NWLC

A DIRE SITUATION FOR WOMEN: THE FUTURE OF *ROE'S* LEGAL PROTECTIONS IF JUDGE KAVANAUGH JOINS THE SUPREME COURT

President Trump promised to nominate only Supreme Court justices who would "automatically" overturn *Roe v. Wade*,[1] and his nominee Brett Kavanaugh has ruled to restrict women's access to abortion.[2] Kavanaugh's confirmation would change the balance of the Supreme Court against access to abortion. Whether the newly constituted Court would overturn *Roe* or profess to uphold the right to abortion while severely undermining it, the result would be dire for women in this country.

Overturning *Roe*

If Judge Kavanaugh joins the Court and rules to overturn *Roe v. Wade*, women could be criminalized and punished in our country for having an abortion.[3]

If the Supreme Court overturned *Roe*, at least 20 states are poised to immediately seek to ban abortion.[4] Problematic state laws on the books include those that automatically ban abortion if *Roe* is overturned, pre-*Roe* abortion bans that could be enforced if *Roe* is overturned, and laws that express a state's intent to restrict the right to legal abortion in the can now end their pregnancies with medication abortion. What has not changed is that women have abortions – and will always need access to abortion – regardless of the legality of the procedure.

When asked about the potential overturning of *Roe* with Judge Kavanaugh on the Supreme Court, Tammi Kromenaker, director of Red River Women's Clinic, North Dakota's only clinic offering abortion care, expressed concern for her patients, particularly the significant percentage of them that live in poverty, for whom access is already difficult. North Dakota has a law on the books that would immediately outlaw abortion in the state if *Roe* were overturned, meaning North Dakota women would have to travel out of state for abortion care. Kromenaker worries that this would leave many of the patients she sees, particularly women of color, women struggling to make ends meet, and rural women, with no access to abortion.[6]

Undermining *Roe*

The Court does not have to overturn *Roe* in order to severely restrict abortion access. The Court could claim to uphold *Roe* but at the same time severely weaken *Roe*'s protections, allowing even more burdensome restrictions than exist today, creating and exacerbating harmful barriers that delay access, increase costs, and force some women to carry an unwanted pregnancy to term.

The Court has upheld *Roe* while undermining its protections in the past. In 1992, the Court issued a decision that changed

The new undue burden standard made it harder to strike down abortion restrictions. In the *Casey* decision itself, the Court upheld a range of Pennsylvania abortion restrictions, including requirements that delayed abortion care for women who had decided to have an abortion, by forcing them to receive biased anti-abortion counseling, and then wait twenty-four hours before obtaining an abortion. After *Casey*, many state legislatures passed burdensome new restrictions on abortion intended to shame, pressure, and punish women who have decided to have an abortion – and to stop abortion altogether.[11]

In 2007, in *Gonzales v. Carhart*, the Court also purported to uphold *Roe* while severely undermining its protections.[12] The Court, by a 5-4 decision, upheld a federal law that banned a medically-appropriate abortion method in every state across the nation with no exception to protect a woman's health. That case represented the first time the Court approved a government restriction on a woman's access to abortion lacking a safeguard for women's health, undermining a core principle of *Roe v. Wade*. Justice Ginsburg said in her dissent that the "Court's hostility to the right *Roe* and *Casey* secured is not concealed."[13] The *Carhart* decision – alongside an influx of anti-abortion politicians put in office by the 2010 elections - led to onslaught of state restrictions in the early 2010s. Since 2011, politicians have passed 401 new laws in 33 states across the country that shame, pressure, and punish women who have decided to have an abortion.[14]

The restrictions – and associated costs – make it difficult, and sometimes impossible for women to obtain an abortion. The restrictions jeopardize women's long-term economic security and have a negative impact on women's equal participation in social and economic life. These include significant, and in some cases, insurmountable, costs that threaten women's financial well-being, job security, workforce participation, and education attainment. Such impacts have particularly detrimental effects on women struggling to make ends meet, women of color, rural women, and women who already have children.[15] In practice, this means that the promise of *Roe* is not a reality for many women.

For example, the Pennsylvania law upheld in *Casey* – that requires women seeking an abortion to receive counseling and then wait twenty-four hours after their counseling before they can receive abortion care – operates as a significant

Andrea Irwin, of the Mabel Wadsworth Center, in Bangor, Maine, explains that, given her state's very rural population, "people have a hard time finding us," since it often means traveling up to 100 miles to get abortion care.[17] Undermining *Roe*'s protections and allowing more incursions on the right would make things even worse for those women trying to get abortion care in Maine – and across the country.

If Kavanaugh were to join the Court, there is every reason to believe that – even if he did not actually overrule *Roe* – he would allow more harmful restrictions on the right to abortion.

The recent 2016 Supreme Court case, *Whole Woman's Health v. Hellerstedt*, illustrates what the Court with Kavanaugh could do to gut *Roe* without overturning it. In that case, the Court issued a 5-3 ruling – with Justice Kennedy as the deciding vote – holding Texas restrictions that created medically unnecessary, burdensome facility and staffing restrictions to be an unconstitutional undue burden.[18] The dissenters – Justices Thomas, Alito, and Roberts – had a different view of the undue burden standard. They agreed with the lower court's assessment that the restrictions did not impose an undue burden – even though the restrictions had already forced twenty-one Texas facilities providing abortion to close.[19]

There is every reason to believe that Judge Kavanaugh in place of Justice Kennedy on the Court would have meant that the restrictions would stand. All but nine or ten Texas clinics – in a state with 5.4 million women of reproductive age – would have been forced to close, meaning fewer doctors, longer wait times, and increased crowding, and leaving more than 500 miles between parts of the state without an abortion provider. If the restrictions were upheld, it would have harmed women's health and taken abortion access away from countless women.[20]

That kind of decision would not have overturned *Roe*, but would have resulted in many more women in this country facing insurmountable hurdles that would act as a complete obstacle to abortion, and they will be forced to carry an unwanted pregnancy to term.

The Supreme Court Could Review a Challenge to *Roe* in the Near Future

- *Bans on abortion at a particular point in pregnancy:* States have passed laws banning abortion at various points in pregnancy, including bans on abortion starting at 6 weeks of pregnancy, before most women even know they are pregnant. A case challenging Mississippi's 15-week ban on abortion is currently before a federal district court.[21]
- *Bans on a particular method of abortion*: States are trying to restrict a safe and common method of second-trimester abortion. Challenges to method bans passed in Texas and Arkansas are currently pending in the 5th and 8th Circuit Courts of Appeals.[22] The 11th Circuit Court of Appeals recently issued a decision on Alabama's method ban, and it's possible that the State of Alabama, who lost that case, could try to bring the case to the Supreme Court.[23]
- *Medically unnecessary and burdensome restrictions on abortion providers*: States continue to pass restrictions on abortion providers in an effort to shut them down, despite the Court's 2016 *Whole Woman's Health v. Hellerstedt* decision holding such restrictions unconstitutional.[25] A case challenging an Arkansas law that would force two of the three clinics in the state to stop providing abortion and effectively ban medication abortion is currently working its way through the courts.[25]

Conclusion

Right now, abortion is not accessible for many women, thanks to prior Supreme Court decisions that have gutted the protections that initially existed under *Roe*. With a Supreme Court vacancy and Trump Supreme Court nominee, the balance of the Court is likely to turn against abortion. The future of abortion access – which is already inadequate for so many – is at risk for women across the country, threatening people's freedom and opportunity to control their lives at the most basic level: their bodies, their families, and their future.

1 Roe v. Wade 410 U.S. 113 (1973).
2 Nat. Women's Law Ctr., Judge Kavanaugh's Supreme Court Nomination Puts Roe V. Wade and Access to Abortion at Serious Risk (2018), https://nwlc.org/resources/judge-kavanaughs-supreme-court-nomination-puts-roe-v-wade-and-access-to-abortion-at-serious-risk/.
3 Many states have retained laws that criminalize abortion or other behavior during pregnancy. These laws have already been used to prosecute women. *See* The Sia Legal Team, Roe's Unfinished Promise: Decriminalizing Abortion Once and For All 1-2 (2018), https://www.sialegalteam.org/roes-unfinished-promise.
4 *See* Ctr. For Reproductive Rights, What If Roe Fell? (2018), https://www.reproductiverights.org/what-if-roe-fell.
5 *See, e.g.,* Nat. Women's Law Ctr., "She's Not Free": Doctors Reflect on a Pre-*Roe* World (2018), https://nwlc.org/resources/abortion-and-roe-v-wade-part-i-pre-roe/.
6 Telephone Interview with Tammi Kromenaker, Director, Red River Women's Clinic (July 27, 2018).
7 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).
8 *See id.* at 834.
9 *See id.* at 912.
10 *See id.* at 837.
11 *See* Guttmacher Inst., An Overview of Abortion Laws (Aug. 1, 2018), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.
12 *See* Gonzales v. Carhart, 550 U.S. 124, 163 (2007).
13 *See id.* at 184.
14 Policy Trends in the States, 2017, Guttmacher Inst. (2018), https://www.guttmacher.org/article/2018/01/policy-trends-states-2017.
15 Brief of Amici Curiae, Nat. Women's Law Ctr, et al. at 12, Whole Woman's Health v. Hellerstedt, 579 U.S. (2016), *available at* https://nwlc.org/resources/45623-2/.
16 Phone interview with Kim Chiz, RN, Executive Director, Allentown Women's Center (July 27, 2018).
17 Phone interview with Andrea Irwin, Executive Director, Mabel Wadsworth Center (July 25, 2018).
18 Whole Woman's Health v. Hellerstedt, 579 U.S. 1 (2016).
19 *See id.*
20 *Whole Woman's Health v. Hellerstedt*, Ctr. For Reproductive Rights (Feb. 23, 2016), https://www.reproductiverights.org/case/whole-womans-health-v-hellerstedt.