Today the Supreme Court heard oral argument in its first abortion case since Justice Kennedy left the bench and was replaced by Justice Kavanaugh. The outcome of this case is likely to come down to Chief Justice Roberts and Justice Kavanaugh.

In *June Medical Services v. Russo* [2] the Supreme Court will decide whether Louisiana’s law requiring physicians performing abortions to have admitting privileges at a local hospital is unconstitutional.

In 2016 in a 5-3 decision the Supreme Court struck down Texas’s admitting privileges law. Louisiana’s Unsafe Abortion Protection Act is nearly identical. It requires physicians performing abortions to have admitting privileges, meaning be a member of the hospital in good standing able to perform surgery on patients, at a hospital not further than 30 miles from the abortion clinic.

In determining the constitutionality of a law regulating abortions the Supreme Court has stated courts must “consider the burdens a law imposes on abortion access together with the benefits those laws confer.”

The Supreme Court struck down the Texas law because half of the abortion clinics in the state had to close because physicians couldn’t get admitting privileges. Many Texas hospitals condition admitting privileges on having a minimum number of patient admissions per year.

The Fifth Circuit found no undue burden in the Louisiana case because the majority of Louisiana hospitals do not require a minimum number of admissions to maintain privileges. The Fifth Circuit concluded that if most abortion doctors in Louisiana put forth a “good-faith effort” they should be able to get admitting privileges.

The challengers claim that the Fifth Circuit is wrong that Louisiana hospitals don’t require a minimum number of admissions to maintain admitting privileges. They point to the district court’s finding that Louisiana’s law would cause two of the state’s three abortion clinics to close.

At oral argument, Justice Alito asked a number of questions indicating that he doesn’t think that the challengers, a number of abortion clinics and abortion doctors, have “standing” to bring the case. Justices Thomas and Gorsuch were silent during the argument, and his line of questing received no traction from Chief Justice Roberts or Justice Kavanaugh. Justice Breyer pointed to eight cases the Court would have to overrule “directly or indirectly” if it were to find no standing. He asked (in jest) if the Court was going to do that maybe it should also reconsider *Marbury v. Madison* (a case from the early 1800s establishing judicial review).

The Justices who tend to vote for a more liberal outcome in controversial cases asked numerous questions indicating they were likely going to rule against Louisiana. Justice Ginsburg asked about the merits of having a 30-mile radius requirement for an abortion doctor to have admitting privileges. She pointed out that most abortions don’t require hospital care but if an abortion did, a patient would be most likely to go to a hospital near her home not near the abortion clinic.
Based on their questions at oral argument the issue of most interest to Chief Justice Roberts and Justice Kavanaugh is whether all admitting privileges laws are unconstitutional based on precedent or whether a court in each state must weigh the burden and benefits of each law. They seemed to both accept the notion that whether admitting privileges laws have benefits that won’t vary by state—but that the burdens may. The challengers argue in their brief [3] that state-by-state weighing of benefits and burdens is unnecessary: where “a law serves no health or safety benefit, any burden imposed by the law is by definition undue.”

The Supreme Court will issue an opinion in this case by the end of June.

By:
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