. 9709, 9732 (Dec. 9, 2016); Brief for Defendant-Appellant at 19, *Whole Woman's Health v. Hellerstedt*, 17-50154 (5th Cir. May 30, 2017).

19. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992) (plurality opinion).

20. 136 S. Ct. at 2309 (“The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”).

21. *Casey*, 505 U.S. at 876 (explaining that “it is important to clarify what is meant by an undue burden,” which is “a standard of general application”); *id.* at 877 (“[A]n undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”); *id.* at 878.

22. *Id.* at 881–82 (discussing the “interest in potential life” with respect to an informed consent requirement); *Hellerstedt*, 136 S. Ct. at 2309 (explaining *Casey*'s application of the undue burden standard); *Casey*, 505 U.S. at 887–98 (applying the undue burden standard to the spousal notification requirement without suggesting requirement was motivated by health reasons); *id.* at 900–01 (applying undue burden standard to restrictions motivated by “medical research”).

have a contract with a physician who has hospital admitting privileges.<sup>23</sup> The restriction is similar in obvious ways to the restriction at issue in *Hellerstedt*—its substance pertains to admitting privileges, its effect would be to reduce the number of clinics in Arkansas from three to one, and that clinic would only be able to provide surgical abortions.<sup>24</sup> Also, as in *Hellerstedt*, there is no evidence that the new requirement improves health outcomes from the preexisting rules regarding medication abortions. Medication abortions are extremely safe,<sup>25</sup> and providers can refer patients to clinics or health centers for minor complications and consult with emergency room doctors as needed.<sup>26</sup> The district court in *Jegley* had preliminarily enjoined the state from enforcing that requirement, concluding there was little evidence of the requirement’s benefits but considerable evidence of the extent of its burdens.<sup>27</sup>

The Eighth Circuit vacated the preliminary injunction, insisting that the district court had not made the required findings of fact to preliminarily enjoin the requirement. The Eighth Circuit explained that the district court “did not define or estimate the number of women who would be unduly burdened” by the requirement because it “did not determine how many women would face increased travel distances.” Additionally, “the district court did not explain” what it meant by “women in the Fayetteville area.”<sup>28</sup> Nor had the district court “estimate[d] the number of women who would forgo abortions” or “estimate[d] the number of women who would postpone their abortions.”<sup>29</sup>

Whether or not that is a fair interpretation of the district court’s opinion in *Jegley*, it is not a fair interpretation of what *Hellerstedt* requires. There were zero findings in *Hellerstedt* on the number of women who would forgo or postpone abortions, or an estimate of the number of women who “would be unduly burdened.”<sup>30</sup> Instead, the Supreme Court relied on findings about the number of abortions that were performed in the state, the number of clinics that would be left in the state to perform them, and the location of the clinics. Nor did *Hellerstedt*—or the district court in that case<sup>31</sup>—define what it meant by the “Houston, Austin, San Antonio, and the Dallas/Fort Worth

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23. 864 F.3d 953, 958–59 (8th Cir. 2017).

24. *Jegley*, 864 F.3d at 956–57.

25. See *Hellerstedt*, 136 S. Ct. 2311 (citing evidence of “at least five peer-reviewed studies on abortion complications in the first trimester, showing that the highest rate of major complications . . . was less than one-quarter of 1%” (citations omitted)).

26. *Jegley*, 864 F.3d at 956.

27. *Id.* at 956–57.

28. *Id.* at 959.

29. *Id.* at 959–60.

30. *Id.* at 959.

31. *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 681 (W.D. Tex. 2014).

metropolitan region” in contrast with what the Eighth Circuit seemed to require in *Jegley*.<sup>32</sup>

When *Hellerstedt* invalidated the admitting-privileges requirement, the Court also relied on the fact that the requirement offered no medical benefits.<sup>33</sup> The Eighth Circuit did not even factor in the lack of medical benefits that the admitting-privileges law offered apart from misconstruing how to assess the burden the law imposed. *Jegley* thus illustrates how at least one court has accepted a state's mistaken interpretation of *Hellerstedt*, and, in doing so, has required courts to make unnecessary findings of fact before invalidating a restriction on abortions.

### C. *Misleading Readings and Limitations*

Another tactic that states and federal courts of appeals have used to try and limit *Hellerstedt* is to take statements from the decision out of context to support propositions that are inconsistent with other parts of the case and its reasoning. For example, several states are continuing to try and enforce laws that are materially indistinguishable from the restrictions at issue in *Hellerstedt*. Louisiana is seeking to enforce a requirement that every doctor who performs abortions in Louisiana must have admitting privileges at a hospital within thirty miles of where the doctor performs abortions.<sup>34</sup> And Missouri is trying to enforce a law that abortion providers meet the requirements of ambulatory surgical centers, as well as a law that physicians performing abortions maintain admitting privileges at a nearby hospital.<sup>35</sup>

In order to defend these laws, the states try to distinguish *Hellerstedt*, which invalidated restrictions materially indistinguishable to them, in two respects. First, some states claim that *Hellerstedt* “repeatedly instructed the lower courts to consider ‘the record evidence’” and that “challenges necessarily require a fact-intensive inquiry.”<sup>36</sup> Thus, Missouri argues, it should be allowed to prove that its requirements actually do promote maternal health, even if the Supreme Court concluded that Texas's materially indistinguishable requirements did not.<sup>37</sup> It is helpful here to consider what the Supreme Court actually said when it referred to “record evidence” in *Hellerstedt*. *Hellerstedt* rejected Texas's claim that courts need not subject a state's claim that its law furthered women's health to any kind of independent evidentiary inquiry:

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32. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2301 (2016) (plurality opinion).

33. *Id.* at 2301–02.

34. *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27, 35 (M.D. La. 2017), *appeal docketed*, 17-30397 (8th Cir. May 12, 2017).

35. Brief of Appellants at 5–7, *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, No. 17-1996 (8th Cir. July 14, 2017).

36. *Id.* at 43.

37. *Id.* at 47.

The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law. Instead, the Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings. In *Casey*, for example, we relied heavily on the District Court's factual findings and the research-based submissions of *amici* in declaring a portion of the law at issue unconstitutional.<sup>38</sup>

Thus, *Hellerstedt* rejected Texas's argument that courts could not consider evidence that a *plaintiff* offered to challenge an abortion restriction; it did not suggest states were free to relitigate *Hellerstedt* by offering additional evidence for courts to consider in order to uphold restrictions that are materially indistinguishable from the ones the Court invalidated.

Moreover, the "record evidence" the Court cited in *Hellerstedt* concerned the safety of abortion *nationwide*. The "record evidence" on the admitting privileges requirement "included" the following:

- "A collection of at least five peer-reviewed studies on abortion complications in the first trimester, showing that the highest rate of major complications—including those complications requiring hospital admission—was less than one-quarter of 1%."<sup>39</sup>
- "Figures in three peer-reviewed studies showing that the highest complication rate found for the much rarer second trimester abortion was less than one-half of 1% (0.45% or about 1 out of about 200)."<sup>40</sup>
- "Expert testimony to the effect that complications rarely require hospital admission, much less immediate transfer to a hospital from an outpatient clinic."<sup>41</sup>
- "[A] study of complications occurring within six weeks after 54,911 abortions that had been paid for by the fee-for-service California Medicaid Program finding that the incidence of complications was 2.1%, the incidence of complications requiring hospital admission was 0.23%, and that of the 54,911 abortion patients included in the study, only 15 required immediate transfer to the hospital on the day of the abortion."<sup>42</sup>
- "Expert testimony stating that 'it is extremely unlikely that a patient will experience a serious complication at the clinic that requires emergent hospitalization' and 'in the rare case in which [one does], the quality of care

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38. *Hellerstedt*, 136 S. Ct. at 2310 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 888–94 (1992) (plurality opinion)).

39. *Id.* at 2311 (citations omitted).

40. *Id.* (citations omitted).

41. *Id.* (citations omitted).

42. *Id.*

that the patient receives is not affected by whether the abortion provider has admitting privileges at the hospital.’<sup>43</sup>

- “[W]hen directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case. This answer is consistent with the findings of the other Federal District Courts that have considered the health benefits of other States’ similar admitting-privileges laws.”<sup>44</sup>

*Hellerstedt*’s exhortations to consider record evidence were directives for courts not to blindly allow legislatures to enact laws that do not offer any real benefits to women’s health. They were not, as Missouri suggests, invitations for states and courts to disagree with the Court’s assessment of the evidence in *Hellerstedt*. And the record evidence on which *Hellerstedt* relied was nationwide evidence that is relevant to any admitting privileges requirement.

Another tactic that states have urged is to argue that courts are not “competen[t]” to review the “benefits” and “burdens” an abortion restriction imposes when that restriction purportedly was enacted to promote an interest in potential life.<sup>45</sup> To support that claim, the states cite *Gonzales v. Carhart* for the proposition that certain topics are “for resolution by legislatures, not the courts.”<sup>46</sup> While *Carhart* upheld an abortion restriction, *Hellerstedt* explained what that statement in *Carhart* meant and what it did not. Specifically, *Hellerstedt* rejected the Fifth Circuit Court of Appeals’ conclusion that courts “err[] by substituting [their] own judgment for that of the legislature’ . . . in part because ‘medical uncertainty underlying a statute is for resolution by legislatures, not the courts.’”<sup>47</sup> *Hellerstedt* explained that “[t]he statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court’s case law,”<sup>48</sup> and that *Carhart* itself still held that “[c]ourt[s] retain[] an independent constitutional duty to review factual findings where constitutional rights are at stake.”<sup>49</sup>

Here too there is evidence that states are succeeding at getting courts to adopt these readings of *Hellerstedt*. In an extraordinary move, the Eighth Circuit went en banc, as a full court, to vacate an injunction that prohibited Missouri from enforcing its ambulatory-surgical-center and admitting-

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43. *Id.* (citations omitted).

44. *Id.* at 2311–12 (citing *Planned Parenthood of Wis., Inc. v. Van Halen*, 94 F. Supp. 3d 949, 563 (W.D. Wis. 2015)).

45. Brief of the Attorneys General of the States of Louisiana et al., *supra* note 12, at 17–22.

46. *Whole Woman’s Health v. Cole*, 790 F.3d 563, 587 (5th Cir. 2015) (citing *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)); Brief of the Attorneys General of the States of Louisiana et al., *supra* note 12, at 20–22.

47. 136 S. Ct. at 2309 (quoting *Whole Woman’s Health v. Cole*, 790 F.3d 563, 587 (5th Cir. 2015) (citing *Carhart*, 550 U.S. at 163)).

48. *Id.* at 2310.

49. *Id.* (quoting *Carhart*, 550 U.S. at 165)).

privileges requirements—even after a three judge panel had refused to vacate the injunction, with one dissenter.<sup>50</sup> After the providers requested emergency relief from the Supreme Court, the Eighth Circuit subsequently clarified that its order was merely an administrative stay (something it refused to tell the providers when they requested clarification)<sup>51</sup> and then reinstated the district court’s injunction.<sup>52</sup>

#### D. *Frontal Resistance*

In addition to these more back-handed ways of undermining the Supreme Court’s cases on reproductive justice, courts have, occasionally, attempted to do so in more explicit ways. For example, the Eighth Circuit Court of Appeals has explicitly urged the Supreme Court to “reevaluate its jurisprudence” on abortion.<sup>53</sup> In that case, the Eighth Circuit invalidated a law that would have prohibited physicians from performing abortions when the physician could detect a fetal heartbeat.<sup>54</sup> The circuit court recognized that “controlling Supreme Court precedent dictate[d] th[at] outcome,” but it continued for pages to explain the “good reasons” the Supreme Court should revisit those cases.<sup>55</sup>

More recently, the Eighth Circuit ruled that women who receive health care from Planned Parenthood lack a private right of action to enforce a Medicaid Act requirement.<sup>56</sup> The requirement—section 23(A)—provides that Medicaid patients must have free choice of providers. In context, this means that states cannot exclude providers from participating in Medicaid for reasons other than their fitness to provide medical services.<sup>57</sup> Arkansas attempted to terminate Planned Parenthood’s ability to participate in the Medicaid program after a video surfaced that showed a Planned Parenthood employee offering to sell fetal tissue, and some patients sued to prevent that

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50. Order, *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, No. 17-1996 (8th Cir. Sept. 12, 2017) (vacating order denying stay of preliminary injunction); Order, *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, No. 17-1996 (8th Cir. Sept. 15, 2017) (granting motion for stay of preliminary injunction).

51. See Application to Vacate Stay of Preliminary Injunction Pending Appeal at 12 n.8, *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, No. 17A328 (U.S. Sept. 22, 2017).

52. Order, *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, No. 17-1996 (8th Cir. Oct. 2, 2017); Amy Howe, *Planned Parenthood Withdraws Application in Missouri Case*, SCOTUSBLOG (Oct. 2, 2017, 8:59 PM), <http://www.scotusblog.com/2017/10/planned-parenthood-withdraws-application-missouri-case/> [<https://perma.cc/RN48-N3LP>].

53. *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 775 (8th Cir. 2015).

54. *Id.*

55. *Id.* at 773–76; see also *id.* at 772 (writing that it “ha[d] no choice but to follow the majority of the [Supreme] Court in assuming the following principles for the purposes of th[e] opinion”).

56. *Does v. Gillespie*, 867 F.3d 1034, 1047 (8th Cir. 2017).

57. 42 U.S.C. § 1396a(a)(23)(A) (2012).

result as inconsistent with section 23(A) of the Medicaid Act. The Eighth Circuit held that the plaintiffs lacked a cause of action—the authorization to sue—under the Medicaid Act, in a decision that conflicts with decisions of the Sixth Circuit,<sup>58</sup> the Seventh Circuit,<sup>59</sup> the Third Circuit,<sup>60</sup> the Ninth Circuit,<sup>61</sup> and the Fifth Circuit.<sup>62</sup> The reason why so many other courts of appeals had reached a different result is because a prior Supreme Court case, *Wilder v. Virginia Hospital Ass'n*,<sup>63</sup> held that plaintiffs had a private right of action to enforce another provision of the Medicaid Act because, among other reasons, the provision was “intend[ed] to benefit” them.<sup>64</sup> The Eighth Circuit Court of Appeals reasoned that *Wilder* has since been “repudiated”—that is, overruled—by the Supreme Court.<sup>65</sup> The Court has never explicitly overruled *Wilder*, and it is not generally the responsibility of the courts of appeals to anticipate which decisions the Supreme Court will choose to overrule.<sup>66</sup>

#### CONCLUSION

Even if the current Supreme Court were to step in and correct the courts of appeals and states' resistance to *Hellerstedt*, there's no guarantee the harmful effects of these laws would be reversed. Many of these restrictions, when allowed to go into effect, result in the closure of clinics, and when a clinic closes, there's the possibility that it will not reopen, even if the restriction that led to its closure is subsequently invalidated. The aftermath of *Hellerstedt* proves as much. Several of the clinics that closed during the period in which Texas was allowed to enforce its requirement never reopened

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58. See *Harris v. Olszewski*, 442 F.3d 456, 461–62 (6th Cir. 2006).

59. See *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 974 (7th Cir. 2012).

60. *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 182 (3d Cir. 2004) (finding that other similar provisions of Medicaid Act have private rights of action).

61. See *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013).

62. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457 (5th Cir. 2017).

63. 496 U.S. 498, 510 (1990).

64. *Id.* at 509 (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989)).

65. *Does v. Gillespie*, 867 F.3d 1034, 1047 (8th Cir. 2017); *id.* at 1052–53 (Melloy, J., dissenting) (characterizing the majority opinion as concluding that the Supreme Court had implicitly repudiated one of its earlier cases).

66. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”). For a piece surveying the reasons for and against such a rule, see Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651 (1995).

after the Supreme Court stayed the enforcement and ultimately invalidated the law.<sup>67</sup>

It's no secret that President Trump has promised to appoint justices to the Supreme Court, and judges to the courts of appeals, who would overturn *Roe v. Wade*.<sup>68</sup> His administration has arguably sought to get a head start on that project by dramatically undermining the Supreme Court's recent decision in *Hellerstedt*.<sup>69</sup> Some states and federal courts are joining in as well. States are urging courts to limit and undercut *Hellerstedt* in several respects, and occasionally they encounter success in court. Several of the judges on President Trump's list of potential nominees to the Supreme Court authored or joined the opinions that wrote off *Hellerstedt* as all but limited to its facts.<sup>70</sup> If President Trump gets the chance to appoint one of those judges, or another one of the judges on his list of potential nominees, to the Supreme Court, then they will make official what they've thus far only been able to say somewhat obliquely: *Hellerstedt* and *Casey* are no longer the law.<sup>71</sup>

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67. See Sophie Novack, *How Texas's Anti-Abortion Lawmakers Win Even While Losing in Court*, TEX. OBSERVER (Jun. 20, 2017, 9:58 AM), <https://www.texasobserver.org/how-texas-anti-abortion-lawmakers-win-while-losing-in-court/> [<https://perma.cc/5WTB-8SJU>] (“HB 2 [the law at issue in *Hellerstedt*] forced the closure of more than half the state’s abortion clinics, and only three have reopened since.”).

68. Ariane de Vogue, *How Trump's Election Reignites the Abortion Wars*, CNN (Dec. 14, 2016, 8:39 AM), <http://www.cnn.com/2016/12/14/politics/trump-abortion-supreme-court/> [<https://perma.cc/3T2L-FTUL>] (citing Mr. Trump's statement that “[t]he judges will be pro-life” and noting that one of his stated contenders for nomination to the Supreme Court, Judge William Pryor, referred to *Roe v. Wade* as an “abomination”); Emily Schultheis, *Trump Talks to “60 Minutes” About Same-Sex Marriage, Abortion and the Supreme Court*, CBS NEWS (Nov. 13, 2016, 6:58 PM), <http://www.cbsnews.com/news/trump-promises-pro-life-justices-supreme-court-same-sex-marriage/> [<https://perma.cc/W3TM-CQS6>] (noting that Trump said: “I’m pro-life . . . The judges will be pro-life.”).

69. For example, the administration argued that holding a woman in custody should be seen simply as failing to affirmatively facilitate her right to abortion. See Appellants’ Emergency Motion for Stay Pending Appeal at 11–18, *Garza v. Hargan*, No. 17-5236 (D.C. Cir. Oct. 18, 2017).

70. Ariane de Vogue, *CNN's Donald Trump Supreme Court Nominee Shortlist*, CNN (Jan. 12, 2017, 6:31 PM), <http://www.cnn.com/2016/12/06/politics/donald-trump-supreme-court-nominee-shortlist/index.html> [<https://perma.cc/G532-E67P>]. Both Judge Gruender and Judge Colloton sit on the U.S. Court of Appeals for the Eighth Circuit. Judge Gruender authored *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953 (8th Cir. 2017), and Judge Colloton authored *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017).

71. Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1195 (2017) (“Justice Gorsuch’s appointment—along with filling vacancies that could emerge from retirements of Justices Ruth Bader Ginsburg, Anthony Kennedy, or Stephen Breyer during [President Trump’s] term—almost surely will create a majority to overrule *Roe*.”).