Problems with the Supreme Court’s Decision in
*Whole Woman’s Health v. Hellerstedt*

On June 27, the Supreme Court, in a 5-3 opinion penned by Justice Breyer, struck down a Texas law that had required abortion clinics to meet the safety standards of ambulatory surgical centers, and had required doctors performing abortions to have hospital admitting privileges. This law was enacted to protect women’s health. [*Whole Woman’s Health v. Hellerstedt*](http://www.supremecourt.gov/opinions/15pdf/15-274_p8k0.pdf), No. 15-274 (U.S.). Chief Justice Roberts and Justices Alito and Thomas dissented.

The majority opinion is one more tragic instance of “abortion distortion”—the tendency of courts to stray from the rules usually used in deciding cases when the underlying dispute involves abortion.

* In 1992, the Supreme Court concluded that abortion laws are constitutional as long as they do not unduly burden a woman’s decision whether to have an abortion before viability. *Planned Parenthood v. Casey*, 505 U.S. 833. The majority in *WWH* claims to be following *Casey*, but actually substitutes for *Casey* a novel balancing test in which courts will decide for themselves whether the benefits of regulation outweigh the burdens. Essentially the Court has turned itself and lower federal courts into *ex officio* medical boards—but only for abortion—denying state legislatures the power to make judgments about what will best protect the health of women seeking an abortion. No procedure performed by a doctor—other than abortion—gets this sort of scrutiny in the federal courts. *WWH*’s departure from *Casey* is all the more remarkable because the latter decision claimed to be rooted in the need to *follow* precedent.

As Justice Thomas puts it: “Whatever scrutiny the majority applies to Texas’ law, it bears little resemblance to the undue-burden test the Court articulated in … *Casey*.” Dissenting op., at 2 (Thomas, J.). “The majority’s undue-burden test looks far less like our post-*Casey* precedents and far more like the strict-scrutiny standard that *Casey* rejected, under which only the most compelling rationales justified restrictions on abortion.” *Id*. at 10.

* When it upheld federal legislation banning partial-birth abortion, the Supreme Court said that it was not the Court’s job to resolve competing claims of medical experts. *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007) (“Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts”); *id*. at 163 (“The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty”). In *WWH*, there was evidence of the benefits of ambulatory surgical center and admitting privileges requirements, but the majority doesn’t discuss that evidence. *See* [USCCB Amicus Brief](http://www.usccb.org/about/general-counsel/amicus-briefs/upload/Whole-Woman-s-Health-v-Hellerstedt.pdf) at 12-19; *see* Dissenting op. at 6 (Thomas, J.) (“[T]oday’s opinion tells the courts that, when the law’s justifications are medically uncertain, they need not defer to the legislature, and must instead assess medical justifications for abortion restrictions by scrutinizing the record themselves.”).
* Ordinarily when faced with a severability clause like the one passed by the Texas legislature, a court will only strike down as much of the law, or as many applications of the law, as are unconstitutional. Here the majority takes the unusual step of striking down the Texas law *in its entirety.* Justice Alito elaborates:

By forgoing severability, the Court strikes down numerous provisions that could not plausibly impose an undue burden. For example, surgical center patients must “be treated with respect, consideration, and dignity.” Tex. Admin. Code, tit. 25, §135.5(a). That’s now enjoined. Patients may not be given misleading “advertising regarding the competence and/or capabilities of the organization.” §135.5(g). Enjoined. Centers must maintain fire alarm and emergency communications systems, §§135.41(d), 135.42(e), and eliminate “[h]azards that might lead to slipping, falling, electrical shock, burns, poisoning, or other trauma,” §135.10(b). Enjoined and enjoined. When a center is being remodeled while still in use, “[t]emporary sound barriers shall be provided where intense, prolonged construction noises will disturb patients or staff in the occupied portions of the building.” §135.51(b)(3)(B)(vi). Enjoined. Centers must develop and enforce policies concerning teaching and publishing by staff. §§135.16(a), (c). Enjoined. They must obtain informed consent before doing research on patients. §135.17(e). Enjoined. And each center “shall develop, implement[,] and maintain an effective, ongoing, organization-wide, data driven patient safety program.” §135.27(b). Also enjoined. These are but a few of the innocuous requirements that the Court invalidates with nary a wave of the hand.

* Ordinarily when plaintiffs lose a lawsuit, they are precluded from bringing the same lawsuit again. Parties get one bite at the apple, not more. Otherwise litigation would be endless and defendants would be subject to repetitive lawsuits on the same underlying claims and issues. The plaintiffs in WWH filed an earlier lawsuit *and lost*. They never sought review of the decision in the Supreme Court, so the decision is and should be treated as final. Instead they filed a *second* lawsuit. And now, departing from the usual rules against re-litigation of previously filed claims, the Court has not only allowed the plaintiffs a second bite at the apple, but has completely invalidated the ambulatory surgical center and admitting privileges requirements.

In all of these ways—the standard of review, deference to legislatures in resolving competing medical claims, enforcement of severability clauses, and preclusion of second claims—the majority departs from traditional rules. As Justice Alito writes: “The Court’s patent refusal to apply well-established law in a neutral way is indefensible and will undermine public confidence in the Court as a fair and neutral arbiter.” Dissenting op. at 3 (Alito, J.).

 *June 27, 2016*