ONE STEP FORWARD, TWO STEPS BACK: *JUNE MEDICAL* REVIVES THE *CASEY* STANDARD FOR ABORTION JURISPRUDENCE

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I. SUMMARY

This article analyzes two recent abortion cases—*Whole Woman's Health v. Hellerstedt* (2016) and *June Medical Services v. Russo* (2020)—and the so-called *Marks* rule from *Marks v. United States* (1977) establishing that the precedential authority of plurality decisions is the narrowest grounds on which five Justices agree. Specifically, the article explores how *Marks* likely permits *June Medical* to overrule *Whole Woman's Health* even though *June Medical*'s narrowest ground was a single Justice concurrence, and *Whole Woman's Health* was a five-Justice majority opinion. The question is relevant because Justice Alito and Justice Gorsuch recently clashed in *Ramos v. Louisiana* (2020) as to whether *Marks* would permit a single Justice to overrule a majority.

The thesis is as follows: if Justice Alito's view of the *Marks* rule—that a single Justice concurrence may overturn a previous majority opinion—wins the day, then Chief Justice Roberts's concurrence in *June Medical* carries precedential weight. Chief Justice Roberts's concurrence tactically rolls back three legal inventions from Justice Breyer's *Whole Woman's Health* opinion that significantly limited the states' ability to restrict abortion under the *Casey* undue burden standard. Accordingly, if the Court must confront the

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Marks-applied-to-*June Medical* issue when another abortion case inevitably reaches the Court, then the Court will likely affirm that the law is indeed *Casey*'s undue burden standard with a minor stare decisis carve-out for the narrow facts of *Whole Woman's Health* and *June Medical*.

Finally, the article will end by analyzing the emergent circuit split. The Fifth, Sixth, and Eighth Circuits interpret the Chief Justice's *June Medical* concurrence as binding precedent under the *Marks* rule. Taking the opposite view, the Seventh and Eleventh Circuits retain the full scope of *Whole Woman's Health* and reject the Chief Justice's concurrence. Eventually, the Supreme Court will have to provide clarity to settle the split.

II. INTRODUCTION

The two abortion cases struck down state laws—Texas's H.B. 2 and Louisiana's Act 620—each requiring abortion-providers to hold admitting privileges at a nearby hospital. The earlier *Whole Woman's Health* opinion was a 5-3 decision (Justice Scalia had recently passed), and Justice Breyer authored the opinion. Justice Breyer's opinion severely limited states' ability to restrict abortion by asserting three unsupported "inventions": (1) factual deference does not go to the state legislatures for questions of medical uncertainty; (2) abortion is a presumptively safe procedure; and (3) *Planned Parenthood v. Casey*'s undue burden analysis entails balancing the benefits and burdens of a state law restriction. *June Medical* was a plurality; Chief Justice Roberts joined a four-Justice plurality. Chief Justice Roberts wrote a separate, narrower concurrence in which he rolled back the three inventions asserted by Justice Breyer in *Whole Woman's Health* but nonetheless affirmed the result under the authority principle of stare decisis. As the narrowest ground, his concurrence should carry precedential authority and reset the Court's abortion jurisprudence to *Casey*.

However, Justice Alito and Justice Gorsuch recently clashed as to whether the *Marks* rule permits a single Justice concurrence to overrule a majority opinion—the situation presented by Chief Justice Roberts's concurrence in *June Medical* overruling Justice Breyer's majority opinion in *Whole Woman's Health*. In *Ramos v. Louisiana* (2020), Justice Gorsuch expressed doubts as to whether a single Justice concurrence could overrule a majority, while Justice Alito wrote that *Marks* produced the same result even with a single Justice concurrence. If the *Marks* rule operates no differently in such a context, then the Supreme Court's abortion jurisprudence is once again the *Casey* standard.

The article will first explore the history of the *Marks* rule for plurality precedent and note a recent conflict—whether the *Marks* rule permits a single concurrence to overrule a majority opinion—then analyze Justice Breyer's majority opinion in *Whole Woman's Health* and Chief Justice Roberts's individual concurrence in *June Medical*, and conclude by describing the emergent circuit split.

Several themes transcend the historical contexts in the interplay between *Marks*, *Whole Woman's Health*, *Ramos*, and *June Medical*. For instance, the *Marks* rule originates in an unsupported footnote a few years prior to its adoption by the majority of the Court in 1977. In *Whole Woman's Health*, Justice Breyer put forth three assertions that are also not well supported. Itself polarizing—as evidenced by the Justices' competing views in *Ramos*—the *Marks* rule tends to show up in controversial cases where division is extreme, positions are intimately held, and compromise is unlikely. The two key cases for the purpose of this article, *Whole Woman's Health* and *June Medical*, are abortion cases out of Texas and Louisiana which concern the constitutionality of geographic hospital admitting privileges restrictions applied to abortion-providing practitioners.

III. MATH, THE *MARKS* RULE, AND *JUNE MEDICAL*

Unlike math class, the Supreme Court is a place where 5+4 and 4+5 can produce entirely different results. A majority of Justices must agree to all of the contents of the Court's opinion before it is publicly delivered.[1] With nine justices on the United States Supreme Court, the magic number is five.[2] There are several ways to count to five, and many more to get to nine. In fact, there are 126 ways to count to five for a plurality opinion, including the 4-to-1-to-

[1] *Supreme Court Procedures*, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Dec. 12, 2021).

[2] *See* Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795 (2017) (describing the implicit consensus, fifth vote, issue-by-issue, and shared agreement approaches).

4 as in *June Medical*.[3] And there are 256 ways to get a majority opinion, from five—the minimum—to a unanimous nine.[4]

The Supreme Court usually adjudicates by a majority rule; whatever legal position receives the majority of votes prevails, and both the result and reasoning in that case become binding precedent.[5] In some cases, a majority of Justices agree that one party should prevail but cannot agree as to *why*, which is known as a plurality decision.[6] In other words, a majority supports the result but not the reasons. There are several methods to reach that magic number five.[7] Then, the question is: what precedential value, if any, should attach to a "fragmented" decision that issues a ruling without a majority opinion?

A. The Marks *Rule*

The Supreme Court answered this question in the 1977 case *Marks v. United States*.[8] The Court held that a plurality decision's holding, for precedential purposes, is "that position taken by those Members who concurred in the judgments on the narrowest grounds."[9] The *Marks* rule is controversial because the Court did not specifically address how to apply the "narrowest grounds" rule.[10] Many scholars and commenters express views that the rule should be altered, restricted, abandoned, or at least clarified.[11]

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[3] Rod Pierce, *Combinations and Permutations*, MATH IS FUN, (Sept. 2, 2021), http://www.mathisfun.com/combinatorics/combinations-permutations.html. To calculate a combination without repetition or regard to order—as in a Supreme Court decision—the formula is: $\frac{n!}{(n-r)!}$ where *n* is the number of things to choose from (here, nine Justices) and *r* is the number chosen (here, five for a majority decision).

[4] *Id.* The same formula is utilized for five, six, seven, eight, and nine Justices. The sum of their totals is represented by the following formula: $\sum(\frac{n!}{(n-r)!})$ where *n* is still the number of Justices and *r* is still the number chosen. The total number of combinations for a majority opinion is found by totaling the sum of $r = 5$, $r = 6$, $r = 7$, $r = 8$, and $r = 9$.

[5] Linas E. Ledebur, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 PENN. ST. L. REV. 899, 903 (2009).

[6] *Id.* at 904.

[7] *See generally*, Michael L. Eber, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207 (2008) (explaining several methods).

[8] 430 U.S. 188 (1977).

[9] *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion of Stewart, J., joined by Powell and Stevens, JJ.)).

[10] *Id.*

[11] *See, e.g.*, Sean McCauley, *Revising the* Marks *Rule in Light of a Plurality Prone Supreme Court: A Case Study of* National Federation of Independent Businesses v. Sebelius, 26 B.U. PUB. INT. L.J. 257, 276–84 (2017) (advocating for a modified version of the dual majority method); *see*

For critics, the *Marks* rule attempts to "derive precedent from disagreement."[12] Moreover, application of the rule is far from uniform. For instance, a decade after *Marks*, the Court did not follow the principle underlying the rule in *CTS Corp. v. Dynamics Corp. of America* when it treated a plurality's view as nonbinding because it "did not represent the views of a majority of the Court."[13]

Of the challenges to the rule, the most significant is the potential (and actual occurrence) of producing precedent that is singularly the voice of one—or at most a few—but in any event not a majority. This is a problem for lower and subsequent courts who eventually must decipher the narrowest grounds. For instance, the Court divided 4-to-1-to-4 regarding federal criminal sentencing in *Freeman v. United States*.[14] Most courts that applied the *Marks* rule determined that Justice Sotomayor's concurrence was the narrowest ground.[15] However, the other eight Justices criticized Justice Sotomayor's concurring view as "erroneous" and "arbitrary."[16] The *Marks* rule, it seems, can create precedential value not only from less-than-majority views, and not only from a singular view, but from the one view that is least favored among the Justices. Because the *Marks* rule applies when there is no majority on any view, the rule tends to create precedents that are practically undesirable or even legally incorrect.[17]

Perhaps the thrust of the *Marks* controversy is that it tends to come up in controversial subjects, including capital punishment, obscenity, and now—with both *Casey* and *June Medical*—abortion. A brief history of the rule may be instructive.

Not quite fifty years old, the *Marks* rule developed "more from the convenience of a specific historical moment than any deep or well-considered legal principle."[18] Even though the rule takes its name from the 1977 majority opinion that formally adopted it, the rule originated a year prior in *Gregg v.*

also, Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1945 (2019) (arguing that "the *Marks* rule is wrong, root and stem, and should be abandoned"); *see also* Petition for a Writ of Certiorari at 10, Hughes v. United States, 138 S. Ct. 542 (2017) (No. 17-155) (asking for "much needed clarity about how to apply the *Marks* rule").

[12] Re, *supra* note 11, at 2007.

[13] 481 U.S. 69, 81 (1987).

[14] 564 U.S. 522 (2011).

[15] *See, e.g.*, United States v. Graham, 704 F.3d 1275, 1278 (10th Cir. 2013) (collecting decisions from the First, Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits), *abrogated by* Hughes v. United States, 138 S. Ct. 1765 (2018).

[16] *Freeman*, 564 U.S. at 533, 544 (plurality opinion); *id.* at 544 (Roberts, C.J., dissenting).

[17] Re, *supra* note 11, at 1946.

[18] *Id.* at 1948.

Georgia.[19] *Gregg* was itself a plurality decision that conveniently announced a rule of precedent affording precedential weight to plurality opinions.[20] *Gregg* divided the Court as it considered the constitutionality of capital punishment, following years of confusion after an earlier case, *Furman v. Georgia*, had similarly divided the Court.[21] In a footnote, the lead plurality in *Gregg* stated the view—with no authority to support it—that the narrowest concurring opinions in *Furman* left open capital punishment's "*per se*" constitutionality.[22] Thus, the *Marks* rule originates in a plurality opinion that seeks to validate plurality opinions by announcing a rule about a previous plurality opinion. Indeed, there is an oddly self-referential quality about it.[23]

Marks was similar to *Gregg* in posture. In 1957, *Roth v. United States* held for the government that "obscenity [was] not within the area of constitutionally protected speech or press" because the First Amendment was not intended to protect everything, such as materials "utterly without redeeming social importance."[24] Then, a fragmented decision in 1966 agreed that an obscenity conviction could not stand, with each of the Justices' proposed tests offering greater First Amendment protections than *Roth*, and splitting on the appropriate First Amendment standard.[25]

Over the next several years, the Court began summarily reversing obscenity convictions "that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment" (the *Memoirs* plurality approach).[26] The Court applied the *Memoirs* plurality approach at least thirty-one times through 1973.[27] The *Marks* defendants trafficked in obscenity during the *Memoirs* plurality approach, prior to ending their operation in early 1973.[28] A few months after the *Marks* defendants ceased their operation, the Court rejected the *Memoirs* approach and restored the

[19] 428 U.S. 153, 169 n.15 (1976) (plurality opinion of Stewart, J., Powell, J., and Stevens, JJ.).

[20] Re, *supra* note 11, at 1948.

[21] 408 U.S. 238 (1972) (per curiam).

[22] *Gregg*, 428 U.S. at 169 n.15 (plurality opinion of Stewart, Powell, and Stevens, JJ.) (Justices Stewart and White's opinion provided the narrowest "holding" of *Furman*.).

[23] Re, *supra* note 11, at 1948.

[24] 354 U.S. 476, 484–85 (1957).

[25] *See* Re, *supra* note 11, at 1949; A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413, 418–20 (plurality opinion); *id.* at 419–21; *id.* at 426, 431–33 (Douglas, J., concurring in the judgment); *id.* at 421 (Black & Stewart, JJ., concurring in the judgment).

[26] Miller v. California, 413 U.S. 15, 22 n.3 (1973).

[27] Re, *supra* note 11, at 1949; Marks v. United States, 430 U.S. 188, 193 n.7 (1977) (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82–83 n.8 (1973) (Brennan, J., dissenting)).

[28] *Marks*, 430 U.S. at 189.

pro-government posture in *Miller v. California*.[29] The *Marks* defendants were convicted under the new *Miller* approach and they appealed, arguing they should have been tried under the *Memoirs* defendant-friendly standard that was in force during the time of their conduct.[30]

The *Marks* Court agreed, holding that the Due Process Clause precluded retroactive application of the *Miller* standard to the defendants.[31] The Court began its analysis with the plurality rule of precedent asserted by the *Gregg* plurality a year prior. They stated: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest ground . . . .'"[32]

The *Marks* rule ebbed and flowed over the decades, and now the tide is at its peak. From 1977 to 1979, the Court cited *Marks* at least six times but never for the *Marks* rule.[33] Then the Court did not cite *Marks* again until 1986 but then only in a footnote in a dissent.[34] The first application by a majority opinion came more than a decade after *Marks*, in 1988.[35] Over the following thirty years, the Court's majority has cited *Marks* for the *Marks* rule nine times. Five times the Court found binding precedent and, in the context of the highly controversial Anti-Terrorism and Effective Death Penalty Act, "clearly established law."[36] Once, the Court simply noted that the decision below had applied *Marks*.[37] Three times the Court noted *Marks* issues only

[29] *Miller*, 413 U.S. at 23, 25–26.

[30] *Marks*, 430 U.S. at 190.

[31] *Id.* at 191, 196.

[32] *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)).

[33] *See* Re, *supra* note 11, at 1943, 1951 n.59 (listing cases).

[34] Celotex Corp. v. Catrett, 477 U.S. 317, 329 n.1 (1986) (Brennan, J., dissenting).

[35] City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 765 n.9 (1988).

[36] Glossip v. Gross, 576 U.S. 863, 879 n.2 (2015) (finding "controlling opinion"); Panetti v. Quarterman, 551 U.S. 930, 949 (2007) (where opinion concurring in part and concurring in the judgment controlled); O'Dell v. Netherland, 521 U.S. 151, 160 (1997) (where concurrence provided "the narrowest grounds of decision among the Justices whose votes were necessary to the judgment"); Romano v. Oklahoma, 512 U.S. 1, 9 (1994) (where fifth vote, concurring on grounds narrower than those put forth by the plurality, was controlling); *Lakewood*, 486 U.S. at 764 n.9 (where plurality put forth the narrowest rationale for the Court's judgment).

[37] City of Erie v. Pap's A.M., 529 U.S. 277, 285, 297 (2000) (plurality). Plurality may have implicitly applied *Marks*.

to avoid them.[38] The best explanation of the Court's perspective on the *Marks* rule, however, is that it is better avoided.[39]

Ordinarily, the Court simply glides over *Marks* rule issues without confrontation.[40] Notable signs that the Court still implicitly recognizes and utilizes the rule's effect are still there. The Court sometimes describes a plurality opinion as a declaration of "the Court" without noting whether the opinion was a majority, plurality, or even a concurrence.[41] Other times, a non-majority opinion will speak as if it has majority support.[42] Regardless, the *Marks* rule has once again arisen by name.

B. A New Marks Controversy

During the 2020 term, in *Ramos v. Louisiana*, the *Marks* rule received direct discussion in the opinion written by Justice Gorsuch and joined in pertinent part by Justice Breyer and Justice Ginsburg, and in the dissent written by Justice Alito and joined in pertinent part by Chief Justice Roberts and Justice Kagan.[43] The Court held that state juries must find criminal defendants guilty by a unanimous verdict.[44] The *Marks* controversy once again came before the Court as the controlling case was a plurality.

Justice Gorsuch, responding to Justice Alito's dissent, called the proposition that a single Justice could bind the Court or overturn a prior majority "dubious."[45] He wrote that the case at hand—*Apodaca v. Oregon*[46]—"yielded no controlling opinion at all."[47] Justice Gorsuch, along with Justice Breyer and Justice Ginsberg, rejected the idea that "a single

[38] Hughes v. United States, 138 S. Ct. 1765, 1772 (2018); Grutter v. Bollinger, 539 U.S. 306, 325 (2003); Nichols v. United States, 511 U.S. 738, 745–46 (1994).

[39] *Nichols*, 511 U.S. at 745–46 (The majority "th[ought] it not useful to pursue the *Marks* inquiry to the utmost logical possibility.").

[40] Re, *supra* note 11, at 1943, 1953-54.

[41] *See, e.g.*, Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (discussing Burson v. Freeman, 504 U.S. 191 (1992) as the reasoning of "the Court" even though the opinion was a plurality); *see also* Re, *supra* note 11, at 1954 n.87.

[42] *See, e.g.*, Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015) (plurality opinion) (stating "we hold" at the end of Part II, despite no majority support for Part II); *see also* Re, *supra* note 11, at 1954 n.87.

[43] 140 S. Ct. 1390 (2020).

[44] *Id.* at 1395.

[45] *Id.* at 1402 (Gorsuch, J., plurality joined by Ginsburg, J., and Breyer, J.).

[46] 406 U.S. 404 (1972) (plurality opinion).

[47] *Ramos*, 140 S. Ct. at 1403.

Justice's opinion *can* overrule prior precedents under 'the logic' of *Marks*."[48] In other words, a single Justice's opinion cannot overrule a majority opinion.

On the other hand, Justice Alito, joined by Chief Justice Roberts and Justice Kagan, wrote the opposite. They did not think that the *Marks* rule "applies any differently when the precedent that would be established by a fractured decision would overrule a prior precedent" from a majority opinion.[49]

For non-majority judgments of the Court, Justice Alito addressed two[50] "separate questions relating to the precedential effect."[51] The first question is whether the position taken by a single concurring Justice can form the binding rule for which the whole decision stands.[52] *Marks* clearly answers this in the affirmative. The "logic of *Marks* applies equally no matter what the division of the Justices in the majority" even where the narrowest ground is supported by only one Justice.[53] The second question is whether the *Marks* rule applies any differently when the precedent that would be established by a fractured decision would overrule a prior precedent by a nonfractured Court.[54] According to Justice Alito, "the logic of *Marks*" also dictates an affirmative answer and there is no case law holding otherwise.[55] Justice Alito's analysis of *Marks* stops there because "this question is academic."[56]

It is a fresh, if academic question—and one not yet answered by a majority—whether *Marks* applies when prior precedent from a majority would be overturned by a plurality or even a single Justice's view. According to Justice Alito, and apparently the Chief Justice and Justice Kagan, the answer is yes.[57] With the passing of Justice Ginsburg and Justice Breyer's retirement from the Court, it seems that Justice Gorsuch may now find his

[48] *Id.* (majority) (quoting Alito, J., dissenting, joined by Roberts, C.J., and Kagan, J., in pertinent part). Additionally, reasoned Justice Gorsuch, "*Marks* never sought to offer or defend such a rule." *Id.* (majority).

[49] *Id.* at 1431 (Alito, J., dissenting).

[50] Justice Alito's dissent also addressed a third question because there was a dispute as to whether Justice Powell's reasoning in *Apodaca*—that the Fourteenth Amendment did not incorporate every aspect of the Sixth Amendment jury-trial right—was binding precedent in deciding *Ramos*. *See id.* at 1431. He answered in the negative, but that case-specific inquiry need not be addressed here. Clearly, non-binding precedent is no precedent. The *Marks* rule thus does not apply.

[51] *Ramos*, 140 S. Ct. at 1430–31 (Alito, J., dissenting).

[52] *Id.* at 1431.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

view held by a single Justice. Accordingly, Justice Alito's view is likely to prevail if, and when, the "dubious proposition" comes before the Court. That circumstance may arise sooner rather than later in the wake of *June Medical*.

C. Applying the Marks *Rule to* June Medical

In *June Medical*, a plurality decision, Chief Justice Roberts joined in the judgment and submitted his own concurrence.[58] His concurrence noted: "Neither party has asked us to reassess the constitutional validity of [the *Casey*] standard."[59] Nonetheless, Chief Justice Roberts's concurrences announced that *Whole Woman's Health* should be contained to its factual terms, understanding that it is an *application* of *Casey*'s undue burden framework, and not an *expansion* upon it.[60] In this way, Chief Justice Roberts's concurring opinion is the narrowest ground between the five Justices who joined in the judgment.

Justice Breyer, Justice Ginsburg, Justice Sotomayor, and Justice Kagan would have upheld the full scope of the framework from *Whole Woman's Health*, interpreting *Casey* to involve a balancing of the benefits and burdens.[61] Chief Justice Roberts's concurrence views such a test as a departure from the *Casey* standard, and so jettisons it, but nonetheless treats *Whole Woman's Health* as authoritative under the doctrine of stare decisis.[62] In this tactical maneuver, Chief Justice Roberts delivers an apparent win for both pro-choice and pro-life advocates by striking down the restriction at issue for the second time and simultaneously rolling back the broader scope announced in *Whole Woman's Health* and repeated in the *June Medical* plurality.[63] In this case, it matters whether one looks at the forest or the trees.

Applying the *Marks* rule to the plurality decision of *June Medical*, the dispute between Justice Alito and Justice Gorsuch is dispositive. According to Justice Alito's view, the "logic of *Marks*" affirms that Chief Justice Roberts's sole concurrence may carry the weight of binding precedence sufficient to overrule the 5-to-3 majority decision in *Whole Woman's Health*.[64] On the other hand, Justice Gorsuch's view is that Chief Justice Roberts's solitary concurrence in the *June Medical* plurality cannot overturn

[58] June Med. Servs. v. Russo, 140 S. Ct. 2103 (2020) (Roberts, C.J., concurring).
[59] *Id.* at 2135.
[60] *Id.* at 2138–39.
[61] *Id.* at 2120 (plurality opinion).
[62] *Id.* at 2139 (Roberts, C.J., concurring).
[63] *Id.*
[64] Ramos v. Louisiana, 140 S. Ct. 1390, 1430–31 (2020) (Alito, J., dissenting).

the opinion issued by the *Whole Woman's Health* majority.[65] The pivotal question is whether the logic of *Marks* means Chief Justice Roberts's sole concurrence overturns the prior majority precedent or whether it does not.[66] If Justice Alito wins the day, then the Chief Justice's concurrence removes the teeth from *Whole Woman's Health*, positioning abortion jurisprudence firmly within the *Casey* standard. The following section explores *Whole Woman's Health* and *June Medical*.

IV. JUSTICE BREYER'S THREE INVENTIONS IN *WHOLE WOMAN'S HEALTH*

At issue in *Whole Woman's Health* were two Texas requirements: (1) physicians performing abortions had to have admitting privileges at a hospital within thirty miles of the location where the abortions took place; and (2) the minimum standards for abortion facilities were the equivalent of the minimum standards for ambulatory surgical centers.[67] The policy and purpose underlying the admitting privileges requirement was to "help ensure that women have easy access to a hospital should complications arise during an abortion procedure."[68] The district court's record indicated that the admitting-privileges requirement decreased the number of facilities providing abortions by half, from about forty to about twenty, which the Court decided placed a substantial burden in the path of a woman's choice.[69]

Justice Breyer's opinion asserted three statements—or inventions—that were not well supported. First, factual deference goes to the district court rather than to the legislature for questions of medical uncertainty.[70] Second, abortion is a presumptively safe procedure.[71] And third, *Casey*'s undue burdens analysis includes a balance of a restrictive law's benefit against any burdens to women.[72] By purporting to exposit from *Casey*, Justice Breyer expands the scope far beyond its text.

[65] *Id.* at 1404 (Gorsuch, J., majority opinion).
[66] *See id.* at 1431 (Alito, J., dissenting).
[67] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).
[68] *Id.* at 2311.
[69] *Id.* at 2312 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion)).
[70] *Id.* at 2310.
[71] *Id.* at 2311.
[72] *Id.* at 2309.

A. Deference goes to the District Court, not the State Legislature

First, Justice Breyer said that factual deference effectively goes to the district court rather than to the legislative process.[73] The opinion broke from previous holdings that state legislatures "enjoy wide discretion" for deciding questions of "medical uncertainty as to the safety of abortion procedures."[74] In the words of Justice Gorsuch's dissent in *June Medical*, responding to the same assertion:

> The judicial power is constrained by an array of rules . . . about the deference due the legislative process . . . . Individually, these rules may seem prosaic. But, collectively, they help keep us in our constitutionally assigned lane, sure that we are in the business of saying what the law is, not what we wish it to be.[75]

Justice Breyer's opinion, on the other hand, says—without citing authority—that allowing legislatures to "resolve questions of medical uncertainty is also inconsistent with this Court's case law."[76] Instead, the Court, when determining the constitutionality of laws regulating abortion procedures, "has placed considerable weight upon evidence and argument presented in judicial proceedings."[77] Justice Breyer cited no clear rule or example for a court's superiority to the state legislature but did cite to *Gonzales v. Carhart*, notwithstanding that *Gonzales* "point[ed] out that [the Court] must review legislative 'factfinding under a deferential standard.'"[78] Additionally, the authority for this assertion is, nebulously, *Casey*'s discussion of parental and spousal notification concerning the potential consequences of requiring paternal or parental involvement.[79]

Thus, the Fifth Circuit's ruling that "the district court erred by substituting its own judgment for that of the legislature . . . [because] medical uncertainty

[73] *Id.* at 2311.

[74] *See* Charmaine Yoest, *Introduction* to WOMEN'S PROTECTION PROJECT (2013), https://media1.razorplanet.com/share/511538-7984/resources/466118_WWP_Book_DE_P2.pdf; *see also* Gonzales v. Carhart, 550 U.S. 124, 163 (2007) (collecting cases).

[75] June Med. Servs. v. Russo, 140 S. Ct. 2103, 2171 (2020) (Gorsuch, J., dissenting).

[76] *Whole Woman's Health*, 136 S. Ct. at 2310; *cf.* Jones v. United States, 463 U.S. 354, 365 n.13 (1983) ("The lesson we have drawn is not that government may not act in the face of uncertainty, but rather that *courts should pay particular deference to legislative judgments*." (emphasis added)).

[77] *Whole Woman's Health*, 136 S. Ct. at 2310.

[78] *Id.* (quoting Gonzales v. Carhart, 550 U.S. 124, 165 (2007)).

[79] *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 888–94 (1992) (finding spousal consent requirement an undue burden but upholding parental consent requirement)).

underlying a statute is for resolution by legislatures, not the courts" was incorrect.[80] By deferring to the district court's findings of fact—although contradictory to those found and reported by the state—the *Whole Woman's Health* opinion granted considerable discretion to trial courts in determining the purposes and effects of abortion regulation, even on issues of medical uncertainty.

B. Abortion is Presumptively Safe

The second invention is the result of the first. According to Justice Breyer, "abortion in Texas was extremely safe."[81] The significance of this simple statement cannot be overstated. Justice Breyer relied on the district court determination that abortions were safer than other procedures and that Texas death and nonfatal complication rates were sufficiently low compared to other states, other procedures, and other times, and so Justice Breyer also declared that abortion was "extremely safe."[82]

Abortions are presumptively safe. Why? Because the district judge thought abortions in Texas were *safe enough*, even though the legislature determined that they were not. It was an unelected judge's *opinion* that death rates were satisfactorily low in stark opposition to elected policymakers in Austin who believed they should be lower. By applying the first invention—deference to the trial court rather than legislative process—the Court left its "constitutionally assigned lane" and simply said what it wished.[83]

C. Casey *entails a balancing of the burdens and benefits*

Third, Justice Breyer wrote that the Fifth Circuit's "articulation of the [*Casey*] standard [was] incorrect."[84] "The rule announced in *Casey*" wrote Justice Breyer, "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."[85] Rather than invalidate the restrictions under the *Casey* purpose prong (an undue burden has the "purpose or effect of placing a substantial obstacle in the path of a

[80] *Id.* at 2309 (quoting Whole Woman's Health v. Cole, 790 F.3d 563, 586–87 (5th Cir. 2015), *rev'd and remanded sub nom.* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016)).

[81] *See id.* at 2311.

[82] *Id.* at 2302, 2298–99, 2311–12 (comparing abortion to colonoscopies, vasectomies, endometrial biopsies, and plastic surgery); *see also* Plaintiffs' Trial Brief at 10, Whole Woman's Health v. Lakey, No. 1:14-CV-284-LY, 2014 WL 11511477 (W.D. Tex. Aug. 12, 2014).

[83] June Med. Servs. v. Russo, 140 S. Ct. 2103, 2171 (2020) (Gorsuch, J., dissenting).

[84] *Whole Woman's Health*, 136 S. Ct. at 2309.

[85] *Id.* (citing, broadly, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887–98 (1992)).

woman seeking an abortion of a nonviable fetus"[86]), the Court engaged in a balancing analysis.[87] The plurality concluded that "neither of these provisions confer[red] medical benefits sufficient to justify the burdens upon access that each imposes."[88] In other words, a restrictive law need not rise to the level of an undue burden—as required by *Casey*—to be unconstitutional; it is sufficient that the burdens merely outweigh the purported benefits.

Do not miss the forest for the trees. To understand the impact of Justice Breyer's reasoning, it is essential to step back. When the benefits and burdens of restricting a presumptively safe procedure are balanced, there are few—if any—restrictions that will be upheld. Indeed, what is the value of impeding that which is already safe? There are no benefits to restricting a safe procedure. So, the burdens will *always* outweigh the benefits; the laws will *always* be struck down. Under the *Whole Woman's Health* analysis, restrictive laws will not—indeed cannot—survive judicial review. Further, no factual report by state legislatures will overcome a trial judge's presumption of safety because the trial court's interpretation controls.[89]

V. CHIEF JUSTICE ROBERTS UNWINDS JUSTICE BREYER'S THREE INVENTIONS

Just a few years after *Whole Woman's Health*, another abortion case was before the Supreme Court: *June Medical Services L.L.C. v. Russo*.[90] This time it was Louisiana's Act 620, a law restricting abortion to physicians holding admitting privileges at a hospital within thirty miles from the location where the abortion was to be performed.[91] Sound familiar? Louisiana argued that facts, circumstances, and anticipated results in Louisiana were different enough from those in Texas that the holding in *Whole Woman's Health* should not control.[92]

The district court made detailed findings of fact and determined that "admitting privileges serve no 'relevant credentialing function,'" and that abortion-providing "physicians may be denied privileges 'for reasons

[86] *Casey*, 505 U.S. at 877.

[87] *Whole Woman's Health*, 136 S. Ct. at 2309–14.

[88] *Whole Woman's Health*, 136 S. Ct. at 2300.

[89] *See id.* at 2310 (implying that district courts can override legislative policy decisions when supporting "'evidence presented in the District Court contradicts' some of the legislative factfinding").

[90] 140 S. Ct. 2103 (2020) (formerly June Medical Services L.L.C. v. Gee).

[91] *Id.* at 2113.

[92] *Id.* at 2132–33.

unrelated to [medical] competency.'"[93] The district court concluded that the law would drastically burden women's right to choose abortions.[94] On appeal, a panel of Fifth Circuit judges reviewed the evidence *de novo* and concluded the district court erred by overlooking "remarkably different" facts between Louisiana's Act 620 and the Texas law at issue in *Whole Woman's Health*.[95] The panel concluded that "no clinics will likely be forced to close on account of the Act," and the law would not impose an undue burden on women's right to choose.[96] A divided Fifth Circuit denied rehearing en banc.[97]

A. The 4-to-1-to-4 Distribution

The Court decided *June Medical Services L.L.C. v. Russo* on June 29, 2020 and was, unsurprisingly, fractured. In a 4-to-1-to-4 decision, the Louisiana law was struck down as unconstitutional.[98] Justice Breyer wrote the opinion for the four-Justice plurality, joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan. Chief Justice Roberts joined in the judgment, submitting his sole concurring opinion.[99] Four dissenting opinions were filed by Justice Thomas, Justice Alito, Justice Gorsuch, and Justice Kavanaugh.[100]

B. Justice Breyer's Plurality: Whole Woman's Health *2.0*

Justice Breyer's plurality followed the full scope of his *Whole Woman's Health* opinion, including its interpretation of *Casey*'s undue burden test as involving a balancing of benefits and burdens. The opinion cited to *Whole Woman's Health* and *Casey* to explain that, "in applying [*Casey*'s undue

[93] *Id.* at 2115.

[94] *Id.* at 2116.

[95] June Med. Servs. v. Gee, 905 F.3d 787, 791 (5th Cir. 2018), *rev'd sub nom.* June Med. Servs. v. Russo, 140 S. Ct. 2103 (2020).

[96] *Id.* at 810–11.

[97] June Med. Servs. v. Gee, 913 F.3d 573, 573 (5th Cir. 2019).

[98] *June Med. Servs.*, 140 S. Ct. at 2133.

[99] *Id.* at 2103.

[100] *Id.* Justice Thomas dissented because, in his view, plaintiffs lacked standing, the Court lacked authority to declare a "duly enacted law" unconstitutional, and the Court's abortion precedents "created the right to abortion out of whole cloth." Justice Alito (joined by Justice Gorsuch, and joined in part by Justice Thomas and Justice Kavanaugh) criticized the plurality's abandonment of *Casey* for the balancing test established in *Whole Woman's Health*. Justice Gorsuch wrote separately to argue that the Court exceeded its authority in striking down the law. Justice Kavanaugh separately dissented to acknowledge that a 5-4 plurality rejected the *Whole Woman's Health* balancing test, while a different 5-4 plurality concurred to strike down Act 620. He concluded that the record did not adequately permit evaluation of the law and the case should have been remanded for additional factfinding.

burden] standards, courts must 'consider the burdens a law imposes on abortion access together with the benefits those laws confer.'"[101] And again, while legislative factfinding is reviewed "under a deferential standard"—as with *Whole Woman's Health*—"the balance tipped against the statute's constitutionality" because the district court—as with *Whole Woman's Health*—determined that "abortion in Louisiana [was] extremely safe."[102]

The plurality's tone is noticeably different than the opinion in *Whole Woman's Health*.[103] It reads more like a lower court opinion *defending* the application of *Whole Woman's Health*, almost as if the plurality recognized that *Whole Woman's Health* was an overreach, knew the composition of the Court changed, and doubled down anyway.

In sum, the plurality fell in line with the *Whole Woman's Health* opinion's three-fold inventions to strike down Act 620 because (1) abortion was presumptively safe, (2) because the district court contradicted the legislature and said so, and (3) the burdens—unsurprisingly—outweighed the benefits. According to the plurality, there was no benefit, and the burden was clear; thus, the statute should be invalidated.[104]

C. Chief Justice Roberts's Concurrence

Chief Justice Roberts supplied the necessary fifth vote to invalidate but did not agree with the plurality's balancing of benefits and burdens test. While he concurred in the result, he argued that *Whole Woman's Health* did not create a new balancing test.[105] Instead, it merely applied *Casey*'s undue burden standard.[106] Thus, Chief Justice Roberts concurred with the plurality because *June Medical* was so factually similar to *Whole Woman's Health* that

[101] *Id.* at 2120 (Breyer, J., plurality) (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016), and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877–78 (1992)).

[102] *Id.* at 2114, 2120 (Breyer, J., plurality).

[103] For example, the plurality's sentence structure tends to subtly, and cleverly, shift the subject from the law to the courts (*compare, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016) ("*The rule* announced in *Casey* . . . *requires* that courts consider the burdens . . . together with the benefits.") (emphasis added), *with June Med. Servs.*, 140 S. Ct. at 2120 ("We went on to explain that, in applying these standards, *courts must 'consider* the burdens a law imposes . . . together with the benefits.") (emphasis added)) and softens its tone (*compare also Whole Woman's Health*, 136 S. Ct. at 2310 (stating "*the Court* . . . *added* that we must not 'place dispositive weight' on [legislative] 'findings'") (emphasis added), *with June Med. Servs.*, 140 S. Ct. at 2120 ("*We cautioned* that courts . . . must not 'place dispositive weight' on [legislative] 'findings'") (emphasis added)).

[104] *June Med. Servs.*, 140 S. Ct. at 2112.

[105] *Id.* at 2135–36 (Roberts, C.J., concurring).

[106] *Id.* at 2138.

the principle of stare decisis demanded the same *outcome*—and nothing more.[107]

Chief Justice Roberts's concurring opinion announced that *Whole Woman's Health* should be restricted to the narrow facts of the case, understood as a strict application of the *Casey* doctrine.[108] He acknowledged that he "joined the dissent in *Whole Woman's Health* and continue[d] to believe that the case was wrongly decided."[109] Nonetheless, the issue "is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case."[110]

Chief Justice Roberts went on to affirm the holding in *Whole Woman's Health* and join the *June Medical* plurality based on stare decisis.[111] He then tactically refuted the analysis of Justice Breyer's three inventions from *Whole Woman's Health* by explicitly rejecting two and thereby implicitly rendering the third obsolete.[112] Chief Justice Roberts asserted that (1) the substantial obstacle test does not include a balancing test and (2) state legislatures receive great deference in questions of medical uncertainty.[113]

First, he wrote: "There is no plausible sense in which anyone, let alone this Court, could objectively" analyze under Justice Breyer's balancing framework.[114] "Attempting to do so would be like 'judging whether a particular line is longer than a particular rock is heavy'"[115] and "would require [the Justices] to act as legislators, not judges."[116] Instead, *Casey* focused on the existence of a substantial obstacle, a query familiar to and within the province of judicial determination.[117] In other words, Chief Justice Roberts's concurrence jettisons the broad balancing test of the benefits and

[107] *Id.* at 2141–42.
[108] *See id.* at 2140–41.
[109] *Id.* at 2133.
[110] *Id.*
[111] *Id.* at 2134.
[112] *See id.* at 2133–42.
[113] *Id.* at 2136, 2139.
[114] *Id.* at 2136.
[115] *Id.* at 2136 (quoting Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment)).
[116] *Id.*
[117] *Id.* (citing Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 694–95 (2014) (asking whether the government "substantially burdens a person's exercise of religion" under RFRA); Az. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S 721, 748 (2011) (asking whether the law "imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups"); and Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999) (asking, in the context of the ADA, whether an individual's impairment "substantially limits one or more major life activities")).

burdens as promulgated in *Whole Woman's Health* in favor of the familiar undue burden test.

Second, the "traditional rule"—consistent with *Casey*—is "that state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[118] Experts frequently disagree about scientific and medical issues affecting policy.[119] Abortion is no different.[120] When experts disagree, legislatures decide, and judges defer.[121] The Court has long recognized when a legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation . . . ."[122]

Even in *Casey*, several restrictions "did not impose a substantial obstacle . . . notwithstanding the District Court's finding that the law[s] did 'not further the state interest in maternal health.'"[123] Justice Breyer did not address them. As mentioned above, Justice Breyer only pointed to *Casey*'s spousal notice for his proposition that any burden not outweighed by some benefit would be unconstitutional.[124]

In contrast, Chief Justice Roberts pointed to Pennsylvania's twenty-four-hour waiting period, reporting and recordkeeping requirements, parental notice requirements, and the requirement that physicians provide certain "truthful, nonmisleading information"—each upheld by *Casey*.[125] In none of these challenges did the *Casey* Court find a substantial obstacle even though the restrictions imposed some degree of burden.[126] The only challenge that

[118] *Id.* (quoting Gonzales v. Carhart, 550 U.S. 124, 163 (2007)).

[119] *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 360 n.3 (1997) (In categorizing mental illness, "psychiatric professionals are not in complete harmony . . . . These disagreements, however, do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that the legislatures have been afforded the widest latitude . . . .").

[120] *See, e.g.*, Whole Woman's Health v. Paxton, 10 F.4th 430, 470 (5th Cir. 2021) (Ho, J., concurring) ("The record of this case demonstrates that scientists disagree about what gestational phase an unborn child begins to feel pain."); *see also id.* at 443 n.13 (majority opinion) ("[T]here appears to be a wide range of views.").

[121] Gonzales v. Carhart, 550 U.S. 124, 163 (2007) (collecting cases where state and federal legislatures received "wide discretion to pass legislation in areas where there is medical and scientific uncertainty"); *see also Paxton*, 10 F.4th at 470 (Ho, J., concurring).

[122] Marshall v. United States, 414 U.S. 417, 427 (1974).

[123] June Med. Servs. v. Russo, 140 S. Ct. 2103, 2136 (Roberts, C.J., concurring) (quoting Planned Parenthood of Se. of Pa. v. Casey, 505 U.S. 833, 886 (1992)).

[124] *See supra* A.A

[125] *June Med. Servs.*, 140 S. Ct. at 2136–37 (Roberts, C.J., concurring).

[126] *Id.* at 2137 ("[T]he Court did not weigh this cost against the benefits of the law"; existence of judicial bypass meant parental consent laws did not "constitute an undue burden"; physician

Casey found unconstitutional was spousal notification, and it did so based on "a bevy of social science evidence" supporting clear and probable danger to women seeking abortions.[127]

According to Chief Justice Roberts, *Casey* is clear: while "the Court at times discussed the benefits of the regulations . . . these benefits were not placed on a scale opposite the law's burdens."[128] Rather, *Casey* understands benefits as a "threshold" inquiry for the "requirement that the State have a 'legitimate purpose' and that the law be 'reasonably related to that goal.'"[129]

In viewing *Whole Woman's Health*, Chief Justice Roberts "respect[ed] the statement . . . that it was applying the undue burden standard of *Casey*" and "[n]othing more."[130] And *Whole Woman's Health* did not need more. Neither *Whole Woman's Health*, *June Medical*, nor *Casey*, "call[ed] for consideration of a regulation's benefits, and nothing in *Casey* commands such consideration."[131] The Chief Justice noted that finding a substantial obstacle was sufficient basis for the decision in *Whole Woman's Health*—and also in *June Medical*, because *Whole Woman's Health* carried precedential weight.[132] Under the principle of stare decisis, he concurred in the judgment because *Whole Woman's Health* "require[d] the same determination about Louisiana's law[,]" but his concurrence "adhere[d] to the holding of *Casey*, requiring a substantial obstacle before striking down an abortion regulation" —and "[n]othing more."[133]

Clearly, Chief Justice Roberts rejects two of Justice Breyer's inventions: that the trial court enjoys great deference in factfinding and that *Casey* includes a balancing of the burdens and benefits. What of the third invention, that abortion is a presumptively safe procedure? Chief Justice Roberts did not expressly address this issue because he did not need to; it is irrelevant with the rejection of the other two. After all, if a regulation does not pose a substantial obstacle, then *Casey* presents no bar—regardless of its relative benefits.

disclosure requirements "cannot be considered a substantial obstacle…and…there is no undue burden"; "it is not an undue burden . . . [even though] the law had little if any benefit.").

[127] *Id.*

[128] *Id.* at 2138.

[129] *Id.* (quoting Planned Parenthood of Se. of Pa. v. Casey, 505 U.S. 833, 878 (plurality opinion), 882 (joint opinion)).

[130] *Id.* at 2138–39. (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016) ("We must here decide whether two provisions of [the Texas law] violate the Federal Constitution as interpreted by *Casey*.")).

[131] *Id.* 2139.

[132] *Id.*

[133] *Id.*

D. The Marks *Rule and Chief Justice Roberts's Concurrence*

Applying the principles from the *Marks* rule to *June Medical*, Chief Justice Roberts's concurrence is the narrowest ground on which five Justices agree.[134] The plurality opinion followed the full scope of *Whole Woman's Health*, which purported to apply the undue burden standard with an additional balancing test, one previously unutilized and undiscovered.[135] Chief Justice Roberts's concurrence interpreted *Whole Woman's Health* as merely an application of *Casey*'s familiar undue burden standard. All five members of the plurality agreed that *Whole Woman's Health* applied *Casey*, but only four members contended that *Whole Woman's Health* expanded *Casey* to include a balancing test.[136]

VI. THE EFFECT OF CHIEF JUSTICE ROBERTS'S *JUNE MEDICAL* CONCURRENCE

Chief Justice Roberts, through his concurrence in *June Medical*, managed to strike down Louisiana's law on the grounds of stare decisis. He did so by giving effect to the narrow outcome of *Whole Woman's Health* while rejecting the reasoning that supported that outcome. The plurality in *June Medical* attempted to roll forward the analysis of *Whole Woman's Health*, despite it being an overreaching opinion. This is the kind of political game-playing that Chief Justice Roberts detests. So, he got himself a double win.

First, Chief Justice Roberts preserved the Court's institutional principle of stare decisis. The point of case law is to treat like cases alike, not to wait for history to repeat identical scenarios—and not to circumvent binding authority by relying on minor differences.[137] At some point, the facts are similar enough that they cannot, and should not, be distinguished away. Thus, Chief Justice Roberts's vote for the outcome reinforces the important principle that the Justices are not politicians who can be sympathetic to the party they happen to agree with on an issue. The Chief sends the message: *That is not how we operate on either side of the proverbial aisle*.

Second, the Chief moves the law back to *Casey*. This is a major substantive win for the party that the Chief happens to agree with on the issue.

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[134] *See* Owen P. Toepfer, June Medical *and the* Marks *Rule*, 96 NOTRE DAME L. REV. 1725 (2021) for further analysis of how each definition of "narrowest" used by several federal circuit courts applies to *June Medical*.

[135] *Id.* at 1727.

[136] *Id.*

[137] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018) ("The law of precedent teaches that like cases should generally be treated alike. . . ").

The move is tactical, subtle, looks like a loss (a la *Marbury v. Madison*[138]), and the effect is missed by those who fail to see the forest for the trees. At a glance, it appears Chief Justice Roberts was "a traitor" to his conservative supporters.[139] He passed on the opportunity to uphold the State's restriction on abortion access, something for which abortion-opponents have little patience. Nonetheless, Chief Justice Roberts rolled back and killed off Justice Breyer's three inventions from *Whole Woman's Health* that would have closed the door to virtually all restrictions on abortion, a clear victory for typically pro-life conservatives.

Thus, the narrowest grounds of *June Medical* is the *Casey* standard as articulated by Chief Justice Roberts in his concurrence with no additional balancing of the benefits and burdens. *June Medical* nullifies Justice Breyer's three inventions in *Whole Woman's Health* while affirming its outcome only, according to the principle of stare decisis. The standard, then, is the undue burdens analysis without the additional balancing test from *Whole Woman's Health*.

VII. RESULTING CIRCUIT SPLIT

But in the wake of *June Medical*, a circuit split emerges. Recall that the key disagreement between Chief Justice Roberts's concurrence and the plurality is what *Whole Woman's Health* meant and how to accord it with *Casey*. According to Justice Roberts, *Casey* entails an analysis of the burdens only—*are they undue?*—while the plurality goes further to balance the benefits as well. Additionally, the circuits may need to determine whether the

[138] *See* 5 U.S. 137 (1803). Thomas Jefferson defeated John Adams in the 1800 presidential election. Just before leaving office, President Adams appointed William Marbury and several others to be federal judges. Jefferson refused to finalize the appointments of these so-called "midnight judges" when he took office. Marbury sued under the Judiciary Act of 1789 to compel mandamus. Chief Justice John Marshall faced a dilemma, as the legitimacy of the Supreme Court's authority hung in the balance. If the Supreme Court issued a mandamus and Jefferson ignored it, the Supreme Court would be powerless to compel compliance. If it did not issue a mandamus, then the Court would appear subservient to the President. Instead, Marshall issued a tactical opinion. Thomas Jefferson, via Secretary of State James Madison, was wrong to prevent the "midnight judges" from taking office. However, the Supreme Court had no jurisdiction in the case and could not force Jefferson to finalize appointments. While the Judiciary Act of 1789 purported to give the Supreme Court original jurisdiction over the matter, the Act was an unconstitutional expansion of the judiciary's power beyond the restraints of Article III. Jefferson did not oppose the Court's ruling because the result was favorable to him. Neither was the Court viewed as subservient to the President because the Court ruled *against* Jefferson. Brilliant.

[139] Kimberly Robinson, *Yes, Roberts is in the Middle. No He's Not a Liberal*, BLOOMBERG L. (July 9, 2020, 11:28 AM), https://news.bloomberglaw.com/us-law-week/yes-roberts-is-in-the-middle-no-hes-not-a-liberal.

district court or state legislature resolves questions of medical and scientific uncertainty. Which view applies depends on how the *Marks* rule applies. Thus, without clear direction from the High Court, the circuits are left with the "vexing task" of "harmoniz[ing] [Supreme Court] decisions as well as possible."[140] The circuits, however, are discordant.

The Fifth, Sixth, and Eighth Circuits agree with this author that Chief Justice Roberts's concurrence is the narrowest ground under *Marks* and his analysis controls. Only the Seventh and Eleventh Circuits currently align with the *June Medical* plurality and undertake the further benefits analysis. Additionally, the Second, Third, Fourth, Ninth, and Federal Circuits have cited to *June Medical*, but none address the contested analysis.[141] Eventually, the Supreme Court will have to resolve the split—unless, of course, *Dobbs v. Jackson* renders the dispute moot and overturns or drastically upends *Roe* and *Casey*.[142]

A. The Roberts (Burden Only) Approach: Fifth, Sixth, and Eighth Circuits

At the time of writing, three circuits hold that the Chief Justice's concurrence represents binding precedent, and that the *Casey* "undue burden" standard does not entail a balancing of the benefits and burdens. The Eighth Circuit was first to rule and wrote briefly to reject both the balancing approach and deference to the court rather than the legislature to resolve questions of medical and scientific uncertainty. Then came the Sixth Circuit, which issued an extraordinarily thorough opinion explaining the circuit's approach to the *Marks* rule and how it interprets *June Medical*. Finally, the

[140] Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 133 (6th Cir. 1994); Nelson v. Quarterman, 472 F.3d 287, 339 (5th Cir. 2006) (Jones, C.J., dissenting).

[141] Clerveaux v. E. Ramapo Cent. Sch. Dist., 984 F.3d 213, 228 (2d Cir. 2021); Folajtar v. Att'y Gen. of the U.S., 980 F.3d 897, 908 (3d Cir. 2020), *cert. denied sub nom.* Folajtar v. Garland, 141 S. Ct. 2511 (2021); Planned Parenthood S. Atl. v. Wilson, No. 21-1369, 2022 WL 517120, at *2 (4th Cir. Feb. 8, 2022); Combe Inc. v. Dr. August Wolff GMBH & Co. KG Arzneimittel, 851 F. App'x 357, 365–66 (4th Cir. 2021); Duncan v. Becerra, 970 F.3d 1133, 1160 n.20 (9th Cir. 2020), *rev'd on reh'g en banc sub nom.* Duncan v. Bonta, 19 F.4th 1087 (9th Cir. 2021); Brooklyn Brewery Corp. v. Brooklyn Brew Shop, 17 F.4th 129, 140 (Fed. Cir. 2021).

[142] *See, e.g.*, Mark Gongloff, *Roe v. Wade is Probably Doomed*, BLOOMBERG OP. (Dec. 1, 2021, 3:49 PM), https://www.bloomberg.com/opinion/articles/2021-12-01/dobbs-v-jackson-supreme-court-will-likely-overturn-roe-v-wade; *see also* Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (granting petition for certiorari); *see generally* Transcript of Oral Argument, Dobbs v. Jackson Women's Health Org., No. 19-1392 (argued Dec. 1, 2021) (providing extensive discussion on stare decisis, alternative standards, viability, and the correctness of *Roe* and *Casey*).

Fifth Circuit joined these two circuits when it reversed a divided panel that initially aligned with the plurality.

1. Eighth Circuit: Clear and Concise that the Concurrence Controls

The Eighth Circuit was the first to determine how *Marks* and *June Medical* should apply, issuing its *Hopkins v. Jegley* opinion just thirty-nine days after *June Medical*.[143] In a surprisingly concise opinion, the Eighth Circuit rejected both the balancing approach and deference to the district court for questions of medical uncertainty.[144] Rehearing and rehearing en banc were both denied.

At issue were four Arkansas state laws regulating abortion: (1) the Arkansas Unborn Child Protection from Dismemberment Act; (2) the Sex Discrimination by Abortion Prohibition Act; (3) an amendment concerning the disposition of fetal remains; and (4) an amendment concerning the maintenance of forensic samples from abortions performed on a child.[145] The district court granted a preliminary injunction preventing enforcement of each of the four.[146] Then, a three-judge panel, writing per curiam, vacated the preliminary injunction and remanded "for reconsideration in light of Chief Justice Roberts's separate opinion in *June Medical*, which is controlling."[147]

The Eighth Circuit panel, echoing the Chief Justice, "rejected the 'observation' made in *Whole Woman's Health* and again by the plurality 'that the undue burden standard requires courts to weigh the law's asserted benefits against the burdens it imposes on abortion access.'"[148] Instead, the court reasoned: "Chief Justice Robert's [sic] vote was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is controlling."[149]

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[143] 968 F.3d 912 (8th Cir. 2020) (rehearing and rehearing en banc denied).

[144] *Id.* at 915–16.

[145] *Id.* at 914.

[146] Hopkins v. Jegley, 267 F. Supp. 3d 1024, 1069, 1085, 1096, 1110–11 (E.D. Ark. 2017), *amended by* No. 4:17-CV-00404-KGB, 2017 WL 6946638 (E.D. Ark. Aug. 2, 2017), *vacated*, 968 F.3d 912 (8th Cir. 2020).

[147] *Hopkins*, 968 F.3d at 916.

[148] *Id.* at 914 (quoting June Med. Servs. v. Russo, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring)).

[149] *Id.* at 915 (quoting Marks v. United States, 430 U.S. 188, 193 (1977), in turn quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) ("When no single rationale explaining the result of a case enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (cleaned up)).

Thus, the Eighth Circuit acknowledged two points emphasized by the Chief Justice. First, a court must decide a single question: "*not* whether benefits outweigh[] burdens," *but instead* "whether a law has the 'effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'"[150] It is the province of legislatures, not courts, to weigh costs and benefits.[151] Second, "in the abortion context, 'state and federal legislatures [have] *wide discretion* to pass legislation in areas where there is *medical and scientific uncertainty.*'"[152]

Accordingly, the district court made two critical errors when it ruled in reliance on *Whole Woman's Health* "without the benefit of Chief Justice Roberts's separate opinion in *June Medical*."[153] First, it applied the balancing analysis to the challenged laws.[154] Second, it failed to give deference to the legislature in resolving questions of medical and scientific uncertainty.[155] The Eighth Circuit panel vacated and remanded the district court's judgment "for reconsideration in light of Chief Justice Roberts's separate opinion in *June Medical*," which the panel expressly noted "is controlling."[156]

2. Sixth Circuit: Robust Analysis Adopting the Roberts Reasoning

The Sixth Circuit also issued its opinion quickly, deciding *EMW Women's Surgical Center, P.S.C. v. Friedlander* forty-eight days after *June Medical*.[157] *Friedlander* contains thorough analysis of the circuit's approach to the *Marks* rule and how it applies to *June Medical*. The Sixth Circuit determined that the Chief Justice's concurrence was the narrowest opinion under *Marks* and is therefore "entitled to as much authority and respect as any other opinion of the Supreme Court."[158] The court also offers, in dicta, a possible inclination for Justice Alito's view in the dispute with Justice

[150] *Id.* at 915 (emphasis added) (quoting *June Medical*, 140 S. Ct. at 2138 (Roberts, C.J., concurring) (in turn quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion)).

[151] *Id.* ("[N]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a *job for the courts*.") (quoting *June Medical*, 140 S. Ct. at 2136 (Roberts, C.J., concurring)).

[152] *Id.* (alteration in original) (quoting *June Medical*, 140 S. Ct. at 2136 (Roberts, C.J., concurring) (quoting Gonzales v. Carhart, 550 U.S. 124, 163 (2007))).

[153] *Id.* at 915–16.

[154] *Id.* at 915.

[155] *Id.* at 915–16.

[156] *Id.* at 916.

[157] 978 F.3d 418 (6th Cir. 2020) (rehearing en banc denied).

[158] *Id.* at 436 (quoting J.L. Spoons, Inc. v. Dragani, 538 F.3d 379, 386 n.2 (6th Cir. 2008)).

Gorsuch as to whether a single Justice opinion may overrule prior precedent.[159]

The law at issue, Ky. Rev. Stat. § 216B.0435, required abortion facilities—in the absence of a statutory waiver—to acquire written agreements with both a hospital and ambulance service for treating and transporting patients with unforeseen complications related to an abortion facility procedure.[160] Beginning in 2016, Kentucky began to scrutinize these agreements more closely and impose more stringent conditions on them.[161] Because EMW—the only licensed abortion facility in Kentucky—could find no Louisville hospital to enter into a compliant transfer agreement, it was unable to satisfy the new and more rigorous regulation requirements.[162]

The district court determined "that the scant medical benefits from transfer and transport agreements are far outweighed by the burden imposed on Kentucky women seeking abortions," amounting to a substantial obstacle and an undue burden.[163] Thus, the district court held that the statute and new regulations were unconstitutional and issued a permanent injunction against their enforcement.[164] Kentucky appealed.[165]

After the Supreme Court decided *June Medical*, the plaintiffs—EMW, its owner, and another facility seeking licensure—submitted a letter citing *June Medical* as support for affirmance; the Commonwealth argued the challenged provisions were constitutional.[166] Like *Hopkins v. Jegley* in the Eighth Circuit, the Sixth Circuit noted that the district court adjudged based on pre-*June Medical* language in *Whole Woman's Health* that "asked whether the benefits of the challenged provisions outweighed their burdens."[167]

The Sixth Circuit explained how *Marks* applies when upholding the law in question and when striking it down. Its application of the *Marks* rule "'follow[s] the reasoning of the concurring opinion with the narrowest line

[159] *See id.* at 433, 436.

[160] *Id.* at 422–23; KY. REV. STAT. ANN. § 216B.0435 (West 1998); 902 KY. ADMIN. REGS. 20:360 § 10 (2017).

[161] *Friedlander*, 978 F.3d at 423–24 (noting, for example, that 902 KY. ADMIN. REGS 20:360 § 10(3)(a) required the partner hospital be in the same county or within a twenty-minute drive of the abortion facility).

[162] *Id.* at 426.

[163] EMW Women's Surgical Ctr., P.S.C. v. Glisson, No. 3:17-CV-00189-GNS, 2018 WL 6444391, at *1 (W.D. Ky. Sept. 28, 2018), *rev'd in part, vacated in part sub nom.* EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 978 F.3d 418 (6th Cir. 2020).

[164] *Id.* at *30.

[165] *Friedlander*, 978 F.3d. at 427.

[166] *Id.* at 428.

[167] *Id.* at 429–30.

of reasoning' that is 'capable of supporting the Court's judgment in that case.'"[168] The "narrowest concurring opinion" is not merely "the Court's *holding*; it 'is the Court's *opinion*' in that case, entitled to as much authority and respect as any other opinion of the Supreme Court."[169] When the fractured decision upholds a law, "the narrowest opinion is the one whose rationale would uphold the fewest laws going forward."[170] Conversely, when the fractured decision strikes down a law, "the narrowest opinion is the one whose rationale would invalidate the fewest laws going forward."[171]

Applying this framework to *June Medical*, "the narrowest opinion concurring in the judgment is the one that would strike down the fewest laws regulating abortion in future cases."[172] And the plurality's opinion is broader. Both the Chief Justice and the plurality "would invalidate any law with 'the effect of placing a substantial obstacle in the path of a woman's choice' to obtain a previability abortion."[173] But only "the plurality would *also invalidate any law* where 'the balance' between the law's benefits and its burdens 'tipped against the statute's constitutionality.'"[174] The plurality's view, being broader in scope, would presumably invalidate some laws that the Chief Justice's view would not.[175] Thus, because "all laws invalid under the Chief Justice's rationale are invalid under the plurality's, but not all laws invalid under the plurality's rationale are invalid under the Chief Justice's," his position is the narrowest.[176] It therefore "constitutes [*June Medical Services*'] holding and provides the governing standard" in the Sixth Circuit.[177]

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[168] *Id.* at 431 (quoting Grutter v. Bollinger, 288 F.3d 732, 741 n.6 (6th Cir. 2002) (en banc), *aff'd*, 539 U.S. 306, 123 S. Ct. 2325 (2003)).

[169] *Id.* at 436 (emphasis added) (quoting J.L. Spoons, Inc. v. Dragani, 538 F.3d 379, 386 n.2 (6th Cir. 2008)). "Because the Chief Justice's controlling opinion in *June Medical Services* sets forth, in a considered opinion, a general standard for how to apply the undue burden test, we must treat that standard as authoritative." *Id.*

[170] *Id.* at 431.

[171] *Id.* at 431–32.

[172] *Id.* at 432.

[173] *Id.* (quoting *June Med. Servs.*, 140 S. Ct. at 2120 (plurality opinion) (quoting *Whole Woman's Health*, 136 S. Ct. at 2309)); *see also June Med. Servs.*, 140 S. Ct. at 2138 & n.2 (Roberts, C.J., concurring in the judgment).

[174] *Friedlander*, 978 F.3d at 432 (emphasis added) (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016)).

[175] *Id.* at 432 n.2. Even though the *June Medical* plurality expressly reserved the question of what standard of review to apply where a regulation is found *not* to impose a substantial obstacle, it is nonetheless "logically impossible for the plurality opinion's standard to be more generous than the Chief Justice's." *Id.*

[176] *Id.* at 433.

[177] *Id.* (alteration in original).

Consequently, the district court erred in attempting to weigh the benefits of the statute and subsequent regulations against their burdens.[178] After determining that the statutes and regulations were reasonably related to a legitimate state interest and that the finding of an undue burden was improper, the Sixth Circuit reversed the district court's judgment, vacated the permanent injunction, and remanded for further proceedings consistent with its opinion.[179]

It is also worth noting that the Sixth Circuit expressly approved of "attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered . . .when that is the determinative opinion."[180] While it did not endeavor to answer whether *Marks* permits a single Justice to overrule a previous majority opinion—because "[b]y its own terms, the Chief Justice's opinion interpreted and applied *Whole Woman's Health* and did not overrule it"—the court may have hinted that it would have interpreted *June Medical* to overrule *Whole Woman's Health*.[181] Such comment is a far cry from Justice Gorsuch's characterization: a "dubious proposition."[182]

3. Fifth Circuit: "Only Burdens" is the Only "Common Denominator" and "Logical Subset"[183]

The Fifth Circuit held that "[u]nder the *Marks* rule, the Chief Justice's concurrence is *June Medical*'s controlling opinion."[184] Because "the Chief Justice's test is a narrower version (only burdens) of the plurality's test (benefits and burdens) . . . [it] controls and [the Fifth Circuit] do[es] not balance the benefits and burdens in assessing an abortion regulation."[185] That resolution, however, was not without a detour.

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[178] *Id.* at 437.

[179] *Id.* at 440, 446–48.

[180] *Id.* at 433 (quoting Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 134 (6th Cir. 1994)). "While 'there is some awkwardness . . . it is the usual practice when that is the determinative opinion.'" *Id.* (quoting *Triplett Grill, Inc.*, 40 F.3d at 134).

[181] *Id.* at 436. "As a lower court, we are bound by the Chief Justice's interpretation [that *Whole Woman's Health* was not overruled] regardless of whether we would adopt that interpretation . . . ." *Id.*

[182] Ramos v. Louisiana, 140 S. Ct. 1390, 1402 (2020) (plurality opinion).

[183] For clarity, this subsection will refer to *Whole Woman's Health v. Hellerstedt* by its complete name. The operative case in the Fifth Circuit is *Whole Woman's Health v. Paxton*, which has four opinions sharing the same name: (1) district court [*Paxton I*]; (2) panel denying Texas's motion to stay injunction pending appeal [*Paxton II*]; (3) panel opinion on the merits [*Paxton III*]; and (4) the Fifth Circuit's en banc opinion [*Paxton IV*].

[184] Whole Woman's Health v. Paxton (*Paxton IV*), 10 F.4th 430, 440 (5th Cir. 2021) (en banc).

[185] *Id.* at 441.

The question arose—unsurprisingly—with Texas Senate Bill 8 (S.B. 8), which, inter alia, prohibits the dilation and evacuation method of abortion, known colloquially as "live-dismemberment."[186] The district court declared S.B. 8 facially unconstitutional, holding that S.B. 8 "plac[ed] a substantial obstacle in the path of a woman's choice . . . ."[187] The district court followed the *Whole Woman's Health v. Hellerstedt* playbook and engaged in a balancing analysis.[188]

On the initial appeal, a two-member majority of a three-judge panel denied Texas's motion for a stay of the injunction pending appeal.[189] The panel expressly rejected Chief Justice Roberts's "only burdens" view in favor of the balancing approach.[190] Judge Don Willett filed a short, seven-sentence dissent because "the case rests upon a now-invalid legal standard."[191] By "a now-invalid legal standard," of course, Judge Willett meant *Whole Woman's Health v. Hellerstedt*.[192] The panel subsequently issued its own opinion on the merits, ruling S.B. 8 unconstitutional under *Whole Woman's Health v. Hellerstedt*.[193] This time, Judge Willett's dissent "explain[ed] why the controlling standard is Chief Justice Roberts's formulation in *June Medical* of the 'undue burden' test from *Casey* rather than the 2016 *Hellerstedt* benefits vs. burdens balancing test."[194]

On rehearing en banc, the Fifth Circuit about faced and adopted Judge Willett's assessment: "We agree with the Eighth and Sixth Circuits in holding

[186] Whole Woman's Health v. Paxton (*Paxton I*), 280 F. Supp. 3d 938, 942 (W.D. Tex. 2017) (where S.B. 8 defines "dismemberment abortion"), *rev'd*, 10 F.4th 430 (5th Cir. 2021); Act of May 26, 2017, 85th Leg., R.S., ch. 441, § 6, 2017 Tex. Gen. Laws 1164, 1165–67 (current version at TEX. HEALTH & SAFETY CODE §§ 171.151–.154); *see also* Press Release, Ken Paxton, Att'y Gen. of Texas, AG Paxton Commends Court's Decision to Uphold Texas' Ban on Live-Dismemberment Abortions (Aug. 20, 2021), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-commends-courts-decision-uphold-texas-ban-live-dismemberment-abortions (referring to the procedure as "live-dismemberment").

[187] *Paxton I*, 280 F. Supp. 3d at 954.

[188] *Id.* at 943–44, 952–54.

[189] *See* Whole Woman's Health v. Paxton (*Paxton II*), 972 F.3d 649 (5th Cir. 2020).

[190] *See id.* at 652–53 ("*June Medical Services LLC v. Russo* has not disturbed the undue-burden test, and *Whole Woman's Health v. Hellerstedt* remains binding law in this circuit.") (citations omitted).

[191] *Id.* at 654–55 (Willett, J., dissenting).

[192] *Id.* at 654.

[193] Whole Woman's Health v. Paxton (*Paxton III*), 978 F.3d 896 (5th Cir. 2020), *withdrawn*, 978 (F.3d 974 (5th Cir. 2020).

[194] *Id.* at 912–33 (Willett, J., dissenting).

that the Chief Justice's concurrence controls."[195] The Fifth Circuit applies *Marks* by looking for a "common denominator" that can "be viewed as a logical subset of" a plurality's opinion.[196] The "common denominator" in *June Medical* "is the undue-burden (substantial-obstacle) analysis" because "[t]he only part [of the plurality's opinion] the Chief Justice disagreed with was the plurality's two-page benefits analysis."[197] So, "the Chief Justice's concurrence controls and [the Fifth Circuit] do[es] not balance the benefits and burdens in assessing an abortion regulation."[198] Thus, "the district court erred by balancing SB8's benefits against its burdens."[199]

B. The Plurality (Balance Benefits and Burdens) Approach: Seventh and Eleventh Circuits

On the other side of the matter sit the Seventh and Eleventh Circuits. Both circuits published opinions after the Eighth and Sixth Circuits issued theirs but before the Fifth Circuit. While the Seventh Circuit agreed that the Chief Justice's concurrence is the "narrowest ground," it only ascribes precedential weight to the proposition that *Whole Woman's Health* had stare decisis effect on *June Medical*. Meanwhile, the Eleventh Circuit barely acknowledged the *Marks* rule or the Chief Justice's concurrence except to note that the only common denominator between them is the conclusion that Louisiana's Act 620 constituted an undue burden.

1. Seventh Circuit: The Chief's Concurrence, but Only Stare Decisis

On remand from the Supreme Court, the Seventh Circuit reaffirmed a district court's grant of a preliminary injunction in *Planned Parenthood of Indiana and Kentucky, Inc. v. Box*.[200] The Seventh Circuit accepted the Chief Justice's concurrence as the narrowest ground, but only ascribed precedential authority to the proposition that *Whole Woman's Health* had stare decisis effect on the outcome of *June Medical*.[201] Because the Seventh Circuit's

[195] Paxton IV, 10 F.4th 430, 441 (5th Cir. 2021) (citing Hopkins v. Jegley, 968 F.3d 912, 915 (8th Cir. 2020) and EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 978 F.3d 418, 437 (6th Cir. 2020)).

[196] *Id.* at 441; *see also* United States v. Duron-Caldera, 737 F.3d 988, 994 n.4 (5th Cir. 2013).

[197] *Paxton IV*, 10 F.4th at 440–41.

[198] *Id.* at 441.

[199] *Id.* at 442.

[200] *See* 991 F.3d 740, 742 (7th Cir. 2021).

[201] *Id.* at 744 ("[T]he *June Medical* plurality and concurrence share the narrow, common ground that *Whole Woman's Health* has stare decisis effect . . . . [T]hat is all that they share . . . .").

formulation of *Marks* does not permit the Chief Justice to overrule *Whole Woman's Health*, the Seventh Circuit still applies the balancing test.[202]

A Southern District of Indiana court applied *Whole Woman's Health* when it granted a preliminary injunction against enforcement of an Indiana statute restricting minors' access to abortion.[203] After the Seventh Circuit affirmed the injunction, the State defendants petitioned for a writ of certiorari.[204] The Supreme Court granted it, vacated the Seventh Circuit's decision, and remanded for further consideration in light of *June Medical*.[205] The Seventh Circuit reissued a new opinion but noted that when the Supreme Court issues an order granting, vacating, and remanding (a "GVR" order), it simply "calls for further thought but does not necessarily imply that the lower court's previous result should be changed."[206] The Seventh Circuit did not change its previous result.[207]

After remand from the Supreme Court, the Seventh Circuit held that the Chief Justice's concurrence "offered the narrowest basis for the judgment in that case," but its precedent is quite narrow.[208] The *Marks* rule "does not . . . turn everything the concurrence said—including its stated reasons for disagreeing with portions of the plurality opinion—into binding precedent that effectively overruled *Whole Woman's Health*."[209] The court did not mince words: "That is not how *Marks* works. It does not allow the dicta in a non-majority opinion to overrule an otherwise binding precedent."[210] Because the court still viewed the *Whole Woman's Health* standards as binding, it once again affirmed the district court's preliminary injunction.[211]

[202] *Id.* at 752 ("[T]he balancing test set forth in *Whole Woman's Health* remains binding precedent.").

[203] *See* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, 258 F. Supp. 3d 929, 933 (S.D. Ind. 2017) (statute requiring parental notice for unemancipated pregnant minors seeking abortion without judicial bypass), *aff'd sub nom.* Planned Parenthood of Ind. & Ky., Inc. v. Adams, 937 F.3d 973 (7th Cir. 2019), *reh'g denied sub nom. Planned Parenthood of Indiana and Kentucky, Inc. v. Box*, 949 F.3d 997 (7th Cir. 2019), *vacated*, 141 S. Ct. 187 (2020) (mem.).

[204] *Planned Parenthood of Indiana and Kentucky, Inc.*, 991 F.3d at 741.

[205] *See* Box v. Planned Parenthood of Ind. & Ky., Inc., 141 S. Ct. 187, 188 (2020) (mem.).

[206] *Planned Parenthood of Indiana and Kentucky, Inc.*, 991 F.3d at 743 (citing Klikno v. United States, 928 F.3d 539, 544 (7th Cir. 2019)).

[207] *Id.* at 742.

[208] *Id.* at 741.

[209] *Id.*

[210] *Id.*

[211] *Id.* at 752.

As to *Marks*, the Seventh Circuit rejected using dissents as well as the so-called swing-vote model.[212] The court analyzed the "logical subsets" approach, which it noted appears to be the darling model of the Supreme Court.[213] A Seventh Circuit court's goal is to find a "genuine common denominator underlying the reasoning of a majority of justices. That opinion—the narrowest one—'must . . . embody a position implicitly approved of by at least five Justices who support the judgment.'"[214] If the operative concurrence "fails to fit within a broader logical circle drawn by the other opinions, *Marks* simply does not apply."[215]

Applied to *June Medical*, the "critical sliver of common ground" between the plurality and Chief Justice Roberts's concurrence is that "*Whole Woman's Health* was entitled to stare decisis effect on essentially identical facts."[216] The *Marks* rule "applies *only* to that common ground," produces no guidance for applying the undue burden standard, and is therefore insufficient to overrule *Whole Woman's Health*.[217] Thus, *Whole Woman's Health* remains binding precedent.[218] Because the Seventh Circuit's approach would require a majority of non-dissenting justices to hold against the balancing test set forth in *Whole Woman's Health*, the Seventh Circuit continues to balance the benefits and burdens.[219]

2. Vacated Eleventh Circuit: No Logical Subset, and Possibly Not Even Narrower

The Eleventh Circuit panel followed the *Whole Woman's Health* balancing test, considering the burdens along with the benefits.[220] The panel ascribed as little authority to *Marks* and the Chief Justice's concurrence as it committed ink to the page discussing them.

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[212] *See id.* at 744–46 (declining to add together the Chief Justice's concurrence and the dissenting opinion to declare *Whole Woman's Health* overruled); *see also id.* at 748–51 (declining to treat the decisive fifth vote's reasoning, much less *all* aspects of that opinion, as controlling).

[213] *Id.* at 747 ("The Supreme Court itself appears to follow this approach."). The Seventh Circuit also describes the logical subsets approach.

[214] *Id.* at 746 (citations omitted) (quoting King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991)).

[215] *Id.*

[216] *Id.* at 748 (first citing June Med. Servs. v. Russo, 140 S. Ct. 2103, 2120 (plurality); and then citing June Med. Servs. v. Russo, 140 S. Ct. 2103, 2139 (2020) (Roberts, C.J., concurring)).

[217] *Id.*

[218] *Id.*

[219] *Id.* at 751–52.

[220] Reprod. Health Servs. v. Strange, 3 F.4th 1240, 1258 (11th Cir. 2021) (per curiam), *vacated sub nom.* Reprod. Health Servs. *ex rel.* Ayers v. Strange, 22 F.4th 1346 (11th Cir. 2022)) (mem.).

The challenged laws were amendments to the Alabama Parental Consent Act requiring parental consent or a judicial order for an unemancipated minor to obtain an abortion.[221] The district court declared that some of the amendments were unconstitutional as violative of the undue burden standard, balancing the benefits and the burdens under *Whole Woman's Health*.[222]

A three-judge panel issued a per curiam opinion, affirming the district court.[223] The panel rejected that *Marks* required any weight be given to the Chief Justice's concurrence. In a footnote, the panel concluded: "the Chief Justice-dissenters bloc did not carry the day and did not overrule *Whole Woman's Health*" and "[his] concurrence cannot fairly be considered narrower than the plurality opinion."[224]

Instead, the panel embraced the full scope of *Whole Woman's Health*:

> A law creates an undue burden if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." A court must consider "the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health* recites the binding standard that we must apply here, and the Supreme Court's recent decision in *June Medical Services, L.L.C. v. Russo*, did not change that.[225]

The court extensively discussed the benefits—which it determined were "incremental at best"—and the burdens.[226] The burdens, including confidentiality and involvement of the district attorney, court appointed guardians ad litem, and parents or guardians, presented a substantial obstacle.[227] Having "agree[d] with the district court that several provisions of the Act create an undue burden under *Whole Woman's Health* and *Casey*,"

[221] ALA. CODE § 26-21-4 (2014).

[222] *Strange*, 3 F.4th at 1250 (listing the seven provisions declared unconstitutional); *id.* at 1260 (acknowledging district court's standard).

[223] *See id.* at 1246.

[224] *Id.* at 1259 n.6.

[225] *Id.* at 1258–59 (citations omitted) (first quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992); and then quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016)).

[226] *See id.* at 1262–67.

[227] *Id.* at 1263–67.

the Eleventh Circuit panel affirmed.[228] But the Eleventh Circuit granted rehearing en banc and vacated the panel's opinion.[229]

VIII. CONCLUSION

What can we expect going forward? It is unlikely that any state could enact an admitting privileges law like those in Texas or Louisiana because the principle of stare decisis, as described by *June Medical*, will almost certainly render such a law factually indistinguishable. However, many other restrictions likely have a better chance at surviving judicial review under *Casey* (as interpreted by *June Medical*) than they would under the expanded standard of *Whole Woman's Health*. Additionally, Justice Amy Coney Barrett—heralded as "Scalia's heir"[230]—may provide the conservatives with the five votes needed to walk back even more abortion jurisprudence, even without the Chief Justice's vote. The retirement of Justice Breyer gives President Biden his first opportunity to nominate a justice; however, his pick is unlikely to impact the ideological alignment of the Court.[231] Finally, the Supreme Court is poised to reshape the landscape in *Dobbs v. Jackson Women's Health Organization*.[232] The substance of the anticipated summer 2022 decision? That is anyone's guess. But unless the Supreme Court radically upends *Roe* and *Casey*, it will eventually have to address the emergent split and provide clarity about how to apply *Marks* to the competing *June Medical* and *Whole Woman's Health* opinions.

What is certain, however, is the *Marks* rule is back before the Court in a big and controversial way, and much hangs in the balance. At least for now.

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[228] *Id.* at 1270.

[229] Reprod. Health Servs. *ex rel.* Ayers v. Strange, 22 F.4th 1346 (11th Cir. 2022) (mem.).

[230] *See* Michael Tarm, *Amy Coney Barrett, Supreme Court Nominee, Is Scalia's Heir*, ASSOCIATED PRESS NEWS (Sept. 26, 2020), https://apnews.com/article/election-2020-ruth-bader-ginsburg-chicago-us-supreme-court-courts-547b7de5b6ebabedee46b08b5bb37141.

[231] Caitlin Clark, *How Will Biden's Nominee Change the Supreme Court?*, TEX. A&M TODAY (Feb. 25, 2022), https://today.tamu.edu/2022/02/25/how-will-bidens-nominee-change-the-supreme-court/.

[232] 141 S. Ct. 2619 (2021) (granting petition for certiorari); *see generally* Transcript of Oral Argument, Dobbs v. Jackson Women's Health Org., No. 19-1392 (argued Dec. 1, 2021) (containing extensive discussion on stare decisis, alternative standards, viability, and the correctness of *Roe* and *Casey*). For an interesting draft of what full-scale unwinding might look like, see Clarke D. Forsythe, *A Draft Opinion Overruling* Roe v. Wade, 16 GEO. J.L. & PUB. POL'Y 445 (2018).