

FORESHADOWING THE REVERSAL OF *ROE V. WADE*: THE UNITED STATES SUPREME COURT AND CASES IMPACTING WOMEN'S HEALTH

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This summer, the Supreme Court handed down decisions on *June Medical Services LLC v. Russo*¹ and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*.² Both of these cases addressed accessibility to women's reproductive health within an increasingly conservative court. Although *June Medical*'s outcome was not as destructive as pro-choice advocates projected,³ *Little Sisters* indicated that *June Medical* may be the exception to SCOTUS's favorable holdings on women's health, not the rule.⁴ With a newly solidified 6-3 conservative majority following the confirmation of Justice Amy Coney Barrett, the Court is likely positioning itself to battle abortion rights in its next session.⁵

This Article discusses the future of abortion rights in the current Supreme Court, citing *June Medical* and *Little Sisters* as the two cases most indicative of similar upcoming decisions. After discussing the background of the cases, this post addresses their future implications and the worrying trends to which they point.

I. *June Medical Services LLC v. Russo*

June Medical challenged abortion access in Louisiana. Although abortion is one of the safest medical procedures currently available,⁶ Louisiana passed a law

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¹ 140 S. Ct. 2103 (2020).

² 140 S. Ct. 2367 (2020).

³ See Lakeesha Harris, *The 'Dire Risk' Louisiana Faces in the 'June Medical Services' Decision*, REWIRE NEWS GROUP (Mar. 2, 2020, 9:30 AM), <https://rewirenewsgroup.com/article/2020/03/02/the-dire-risk-louisiana-faces-in-the-june-medical-services-decision/>; Sarah Boonin, *June Medical Services v. Russo: Is it Really the End of Roe? How Did it Come to This?*, MS. MAGAZINE (Mar. 4, 2020), <https://msmagazine.com/2020/03/04/june-v-russo-is-it-really-the-end-of-ro-how-did-it-come-to-this/>.

⁴ Note that while *June Medical* was a somewhat liberal decision, *Little Sisters* dampened this decision as a more conservative ruling on women's rights. See also *June Medical*, 140 S. Ct. at 2133 (Roberts, J., concurring) (writing that Roberts only concurred to uphold precedent, but that he believes *June Medical* was incorrectly decided and hopes the court will overturn it in the future).

⁵ With the addition of Judge Barrett, who has never directly ruled on abortion but personally opposes it, the court will now have six conservative members, all of whom are explicitly anti-abortion or have stayed ambiguous on their views; none have declared themselves pro-choice. In *June Medical*, Thomas, Gorsuch, Kavanaugh, and Alito all dissented. Roberts stated he did not support abortion but stood by precedent); Adam Liptak, *Amy Coney Barrett, Trump's Supreme Court Pick, Signed Anti-Abortion Ad*, NEW YORK TIMES (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/us/amy-coney-barrett-abortion.html>.

⁶ *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016) (Ginsburg, J., concurring) (“[a]bortion is one of the safest medical procedures performed in the United States”). See Alison Kodjak, *Landmark Report Concludes Abortion In U.S. Is Safe*, NATIONAL PUBLIC RADIO (Mar. 16, 2018, 11:00 AM), <https://www.npr.org/sections/health-shots/2018/03/16/593447727/landmark-report-concludes-abortion-is-safe> (finding that abortion complications are “rare,” and that state laws restricting abortion threaten care safety); *Safety of abortion in the United States*, ADVANCING NEW STANDARDS IN REPRODUCTIVE HEALTH (Dec. 2014), <https://www.ansirh.org/sites/default/files/publications/files/safetybrief12-14.pdf> (“Less than a quarter of one percent of abortions result in a major complication. Less than one percent

purportedly designed to increase the safety of abortions.⁷ Under this pretext, the law would close down all but one abortion clinic in the state.⁸ When reviewing this case, the Supreme Court's main precedent was *Whole Woman's Health v. Hellerstedt*,⁹ in which the Texas legislature attempted to shut down almost all abortion clinics in the state under the same pretextual safety law four years earlier.¹⁰ At this time, the more liberal Court¹¹ ruled against the state. But in 2020 many pro-choice organizations feared *June Medical* could be the first step to the conservative Court attempting to overturn *Roe v. Wade*.¹²

In an unexpected decision, the Court again ruled against the state, with Chief Justice Roberts tipping the scales. Roberts claimed that although he did not personally support abortion, he respected the precedent set by *Whole Women's Health*,¹³ thus sided with the liberal justices, although many suspected that Roberts was "laying the groundwork for much weaker protections for abortion rights."¹⁴ This left Justices Kagan, Ginsburg, Sotomayor, and Breyer as actual

of abortions result in a complication that is diagnosed and treated in an emergency room. The overall abortion complication rate is lower than those for wisdom tooth removal and tonsillectomy.”).

⁷ *June Medical*, 140 S. Ct. at 2112 (Louisiana claimed that doctors at abortion clinics needed admitting privileges to hospitals in case their patients needed to be admitted and needed their original doctor to treat them). *But see* testimony from Doe 6, who stated that in his fifty years of experience, only two people needed hospital care after an abortion, and one was able to be treated without being admitted (*June Medical*, 140 S. Ct. at 2123); *Id.* at 2140 (Roberts, J., concurring) (“because complications requiring hospitalization are relatively rare, abortion providers were ‘unlikely to have any patients to admit’ and thus were ‘unable to maintain admitting privileges or obtain those privileges for the future.’”).

⁸ Laurie Sobel & Alina Salganicoff, *Abortion Back at the Supreme Court: June Medical Services LLC v. Russo*, KAISER FAMILY FOUNDATION (Jun. 29, 2020), <https://www.kff.org/womens-health-policy/issue-brief/abortion-back-at-the-supreme-court-june-medical-services-llc-v-russo/> (“Act 620 . . . would force two of Louisiana’s three abortion clinics to close”).

⁹ 136 S.Ct. 2292 (2016)

¹⁰ Texas tried to pass a law almost identical to Louisiana’s admitting privileges law; the court struck down this law as unnecessary because abortion is already a safe procedure, and this would impose an “undue burden” on people seeking abortion. *Id.* at 2300.

¹¹ Justices Ginsburg, Kagan, Sotomayor, Breyer, and Kennedy, who is usually a swing vote, joined the majority opinion. *Id.*

¹² Leah Litman, *June Medical As The New Casey*, TAKE CARE (Jun. 29, 2020), <https://takecareblog.com/blog/june-medical-as-the-new-casey/> (“the change in the Court’s personnel put [*Whole Women’s Health*] in jeopardy”). *See Id.* at 2142 (Thomas, J., dissenting) (“Our abortion precedents are grievously wrong and should be overruled.”); *see also* Laurie Sobel et al., *Abortion at SCOTUS: A Review of Potential Cases this Term and Possible Rulings*, KAISER FAMILY FOUNDATION (Oct. 30, 2020), <https://www.kff.org/womens-health-policy/issue-brief/abortion-at-scotus-a-review-of-potential-cases-this-term-and-possible-rulings/> (“With a new conservative Justice, the Court may overturn the long-held precedent that abortion doctors and clinics have the right to challenge abortion regulations on behalf of their patients (third-party standing). If the Court decides that doctors and clinics no longer have the right to challenge abortion regulations on behalf of their patients, abortion would remain a constitutional right, but the constitutionality of many abortion regulations may go unchallenged.”); Sarah Boonin, *The Confirmation of Amy Coney Barrett—and the End of Roe as We Know It*, MS. MAGAZINE (Mar. 4, 2020), <https://msmagazine.com/2020/10/21/amy-coney-barrett-roe-v-wade-june-medical-services/> (“[the confirmation of Judge Barrett] will lurch the Court significantly to the right. The tenuous balance struck in *June Medical Services* will be lost.”).

¹³ *Supra* note 4.

¹⁴ Laurence H. Tribe, *Roberts’s approach could end up being more protective of abortion rights — not less*, THE WASHINGTON POST (Jul. 1, 2020),

supporters of pro-choice; with the loss of Ginsburg, the Court now has only three pro-choice members. Without a majority hold, the future of abortion rights is uncertain.

II. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*

In *Little Sisters*, religious employers challenged the Affordable Care Act (ACA).¹⁵ The ACA required that all employers cover contraception under insurance policies, but non-profit religious employers could be exempt.¹⁶ Later, the Supreme Court expanded the exemption to include for-profit religious organizations as well.¹⁷ In 2017, the Trump Administration pushed this further, adding that non-religious organizations with simply a moral objection could now deny contraceptive coverage.¹⁸ In early July, the Supreme Court confirmed the Trump Administration's right to make religious and moral exceptions to the ACA's demand for contraceptive coverage.¹⁹ Only Justices Ginsburg and Sotomayor dissented, arguing that the ACA did not permit organizations to deny women's health services under any exceptions.²⁰

III. Future Implications

Both *June Medical* and *Little Sisters* have far reaching implications. *June Medical*'s decision points to a worrying trend of the Supreme Court inching closer to re-evaluating *Roe v. Wade*.²¹ As the Court is expected to address more cases on reproductive rights in its upcoming term,²² its conservative leanings could potentially put harmful limits on abortion access. Additionally in *Little Sisters*, the late Justice Ginsburg estimated that between 70,500 and 126,400 women would lose access to low-cost contraceptive services because of this decision.²³ As birth control treats a myriad of reproductive health issues, this could leave many women battling serious medical conditions, such as polycystic ovary syndrome or

<https://www.washingtonpost.com/opinions/2020/07/01/robertss-approach-could-end-up-being-more-protective-abortion-rights-not-less/>.

¹⁵ *Little sisters*, 140 S. Ct. at 2372-73.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2387-89 (finding that the Health Resources and Service Administration could put any exceptions or limits on the ACA. Thus, under the Trump admin, the HRSA could exempt any organization who opposed covering contraceptive, even if the organization was not explicitly religious).

²⁰ *Id.* at 2400-01 (Ginsburg, J., dissenting).

²¹ The Court's decision to grant certiorari to *June Medical* despite the fact that it had already ruled on *Whole Women's Health* is disturbing in itself; it seemed to clearly indicate that because Justice Kennedy had left the court and Kavanaugh had been appointed, the court was trying to reevaluate this issue under a more conservative gaze. Leah Litman, *June Medical As The New Casey*, TAKE CARE (Jun. 29, 2020), <https://takecareblog.com/blog/june-medical-as-the-new-casey>.

²² MaryBeth Musumeci & Laurie Sobel, *A Reconfigured U.S. Supreme Court: Implications for Health Policy*, KAISER FAMILY FOUNDATION (Oct. 09, 2020), <https://www.kff.org/health-reform/issue-brief/a-reconfigured-u-s-supreme-court-implications-for-health-policy/>.

²³ *Little sisters*, 140 S. Ct. at 2408 (Ginsburg, J., dissenting).

endometriosis, without treatment.²⁴ These cases could foreshadow the Court pulling back further on reproductive rights in its next term with newly-appointed Justice Barrett.²⁵

²⁴ See *Birth Control: Benefits Beyond Pregnancy Prevention*, WEBMD (Dec. 26, 2018), <https://www.webmd.com/sex/birth-control/other-benefits-birth-control>.

²⁵ *Supra* note 4 and accompanying text.