Written by **Warren Mass** on November 20, 2013

Supreme Court Declines to Block Texas Abortion Restrictions

In a 5-4 vote on November 19, the Supreme Court declined to block a new Texas law that imposes some moderate restrictions on abortion. Consequently, the law will remain in effect pending an appeal at the Fifth U.S. Circuit Court of Appeals in New Orleans.

By its vote, the High Court refused the November 4 emergency application filed by Planned Parenthood and several Texas abortion clinics to overturn a preliminary federal appeals court ruling that allowed a key provision of the law — requiring doctors who perform abortions to have admitting privileges at a nearby hospital — to take effect.

The law, which requires any physician performing an abortion at a Texas clinic to have admitting privileges at a hospital within 30 miles of the clinic, was passed during a special session of the state legislature in July. A vote had been prevented on the measure during the regular legislative session after an uncontrolled pro-abortion mob, encouraged by the filibuster and strong rhetoric of state Senator Wendy Davis (now a candidate for Texas governor) disrupted the proceedings.

However, on October 28, federal District Judge Lee Yeakel handed down a ruling that blocked the law's provisions requiring abortion doctors to have hospital admitting privileges within 30 miles of their clinic, as well as a provision requiring abortionists to follow FDA protocol for abortion-inducing drugs such as RU-486.

Texas Attorney General Gregg Abbott subsequently announced that his office would appeal that ruling, telling reporters that he had "no doubt that this case is going all the way to the United States Supreme Court."

But on October 31, in response to an emergency appeal from Abbott, a panel of judges at the 5th Circuit Court of Appeals reinstated the requirement that abortionists have hospital admitting privileges. The ruling by the appeals court is temporary until a complete hearing is held on the law in January.

In its 20-page ruling, the court acknowledged that the provision "may increase the cost of accessing an abortion provider and decrease the number of physicians available to perform abortions." However, the panel said that the U.S. Supreme Court has held that having "the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate" a law that serves a valid purpose, "one not designed to strike at the right itself."

While the court left in place Yeakel's ruling that overturned the law's restrictions on the dispensing of RU-486 and other drugs that can induce abortion in women, a key pro-life component of the law, a ban on abortion after the 20th week of pregnancy, was also not affected by legal challenge.

It was that reinstatement of most of the law by the court that prompted Planned Parenthood, et al., to file their latest plea, just rejected by the Supreme Court.

The case was *Planned Parenthood of Greater Texas Surgical Health Services v. Gregory Abbott*. In an e-mailed response regarding the plaintiffs' emergency application for a stay, Lauren Bean, a spokeswoman for the office of the attorney general, wrote: "We believe the Fifth Circuit panel's unanimous decision was correct and will continue to defend the law before the U.S. Supreme Court."

Texas Governor Rick Perry praised the Supreme Court's decision, saying, "This is good news both for the unborn and for the women of Texas, who are now better protected from shoddy abortion providers operating in dangerous conditions. As always, Texas will continue doing everything we can to protect the culture of life in our state."

Cecile Richards, president of Planned Parenthood Federation of America (daughter of the late former Texas Governor Ann Richards, and former deputy chief of staff to the U.S. Rep. Nancy Pelosi), said the groups will continue the legal fight:

> We will take every step we can to protect the health of Texas women. This law is blocking women in Texas from getting a safe and legal medical procedure that has been their constitutionally protected right for 40 years. This is outrageous and unacceptable — and also demonstrates why we need stronger federal protections for women's health. Your rights and your ability to make your own medical decisions should not depend on your ZIP code.

Richards did not mention where in the U.S. Constitution this "constitutionally protected right" is found, probably since the document that serves as the supreme law of the land is silent on abortion.

Lauren Bean said on Tuesday that the attorney general's office is "pleased" with the Supreme Court's ruling, noting, "These are commonsense — and perfectly constitutional — regulations that further the state's interest in protecting the health and safety of Texas women."

It is difficult for abortionists to obtain hospital admitting privileges, and the new law's requirement has caused approximately one-third of the abortion clinics in Texas to close, making it more difficult for an estimated 20,000 Texas women to terminate the lives of their unborn children.

The *Christian Science Monitor* quoted Elizabeth Graham, director of Texas Right to Life, who praised the high court's action as a significant step forward. "This ruling signals that Texas is on the verge of a decisive legal pro-life victory," she said. "The recent closures of abortion clinics, even if temporary, prove that [the Texas law] does have a major impact in protecting women and their unborn children from substandard care at abortion clinics."

Texas is but one of several states that have passed laws requiring abortionists to have nearby hospital admitting privileges. Other include Tennessee and Utah. However, courts have temporarily prevented enforcement of similar laws in Alabama, Kansas, Mississippi, North Dakota, and Wisconsin.

Speaking for the majority voting not to block the Texas law, Justice Antonin Scalia said that the appeals court's earlier decision was based on its conclusion that Texas officials were likely to prevail in the case, with the new statute being upheld as constitutional.

The justices owed deference to the appeals court's conclusion, he said. "It would flout core principles of federalism by mandating postponement of a state law without asserting that the law is even probably unconstitutional," Justice Scalia wrote.

Prior to the Supreme Court's 1973 *Roe v. Wade* decision, states were free to restrict, prohibit, or allow

abortion, since abortion is not mentioned in the Constitution and the 10th Amendment states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Suddenly, after *Roe*, the court deemed abortion a fundamental right under the Constitution (which, as noted, ignores abortion) — thereby subjecting all laws attempting to restrict it to the standard of strict scrutiny.

That such an interpretation of the Constitution was novel and unprecedented was brought home by Justices Byron R. White and William H. Rehnquist, who wrote dissenting opinions in this case. White wrote, in part:

> I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the woman, on the other hand.

Rehnquist asserted that, with *Roe*, the court's historical analysis was flawed:

> To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today.

Related articles:

Federal Appeals Court Reinstates Texas Pro-life Measure

Federal Judge's Ruling Halts Key Portions of Texas Pro-Life Law

Pro-abortion Mob Continues as Texas Lawmakers Gather to Pass Pro-Life Bill