Planned Parenthood Mar Monte

Watching the Supremes

A Review of Top Cases Impacting Planned Parenthood and our Patients, Staff, and Communities

The COVID-19 pandemic is wreaking havoc on literally everything in this country, including the U.S. Supreme Court. The Court closed its iconic building to the public in March and, for the first time ever, SCOTUS wonks were (sort of) treated to being in the room where it happens – listening live to oral arguments via telephone conference call.

With 12 cases already postponed to the new term, beginning October 2020, the Court is set to issue fewer opinions in a single term than it has in decades. Even so, the Justices continue to make history with landmark rulings that change the lives of millions.

Below is an analysis of the Court's decisions addressing abortion, birth control, DACA, and LGBTQ rights.

Abortion Access – June Medical Services v. Russo

The U.S. Supreme Court's 1973 *Roe v. Wade* decision, synonymous with safe and legal abortion, has been – and continues to be – on the verge of destruction. The Court's decision in *June Medical Services LLC v. Russo* kept the status quo intact with Chief Justice John Roberts holding the door open for future assaults on abortion access and rights.

At issue in *June Medical* was Act 260, a Louisiana law requiring physicians that provide abortion care to have admitting privileges at a local hospital. Passed with absurd magniloquent language feigning concern for a woman's health and safety, the law would strip health centers of their licenses if they employed an abortion provider without hospital admitting privileges. Laws like this that burden health care providers and the health centers where they work with medically unnecessary requirements are known as targeted regulation of abortion providers ("TRAP") laws. They are designed expressly to limit or end access to abortion.

Admitting privileges, the particular type of TRAP law deployed by the Louisiana legislature, are frequently used as a red herring for protecting women's health, despite the fact that abortion care is one of the safest outpatient procedures. In fact, Justice Stephen Breyer cites the District Court's finding that abortion is "extremely safe." He noted that a person is 14 times more likely to die by carrying a pregnancy to term than by having an abortion, and that the mortality rate for colonoscopies – considered a very safe procedure – is 10 times higher than for abortion.

To obtain admitting privileges, many hospitals require physicians to admit a minimum number of patients, something those who provide abortion care are unable to do precisely because abortion is so safe.

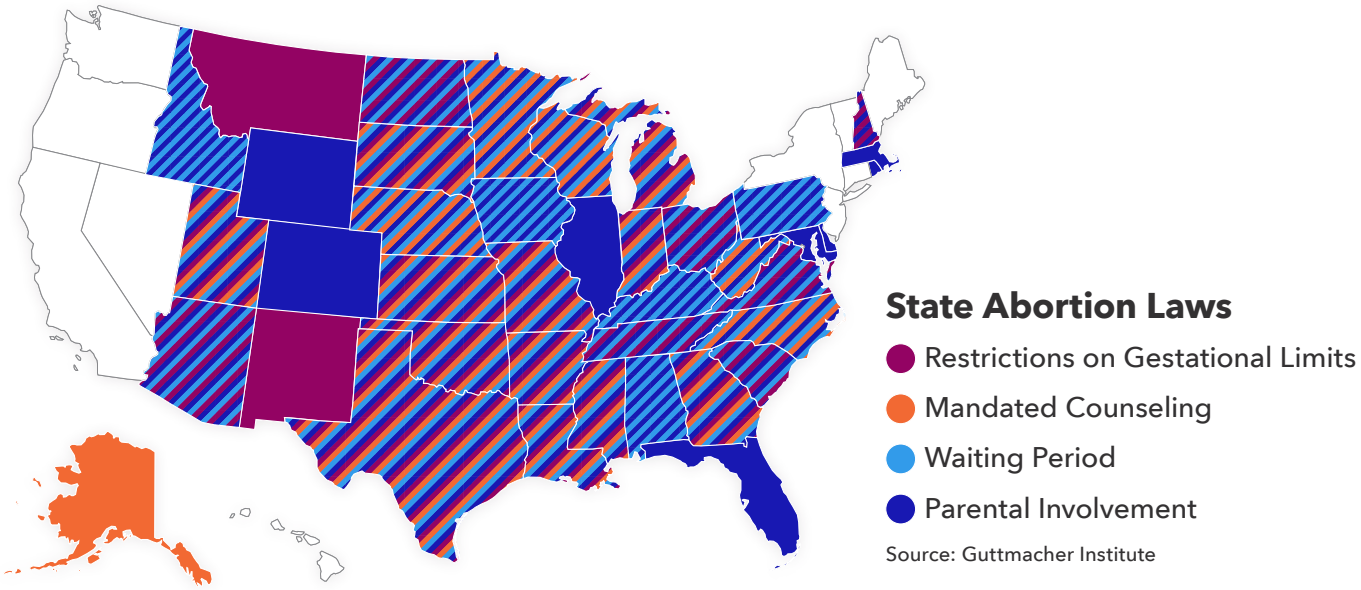
Justice Breyer, writing for the Court, said "The evidence also shows that many providers, even if they could initially obtain admitting privileges, would be unable to keep them. That is because, unless they have a practice that requires regular in-hospital care, they will lose the privileges for failing to use them." Indeed, one of the physicians who has provided abortion care in Louisiana to thousands of women over a decade, had only two patients who required "direct transfer to a hospital and one of them was treated without being admitted."

Even though the Louisiana law was enjoined and never went into effect, it still resulted in the closure of two health centers, leaving only three health centers and a total of five physicians to serve the 10,000 people who obtain abortions in Louisiana each year.

If this sounds familiar, it's because there was no legally significant distinction between this case and *Whole Women's Health v. Hellerstedt*, the Texas admitting-privileges law struck down by the U.S. Supreme Court in 2016. The only difference between 2016 and now is the retirement of Justice Anthony Kennedy, the "swing vote" on the Court, and President Trump appointing two avowed anti-abortion Justices to the bench. Which raises the question, why did the Court agree to hear arguments in the *June Medical* case at all?

In deciding *Roe v. Wade* back in 1973, the Court adopted the highest and most stringent standard of judicial review, called strict scrutiny, that, when applied to abortion, meant that all restrictions on abortion must be *narrowly tailored* to serve a *compelling state interest*.

When the Court heard *Planned Parenthood v. Casey* 19 years later in 1992, it adopted the undue burden test, a much more relaxed form of judicial review. The Court wrote that, "an undue burden exists if its purpose or effect is to place a substantial obstacle in the path" of a person seeking abortion care. ***Casey* had the effect of letting loose the cluster of TRAP laws and other abortion restrictions across the country.**



In this term's *June Medical* decision, Chief Justice Roberts expressly rejects the legal reasoning in *Whole Woman's Health* and adopts the comparatively breezy form of judicial review known as "substantial obstacle." While mainstream media depicted Roberts as the savior of abortion rights because he veiled his concurring opinion in the institutionalist language of *stare decisis,* in reality, **Roberts deviously paved the path for future challenges to abortion care and access while simultaneously attempting to portray the U.S. Supreme Court as the non-political branch of federal government.**

Dahlia Lithwick, an award winning journalist and Supreme Court expert who Planned Parenthood Mar Monte featured during a webinar in June, wrote about the decision, "It's at least worth remarking here that there were six separate opinions Monday, *one from every male member of the court*. Not one female justice wrote a word (very, very 'under his eye')."

The final vote (5-4) in *June Medical* was a small but important victory in a larger war where anti-abortion activists and politicians are relentless in their pursuit of draconian and unconstitutional laws like the ones passed recently in Tennessee and Iowa.

Birth Control – Trump v. Pennsylvania

The year is 2020, and we are still talking about access to birth control. This time in this case, what we're *really* talking about is an employer's religious and "moral" objections to prevent women from obtaining access to the most effective forms of contraceptives as essential, preventive care. As Justice Ruth Bader Ginsburg wrote in her dissent, "Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the *nth* degree."

Two cases – both in Pennsylvania – were combined this term, and we'll get to the details in a minute. First, it's important to know that these legal challenges are the latest in a series of U.S. Supreme Court cases that stem from a provision of the Patient Protection and Affordable Care Act ("ACA"). The law, enacted in 2010, mandated all health insurance policies cover, at no cost to the patient, preventive care and screenings for women, including Food and Drug Administration-approved contraceptives.

The ACA carved out an exception for religious organizations. But some employers, like the owners of a privately held chain of craft stores, Hobby Lobby, held strict personal convictions – not founded in science – and claimed that it was a violation of their religious beliefs to grant employees access to birth control coverage.

In the subsequent 2014 Supreme Court case *Burwell v. Hobby Lobby*, the Court found that under the Religious Freedom Restoration Act, closely held for-profit corporations with religious objections were wrongly being compelled to provide contraception. In a dissent characterized by Justice Anthony Kennedy as "respectful and powerful," Justice Ruth Bader Ginsburg wrote with astonishment that the Court had immensely expanded religious rights to for-profit corporations. "…the exercise of religion is characteristic of natural persons, not artificial legal entities."

What did all of this mean for women needing birth control? After *Hobby Lobby*, certain employers could block their employees' access to birth control. The Obama administration responded by amending the rules to extend the religious objection to not just religious organizations, but also closely held for-profit entities. Although these organizations can refuse to cover birth control in their health plans, health insurance companies must continue to directly provide birth control at no cost to employees.

And that's where the recently combined Supreme Court cases, *Trump v. Pennsylvania* and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,* start. The Trump administration expanded the exemption for birth control coverage to any private employer,

including publicly traded companies with religious or "moral" objections to birth control. This is far beyond the ACA's exemption for religious organizations and closely held for-profit entities.

During oral arguments in May 2020, Justice Sonia Sotomayor sharply raised the issue of what would happen if the government were to similarly exempt religious employers who held objections to a vaccine for COVID-19. The lawyer representing *Little Sisters* thought this was going too far.

We found out what seven of the nine Supreme Court Justices thought when they issued their opinion on the second to last day of the Court's term. **Justice Clarence Thomas, writing for the majority, gave an immense amount of deference to a particular group of people: employers who object to women having access to birth control as part of their employer sponsored health plans.**

The result is a betrayal of the ACA and a stark deviation from Congress's intent for insurers to cover, at no cost to the patient, preventive care and screenings for women. Justice Ginsburg wrote, "This Court leaves women workers to fend for themselves, to seek contraceptive coverage from sources other than their employers' insurer, and, absent another available source of funding, to pay for contraceptive services out of their own pockets."

DACA – Department of Homeland Security v. Regents of the University of California

The Deferred Action for Childhood Arrivals ("DACA") policy was an executive branch memorandum announced by President Barack Obama in 2012 that allowed undocumented young adults who came to the U.S. as children to apply for protection from deportation.

DACA recipients, known as Dreamers, numbered nearly 700,000. The program allowed them to work legally in the U.S. and gave Dreamers' access to other benefits, including health insurance, and the ability to obtain documentation, such as driver licenses.

In 2017, then U.S. Attorney General Jeff Sessions announced that the Trump administration would end DACA. Three different legal challenges brought by states, cities, universities, DACA recipients, businesses, and civil rights groups were all successful with lower courts in ordering the government to keep DACA in place.

By accepting review of these cases, the U.S. Supreme Court was addressing two questions: Whether the Court has the authority to review the case and whether the Trump administration followed proper legal procedure in its quest to end DACA.

The Court rejected the Trump administration's argument that the decision was unreviewable. In the more important question, the Court used the Administrative Procedure Act ("APA") which governs the process federal agencies use to develop and issue regulations.

Roberts, writing for the majority, quickly made clear that role of the Court was not to second guess the judgment of the federal agency and not to decide "whether DACA or its rescission are sound policies." Rather, the Court is to determine if the agency's decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment."

The majority of the Court found that the Trump administration failed to meet this minimum requirement when ending DACA.

In deciding against the Trump administration, Roberts also provided a solution that leaves the door open to future challenges. If the administration wants to rescind DACA, it just has to offer a better explanation in accordance with the APA.

LGBTQ rights – Bostock v. Clayton County, Georgia

In a monumental decision, the U.S. Supreme Court held that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against LGBTQ workers. The Court's ruling continues a more recent trend of support for LGBTQ people following two decisions over the past two decades; the 2003 case, *Lawrence v. Texas*, which made same-sex sexual activity legal across the U.S., and the landmark 2015 case, *Obergefell v. Hodges*, which legalized same-sex marriage in all states. These were precursors to the current case, *Bostock v. Clayton County, Georgia*.

To review, Title VII protects employees from discrimination "because of [an employee's] race, color, religion, sex, or national origin." Not *explicitly* referenced is an employee's gender identity or sexual orientation. While President Lyndon B. Johnson and the drafters of the landmark Civil Rights Act no doubt did not consider that the meaning of sex would one day be inclusive of gender identity or sexual orientation, the current Supreme Court did not find that relevant. Justice Neil Gorsuch, writing for a 6-3 majority, reasoned that the text of the 1964 law is what matters, not the expectations of lawmakers. Gorsuch, a self-described textualist and staunch conservative, surprised many be authoring the majority opinion.

In *Bostock v. Clayton County*, the Court combined three cases, and in each case, the employer fired a long-time employee simply because of their gender identity or sexual orientation. Gerald Bostock, a mental health counselor, was fired for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. Donald Zarda, was fired from his skydiving job by his employer, Altitude Express, after he mentioned being gay. And Aimee Stephens, who when hired presented as a man, was fired by her funeral home employer after she informed her employer she planned to "live and work full-time as a woman."

In his majority opinion, Justice Gorsuch wrote that sex discrimination occurs whenever an employer treats male employees differently from female employees, or vice-versa:, "…[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

To illustrate the Court's point, Gorsuch uses two illustrations: "Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague."

Describing a different example, Gorsuch writes, "Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalized a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision."

Given that fewer than half of the 50 states currently ban employment discrimination based on gender identify or sexual orientation, the Court's decision is a significant expansion of protections. Gerald Bostock, the plaintiff who will forever be associated with this historic decision, penned an op-ed after the Court issued their opinion.

In it, he writes, "Seven years ago I was fired because I'm gay…I lost my job, and my medical insurance, while in recovery after my cancer treatment…Thank you to the Supreme Court for recognizing basic human rights, and sending a clear signal that we should treat each other with dignity and respect. We still have a long way to go to stamp out discrimination. Recent events underscore the injustices in our society, and remind us that we have to work harder. Discrimination, of any kind, has no place in this world."