Op-Ed

Abortion isn't an outlier medical procedure, it's a constitutional right

A woman enters Choice Clinic, formerly Whole Woman's Health Clinic, on June 27 in Austin, Texas. (Eric Gay / Associated Press)

Dorothy Samuels

In recent years, opponents of abortion rights have succeeded in making it much more difficult for women in large swathes of the United States to safely and legally terminate their pregnancies. They did so under the flimsy pretext of protecting women's health and safety, securing the enactment in state after state of onerous, cost-prohibitive and medically unnecessary restrictions designed to force clinic closures and otherwise impede abortion access.

On Monday, the Supreme Court responded to a prime example of the dishonest "health and safety" scam with a 5-3 decision striking down an alarmingly effective pair of restrictions in Texas. The court's ruling in Whole Woman's Health vs. Hellerstedt, and the implicit reinforcement of the judiciary's essential role in safeguarding abortion rights, marks a turning point in the still-raging battle to preserve women's reproductive freedom, not just in Texas but nationwide.

The U.S. Supreme CourtThe U.S. Supreme Court's decision to strike down two onerous provisions in a Texas abortion law sends a clear and powerful message that medically unjustified restrictions that obstruct a woman's access to abortion are unconstitutional. In its most sweeping decision on abortion since 1992, the court...

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One of the restrictions at issue mandated that all physicians performing abortions obtain admitting privileges at a nearby hospital, which typically are unattainable for political and bureaucratic reasons unrelated to a doctor's competence. The second restriction singled out abortion providers for costly surgical center standards, revealingly not imposed on facilities performing other common procedures with much higher complication rates, such as colonoscopies and liposuction.

Together those restrictions threatened to leave the state's 5.4 million reproductive-age women with 10 or fewer abortion clinics, compared with around 40 before their enactment, and without any clinic in the more than 500-mile stretch between San Antonio and the New Mexico border – all on the basis of the false notion that abortion is a risky procedure requiring obstructive regulations.

"We conclude that neither of those provisions offers medical benefits sufficient to justify the burdens upon access that each imposes," wrote Justice Stephen Breyer in the majority opinion joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan.

Before the justices was a wildly off-base ruling by a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit. It upheld the state's restrictions, declining to seriously examine whether they imposed an "undue burden" on abortion rights, as called for under the Supreme Court's 1992 ruling in Planned Parenthood of Southeastern Pennsylvania v. Casey.

Access to abortion, as the Supreme Court reaffirmed on Monday, is a fundamental liberty. It's not an outlier medical procedure, it's a constitutional right.

The Fifth Circuit judges refused to acknowledge the strong medical consensus that neither of the challenged provisions actually advanced women's health. They further claimed that "any conceivable

rationale" for the restrictions was sufficient – an ultra-deferential approach that amounts to judicial malpractice. For starters, it misses the critical role of courts in looking behind government explanations and checking legislative and executive overreach.

Breyer took pains to swat down the Fifth Circuit's lame view. "The rule announced in Casey… requires that courts consider the burdens a law imposes on abortion access together with the benefits the law imposes," he wrote.

With that clarification, the court not only avoided the stealthy dismantling of abortion rights in Texas, but also added teeth to the undue burden standard. From here on out, anti-abortion activists will have to demonstrate that any proposed restrictions actually provide a benefit, one that justifies an imposition on a fundamental right. Since most if not all recent abortion laws do no such thing, pro-reproductive rights forces have a powerful new weapon.

At its heart, the case posed a profound test of the court's commitment to evidence-based judging. It may not be surprising, but it's certainly sad that the court's conservative bloc, including Chief Justice John Roberts, refused to call out a rather obvious legislative hoax. They actually went so far as to dismiss the connection between the restrictions and the dramatic drop in open clinics, claiming there was insufficient evidence of a causal link. Such chutzpah would be laughable if the jurists weren't so powerful.

More than a third of American women have at least one abortion before the age of 45, most of them already mothers. Access to abortion, as the Supreme Court reaffirmed on Monday, is a fundamental liberty. It's not an outlier medical procedure, it's a constitutional right that facilitates women's ability to participate equally in the country's economic and social life.

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