As they say at the Supreme Court, I concur, but on different grounds. But first: a confession. During the months that the Supreme Court was considering and ultimately decided Whole Women’s Health v. Hellerstedt, striking down Texas’s admitting privileges law, my time was almost entirely consumed with defending David Daleiden and the Center for Medical Progress. When that decision came down in June 2016, I was aware that Justice Kennedy had joined the liberal wing of the Court to strike down the law, but I was unfamiliar with the details.

I remedied that to a certain extent when I flew to Washington, D.C., this past March to attend the oral argument in JMS v. Russo. On the flight (with no wifi and therefore no distractions), I read not only the parties’ briefs in JMS, but also all of the justices’ opinions in WWH, the lower court rulings in WWH and JMS, and the Supreme Court’s earlier order in JMS keeping the Louisiana law from going into effect pending its final decision.

I was astounded to realize that, in both WWH and JMS, the dispute was between, on the one hand, those judges who found that the admitting privileges law at issue would cause clinics to close, thereby placing a “substantial obstacle” in the path of women seeking abortions, and on the other hand, those judges who found that the admitting privileges law was necessary to protect the health of women seeking abortions.

Many pro-life leaders expressed disappointment over the Supreme Court’s decision in June Medical Services v. Russo striking down Louisiana’s admitting privileges law, but also found a silver lining in Chief Justice Roberts’ concurring opinion stating that abortion regulations should not be subject to a test that balances the benefits of the law against the burdens on women seeking abortions.
and on the other hand, those judges who believed either that the law would not have that effect or that the plaintiff abortion clinics had failed to show that the law would have that effect.

In other words, the “pro-life” legal position was that the plaintiffs hadn’t (yet) shown that the admitting privileges law would interfere with the abortion juggernaut. Once that was shown, the point went to the pro-aborts.

The oral argument in JMS confirmed that the battle was being carried out entirely on the enemy’s ground. There was no hint that any of the justices was re-examining Roe or Casey. After the argument, I was fairly certain that Chief Justice Roberts would join the liberals on the Court in voting to strike down the law. What was more troubling, however, was the fact that, from an anti-abortion perspective, it didn’t seem to matter which side won. Both of the parties and almost all of the judges who ruled on the cases agreed that, under Casey, the admitting privileges law—and any other abortion regulation—could be upheld only if the law did not significantly interfere with the availability of abortions.

The final decision rendered by the Court broke down 4-1-4, with Justice Breyer writing for the effective majority that the Louisiana law was unconstitutional under Casey and WWH because it “places a substantial obstacle in the path of a large fraction of those women seeking abortion for whom it is a relevant restriction” while offering “no significant health-related benefits.” Chief Justice Roberts wrote his own opinion setting out his disagreement with the liberal justices’ approach of balancing the benefits of the law against the burdens on women, but agreeing with their conclusion that the law was unconstitutional.

Justice Thomas’s dissent recited his fundamental disagreement with Roe and Casey and reiterated his willingness to overrule those precedents, while also holding that the Louisiana law would be constitutional even under the Casey standard. Justice Alito’s dissent, in which Justices Gorsuch and Kavanaugh joined, took issue with abortion providers being allowed to bring suit purportedly on behalf of their patients, and said that the case should be remanded to the trial court to correct that and other procedural problems. Justice Gorsuch wrote to point out the problems with the Chief Justice’s approach, and Justice Kavanaugh wrote a short dissent summing up where all the other justices stood, most notably, that “five Members of the Court reject the Whole Women’s Health cost-benefit standard.”

In this rejection of cost-benefit balancing for abortion regulations, many pro-lifers have seen a silver lining, an opening, even a stealth victory. I believe it is merely a sideshow, a distraction from our primary goal of overturning Roe and Casey.

As Justice Gorsuch pointed out, even using Chief Justice Roberts’ test, “it seems possible that even the most compelling and narrowly tailored medical regulation would have to fail if it placed a substantial obstacle in the way of abortion access.” Precisely. In fact, under either test, balancing or not balancing, any regulation that results in clinic closures and strained access to abortion will ultimately be struck down under Casey and Hellerstedt. If Kermit Gosnell is the only abortion provider in eastern Pennsylvania, and he says he will quit if he can’t have his cats with him, then a law banning household pets from the operating room would be an unconstitutional “substantial obstacle” to women getting abortions, whichever test is used.

This focus on availability of abortions was the new twist in WWH.

The abortion laws at issue in Casey were efforts by the state to decrease demand for abortion, e.g., informed consent, reflection period, parental consent, spousal notification. The Casey plurality considered whether any of those provisions would directly pose a substantial obstacle to a woman seeking an abortion, and ruled that only the spousal notification law could, in a large fraction of cases, place such an obstacle to a woman carrying out her decision.

In WWH, however, the plaintiffs argued that the health and safety regulations enforced by Texas decreased the supply of abortions, and for the first time, the Court found that a law could be struck down under Casey if it created obstacles to abortion by the indirect path of clinic closures and disqualification of doctors from abortion practice.

This new source of “substantial obstacles” for women seeking abortions has led to intensely fact-specific records and arguments concerning for example, how many doctors are currently doing abortions, which doctors made what
efforts to get admitting privileges at how many hospitals, how many days a week they work, how many abortions they can do per hour, where the abortion clinics are located, which ones have ultrasound machines, driving times across the state, and the availability of public transportation. Both the Supreme Court and the lower courts have descended into mind-numbing detail on these and similar points.

But to what end? Any decision a court makes about whether or not an abortion regulation is constitutional because, at this moment, the law strains the availability of abortion in the state, is subject to reconsideration and re-litigation in light of changed circumstances, such as doctors entering or leaving abortion practice, or clinics opening or closing in various areas of the state. Even something unrelated to abortion, such as the establishment of a high-speed rail system, could factor into whether a “large fraction” of women were unduly burdened by a law that results in clinic closures. Moreover, as long as courts are now obliged to strike down laws that “unduly” constrain the availability of abortions, clinics have little incentive to come into compliance with the laws, rather than challenging them and claiming they will have to shut their doors.

In JMS, the justices were working within the Casey framework to pinpoint when too many women find it too difficult to get abortions. Roberts and the conservative justices tried to establish a beachhead against courts deciding challenges to abortion health and safety regulations by weighing the benefits of the law against its burdens. Apparently unconscious of the irony, Chief Justice Roberts wrote:

In this context, courts applying a balancing test would be asked in essence to weigh the State’s interests in “protecting the potentiality of human life” and the health of the woman, on the one hand, against the woman’s liberty interest in defining her “own concept of existence, of meaning, of the universe, and of the mystery of human life” on the other. Casey, 505 U.S., at 851. There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were…. Pretending that we could pull that off would require us to act as legislators, not judges ….

What Chief Justice Roberts here described as an impossible balancing of improponderables is exactly what the Supreme Court undertook to do, first in Roe and then in Casey, in order to settle the abortion debate once and for all.

In Roe, the Supreme Court assigned specific weights to the state’s interest in maternal health, in the “potential” human life at various gestational stages, and in the mother’s privacy right, and precisely and conveniently balanced them according to the trimesters of pregnancy. In Casey, quoted by Roberts, the Court abandoned the trimester system but still imposed, under the guise of interpreting the Constitution, a balancing of rights as between the mother and unborn child, drawing a dotted line at viability where the balance shifts toward the state’s interest in preserving the life of the child.

For that reason, it is eye-opening to see Chief Justice Roberts, in agreement with four other members of the Court and thus constituting a majority of the Court, saying that the balancing of rights performed by the Court in Casey was a job for the legislature, not for the courts. Recall that, in voting to strike down Louisiana’s law, the Chief Justice was not striking down a pro-life/anti-abortion law. Neither party presented the law as one furthering the state’s interest in protecting unborn children. On the contrary, the state’s position was that the law’s sole purpose was to make abortion safer and that it did not unduly interfere with access to abortion.

The Chief Justice recognized that he was presented with a very narrow question. He specifically noted: “Both Louisiana and the providers agree that the undue burden standard announced in Casey provides the appropriate framework to analyze Louisiana’s law. Neither party has asked us to reassess the constitutional validity of that standard.” Justices Alito and Kavanaugh made the same observation: the State did not ask the Court to reexamine Casey. Justice Gorsuch noted that Roe was not at issue, while Justice Thomas made it clear he would need no invitation to reconsider both.

It’s time to ask. Time to present the Court with laws that are irreconcilable with Roe and Casey and to ask the Court to uphold the laws and overrule their badly flawed prior decisions. And keep asking until the Court does so.
Mail Order Abortions

On April 14, 2020, Planned Parenthood issued a press release stating that it intended to expand its telehealth options into all 50 states. The services that would be widely available without an in-person office visit included birth control, gender transition hormone therapy, and the morning-after pill, as well as abortion follow-up.

That same day, Senator Elizabeth Warren (D-Mass.), along with Senators Patty Murray (D-Wash.), and Tammy Baldwin (D-Wisc.)—all heavily funded by Planned Parenthood—sent a letter to FDA Commissioner Stephen Hahn declaring chemical abortion to be an “essential service” and demanding an immediate change in the Food and Drug Administration’s in-person requirements for abortion drugs mifepristone and misoprostol. Since 2000, the FDA has required women undergoing a chemical abortion to take the first dose of the drugs in an abortionist’s office. Life Legal has written previously about the dangers of taking these drugs at home without in-person exams, including ultrasound. For example, an ultrasound is a necessary step prior to prescribing these pills: the abortion drugs can cause an unknown ectopic pregnancy to rupture, inducing severe pain and bleeding that may lead to hospitalization and even death. Ultrasound is also necessary to determine the baby’s precise age, as the FDA has not approved abortion drugs beyond ten weeks gestation.

On June 16, another group of Planned Parenthood funded lawmakers led by Senator Diane DeGette (D-Colo.)—who opposes laws banning partial-birth abortion—sent a letter to Commissioner Hahn demanding that the FDA allow chemical abortion drugs to be available through the mail.

Life Legal has joined with other anti-abortion groups to advocate for life during this pandemic through a letter of our own.

“While we are in a hectic race to save lives, Planned Parenthood and other powers in the abortion industry remain insistent on taking the lives of innocent unborn children…. [A]bortion activists are relentlessly insisting that dangerous chemical abortions be made more accessible, even going so far as to demand that FDA safeguards meant to protect women are temporarily suspended. At a time when hospitals are overloaded, the abortion industry is putting women at risk of incomplete abortion, hemorrhage, and infection. Women undergoing chemical abortions are especially vulnerable, experiencing four times as many adverse events as women undergoing surgical abortions.”

On May 27, the pro-abortion American College of Obstetricians and Gynecologists (ACOG), along with the SisterSong Women of Color Reproductive Justice Collective, sued the FDA and the U.S. Department of Health and Human Services to lift the restrictions on chemical abortion in light of COVID-19. Tragically, on July 12, U.S. District Judge Theodore Chuang—an Obama appointee—ruled in ACOG’s favor, holding that requiring women to travel to an in-person appointment imposes a “substantial obstacle in the path of women seeking an abortion.” Chuang relied on the undue burden test introduced in Planned Parenthood v. Casey and expanded in Whole Women’s Health v. Hellerstedt in 2016 in his 80-page ruling.

At the time of this writing, chemical abortions are available through telehealth appointments and mail order prescriptions.
Lawsuit Feeding Frenzy
In addition to petitioning the FDA and other federal agencies to eliminate chemical abortion restrictions, Planned Parenthood went on a litigation frenzy when states began to designate abortion as “non-essential.”

In March, Texas Governor Greg Abbott issued an executive order requiring all elective surgeries—including abortions—to be postponed in order to conserve scarce personal protective equipment (PPE) for life-saving procedures. Planned Parenthood sued, claiming that abortions are just as “essential” as say, removing a malignant brain tumor. Although the lower court issued a temporary restraining order (TRO) forbidding the state of Texas from designating abortion as a non-essential service, the Fifth Circuit Court of Appeals reversed, which meant surgical abortions were again prohibited. Unfortunately, the ruling did not cover chemical abortions, as the Fifth Circuit held that the State did not provide sufficient evidence as to why chemical abortions should be considered non-essential. Still, surgical abortions were banned in Texas for an entire month, potentially saving hundreds of lives.

While Planned Parenthood insisted that its abortion services were “essential,” it essentially acknowledged that it was competing with hospitals for scarce resources when it sent out emergency appeals asking donors for PPE, including surgical gloves and masks.

Encouraging Child Pornography
Outside the political and judicial activities Planned Parenthood is engaging in during the COVID-19 pandemic, some affiliates are also posting advice for “safer sex” on their websites. On its blog, Planned Parenthood of Illinois encourages readers to “reconsider one-night stands” and instead try virtual sex, phone sex, or sexting. Even though this advice is not issued solely to teens, Planned Parenthood must surely know that a large part of its audience is underage. The recommended activities are not only dangerous, but illegal for minors. Sending or receiving sexts involving minors is a violation of state and federal pornography laws.

While Planned Parenthood’s main website does advise minors about the legal implications of sexting, the warning is noticeably missing from local affiliates’ COVID-19 pages.

Overall, it is clear that from political influence to judicial activism to community outreach, Planned Parenthood is not letting this crisis go to waste when pursuing its agenda of killing innocent children and encouraging risky sexual behaviors that fuel its business model. This is why Life Legal continues to fight for life in the courtroom and the public sphere.

In March, Texas Governor Greg Abbott issued an executive order requiring all elective surgeries—including abortions—to be postponed in order to conserve scarce personal protective equipment (PPE) for life-saving procedures. Planned Parenthood sued, claiming that abortions are just as “essential” as say, removing a malignant brain tumor. Although the lower court issued a temporary restraining order (TRO) forbidding the state of Texas from designating abortion as a non-essential service, the Fifth Circuit Court of Appeals reversed, which meant surgical abortions were again prohibited. Unfortunately, the ruling did not cover chemical abortions, as the Fifth Circuit held that the State did not provide sufficient evidence as to why chemical abortions should be considered non-essential. Still, surgical abortions were banned in Texas for an entire month, potentially saving hundreds of lives.

While Planned Parenthood insisted that its abortion services were “essential,” it essentially acknowledged that it was competing with hospitals for scarce resources when it sent out emergency appeals asking donors for PPE, including surgical gloves and masks.

Ohio officials, likewise, found themselves in court defending the state’s interest to provide abortion drugs if a woman qualified for them.

Similar TROs and/or preliminary injunctions were issued in Oklahoma (appeal denied) and Alabama (stay granted in part, denied in part). Planned Parenthood also filed suit in Iowa, but later moved to dismiss it.

Of course, the abortion cartel seeks attorney costs and fees in all of its lawsuits. In Whole Women’s Health v. Hellerstedt, which challenged a Texas admitting privileges law that was ultimately struck down by the Supreme Court, attorneys for the abortionists sought $4.5 million in fees, billing at an average of $740 per hour. But Planned Parenthood is also trying to recover attorney fees in each of the lawsuits in which it obtained a TRO to be able to continue killing babies. The Attorney General of Ohio recently filed a petition for review with the U.S. Supreme Court, arguing that temporary restraining orders are, by definition, not final judgments and therefore Planned Parenthood should not be eligible for fees. Nineteen other states filed a “friend of the court,” or amicus brief with the Court in support of Ohio’s petition arguing that clarity is needed so states are not “left to gamble with public money.”
As tensions rise from “shelter at home orders” and social discord, we have witnessed those in the abortion industry manipulate the use of taxpayer funded law enforcement personnel to intimidate pro-life sidewalk counselors from praying, speaking truth, and offering life-saving alternatives to women considering abortion. Abortion clinic personnel frequently call the police and make false claims that sidewalk counselors have violated a myriad of laws. In Napa, California, i.e., Life Legal’s Napa, California, Planned Parenthood employees called the police every day in a one-week span. They even called twice in the same day! While in each of those instances no charges were filed against the sidewalk counselors, the mere interaction with law enforcement was unnecessary, detracted from valuable prayers for the babies and their moms, and intimidated pro-life advocates from peacefully exercising their free speech rights on the public sidewalk. These visits were a complete waste of law enforcement resources that could be better spent dealing with actual problems.

In some cities, pro-abortion law enforcement officers now routinely sit outside or regularly patrol around clinics during certain hours. As a result,.

UNINHIBITED, ROBUST, AND WIDE OPEN! YES, BUT FOR WHOM, EXACTLY?

Allison Aranda

In the midst of societal chaos, we must not grow weary of praying to end abortion and ministering to women and their unborn children. The pro-life voice is being muzzled by fear and intimidation of abortion workers and their pawns. The very people who swear to uphold and defend the Constitution and protect and serve are being used to silence the peaceful pro-life advocates who simply pray and offer life-saving alternatives to abortion.

IN SOME CITIES, PRO-ABORTION LAW ENFORCEMENT OFFICERS NOW ROUTINELY SIT OUTSIDE OR REGULARLY PATROL AROUND CLINICS DURING CERTAIN HOURS.
we at Life Legal have received calls from people from various parts of the country expressing their fear over the constant police surveillance outside of abortion clinics. These are law-abiding, peaceful sidewalk advocates who fear being arrested for speaking too loudly or inadvertently stepping a toe across a property line.

In San Francisco, California, the police arrested Ron K. for purportedly violating the city’s “shelter-in-place” law. Despite the fact that the City dismissed the charges and acknowledged that pro-lifers had a right to be on the sidewalk as long as they were social distancing, the police still sit outside Planned Parenthood and take photographs of the pro-life sidewalk advocates and video record their activities. This is the same police force that refuses to prosecute the Antifa pro-abortion radical that violently attacked Ron K. just last year. The same police force that allowed hundreds of people to engage in rampant rioting and looting, not to mention flagrant violations of the city’s COVID-19 restrictions.

In Dallas, Texas, sidewalk advocates have been threatened with arrest for speaking too loudly outside the clinic as they pray. Outside the clinic of notorious late-term abortionist Curtis Boyd, two officers maintain a continuous presence on “abortion days.” While Boyd and his cohorts carve up fully formed babies, police are stationed outside the clinic—not to protect the human beings who are being murdered inside, but to ensure that the pro-lifers outside don’t raise their voices at injustice.

At the same time, large crowds of violent protestors in cities across the nation are allowed to violate social distancing rules and a whole slew of criminal laws because their topic of expression is more “politically acceptable.”

What is the result of this biased and selective intimidation? Many in the pro-life community are being silenced by fear and threat of arrest. And this is exactly what abortionists are hoping for. They don’t have to go through the trouble of enacting bubble zone laws or other restrictions on pro-life speech—they just coopt taxpayer funded law enforcement officers to hover over pro-lifers in the name of protecting “fundamental rights.”

But this is precisely the type of activity that is prohibited by the First Amendment to the U.S. Constitution.

We commend and applaud the courageous law enforcement officers who stand for life and liberty and do not cower to the abortion cartel. We have intervened in cases across the country where we believe police officers have been called for the purpose of suppressing what should be protected speech.

Life Legal is committed to providing a vigorous defense to protect your rights to speak freely, publicly assemble, and to exercise your religious freedoms on the public sidewalk. We must not tremble in the face of adversity. As long as abortion clinics remain open and women are in need of life-saving alternatives, we must not relent in our pursuit to protect life.
• Please consider making a tax-deductible contribution today. Life Legal provides trained and committed legal representation in life and death cases across the country. Your generosity saves lives! lldf.org/donate
• Please contact your U.S. Senator (senate.gov/) to support legislation defunding Planned Parenthood!
• Wanted: Attorneys to assist with forced death and denial of care cases. We also need doctors willing to serve as expert witnesses. Please call Life Legal for more information: (707) 224-6675