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Supreme Court Update: June Medical Services v. Gee (No 18A774), Dunn v. Ray (No. 18A815)

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Greetings, Court Fans!

The Court is between sittings, so we've got no new opinions to report, but there was some significant action on the orders front last night, concerning three of the more divisive issues to come before the Court—abortion, the death penalty, and religion.

On the abortion front, in ***June Medical Services v. Gee* (No 18A774)**, the four liberal justices and Chief Justice Roberts stayed the mandate of a Fifth Circuit decision upholding a Louisiana law regulating abortion clinics. The law in question requires doctors who perform abortions to have admitting privileges at a nearby hospital. If that sounds familiar, it should: In *Whole Woman's Health v. Hellerstedt* (2016), the Court (with Justice Kennedy joining the liberals) invalidated a similar Texas statute over a dissent by Justice Alito joined by the Chief and Justice Thomas. (The case was decided after Justice Scalia's death.) The majority found this admitting-privileges requirement facially unconstitutional because Texas had failed to show that the law advanced a legitimate interest in protecting women's health.

Moreover, the law imposed a "substantial obstacle in the path of a woman's choice," because enforcing it would require half of Texas's abortion providers to close, requiring many women to travel hundreds of miles to obtain an abortion. Balancing this obstacle against the absence of any health benefit, the majority concluded that the law imposed an "undue burden" under *Planned Parenthood v. Casey* (1992) and was therefore unconstitutional.

In *June Medical Services*, a group of Louisiana abortion providers challenged that state's nearly identical law, and the district court agreed with them, relying on *Hellerstedt*. But in a decision issued a few weeks ago, a panel of the Fifth Circuit reversed, distinguishing *Hellerstedt* because it was unclear whether the law would actually restrict access to abortion at all: Louisiana has only three clinics that provide abortions, and unlike in Texas, it appeared that the four doctors who perform abortions at those clinics *might* be able to obtain admitting privileges nearby. Last Friday, Justice Alito (the Circuit Justice for CA5) issued a temporary stay of the Fifth Circuit's order, keeping the District Court's injunction in place for one week, while the full Court considered the matter. And late last night, just before the law might have gone into effect upon the expiration of Alito's stay, the full Court issued a longer stay, maintaining the District Court's injunction against the law going into effect so the providers can file a cert petition and so that the Supreme Court can then decide the merits (assuming it grants certiorari, as most assume it will).

Much of the commentary today on this order has focused on the votes of the Justices at each end of the seniority spectrum. First, Chief Justice Roberts joined liberal justices in staying the Fifth Circuit's decision, even though he had dissented from *Hellerstedt*. Most interpret this as the Chief recognizing *Hellerstedt* as binding precedent, *at least as far as the Fifth Circuit is concerned*. *Hellerstedt* may be overruled or limited, but it is the job of the Supreme Court, not appellate courts, to do so. Whether the Chief views *Hellerstedt* as binding precedent in a stronger sense—i.e., precedent to be followed based on stare decisis—will have to wait until the Supreme Court takes up the merits.

Second, Justice Kavanaugh penned a dissenting opinion, which many have interpreted as his "coming out" from a period of "laying low." Court Fans may recall that Kavanaugh's confirmation depended in part on support from pro-choice Republicans like Maine's Susan Collins, who predicted that Kavanaugh would continue Justice Kennedy's legacy of being a moderate on abortion. Many on the left today are decrying that stance and lamenting that Kavanaugh has now revealed his true colors with respect to *Roe*. We think the verdict's still out. Kavanaugh's opinion is clearly meant to stake out a more moderate position than his fellow dissenters, who dissented without opinion. As he explained, if the Fifth Circuit's decision were allowed to go into effect, Louisiana's law would not take effect immediately. Instead, it would enter a 45-day "regulatory transition" period, during which the state's four abortion providers could try to obtain admitting privileges at local hospitals. In Kavanaugh's view, it was premature to stay enforcement of the law until the providers have tried, and some failed, to obtain admitting privileges: If all four providers succeed in obtaining privileges, the law would not restrict access to abortion (at least in the same manner as the Texas law that was struck down in *Whole Woman's Health*). He, therefore, would have denied the stay, without prejudice to the providers' ability to later bring a motion for a preliminary injunction

if, at the conclusion of the 45-day regulatory transition period, some of them were unable to obtain privileges and one or more clinics was at risk of closing. As with the Chief's vote to maintain the stay, Justice Kavanaugh's true views on the scope and durability of *Whole Women's Health* (and *Roe*), will remain unknown until the Court reaches the merits, something we expect to happen next term.

The Court's other controversial late-night order, vacating a stay of execution in ***Dunn v. Ray (No. 18A815)***, is a bit harder to understand. Domineque Ray was sentenced to death for the rape and murder of a 15-year-old girl in 1995. On November 6, 2018, Alabama scheduled Ray's execution date for February 7, 2019. On January 28, 2019, Ray, who is Muslim, sought a stay of the execution, arguing that the prison's refusal to permit his imam to attend to him in the execution chamber violates the Establishment Clause. The prison's policy permits a death row inmate to be attended by both the prison chaplain and the inmate's personal spiritual adviser, but only permits the (Christian) chaplain to be present in the execution chamber. When Ray sought to have his imam present in the execution chamber, his request was denied on security grounds. The request was denied on January 23rd, and Ray filed a complaint seeking a stay on January 28th. The Eleventh Circuit granted the stay on Wednesday, but last night a divided court vacated the stay on the ground that Ray had waited too long to seek it. Citing *Gomez v. District Court* (1992), which held that "[a] court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief," the Court held that Ray should have sought a stay closer to November 6th, when his execution was scheduled.

Justice Kagan, joined by the other more liberal justices, dissented, calling the Court's decision "profoundly wrong." In her view, the Alabama policy very likely violates the Establishment Clause because a Christian prisoner may have a minister of his own faith attend to him in death, while an inmate of another faith may not. While she acknowledged that prison security is an important interest, she noted that the State had offered no evidence to show that its wholesale prohibition on outside spiritual advisors is, in fact, necessary to achieve that goal. (As she noted, the only evidence the State offered was an affidavit stating that its policy "is the least restrictive means of furthering" its interest in safety and security.) With respect to the timing issue, Justice Kagan noted that, even though his execution was scheduled on November 6, Ray had no way of knowing that the State would deny his request before January 23rd. The relevant Alabama statute provides that both the prison chaplain and the inmate's spiritual adviser of choice "may be present at an execution," without drawing a distinction between those who may be present in the execution chamber and those who may only be present in the viewing room. (The majority did not address this point.) Justice Kagan observed that the Court is normally reluctant to vacate a stay (which implies an abuse of discretion by the lower court). "Here, Ray has put forward a powerful claim that his religious rights will be violated at the moment the state puts him to death. The Eleventh Circuit wanted to hear that claim in full. Instead, this Court short-circuits that ordinary process—and itself rejects the claim with little briefing and no argument—just so the State can meet its preferred execution date."

With that, we'll conclude this episode of Supreme Court Update: Culture Wars

Edition. Barring any other controversial Orders, we'll be back when the Court returns with opinions.