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WHEN STARE DECISIS IS ON YOUR SIDE, BUT CHIEF JUSTICE ROBERTS IS NOT: *JUNE MEDICAL V. RUSSO'S* PLURALITY OPINION AND ITS FUTURE EFFECT ON ABORTION JURISPRUDENCE

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I. INTRODUCTION

In 1992, the Supreme Court decided the seminal abortion rights case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[1] Women across the country waited with baited breath for the Court's decision, as it was rumored that this case could overturn *Roe v. Wade*,[2] thus, erasing

*I would like to thank my Faculty Advisor, Professor Carlos A. Ball for his guidance and my family for their unwavering support.

1. *See generally* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (plurality opinion).
2. *See generally e.g.*, Linda Greenhouse, *The Supreme Court; High Court, 5-4, Affirms Right to Abortion but Allows Most of Pennsylvania's Limits*, NY TIMES (June 30, 1992), https://www.nytimes.com/1992/06/30/us/supreme-court-high-court-5-4-affirms-right-abortion-but-allows-most-pennsylvania.html; Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX L. REV. 1189, 1206 (2017).

a woman's right to a safe and legal abortion.[3] Supporters of reproductive freedom were reassured when the Court's plurality opinion in *Casey* reaffirmed the essential holding of *Roe*.[4] However, the Court explained that a State may express its interest in the life of the fetus through the imposition of certain regulations.[5] Most notably, the Court articulated the undue burden standard: if a state regulation has the purpose or effect of placing a substantial obstacle in a woman's path to obtain an abortion of a non-viable fetus, the regulation is unconstitutional.[6]

The Court's ruling in *Casey*, signaled that states may enact abortion regulations that could impede women from obtaining an abortion.[7] Some of these regulations include: waiting periods, informed consent procedures, and targeted regulation of abortion providers ("TRAP") laws.[8] Waiting periods can range from twenty-four to forty-eight hours, and require the woman to wait a mandated period of time between receiving counseling and the abortion procedures; usually requiring her to make two separate trips to the abortion provider.[9] Informed consent

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3. *See also* Barry P. McDonald, *A* Hellerstedt *Tale; There and Back Again?*, 85 U. CIN. L. REV. 979, 988 (2017); M. Akram Faizer, *Federal Abortion Rights Under a Conservative United States Supreme Court*, 69 DRAKE L. REV. DISCOURSE 101, 103 (2020); Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 314 (2020) ("Because it explicitly declined to overrule *Roe*, *Casey* is widely credited with 'saving' the 1973 decision.").

4. *Casey*, 505 U.S. at 846; *see also* Murray, *supra* note 3, at 314.

5. *See e.g.*, *Casey*, 505 U.S. at 846; Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016); Gonzales v. Carhart, 550 U.S. 124, 145 (2007).

6. *E.g.*, *Casey*, 505 U.S. at 874; Chelsea M. Donaldson, Note, Breaking *the TRAP: How* Whole Woman's Health *Protects Abortion Access, and the Substantive Due Process Clause's Rebuke of Anti-Abortion Regulations*, 40 W. NEW ENG. L. REV. 257, 280 (2018).

7. *See, e.g.*, Donaldson, *supra* note 6, at 259; Faizer, *supra* note 3, at 103; Lucy Perkins, *How a Supreme Court Case from Pennsylvania Changed Abortion Access Across the Country*, 90.5 WESA (Sept. 7, 2018), https://www.wesa.fm/post/how-supreme-court-case-pennsylvania-changed-abortion-access-across-country#stream/0.

8. *See, e.g.*, *An Overview of Abortion Laws*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/overview-abortion-laws# (last updated Mar. 1, 2021); *Federal and State Bans and Restrictions on Abortion*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/federal-and-state-bans-and-restrictions-abortion (last visited Mar. 11, 2021); *State Actions Undermining Abortion in 2020*, AM. CTR. FOR PROGRESS (Aug. 27, 2020), https://www.americanprogress.org/issues/women/reports/2020/08/27/489786/state-actions-undermining-abortion-rights-2020/; Christine Vestal, *New Laws Deepen State Differences Over Abortion*, PEW: STATELINE (July 30, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/07/30/new-laws-deepen-state-differences-over-abortion. In addition to these laws, there are several states such that have legislation that will automatically ban abortion if Roe is overturned. *Abortion Policy in the Absence of* Roe, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe (last visited Mar. 11, 2021).

9. *See, e.g.*, Von Diaz, *TRAP Laws Are the New Battleground for Abortion Rights*, COLOR LINES (Nov. 5, 2013, 6:14 PM), https://www.colorlines.com/articles/trap-laws-are-new-battleground-abortion-rights. For a more detailed analysis on these regulations and

laws can include State mandated counseling and procedures that require distribution of certain literature to the woman when seeking an abortion.[10] This literature can include information that is not medically proven or certain, such as the alleged link between abortion and breast cancer, the ability of the fetus to feel pain, and unsubstantiated[11] long term "mental health" consequences for a woman who decides to terminate her pregnancy.[12] Finally, TRAP laws are regulations directed at abortion providers, and can be medical, administrative, or facility-related requirements whose goal is to force closure of clinics that provide abortions.[13] TRAP laws are costly, severe, medically unnecessary, and simply make it more challenging for women to access abortion by limiting the number of providers within a particular state.[14] These laws typically entail certain mandates of offices where abortions are performed such as requirements for procedure rooms and corridors, set obligatory distances between hospitals and abortion providers, and required admitting privileges at hospitals.[15] Implemented under the guise of protection of women's health, many of these state regulations pass constitutional muster under the undue burden set forth in *Casey*.[16]

The strictest of TRAP laws were tested in 2016 in the Supreme Court case, *Whole Woman's Health v. Hellerstedt*.[17] In *Whole Woman's Health*, the Court held that the admitting privileges provision of Texas

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their effect on women, see Hannah Haksgaard, *Rural Women and Developments in the Undue Burden Analysis: The Effect of* Whole Woman's Health v. Hellerstedt, 65 DRAKE L. REV. 663 (2017). *See also* Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—and the Women They Serve—Pay the Price*, 16 GUTTMACHER POL'Y REV., no. 2, June 25, 2013, https://www.guttmacher.org/gpr/2013/06/trap-laws-gain-political-traction-while-abortion-clinics-and-women-they-serve-pay-price.

10. *See, e.g.*, *Types of State Attacks on Abortion*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/types-attacks (last visited Mar. 11, 2021).

11. *See Congress Should Not Legitimize the Mythical "Post-Abortion Syndrome,"* NARAL PRO-CHOICE AM. https://www.prochoiceamerica.org/wp-content/uploads/2016/12/9.-Congress-Should-Not-Legitimize-the-Mythical-Post-Abortion-Syndrome.pdf (last visited Mar. 11, 2021); *Types of State Attacks on Abortion*, *supra* note 10.

12. *See, e.g.*, *An Overview of Abortion Laws*, *supra* note 8.

13. *See id.*; Haksgaard, *supra* note 9, at 683.

14. *See e.g.*, *What are TRAP Laws?*, PLANNED PARENTHOOD , https://www.plannedparenthoodaction.org/issues/abortion/types-attacks/trap-laws#:~:text=Targeted%20restrictions%20on%20abortion%20providers,providers%20and%20women's%20health%20centers. (last visited Mar. 11, 2020); Diaz, *supra* note 9.

15. *See e.g.*, *Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INST.: STATE LAWS AND POLICIES, https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers (last updated Nov. 1, 2020).

16. *See id.*; *see also Types of State Attacks on Abortion*, *supra* note 10.

17. *See e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016). Donaldson, *supra* note 6, at 288.

legislation, HB2, as well as its surgical center policy were unconstitutional because they placed an undue burden on a woman's decision to have an abortion that was not offset by the alleged benefit the laws conferred on the mother.[18] The Court stated that this balancing of the benefits and burdens was derived from *Casey* when it rejected the spousal notification regulation.[19] The admitting privileges provision in the Texas law required physicians who perform abortions to have admitting privileges at a hospital within thirty miles of an abortion facility.[20] Additionally, the provision required that abortion facilities meet minimum standards for ambulatory surgical centers.[21] These regulations, if enforced, would have effectively shut down all but seven abortion providers for the entire state of Texas.[22] The Court held that the ramifications of this requirement, such as, extraordinary travel, long and crowded wait times, would put a substantial obstacle in the way of women seeking abortions, and would thus constitute as an undue burden.[23] The burdens that would be experienced by women were weighed against the little benefits the provisions actually provided to women, and therefore, the regulation was unconstitutional.[24]

June Medical Services v. Russo was an almost identical challenge of state abortion regulations. Like HB2, *June Medical* questioned the constitutionality of Louisiana regulations regarding admitting privileges.[25] The similarities of the regulations left pro-choice advocates confused and concerned when the Court granted certiorari of the case in 2019.[26] With the then 5-4 conservative majority of the Court, including

18. *Whole Woman's Health*, 136 S. Ct. at 2320.

19. *Id.* at 2310, 2320; June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020) (plurality opinion). The Court in *Casey* lays out an extensive analysis discussing that the limited studies available show that most women tell their male partners when they are getting an abortion. *Planned Parenthood v. Casey*, 505 U.S. 833, 892 (1992) (plurality opinion). Those of which who choose not to do so out of fear of violence and other instances of domestic abuse. *Id.* at 893–98. It is this analysis that the Court in *Whole Women's Health* points to in their opinion. *Whole Woman's Health*, 136 S. Ct. at 2309 ("The rule announced in Casey, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer. See 505 U.S., at 887-898, (opinion of the Court) (performing this balancing with respect to a spousal notification provision)").

20. *Whole Woman's Health*, 136 S. Ct. at 2300.

21. *Id. See generally Types of State Attacks on Abortion*, *supra* note 10.

22. *Whole Woman's Health*, 136 S. Ct. at 2301.

23. *Id.* at 2318.

24. *Id.*

25. *June Med. Servs.*, 140 S. Ct. at 2112 (plurality opinion) ("In this case, we consider the constitutionality of a Louisiana statute, Act 620, that is almost word-for word identical to Texas' admitting privileges law.").

26. *See* Murray, *supra* note 3, at 320; Lauren Kelley, *What if the Supreme Court Rules on Abortion and the Country Shrugs*, N.Y. TIMES (June 21, 2020), https://www.nytimes.com/2020/06/21/opinion/supreme-court-abortion-june-medical.html; Jessica Glenza, *Abortion Rights Case is First Test for Right-Leaning US Supreme Court*,

those who dissented in *Whole Woman's Health*, the benefit and burden analysis set forth only three years previously appeared to be in jeopardy.[27] *June Medical*, presented practically the same facts as *Whole Woman's Health*.[28] Indeed, after *Whole Woman's Health* was decided, Louisiana drafted the law at issue, Act 620, in direct response to the Court's decision.[29] Similar to HB2, Act 620, required any doctor performing abortions to hold admitting privileges at a hospital located within thirty miles from the location where the abortion was being performed.[30]

Ultimately, the Court held that Act 620 was unconstitutional, and it did not satisfy the undue burden test for the same reasons articulated in *Whole Woman's Health*.[31] In a 5-4 decision, Justices Breyer, Ginsburg, Sotomayor, and Kagan formed the plurality; Justices Gorsuch, Alito, Kavanaugh, and Thomas dissenting.[32] The surprising swing vote was in fact, Chief Justice Roberts who penned a concurring opinion agreeing with the holding.[33] However, what was first heralded as a win for pro-choice advocates, was fleeting as careful examination of the effects of Chief Justice Roberts' concurrence began.[34] Under the façade of stare decisis, Chief Justice Roberts' concurring opinion in *June Medical* agreed with the decision, but expressly rejected the established burden and benefit analysis set forth in *Whole Woman's Health*.[35] The effects of this concurrence, whether purposeful or not, can and likely will be

GUARDIAN (Mar. 4, 2020, 4:00 PM), https://www.theguardian.com/law/2020/mar/04/us-supreme-court-louisiana-abortion-rights.

27. *See Whole Woman's Health*, 136 S. Ct. at 2292; Murray, *supra*, note 3, at 320; Adam Liptak, *Confirming Kavanaugh: A Triumph for Conservatives, but a Blow to the Court's Image*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/conservative-supreme-court-kavanaugh.html (stating that with Kavanaugh's confirmation, the Supreme Court will be more conservative than any other time in modern day history, solidifying a 5-4 conservative strong hold).

28. *See June Med. Servs.*, 140 S. Ct. at 2112 (plurality opinion).

29. *Id.* at 2113.

30. LA. STAT. ANN. § 40:1061.10 (2016); *June Med. Servs.*, 140 S. Ct. at 2113 (plurality opinion).

31. *June Med. Servs.*, 140 S. Ct. at 2120 (plurality opinion).

32. *Id.* at 2113, 2131–32; Thomas J. Molony, *Taking Another Look at the Call on the Field:* Roe, *Chief Justice Roberts, and Stare Decisis*, 43 HARV. J. L. & PUB. POL'Y 733, 736 (2020).

33. *June Med.*, 140 S. Ct. at 2133 (C.J. Roberts, concurring); Molony, *supra*, note 32.

34. Murray, *supra* note 3, at 320; Ann North, *What the Supreme Court's Latest Abortion Ruling Says About the Future of Roe*, VOX (May 28, 2019, 2:10 PM), https://www.vox.com/2019/5/28/18642536/indiana-abortion-law-supreme-court-scotus-2019; Gretchen Borchelt, June Medical Services v. Russo*: When a "Win" is Not a Win*, SCOTUS BLOG (June 30, 2020, 12:31 PM), https://www.scotusblog.com/2020/06/symposium-june-medical-services-v-russo-when-a-win-is-not-a-win/.

35. *June Med. Servs.*, 140 S. Ct. at 2135-36. (C.J. Roberts, concurring); Murray, *supra* note 3, at 323; Borchelt, *supra* note 34.

weaponized as a strategic method to undermine abortion protections around the country.[36] Within his concurrence, Chief Justice Roberts articulates that the burden and benefit analysis of *Whole Woman's Health* is not sound under *Casey*.[37] This concurrence has already begun to cause splits within the circuits,[38] and pose numerous problems both for the Court's legitimacy but also for reproductive rights of women in the country.[39] Chief Justice Roberts' rejection of stare decisis can lead lower courts to question if the Court means the opinion it delivered.[40] These splits will remain relevant as the Supreme Court considers whether to uphold the super precedent of *Roe*.[41] Confusion among the lower courts will continue if the Court does decide to maintain *Roe*; depending on a lower court's interpretation of Chief Justice Roberts' concurrence, an abortion regulation with few or no benefits to pregnant women, may or may not pass constitutional muster.[42]

In this Commentary, I will discuss what Chief Justice Roberts' concurrence means for the undue burden test, the concept of stare decisis and its impact upon the validity of the Supreme Court as an institution. Lastly, I will discuss how this concurrence is currently, and will only continue, to create confusion within the circuit and lower courts, further jeopardizing abortion rights in the country.

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36. *See* North, *supra* note 34; Murray, *supra* note 3, at 325; Borchelt, *supra* note 34.

37. *June Med. Servs.*, 140 S. Ct. at 2135–36 (C.J. Roberts, concurring) ("Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts.")

38. EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 978 F.3d 418, 430 (6th Cir. 2020); Hopkins v. Jegley, 968 F.3d 912, 916 (8th Cir. 2020); Whole Woman's Health v. Paxton, 10 F.4th 430, 441 (5th Cir. 2021); Reprod. Health Servs. v. Strange, 3 F.4th 1240, 1259 (11th Cir. 2021); Dahlia Lithwick & Mark Joseph Stern, *John Roberts' Stealth Attack on Abortion Rights Just Paid Off*, SLATE (Aug. 7, 2020, 6:24 PM), https://slate.com/news-and-politics/2020/08/john-roberts-8th-circuit-abortion-rights-arkansas.html.

39. *See* sources cited *supra* note 36. *See also* Murray, *supra* note 3, at 327.

40. *See generally* Faizer, *supra* note 3. *See also* Michael Gentithes, Janus-*Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 139 (2020).

41. The Supreme Court recently heard oral arguments in *Dobbs v. Jackson Women's Health*, in which it will decide whether all pre-viability prohibitions on elective abortions are unconstitutional. *See* Dobbs v. Jackson Women's Health, 142 S. Ct. 414, 414 (2021); Oral Argument, Dobbs v. Jackson Women's Health, 142 S. Ct. 414 (2021) (No.19-1392), https://www.supremecourt.gov/oral_arguments/audio/2021/19-1392. If the Court does so it will be overturning *Roe*. Adam Liptak, *What to Know About the Mississippi Abortion Law Challenging Roe v. Wade*, N.Y. TIMES (Dec. 1, 2021), https://www.nytimes.com/article/mississippi-abortion-law.html.

42. *See* EMW Women's Surgical Ctr., 978 F.3d at 430 (6th Cir. 2020); Reprod. Health Servs. v. Strange, 3 F.4th 1240, 1259 (11th Cir. 2021). *See, e.g.*, Borchelt, *supra* note 34; Diaz, *supra* note 9; *Types of State Attacks on Abortion*, *supra* note 10.

II. BENEFITS AND BURDEN SUSTAINED IN *JUNE MEDICAL SERVICES LLC V. RUSSO*, FOR NOW

In June 2020, the Supreme Court decided *June Medical Services v. Russo*. Many commentators were puzzled by the Court's grant of certiorari, due to the case's similarity in facts to *Whole Woman's Health*.[43] Pro-choice advocates were concerned that the new conservative majority would overturn *Whole Woman's Health*, despite its relatively recent holding.[44] However, Chief Justice Roberts became the unlikely fifth vote to join the decision, though concurring separately.[45] But what was touted as a win for reproductive rights activists was in fact an unsound use of the doctrine of stare decisis.[46] Regardless of the Chief Justice's intentions, the ramifications of his concurrence will undercut the Court's legitimacy and also established the grounds to undermine the right to obtain an abortion throughout the country.[47]

In *June Medical*, the challenged Louisiana statute, Act 620 ("Act 620"), was nearly identical in language to the admitting privileges of HB2. Prior to Act 620, Louisiana mandated that a doctor performing abortions must possess local hospital admitting privileges **or** have a patient transfer arrangement with a physician with admitting privileges at a hospital within thirty miles of the facility.[48] Upon its passage, Act 620 took away the transfer agreement option, and rendered it a condition for doctors performing abortions to have admitting privileges within thirty miles.[49] Similar to the *Whole Woman's Health* majority opinion, *June Medical's* plurality opinion set forth the extensive factual findings of the lower court, which found that no significant health benefit was given by the new law.[50] The district court also found that enforcing the admitting privileges would "result in a drastic reduction in the number and geographic distribution of abortion providers."[51] If Act 620 were to be upheld, there would be only one to two providers in the entire state of Louisiana.[52]

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43. *See, e.g.*, Borchelt, *supra* note 34; Strict Scrutiny, *Save Your Yarn* (June 29, 2020) (downloaded using Spotify); Lithwick & Stern, *supra* note 38.
44. *Id.*
45. *See generally* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (plurality opinion).
46. Faizer, *supra* note 3. *See also* sources cited, *supra* note 43.
47. *See, e.g.*, Borchelt, *supra* note 34; Strict Scrutiny, *supra* note 43; Lithwick & Stern, *supra* note 38.
48. LA. STAT. ANN. § 40:1061.10 (2016).
49. LA. STAT. ANN. § 40:1061.10(A)(2)(a).
50. *See June Med. Servs.*, 140 S. Ct. at 2112, 2114–15 (plurality opinion).
51. *Id.* at 2122.
52. *Id.* at 2115–16.

The plurality reaffirmed that health regulations that are medically unnecessary are unconstitutional when those regulations impose an undue burden; if they have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion.[53] Reiterating the test as stated in *Whole Woman's Health*, courts must "consider the burdens a law imposes on abortion access together with the benefits those laws confer."[54] To assess this balance, the plurality examined the provision and what it possibly provides for women. The plurality explained that admitting privileges are not connected to actual medical skill or knowledge, rather with servicing a particular number of patients a year at the physical hospital.[55] Further, the Court accepted the direct evidence from the lower courts, that many doctors' applications for admitting privileges were denied for reasons that were unrelated to their ability to perform abortions safely.[56] Here, the State failed to introduce any evidence that patients were treated any better when their doctors had admitting privileges, and in addition, there was evidence to show that medical complications from abortions are exceedingly rare.[57] As stated in *Whole Woman's Health*, there is no indication that any significant benefit is granted to women through these admitting privileges.[58] *June Medical*'s nearly identical factual similarities to *Whole Woman's Health* commanded the Court to conclude the same way; the admitting privileges requirement was unconstitutional because it would effectively foreclose all but one abortion provider for the entire state.[59] the admitting privileges requirement was unconstitutional because it would effectively foreclose all but one abortion provider for the entire state.[60] This would impose numerous burdens on the women of Louisiana, such as prolonged wait times, as well as extraordinary travel conditions.[61] These burdens compared with the nonexistent benefits of the provision in question constituted a substantial obstacle for women in the state.[62] The Chief Justice joined in the decision but concurred

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53. *Id.* at 2120.
54. *Id.* (quoting *Whole Woman's Health*, 136 S. Ct. 2292, 2309 (2016)).
55. *Id.* at 2122–23. This is difficult because abortions are so safe and do not require hospitalizations of any kind. *Id.*
56. *See id.*
57. *See id.* at 2123–24.
58. *Id.* at 2124. *See also Whole Woman's Health*, 136 S. Ct. at 2311-12.
59. *Id.* at 2132–33.
60. *See id.* at 2128–30. The Dissents for this case discussed the standing requirements for the doctors bringing this case forward, however, this paper will not address these aspects of the dissenting opinions.
61. *See id.* This law would eliminate Doctor Does 1, 2, 3, and 6 as abortion providers leaving only Doctor Doe 5, who claimed that he would stop providing those services if he were the only abortion provider left in the state of Louisiana. *Id.*
62. *Id.* at 2132.

separately.[63] As I will discuss in the remainder of this paper his concurrence will have serious consequences for the Supreme Court's authority, as well as for reproductive rights throughout the country.

III. CHIEF JUSTICE ROBERTS' CONCURRING OPINION

Despite Chief Justice Roberts' assertion regarding stare decisis in his concurring opinion, he disregards this same doctrine and proclaimed that *Casey* contains no consideration of benefits.[64] Chief Justice Roberts maintained his belief that *Whole Woman's Health* was wrongly decided, as he had joined the dissent in that ruling.[65] Roberts alleged in his concurrence that the question presented to the Court in *June Medical* was not whether or not *Whole Woman's Health* was properly decided, but rather if the precedent set forth in that case should be adhered to.[66] "The legal doctrine of stare decisis requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore, Louisiana's law cannot stand under our precedents."[67] Next, Roberts elaborated on the doctrine and its meaning; how it gives credence to the Court's legitimacy and curbs arbitrary discretion from the lower courts.[68] However, his use of stare decisis is rendered hollow, when he continued to reject the undue burden standard as stated in *Whole Woman's Health*.[69]

A. His Interpretation of the Undue Burden Test

Chief Justice Roberts' interpretation of the undue standard in his concurring opinion will have substantial ramifications both for the Supreme Court's legitimacy and for reproductive rights in the United States.[70] A concurrence starting and ending with deference to stare decisis would have been adequate to explain the Chief Justice's vote with the liberal cohort of the Court. It has been well established that Chief Justice Roberts has concerns about the legitimacy of the Supreme Court both in terms of precedent and perception.[71] Therefore, this defense of

63. *Id.* at 2133–42 (Roberts, C.J., concurring).
64. *Id.* at 2135–36.
65. *Id.* at 2133.
66. *Id.*
67. *Id.* at 2134.
68. *Id.*
69. *See id.* at 2135–36.
70. *See id.* at 2136; Murray, *supra* note 3, at 325–27; Faizer, *supra* note 3, at 107.
71. Jeffery Rosen, *John Roberts is Just Who the Supreme Court Needed*, ATLANTIC (Jul. 13, 2020), https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053/; Kimberly Strawbridge Robinson, *Yes, Roberts is in the*

stare decisis is not shocking to those familiar with the Chief Justice's views on the Court's role as an institution.[72] However, Chief Justice Roberts has also been known to possess a calculating and strategic legal mind.[73] Whether purposeful or not, Chief Justice Roberts' analysis of the undue burden in *June Medical* raised serious questions about his commitment to stare decisis and the Court's legitimacy.[74]

Chief Justice Roberts concurrence explicitly stated that *Casey* does not suggest a consideration of the benefits.[75] In balancing burdens and benefits of abortion regulations, the Chief Justice accused the majority of *Whole Woman's Health* of placing judges in the role of legislators rather than judiciary.[76] He then turned to *Casey*, reiterating what the plurality there found: the 24 hour waiting period, the parental consent, the aspect of informed consent, and the state mandated reporting requirements to not be substantial obstacles (and thus, not undue burdens) to the women of Pennsylvania.[77] In reference to the unconstitutionality of the spousal notification provision, Chief Justice Roberts described that the plurality only came to that conclusion through extensive testimony and social science evidence that the requirement would significantly prevent women from terminating their pregnancy.[78] Here, Chief Justice Roberts does concede that there was a consideration of the benefits of the regulations in *Casey*, but he clarifies that the Court did not weigh such benefits in exact opposition to the burdens of the relevant statutory provisions.[79] The undue burden set forth in *Casey*, weighed the benefits of the regulation only when evaluating "that the State ha[d] a 'legitimate

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Middle. No, He's Not a Liberal, BLOOMBERG LAW (Jul. 9, 2020), https://news.bloomberglaw.com/us-law-week/yes-roberts-is-in-the-middle-no-hes-not-a-liberal; Strict Scrutiny, *supra* note 43.

72. *See* Jennifer Finney Boylan, *Getting Beyond Balls and Strikes*, N.Y. TIMES (Oct. 23, 2018), https://www.nytimes.com/2018/10/23/opinion/getting-beyond-balls-and-strikes.html.

73. Sam Baker, *John Roberts' Long Game*, AXIOS, (Jul. 10, 2020), https://www.axios.com/john-roberts-long-game-supreme-court-482bf202-a738-4da3-a830-1e7c03a38835.html; *see also* Lithwick & Stern, *supra* note 38; Strict Scrutiny, *supra* note 43.

74. *See* Baker, *supra* note 73; Strict Scrutiny, *supra* note 43; Rosen, *supra* note 71; Adam Liptak, *John Roberts was Already Chief Justice. But Now It's His Court*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/2020/06/30/us/john-roberts-supreme-court.html ("An incrementalist and an institutionalist, the chief justice generally nudges the court to the right in small steps, with one eye on its prestige and legitimacy. He is impatient with legal shortcuts and, at only 65, can well afford to play the long game."); Lawrence Friedman, *Justice Roberts Plays the Long Game*, THE HILL (Jul. 6, 2020), https://thehill.com/opinion/judiciary/505965-justice-roberts-plays-the-long-game.

75. *June Med. Servs.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring).

76. *Id.*

77. *Id.* at 2137.

78. *Id.* at 2137–38.

79. *Id.*

purpose' and that the law be 'reasonably related to that goal.'"[80] Chief Justice Roberts additionally referenced other precedent in his concurrence such as *Mazurek v. Armstrong*.[81] In *Mazurek*, a Montana regulation that confined the performance of abortions to only licensed physicians was challenged before the Court.[82] The majority in that case held that the statute was not a substantial obstacle, as it only affected one practitioner in the state.[83] The majority also relied upon the State's discretion in addressing its own needs and problems through legislation.[84] Chief Justice Roberts specifically cited this case noting that *Casey* does not require a weighing of the benefits and burdens opposite one another.[85] However, this comparison in *Mazurek* is not dispositive, as the magnitude of the Montana statute did not rise to the level of inhibiting women from obtaining an abortion as in *Whole Woman's Health*, *June Medical*, or the spousal notification of *Casey*.[86]

a. Improper Application of the Doctrine of Stare Decisis

This concurrence leaves us to question what type of stare decisis the Chief Justice is advancing. This cabined version does not add to the legitimacy that he craves for the Court.[87] The Chief Justice is not utilizing his concurrence as a mechanism for legitimacy, but an aggregation of power in which he cherry picks, "respect for precedent depended entirely on identifying those aspects of past decisions that he wished to follow and those that he did not."[88]

The Supreme Court has itself stated that, "stare decisis is not…a universal inexorable command," [89] and there are numerous factors taken into consideration when evaluating whether to overturn precedent. These include: whether the precedent is settled; whether the precedent was wrongly decided; whether the precedent is unworkable; whether factual changes or legal changes have diminished the original precedent; and whether the reliance interests are substantial.[90] A detailed consideration of **all** of the above factors need not be present in the Court's

80. *Id.* at 2138.
81. *Id.*
82. *Id.*; Mazurek v. Armstrong, 520 U.S. 968, 969 (1997).
83. *See June Med. Servs.*, 140 S. Ct. at 2138 (Roberts, C.J., concurring).
84. *Id.*
85. *Id.* at 2138–39.
86. Murray, *supra* note 3, at 324.
87. *See* Baker, *supra* note 73; Strict Scrutiny, *supra* note 43; Rosen, *supra* note 71; Liptak, *supra* note 74; Friedman, *supra* note 74.
88. Murray, *supra* note 3, at 325.
89. Gentithes, *supra* note 40, at 94; *see* also Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992).
90. *See Casey*, 505 U.S. at 854–57.

articulation when deciding to overturn a prior decision, but these factors have been stated as considerations by the Court over the years.[91] In fact, some of these factors were included in the plurality's opinion when addressing *Roe*, within *Casey*.[92]

> [T]he rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Professor Gentithes has discussed how the Court has through its past decisions established two forms of stare decisis tradition throughout its institutional history: strong and weak.[93] The weak tradition of stare decisis, subscribes that Justices should not be bound to follow precedents that have been poorly reasoned.[94] This tradition is in juxtaposition to the strong tradition of stare decisis that was set forth in *Casey*.[95] The strong tradition of stare decisis is predicated on the belief that precedents can and should only be overturned based on a series of objective factors.[96] These factors **do not** include a Justice's disagreement with a prior decision's reasoning,[97] and should be grounded in a, "series of prudential and pragmatic considerations."[98] While *Casey* presented an important articulation of the strong tradition of stare decisis, the opinions set forth also illustrated by contrast, the weak tradition. Both Justices Rehnquist and Scalia asserted that overruling precedent should be available for poorly reasoned decisions, like *Roe*, albeit that displacement of precedent would then occur more frequently.[99] While these two approaches to stare

91. *Id.*
92. *Id*. at 854. *See generally* Bridget Winkler, *Deviation from The Principles of Stare Decisis in Abortion Jurisprudence, and an Analysis of* June Medical Services LLC v. Russo *Oral Argument*, 68 UCLA L. REV. 14 (2020).
93. Gentithes, *supra* note 40, at 95, 96.
94. *Id.* at 96.
95. *Id.* at 96–97.
96. *Id.*
97. *Id.*
98. *Id.* at 97.
99. *Id.* at 99. ("Though the *Casey* plurality opinion seemed to give permanence to a strong stare decisis tradition, several decisions in recent decades have chipped away at *Casey*'s primacy as a precedent on precedent. One example is Justice Alito's 2009 majority opinion in *Pearson v. Callahan*. In that case, the Court considered whether the two-step procedure to evaluate qualified immunity claims announced eight years earlier in *Saucier v. Katz* should remain mandatory. Justice Alito acknowledged the need to

decisis exist, it logically follows that Chief Justice Roberts would subscribe to the strong tradition, as it pushes against frequent overturning of precedent; and thus, provides the stability and validity for the Court as an institution.[100] However, it is demonstrably clear from the concurrence that the Chief Justice is falsely adhering to this tradition of stare decisis, as he agrees with the decision but completely disregards the reasoning of the undue burden in *Whole Woman's Health*.[101] Further, the objective reasons that are found in this tradition, separate from a Justice's disagreement with reasoning, point to not overturn precedent.[102]

What is so vital to the doctrine of stare decisis is that it limits Justices from overturning prior cases based on his or her disagreement with the Court's previous reasoning, and allows the Court to be viewed as a legitimate institution.[103] As Chief Justice Roberts said himself, "for precedent to mean anything, the doctrine [of stare decisis] must give way only to a rationale that goes beyond whether the case was decided correctly."[104] However, to uphold a ruling based on the concept that adheres to the strong tradition of stare decisis, as Chief Justice Roberts appears to do in *June Medical*, and then to eviscerate the reasoning in a concurrence does not bolster to the Court's legitimacy.[105] Such opinions could encourage lower courts to disregard binding case law until such cases are consistently reaffirmed by the Supreme Court. [106]

While historically justices deferred less to more recent decisions,[107] abortion precedent occupies a unique, and somewhat precarious, position as the whole line of decisions rely on *Roe*.[108] This is evidenced by the

consider stare decisis doctrine but claimed that reversing 'precedent is particularly appropriate where . . . a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings.' Alito would later confirm that, at least in constitutional cases, it is 'appropriate' to overrule decisions that are 'badly reasoned.'").

100. *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring).

101. *Id.* at 2138.

102. *See generally* Molony, *supra* note 32, at 808–09 ("For the Chief Justice, restraint is characterized by three fundamental principles. First, the Court should refrain from inserting itself into controversial issues except in those cases when there is a case or controversy—as the Constitution requires. Second, the Court should defer to the political branches whenever possible. And third, the Court should avoid deciding more than is necessary to resolve a case.").

103. Gentithes, *supra* note 40, at 124–26.

104. *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring).

105. *See* Gentithes, *supra* note 40, at 126; Murray, *supra* note 3, at 327.

106. Gentithes, *supra* note 40, at 139.

107. *Id.* at 138.

108. Murray, *supra* note 3, at 328; *see generally* Molony, *supra* note 32.

countless dissents and concurrences of abortion jurisprudence in which Supreme Court Justices have questioned and opined if *Roe* had been decided correctly.[109] Prof. Melissa Murray has skillfully pointed out, "abortion shadows the Court's stare decisis jurisprudence."[110] But even if we are to ignore the temporal aspect of *Whole Woman's Health*, it does not warrant to be gutted as it has been in Chief Justice Roberts' concurrence under the tradition of strong stare decisis. The weighing of benefits within the undue burden standard has not been found to be unworkable in any capacity—this is shown by the fact that the regulations that were attempted to be implemented actually provided no health benefits to women receiving abortions.[111] Additionally, although states may pass legislation to illustrate their preference for birth over abortion, the Court has made clear that there are constitutional limits to those regulations.[112] While it could be argued that the holding has not been a part of jurisprudence long enough to have induced reliance, this argument still dissolves against the policy aspect of stare decisis[113]

As stated previously, this could encourage lower courts to either disregard binding case law while waiting for confirmation that the Justices in fact, "meant what they said."[114] Furthermore, frequent overruling of prior case law based on Justice's disagreement of flawed reasoning, decreases the public faith in the legitimacy of the institution of the Court as a whole.[115] Chief Justice Roberts' concurrence accomplished one thing that Justice Kavanaugh stated in his dissent, "today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard."[116] But, this rejection is unsound as in the past four years there has not been a development in legal principles or a change in facts specific to this holding to render the present undue burden analysis a remnant of the past.[117] A true deference to stare decisis cannot claim allegiance to the doctrine and yet articulate a detailed, differing reasoning from the plurality.[118]

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109. *See* Whole Woman's Health v. Hellderstedt, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting) ("I remain fundamentally opposed to the Court's abortion jurisprudence.").

110. Murray, *supra* note 3, at 337.

111. *See generally June Med. Servs*., 140 S. Ct. 2103 (plurality opinion); *Whole Woman's Health*, 136 S. Ct. 2292; Planned Parenthood v. Casey, 550 U.S. 833 (1992) (plurality opinion).

112. *See generally June Med. Servs*., 140 S. Ct. 2103; *Whole Woman's Health*, 136 S. Ct. 2292; *Casey*, 550 U.S. 833.

113. *See generally* Gentithes, *supra* note 40. *See also* Baker, *supra* note 73; Strict Scrutiny, *supra* note 43; Rosen, *supra* note 71; Liptak, *supra* 74; Friedman, *supra* 74.

114. Gentithes, *supra* note 40 at 139.

115. *Id.* at 138–39.

116. *June Med. Servs.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting).

117. *See* Borchelt *supra* note 34.

118. *June Med. Servs.*, 140 S. Ct. at 2136. (Roberts, C.J., concurring).

IV. DISAGREEMENT AMONG THE CIRCUIT & LOWER COURTS

This concurrence will inevitably cause disagreement throughout the circuit and lower courts. When a Justice pens a concurring opinion for a fragmented court, it must be considered by the lower courts in the narrowest grounds.[119] Though the facts of the cases of *Whole Woman's Health* and *June Medical* are nearly identical, the majority and plurality opinions set forth differing reasoning for the lower courts to consider.[120] By writing this type of concurrence, Roberts essentially attempts to erase the standard as it is enunciated in *Whole Woman's Health*, and thus, giving courts the freedom to pick and choose which standard to abide by.[121] Whether calculated or not, Chief Justice Roberts' concurring opinion has allowed for abortion opponents to weaponize on this disagreement in the circuit and lower courts.[122] This concurrence will remain relevant pending the Court's decision in *Dobbs*—if the Court maintains its abortion jurisprudence, the question of the proper undue burden analysis persists.

A. Seventh Circuit's Interpretation of Justice Roberts' Concurrence

In *Box v. Planned Parenthood of Indiana*, the Supreme Court vacated the judgement of the Seventh Circuit's decision in *Planned Parenthood of Ind. v. Adams*,[123] and remanded the case for further consideration in light of *June Medical*.[124] In *Adams*, a new Indiana law was challenged for its amendment to parental consent and judicial bypass for minors seeking to obtain abortions in a number of ways.[125] In a judicial bypass, if a judge concludes that parental consent is not necessary to obtain the abortion either because of the minor's maturity to make her own decisions or because the abortion is in her best interests, parents must still be given prior notice unless the judge also finds that notice is not in

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119. Marks v. United States, 430 U.S. 188, 194 (1977).

120. *See generally June Med. Servs*., 140 S. Ct. 2103(plurality opinion); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); Planned Parenthood v. Casey, 550 U.S. 833 (1992) (plurality opinion).

121. *See June Med. Servs.*, 140 S. Ct. at 2136. (Roberts, C.J., concurring).

122. *See e.g.*, Borchelt, *supra* note 34; Strict Scrutiny, *supra* note 43; Lithwick & Stern, *supra* note 38.

123. Planned Parenthood of Ind. v. Adams, 937 F.3d 973 (7th Cir. 2019), *rev'd sub nom.*, Box v. Planned Parenthood of Ind., 141 S. Ct. 187 (2020) (granting petition for writ of certiorari).

124. *Box*, 141 S.Ct. at 187–88 ("On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *June Medical Services L.L.C.* v. *Russo*.").

125. *Adams,* 937 F.3d 973.

the minor's "best interests."[126] Regarding parental consent the new law required the physician to obtain written parental consent, and to attain government-issued proof of identification from the consenting parent, and evidence that provides an "an articulable basis for a reasonably prudent person to believe that the person is the parent or legal guardian or custodian of the unemancipated pregnant minor."[127] Before the new law took effect, Planned Parenthood sued and sought a preliminary injunction prohibiting enforcement of the new parental notice requirements.[128] The district court granted the injunction enjoining the notice requirement based on the likelihood that this requisite would create an undue burden for minors in Indiana for terminating a pregnancy.[129]

Upon appeal to the Seventh Circuit the court affirmed the district court's preliminary injunction.[130] The court's analysis employed both the *Casey* and *Whole Woman's Health* balance of the benefits and burdens conferred by the notice requirement.[131] The Seventh Circuit stated that Indiana failed to provide a reason for the new parental notice requirement, or that it solved a problem the State was experiencing.[132] This law would have the practical effect of allowing parents to have a veto over the abortion decision, which would impose a substantial burden on such minors.[133] The court found that the State also failed to identify an actual benefit conferred on the minor, and the State's argument that parents needed to care for their daughter's health needs following an abortion procedure was not an adequate benefit.[134] The argument was not logical because the State presented no actual evidence that a benefit would be given to the minors.[135] Moreover, the court acknowledged that a notice requirement and a consent requirement are two distinct concepts, but that a notice requirement can operate as the equivalent of a consent requirement.[136] The Court stated that *Casey* recognized this possibility and that the record showed that there was a "serious potential for the kind of harms identified in *Casey*."[137] The Court found that none of the district court's findings were clearly erroneous, and the court

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126. *Id.* at 975.
127. *Id.* at 976.
128. *Id.*
129. *Id. at* 978.
130. *Id.*
131. *Id.*
132. *Id.* at 983.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 985.
137. *Id.*

affirmed the district court's grant of the preliminary injunction.[138] However, the Supreme Court vacated this judgement, citing consideration of *June Medical* illustrating that Roberts' concurring opinion leaves courts in a state of limbo in their undue burden analysis.

B. Sixth Circuit & Eighth Circuit Interpretation

The confusion among courts are already emerging around the country, as there is disagreement in the interpretation of how concurring opinions should be addressed.[139] In *Marks v. United States*, it was held that when a fragmented court rules on a case and there is not a solitary explanation for the holding, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[140]

Within the Sixth and Eighth circuit courts have reversed and remanded decisions regarding abortion regulations back to their respective district courts citing that the Roberts concurrence was controlling in the matter and required their consideration.[141] *EMW Women's Surgical Center v. Friedlander*, involved a challenge to a Kentucky statute, KRS § 216B.10, which has been contested for a number of years.[142] This law requires abortion providers within the state to have transfer and transport agreement requirements with surrounding hospitals.[143] Following an affirmance, the plaintiffs, EMW Women's Surgical Center, submitted a letter to the court clerk as relevant, additional authority.[144] This letter specifically cited the recent decision of *June Medical* as support for the preliminary injunction against the Kentucky law.[145] The Sixth Circuit's opinion cited Chief Justice Roberts' concurrence as controlling, "[b]ecause no opinion in *June Medical Services* garnered a majority, we, as a lower court, have the 'vexing task' of deciding which opinion controls."[146] The court found that under *Marks*, Chief Justice Roberts' concurrence and reasoning is the prevailing standard for the present case.[147] Due to the fact that the Chief Justice's concurrence rejected that the undue burden is a balancing test, the Sixth Circuit held that the court need only consider whether the statutes is

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138. *Id.* at 991.
139. Marks v. United States, 430 U.S. 188, 194 (1976).
140. *Id.*
141. EMW Women's Surgical Ctr., v. Friedlander, 978 F.3d 418, 430 (6th Cir. 2020); Hopkins v. Jegley, 968 F.3d 912, 916 (8th Cir. 2020).
142. EMW Women's Surgical Ctr., 978 F.3d at 424.
143. *Id.* at 428.
144. *Id.*
145. *Id.*
146. *Id.* at 431.
147. *Id.* at 433.

reasonably related to a legitimate state interest and whether that statute imposed a substantial obstacle to women seeking an abortion.[148] The Court determined that the statute was reasonably related to a legitimate state interest, despite the fact that the district court found that the transfer and transport agreements did not benefit or protect women's health and safety.[149] Additionally, the Court asserted that the district court's evidentiary findings were in contradiction with the traditional standard of deference to state legislatures "for areas where there is medical uncertainty."[150] Because the district court found that there is a risk that a transfer from an abortion facility to an emergency room due to procedural complications, Kentucky's legislature was seeking to correct a problem, and the two were reasonably related.[151] The Sixth Circuit's opinion perfectly illustrates how Chief Justice Roberts' concurrence can be weaponized to undermine valid precedent and can be used to effectively inhibit women from access to safe, legal, abortions. The Sixth Circuit received a petition for rehearing, which was denied en banc.[152]

Similarly, in the Eighth Circuit case, *Hopkins v. Jegley*, the Court of Appeals vacated the judgment of the district court and remanded, in light of Chief Justice Roberts' concurrence from *June Medical*, specifically citing the "wide discretion" he described that courts are required to afford legislatures in areas of medical uncertainty.[153] In the somewhat brief opinion from the Court of Appeals, the court focused on Roberts' rejection of the balancing of benefits and burdens, as stated in *Casey* and how this reading is not a proper understanding of *Casey*.[154] While the Arkansas Eastern District Court followed the weighing of benefits and burdens, in their analysis of the standard on remand, this interaction between the circuit and district court illustrates the disagreement to come to the circuit and lower courts.[155]

148. *Id.* at 437.

149. *Id.* at 438.

150. *Id.* at 438–39.

151. *Id.* at 439–40. ("The district court, not having the benefit of the *June Medical Services* decision, failed to perform traditional rational-basis review, and erred in holding otherwise.").

152. EMW Women's Surgical Ctr., v. Friedlander, No. 18-6161, 2020 U.S. App. LEXIS 40857, at *2 (6th Cir. Dec. 31, 2020).

153. Hopkins v. Jegley, 968 F.3d 912, 916 (8th Cir. 2020).

154. *Id.* at 914–15.

155. Hopkins v. Jegley, No. 4:17-cv-00404-KGB, 2021 U.S. Dist. LEXIS 1602, at*390 (E.D. Ark. January 5, 2021).

C. Eleventh Circuit Interpretation

The above circuits response to Chief Justice Roberts' concurrence appears to be in contradiction to the Eleventh Circuit's articulation of *Marks*. In *Reproductive Health Services v. Strange*, the court states that the recent decision of *June Medical* does not modify the undue burden analysis set forth in *Whole Women's Health*, thus, explicitly affirming the balancing of burdens a law imposes in conjunction with its benefits. [156] The regulation at issue centered on amendments to Alabama's Parental Consent Act, which dictates when a minor can obtain an abortion.[157] These amendments affected the process of a minor obtaining a judicial bypass.[158] The proposed changes would allow the following: 1) the minor's name to be disclosed to the court, personnel, the District Attorney, and any other necessary witness; 2) if parents were aware of the judicial bypass, they would be given notice and able to participate in the proceedings with the rights of any party to the proceeding; 3) notify the District Attorney of the county that the minor resides in and may file an appeal from the bypass court's decision; 4) the court may appoint a guardian ad litem to represent the interests of the unborn child; 5) the guardian ad litem for the fetus and parents of the minor may cross examine the minor and any other witnesses.[159] The court's analysis evaluates both the benefits and the burdens of the statute's amendments.[160] The court found that the Attorney General's proposal that the changes to the judicial bypass procedures did not advance the proposed benefit of providing "guidance and assistance" to minors considering an abortion.[161] Nor, was there any evidence that the previous procedures were unacceptable or led to uninformed decisions by minors.[162]

The amendments' "incremental" benefits were then weighed against the burdens imposed. The court found that: the involvement of the District Attorney acting in an adversarial role; the possibility of painful and probing examination by guardian ad litem for the fetus, as well as involvement of the parents; and the amendments' failure to ensure minor's anonymity imposed substantial obstacles in the path of a minor attempting to obtain an abortion through the process of judicial

156. Reprod. Health Servs. v. Strange, 3 F.4th 1240, 1258-59 (11th Cir. 2021).
157. ALA. CODE § 26-21-4 (2014).
158. *Strange*, 3 F.4th at 1258–59.
159. *Id.* at 1247–48.
160. *Id.* at 1262–63
161. *Id.* at 1262.
162. *Id.* ("We find that the benefit from the participation of additional parties (like the District Attorney, the minor's parents, or a guardian ad litem for the fetus) under Alabama's amended procedures is incremental at best.").

bypass.[163] Therefore, the court held that burdens against the benefits constituted an undue burden. The court stated that Chief Justice Roberts' concurrence in *June Medical* combined with the four dissenters that rejected that benefit and burden analysis did not overrule *Whole Women's Health*.[164] In citing to *Marks*, the court stated that in assessing split decisions, the court must look to the narrowest grounds of agreement among the members who concurred in the judgment.[165] Because the dissenters disagreed with the concurring opinion on a number of issues, and the common ground that the plurality agreed with the Chief Justice was that the Louisiana statute constituted an undue burden, the circuit court was still bound by the benefits and burdens analysis of *Whole Women's Health*.[166]

D. Implications

The stark difference between these circuit courts and their approach to the *June Medical* plurality opinion and Chief Justice Roberts' concurrence is instructive of the issues and implications to come.[167] How these issues will be addressed is still unknown, especially as the Court now considers the major precedent of *Roe*.[168] As illustrated in the above cases, both opponents and supporters of abortion rights believe that this opinion provides support for their own belief systems, and leads to further confusion to the lower courts as to how analyze abortion regulations. Whether intentional or not, Chief Justice Roberts' implementation of stare decisis, ultimately does not add to or support the legitimacy of the Court as an institution.[169]

V. CONCLUSION

While abortion advocates rejoiced the day that the *June Medical* opinion was announced it was a short-lived celebration. Chief Justice

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163. *Id.* at 1263–67.
164. *Id.* at 1271 n.6.
165. *Id.*
166. *Id.*
167. EMW Women's Surgical Ctr., v. Friedlander, 978 F.3d 418, 430 (6th Cir. 2020); Hopkins v. Jegley, 968 F.3d 912, 916 (8th Cir. 2020); *Strange*, 3 F.4th at 1258–59 (11th Cir. 2021).
168. *See* Dobbs v. Jackson Women's Health, 141 S. Ct. 2619 (2021 Oral Argument, Dobbs v. Jackson Women's Health, 142 S. Ct. 414 (2021) (No.19-1392), https://www.supremecourt.gov/oral_arguments/audio/2021/19-1392. If the Court does so it will be overturning *Roe*. Adam Liptak, *What to Know About the Mississippi Abortion Law Challenging Roe v. Wade*, N.Y. TIMES (Dec. 1, 2021), https://www.nytimes.com/article/mississippi-abortion-law.html.
169. *See* Gentithes, *supra* note 40, at 124.

Roberts' concurrence will facilitate for future disagreement among the circuit and lower courts throughout the country. Depending on the Court's decision in *Dobbs*, this concurrence may still compel the Supreme Court to revisit and clearly articulate the undue burden standard. This confrontation will likely undermine the public opinion of the Court and its validity as an impartial and stable institution. Furthermore, it places the reproductive rights of millions of women in a perilous state, the outcome of which remains unclear.