UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

PLANNED PARENTHOOD OF THE GREAT NORTHWEST AND THE HAWAIIAN ISLANDS, a Washington corporation; MARY STARK, on behalf of herself and her patients, Plaintiffs, vs. LAWRENCE G. WASDEN, et al. Defendants.	CASE NO. 1:18-cv-00555-BLW **MOTION HEARING**

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE B. LYNN WINMILL
THURSDAY, JUNE 6, 2019; 11:02 A.M.
BOISE, IDAHO

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TAMARA I. HOHENLEITNER, CSR 619, CRR
FEDERAL OFFICIAL COURT REPORTER
550 WEST FORT STREET, BOISE, IDAHO 83724

APPEARANCES

FOR PLAINTIFFS

Vanessa Soriano Power
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101

Kim Clark
LEGAL VOICE
907 Pine Street, Suite 500
Seattle, WA 98101

Nicole C. Hancock
STOEL RIVES LLP
101 S. Capitol Blvd., Suite 1900
Boise, ID 83703

FOR DEFENDANTS

Cynthia Yee-Wallace
Megan A. Larrondo
IDAHO ATTORNEY GENERAL
LAWRENCE G. WASDEN
954 W. Jefferson Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010

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[4] PROCEEDINGS

June 6, 2019

THE CLERK: The court will now hear Civil Case 18-555, Planned Parenthood of the Great Northwest and Hawaiian Islands versus Lawrence Wasden, regarding defendants' motion to dismiss.

THE COURT: Good morning, Counsel.

Counsel, I'm going to take just a couple minutes and offer some just very brief observations.

I think Mr. Coit advised you that we're under kind of a time restraint; we have to be somewhere at noon. So we're going to try to limit both sides to about 20 minutes. And we're only going to deal with the motion to dismiss, and it is a motion to dismiss. So as a result, we need to focus just on the law.

The observations I would make is that I think this case clearly turns on the tension between the Supreme Court's decision in *Mazurek* and *Whole Woman's Health* and how we resolve that. *Mazurek*, I think the question is: Does it establish a per se rule that it is within the state legislature's responsibility without judicial oversight to restrict abortion to licensed physicians regardless of motive and regardless of how much it may affect a woman's access to an abortion. That's

the view of *Mazurek* that I think the state basically is taking.

On the other hand, we have, you know, the more recent [5] decision in *Whole Woman's Health* in which the court, in analyzing – indicates that a court, such as myself, in analyzing the law which imposes restriction on abortions, whether that court may properly consider both the extent of the requirements of burden to access along with whatever benefits the state claims to obtain from the restriction.

It seems to me the court clearly, by reversing I think it was the Fifth Circuit and adopting the approach taken by the district court, says that that is the appropriate thing to do.

Those two decisions seem to be in conflict. One suggests a much more fact-intensive inquiry. As I recall, the *Whole Woman's Health* had to do with whether it was appropriate to require that the doctor not only be a licensed physician but that they have admitting privileges.

So it was a question of the extent – you know, not just having a license, per se, but what other qualifications must the abortion provider have in order to provide the service.

And so, for that reason, it does seem to me that it's getting into the same issue here as to what qualifications must the healthcare provider have in order to perform an abortion under state law and whether that

restriction unduly burdens a woman's right to an abortion.

So I've got some questions to follow on with that, but I think the other thing that I guess I want the parties to address is that *Mazurek* was decided 20-plus years ago. In that [6] time, I'm not sure if physician's assistants and nurse practitioners – if there was much of it going on or if it was just starting. Now it's taking over. And I think we've heard comments that at some point in the not too distant future, essentially all primary care – all primary care treatment is going to be provided by physician's assistants, and MDs will be almost all specialists.

And that raises the question: If the State of Idaho were to adopt a requirement that only gynecologists can perform abortions, would that muster moisture under either *Whole Woman's Health* or *Mazurek?*

Because that kind of goes to this issue of can the state impose requirements – not just a medical license, but in defining what kind of medical license you need to provide an abortion. Does that essentially create kind of a per se rule under *Mazurek*, or would it require to get into a more granular, fact-sensitive review as suggested by *Whole Woman's Health?*

So that's the issues that are banging around in my mind. Ms. Yee-Wallace, I think it's your motion, so I'll hear you first. And it looks like you are reserving five minutes for rebuttal.

ARGUMENT BY DEFENDANTS

MS. YEE-WALLACE: I am, Your Honor. Thank you.

So in light of the court's comments, I'm just going to jump straight into *Mazurek*.

[7] THE COURT: That's why I ask those questions.

MS. YEE-WALLACE: Fair enough.

Your Honor, I think there are two things that are dispositive with respect to why *Mazurek* disposes of this case is: Number one, we aren't dealing with the nuances of a physicians-only law. We aren't dealing with the degrees to which certain physicians or the number of physicians or the days on which abortions can be performed.

This is a baseline requirement that the United States Supreme Court has long upheld since the *Roe* decision. And what's significant when you look at the *Mazurek* decision is when the Supreme Court was addressing the Ninth Circuit's argument – and at that time in 1997, there were apparently physician's assistants who were performing abortions.

And the facts of that case was that this particular physician's assistant had been performing abortions for years. So it appeared to be at least somewhat commonplace in Montana.

And the plaintiffs in that case in 1997 made some of the very same arguments that the plaintiffs in this

case have made. And when the Supreme Court looked at the Ninth Circuit's arguments and analysis, he pointed – the Supreme Court pointed out two errors.

The first error was the Supreme Court, looking at the fact that the Ninth Circuit held that the plaintiff had a fair chance of success on the merits, and the court said: First of [8] all, that's wrong in light of *Casey*. Because states have wide latitude to restrict certain procedures to physicians only. And it was undisputed that there was insufficient evidence.

If the Supreme Court had stopped its analysis of the Ninth Circuit's decision there and had gone no further, I think the controlling nature of *Mazurek* may be up for debate. But the Supreme Court didn't stop there.

The Supreme Court found a second, which is the dispositive error, and said the Ninth Circuit also got it wrong in not disposing of the case because of our prior precedent. And they went through the *Roe* case and the *Menillo* case and the *City of Akron* case and essentially did create a bright-line rule.

Which there are very few, I will admit, bright-line rules in abortion jurisprudence that states can rely on. But the source of a state's ability to restrict abortions to physicians only is a power that the United States Supreme Court has said is something that the Constitution itself gives states wide latitude to decide.

So in terms of whether or not there is a tension between *Whole Woman's Health* and Idaho's physician-only – or *Mazurek*, we are not here today taking the

position that all abortion regulations that have been decided on the books in the past may not be subject to *Whole Woman's Health* analysis.

But the issue before this court is whether Idaho's law [9] that says physicians may only be performed by abortion [*sic*], whether or not this case is foreclosed by the *Mazurek* decision. And there is no tension between *Whole Woman's Health* and *Mazurek*.

What *Whole Woman's Health* did is reaffirm *Casey* and then fleshed out how the court is to weigh the evidence when the undue burden analysis applies.

Again, the *Whole Woman's Health* case affirmed *Casey*, which was one of the seminal cases in which the court upheld the state's ability to restrict certain functions in the abortion process to licensed individuals.

And so what the results of the Supreme Court's prior precedent and what's dispositive is – and what answers this question is the bright-line rule that *Mazurek* created based on its prior precedent. The – based on that precedent, the court –

THE COURT: Counsel, let's envision a world where things have changed, where there is no longer primary care physicians. All – the world has changed and licensure has changed so that – you know, I have – for quite some time, I would go in for physicals and see a physician's assistant but never see a doctor.

And the point may come, with the cost of healthcare, where, as I suggested earlier, essentially

you are going to restrict it just – if it has to be a licensed physician, it [10] will be perhaps a gynecologist.

Are you saying that would be appropriate, just to limit it to only a specialist that – and not even allow a general practitioner? Because perhaps they don't even exist at that point, because all of the primary care is being offered by the physician's assistants and nurse practitioners.

MS. YEE-WALLACE: I think the question in that case would be whether or not *Mazurek* needs to be overturned explicitly.

And just like the court did in the *Casey* case when it reaffirmed *Roe*, it talked about the importance of precedence. And it basically talked about two concepts that were critical to the court's decision in reaffirming *Roe* in the *Casey* case, which was: Have things changed so much that now we have a different understanding of the central holding in *Roe?* Or is there something else that's happened that gives us a different understanding of that case in *Roe.*

I don't think the *Whole Woman's Health* case calls *Mazurek's* line of reasoning or the central holding in question. And nor is there any evidence that medicine has advanced to such a point that it would be necessary to undo that precedent.

But even if it were, Your Honor, it would [sic] for the United States Supreme Court to overturn explicitly the *Mazurek* decision. And this court is still bound to follow that decision as controlling in this case.

[11] THE COURT: But I'm also bound by Whole health – *Whole Woman's Health*. And if that suggests that I should, in that case, evaluating whether a doctor should be required to have admission privileges at a hospital, clearly the court said you can look at these very things: What is the burden, and what is the supposed justification?

Go ahead.

MS. YEE-WALLACE: The difference is, Your Honor, in *Whole Woman's Health*, there was not Supreme Court precedent going back to 1973 that had constitutionally upheld surgical center requirements and admitting privileges requirements.

In this case, there has been precedent going back to 1973 upholding that standard as constitutionally permissible, as inherently reasonable – as an inherently reasonable means to regulate the abortion procedure.

It goes back to *Roe vs. Wade*. That's a critical difference. Prior precedent is not a nothing burden [sic] in this case. It is dispositive. And the regulations that were at issue in *Whole Woman's Health* did not have the history behind it that this particular law does. And this law has been on the books since 2000 in Idaho.

And there is a reason why plaintiffs can't point to other than the sort of new wave of lawsuits that are being filed against the country that's trying to open up that particular provision, physicians-only lawsuits across the country. There [12] is reasons why there is

not prior precedent that goes in their favor that they are making new precedent now. It's because states have relied since 1973 on the fact that the U.S. Supreme Court has told them it's constitutionally permissible for states to set a baseline on the qualifications of who can perform abortion – this very unique act, which is the only medical act that terminates a potential life – to physicians only.

The regulations in *Whole Woman's Health* did not have that history. And that history is significant and dispositive in this case.

THE COURT: Okay.

MS. YEE-WALLACE: With that, Your Honor, I'll yield my time for reply.

THE COURT: All right. Ms. Power.

Ms. Power, what about the lack of any cases? I mean, Ms. Yee-Wallace is absolutely right. I mean, even though I have indicated that physician's assistants and nurse practitioners have become kind of the primary – I guess the front line in providing primary healthcare, they have been around for 25, 30 years. Surely, there has been an opportunity to address that issue in the intervening years since *Mazurek*.

And I haven't seen a lot, if any, cases where courts have, in fact, been willing to say that, no, the state is not free to impose this baseline requirement that only licensed physicians can provide abortion services.

[13] ARGUMENT BY PLAINTIFFS

MS. POWER: Your Honor, you're correct that this is relatively new within the courts construct. But there are a number of things that have changed in the past 20 years. And so, of course, as the court recognized, it's the standardization of what we call APCs, or advanced practice clinicians.

But it's also the fact that medication abortion has now become – the advent of safe medication abortion is now prevalent. This is something that – that we think feeds directly into the facts and the factual allegations that have been set forth here that the court does need to take into consideration.

I'll address a couple high-level points first. Because we recognize that *Mazurek* and *Whole Woman's Health* are, arguably, in tension. But from our perspective, this case fits squarely within both of them.

What the state has failed to note is that *Mazurek* itself applied the undue burden analysis that was set forth in *Casey*. So the undue burden analysis does have to apply here.

What *Whole Woman's Health* did was refine that analysis and directed courts to take it in context. And that is where –

THE COURT: So what you're saying is *Mazurek* did not establish a per se rule; it established an application of the undue burden test under *Casey* to the question of restricting [14] abortions to licensed physicians? And that was true then, but now we have

it in Montana and today in Idaho, with the changes that have occurred in healthcare, that – and under the direction of *Whole Woman's Health*, we look at the same issue and should we feel free to come out with a different conclusion consistent with *Mazurek?* Because *Mazurek* was, in fact, decided under the facts present in Montana in whatever year it was.

What year was it?

MS. POWER: 1997.

THE COURT: '97. And today, in 2019 in Idaho, we take the *Casey* standard, apply it here with the further direction we have from *Whole Woman's Health*. And you're suggesting that at least, at a minimum, there needs to be the development of a factual record and *Casey* and *Mazurek and Whole Woman's Health* applied here today now?

MS. POWER: That's exactly right, Your Honor.

And we do not, as the state suggests, argue that *Mazurek* was overturned by *Whole Woman's Health*.

THE COURT: Let me ask – and this might be for Ms. Yee-Wallace. Is there any – again, this probably is in the briefing. It's been a busy week. I have reviewed it, but I'm a little fuzzy now on some of the details. But are there cases in which the lower courts or courts of appeal have specifically said *Mazurek* is a per se rule based – I think, Ms. Yee-Wallace called it a baseline, or have they generally treated it in the [15] way you have? It's kind of like an antitrust rule of

reason versus a per se violation of Section 2 of the Sherman Act.

MS. POWER: Right. There are cases, Your Honor, candidly, where the – and I think it's *Carhart* – in which the U.S. Supreme Court did say that *Mazurek* was a longstanding rule. But that was in 2007.

And so since then, there have been several other cases. I would the [sic] direct the court's attention to the *Humble* case out of the Ninth Circuit, as well as *Tucson vs. Eden* out of the Ninth Circuit, both of which reconcile *Mazurek* within this context. And then, of course, *Whole Woman's Health* was subsequent to those in 2016.

What I would note for court here is that *Mazurek* is distinguishable from the case that's currently before the court. And there are a couple of bases for that.

The first is the standard. The standard that was applied in *Mazurek* was in the context of a preliminary injunction, where, of course, among other factors, the plaintiffs had to show a likelihood of success on the merits.

We're here before the court today on a motion to dismiss. It's a very different standard. We have to show plausibility and whether there is a plausibility of our ability to make a claim under either substantive due process or equal protection.

Second, the *Mazurek* court looked at the evidence that [16] was before it and whether there was sufficient evidence before it. So it was applying the evidentiary

standard as well. There is no evidentiary standard that's currently before the court, again, given the procedural context.

Third and very important here is that the legal theory that the U.S. Supreme Court was looking at in *Mazurek* was different than the legal theory that's being pursued here. Under *Casey*, a law can be deemed unconstitutional if either the purpose of the law or the effect of the law puts in place a substantial obstacle to a woman's right to abortion.

In *Mazurek*, the issue before the court was whether the Montana legislature acted with an improper purpose in passing that legislation. Here, the plaintiffs do not contest the purpose of the law. We are asserting that the effect of the law itself is what is unconstitutional.

THE COURT: Just to make sure I understand your point. So what you're saying is that *Mazurek* tells us that we are not to question the legislature's motive in imposing a physicians-only requirement?

But you, I think, would also say, though, that we can evaluate the burden that that physicians-only requirement may impose.

MS. POWER: Correct, Your Honor. Though *Mazurek* actually went a little bit further than that. It was looking at whether there was evidence. And when it overturned the [17] Ninth Circuit, it challenged the Ninth Circuit's decision because the Ninth Circuit said there may have been an improper purpose in – in what

the legislature had determined but found no evidence of improper motive.

THE COURT: In any event, the Supreme Court did not get to the issue of whether it burdened, or did it? Whether it burdened a woman's right to access to an abortion.

MS. POWER: That's correct. It was – there was essentially uncontested evidence as to whether there was a burden or not. It didn't reach the effect portion of it.

THE COURT: Okay.

MS. POWER: So in short, the plaintiffs here, we are arguing that *Mazurek* can be reconciled with the case that's before the court today, and that it is the application of *Whole Woman's Health* here that is truly what shows that the claims that are at issue are plausible.

And so as the court knows, in *Whole Woman's Health*, the regulations at issue were found unconstitutional. Those were the admitting privileges and the surgical center requirement restrictions.

There are several findings from *Whole Woman's Health* that are directly applicable here – again, in the context of a motion to dismiss – for a showing that the theories at issue here are plausible. These are three of those findings.

The first is that *Whole Woman's Health* found that the [18] abortions at issue there – again, early

abortion, just like here – is extremely safe with particularly low rates of any serious complications. Same facts are alleged here.

Whole Woman's Health found that the challenged restrictions were inconsistent with how that state – that was Texas – how they regulated comparable and higher-risk medical procedures. The same is at issue here.

Abortion is called out separately in the state regulations from any other medical regulation. And that is inconsistent with how Idaho regulates other medical procedures.

And, third, the *Whole Woman's Health* court found that by restricting the provider network that was available to patients, that that restriction resulted in the undue burden on the patients themselves. And, again, same is at issue here.

The restriction that's in place limits the ability of APCs who are otherwise similarly situated and qualified to be able to provide abortion services.

Those APCs are already providing a multitude of services. They are licensed by the State Board of Nursing, and they have to prove up, through their education, their qualifications, their experience, and their abilities – excuse me – excuse me, Your Honor.

THE COURT: That's fine.

MS. POWER: – the ability to – they can perform childbirth services; they can perform endometrial

biopsies, all [19] sorts of services that are, in fact, more complicated and arguably more serious in certain respects in terms of *Woman's Health* than the services that are at issue here, when we're talking about medication abortion and early aspiration abortion.

And so, Your Honor, then if I can turn to looking at the burden and how the court would look at the application here in terms of weighing the burden versus the state's justification.

The state argued on reply that the restriction at issue here is justified for two reasons. The first is that they claim that it is for – with respect to the state's interest in protecting potential human life. And the second is that the state has an interest in maternal health. But neither of those carry weight here.

With respect to the first, the interest in potential human life, it's not a valid interest in this context. And the reason is because that these are early previability abortions.

And under the *Hodgson* case, U.S. Supreme Court case, the court said that standing alone, the state's interest in childbirth or in potential human life is not standing alone sufficient to justify restrictions.

And then, second, the state's interest in maternal health, the issue here is that the ban on APCs doesn't further maternal health. And the reason why is because the facts as alleged show that it can result in delay and that it can have a [20] negative impact, in fact, on maternal health.

When there is a restriction on abortion, the state needs to not just show that it is trying to help by putting in place a health and safety restriction, but it also needs to show that it is not hindering maternal health. And here, the facts as alleged show that it is, in fact, hindering women's health, because there is not a showing of medical necessity.

What *Whole Woman's Health* teaches is that the court needs to look beyond just a superficial or conclusory assertion of what the state's justification is, that the state needs to prove that up. And that means that we need to go beyond the motion to dismiss stage.

And so – excuse me – when we look at the burden that is imposed here on patients, the Ninth Circuit's ruling in *Tucson vs. Eden* is informative. Because in that case, the court laid out some of the factors that the court may review in considering what the burden is.

Some of those factors include the increase in cost or limits to a supply of providers, delay or deterrence in receiving abortion services, a delay that can result in an increased health risk, as well as looking at the societal context, how abortion regulations impact women's lived experience, so socioeconomic factors.

And those – those come into play here, Your Honor, because the restriction at issue under Idaho law does limit the [21] pool of available providers. That's, I think, a given here.

In addition, the facts show, as alleged, that there is a delay that can come from the limited pool of

available providers and that that results in increased medical risk for some women. That can also result in foreclosing the option of medical abortion to some women.

And we would point the court to the *Humble* case to show why that is truly an undue burden. Because in *Humble*, the court looked at whether a restriction on medical abortion constituted an undue burden, and it found that it did in that case.

The final one is financial strain and other strain. 70 percent of the women who are at issue in this case are in rural parts of Idaho. They have serious restrictions – serious limitations in their ability to access services due to location, to distance, child care, time off work. All of these things pulled together do add up to an undue burden.

So we believe that under the substantive due process analysis, that the statute will fail. But for purposes of the motion to dismiss, we have certainly set forth facts under notice pleading standards and under *Iqbal/Twombly* that are more than sufficient to state a claim.

One thing I will touch briefly on is that the state has made an argument on reply that the burden here – when the court looks at weighing the burden versus the benefit, that the [22] burden is insignificant. And that's simply not the case.

First, the court has to look at the state's justification. And because we don't see, and they have not set

forth, any medical necessity justification for this regulation that actually comes into – into play, simply saying that it is for the benefit of maternal health when the facts show that it can negatively impact maternal health shows that state's justification is not valid.

But even if the court looks at the state's justification, takes it at face value, it needs to weigh it against the burden. And the burden here is not insignificant.

We would point the court to *Casey* itself when looking at the significance of a burden. In *Casey*, the court found that the spousal notification restrictions, the regulation that was in place, was unconstitutional. And the court found that was so despite the factual finding that it may have only affected 1 percent of married women who would have chosen not to notify their spouses.

And so given that, and in that context of what was found in *Casey*, it is certainly the case that – that there is a significance here when we're talking about the number of women and the – as set forth in the factual allegations, the impact on women.

I'll turn very briefly to equal protection, Your Honor. Plaintiffs have set forth two arguments and two [23] claims, one under substantive due process.

Under equal protection, there is a factual determination that ultimately will need to be made as to whether APCs are similarly situated with physicians. And we certainly believe that that is the case.

What the court will need to ultimately determine is whether there is a link between the state's interest in previability regulation of abortion and the distinction that is drawn by the statute here.

One last point, Your Honor, because you have raised some questions about the – really, the advent of APCs in society and how that may play out.

If the court ultimately removes the ban on – the physicians-only ban that's in place in Idaho, it will not suddenly open the doors to anyone performing early abortions. The APCs are already limited. The APCs who could even perform abortions are already limited, and that's because of the framework that is already in place.

Abortion has been called out separately by the state legislature for this particular ban. But if it's removed, it changes nothing about the licensing framework that's in place with the Board of Nursing and the same regulatory scheme that actually governs all medical professionals through the different licensing framework. They govern –

THE COURT: Explain to me: Is the – the APC is [24] allowed to do medical procedures without a physician present, presumably, including at least medical abortion, if not – is it –

MS. POWER: Aspirational.

THE COURT: Aspirational. But there is a requirement of physician oversight of some kind so

they have to actually function under someone else's medical license?

MS. POWER: Not under the current scope of practice under Idaho law.

So the scope of practice is what determines, under the licensing framework, what an APC – just like what any physician – can perform. So certainly, for example, a dermatologist can't perform certain procedures with respect to cardiology. And it's that same scope of practice that would apply here to APCs.

THE COURT: So this would be a sea change in the sense that an APC would be now free, without any physician oversight, to perform both medical and aspirational abortions?

MS. POWER: It would – it would, Your Honor. It would lift that restriction and would allow additional providers.

So as set forth, for all those reasons, Your Honor, the plaintiffs ask that the court deny the motion to dismiss before it.

Thank you, Your Honor.

[25] THE COURT: All right. Thank you.

Ms. Yee-Wallace, while you're stepping up there, I went back, based upon something that Ms. Power said, and took a quick look again at *Mazurek*. And I think she is right that, in fact, Judge Hatfield in the Montana District Court had made a finding that there was not an undue burden caused by the requirement or a

prohibition on anyone but a physician providing the abortion.

Then at the circuit court level, they, in essence, sidestepped that finding and found kind of an implicit bias or implicit intent on the part of the Montana legislature to restrict abortion.

And the Supreme Court basically said, I think, the Ninth Circuit has got it wrong. We – first of all, there is no evidence to suggest that the Montana legislature had that discrimination. They just simply got it wrong, and they should have relied upon Judge Hatfield's, the district judge, finding that there was no burden.

That suggests in keeping with – that at least Judge Hatfield went through a process not unlike what Justice Breyer suggests the court can appropriately do under *Whole Woman's Health* in the context of deciding whether a restriction on nonphysician abortion passes you must under *Roe* and *Casey*.

What's wrong with that analysis?

[26] ARGUMENT BY DEFENDANTS

MS. YEE-WALLACE: I'll tell you what's wrong with that analysis, Your Honor.

Number one is that the Supreme Court didn't just look to the Ninth Circuit's analysis of the undue burden and say: You got it wrong because there was insufficient – it was uncontested there was insufficient analysis.

The Supreme Court then went on to then consider the plaintiff's argument. And what – the plaintiff's argument on that – in that case is similar to what the plaintiffs are arguing here: That there was loads of evidence; that medical providers other than physicians could safely perform abortions. And that undermined the purpose of the legislation.

And the court said – the Supreme Court said, in essence – my words, not theirs – I'm not even going to hear that argument because that's foreclosed by *Casey.* What we said in *Casey* was that states have wide latitude to limit certain medical procedures – in particular, the performance of abortions – to physicians.

If the Supreme Court had ended its analysis there and had only looked at –

THE COURT: Just a moment. Did they use the words "wide latitude," or did they say "absolute right"?

MS. YEE-WALLACE: "Wide latitude."

But what is significant –

[27] THE COURT: Just a moment. Let me follow up, then.

MS. YEE-WALLACE: Sure.

THE COURT: Does "wide latitude" now mean something different post *Whole Woman's Health?*

MS. YEE-WALLACE: No.

THE COURT: My point is that *Whole Woman's Health* suggests a structure of analysis. And, again, Justice Thomas, I think, pushed back and said: Hey, this is inconsistent with what we did in *Mazurek*. But the majority didn't see it that way, or at least they didn't address it that way.

And that's why I'm trying to see if there is a way to reconcile the two decisions and treat *Mazurek* as being a – just what I described, an affirmation of the district court's ability to determine whether or not a restriction of abortion to only physicians is to be evaluated under whether it's an undue burden or not.

MS. YEE-WALLACE: The court does not have to look at the Ninth Circuit as simply affirming an undue burden analysis because the Supreme Court went on in the *Mazurek* case to find a second dispositive error.

And what the court said was: The Court of Appeals decision is wrong. The Ninth Circuit was wrong for not disposing of the case at the preliminary injunction stage because of our prior precedent. And based on that prior precedent, we have emphasized that we have left no doubt that, [28] to ensure the safety of the abortion procedure, states may mandate that only physicians perform abortions.

In the *Whole Woman's Health* case, you were talking about licensed physicians plus admitting privileges. You were talking about licensed physicians plus surgical center requirements. You weren't talking

about the baseline requirement that has been upheld since *Roe*.

And just to stress how courts have viewed the physician-only requirement: In the *Humble* case itself, the court acknowledged that the physician-only was talking about regulations that are, one extreme, an undue burden and that on the other extreme, considered harmless. And then it cited the *Mazurek* case.

So the evidence is even in 2014, when the Ninth Circuit was referring to the regulation at issue in *Mazurek*, that it views that regulation as harmless. Because, again, it was like a baseline, reasonable method to ensure that there is just a basic structure for the performance of abortions.

I didn't get into the facts because I thought the court didn't want to. But when we do, there is a reason why Planned Parenthood is asking only for medication and surgical abortions. It's because some physicians who perform abortions won't even perform some of the different types of abortions because they are so specialized.

[29] And Idaho gets to make the policy decision about who is the most qualified to make – to perform abortions, not the judiciary. It is an Idaho legislative decision which the Supreme Court has upheld that they have.

THE COURT: So factually, if the Idaho legislature – well, if in the state of Idaho – and again, this is just totally hypothetical – there is no licensed

physician willing to perform abortions, but there are – is it APCs? – APCs who are willing to perform that abortion, that clearly is creating a burden upon a woman's ability to access an abortion. But the court doesn't even look at that because the legislature is absolutely free to require physicians only to perform the abortions, no matter what the impact may be upon the right or access to abortion?

MS. YEE-WALLACE: If, for some reason, every licensed physician in the state of Idaho died tomorrow and there was no physician in the state of Idaho who was willing, able, or competent to perform abortions, I think we would be in a different position.

But the legal analysis would still be, at this point, Your Honor: Should *Mazurek* be overturned? Not: Now is it time to apply the undue burden analysis to a constitutionally permissible regulation? The question would be: Should we now be overturning *Mazurek?*

THE COURT: And if the state were to say only [30] gynecologists should be allowed to perform that, would that be – again, it's not a matter – does that, again, require that the court just defer to the legislature's judgment even though there is no medical support for that at all?

MS. YEE-WALLACE: Not the case here. But if it were the case –

THE COURT: I know it's not the case here.

MS. YEE-WALLACE: If we were saying at that point licensed physician plus gynecologist – like

they were saying licensed physician plus surgical center requirement in *Whole Woman's Health* – I think we would have a tougher time in that particular area. But that's not where we're at in this case.

THE COURT: Okay. Other than the Supreme Court's language in *Mazurek*, what's the principle difference between requiring – the state requiring a gynecologist or the state requiring a licensed physician when the understanding in the medical field is that an APC is absolutely qualified to perform those procedures? Why is there any difference other than some language from the Supreme Court in *Mazurek?*

MS. YEE-WALLACE: Your Honor, because the women – what's at issue is what the Constitution allows the states to regulate. And this – allowing a baseline of physicians only is – derives from the Constitution and the latitude that –

THE COURT: It's derived from the Supreme Court's [31] language in *Mazurek.*

What I'm asking is if there is – so we do it simply because the Supreme Court said that even though, in fact, logically and being intellectually honest, there is no difference whatsoever between gradations between an APC, a licensed physician, and a gynecologist?

MS. YEE-WALLACE: We do it because we follow prior precedent, which is binding on this court.

THE COURT: That's not a bad answer.

MS. YEE-WALLACE: And honestly, Your Honor, because also those types of policy decisions, when it comes to this one, that states get to decide who is the most qualified to perform this unique act, that is something that is a legislative choice.

If this APC ban – what they call the "APC ban." If the physicians-only rule is enjoined by this court, this court will be telling Idaho they have to change their standards on who can perform abortions. This court will be telling Idaho that –

THE COURT: Well, but the Supreme Court has said that this court can do in certain fields, such as prohibiting them from requiring license – or admitting privileges at hospitals.

MS. YEE-WALLACE: Well, and that leads to our second argument. I don't agree that it's simply a matter of not enforcing a regulation.

I think what's happening in this case would be using the due process clause to impose an affirmative obligation to [32] change what they claim is the interference in this case.

What plaintiffs claim is the interference of this case is that there is no publicly available abortion facilities that can perform abortions more often than Wednesday, Thursday, and Friday because of Planned Parenthood's scheduling issues.

Does the State of Idaho have a constitutional duty to correct those – those scheduling issues? Because essentially, if the court enjoins the physician-only rule to

address that restriction, that's what the court would be saying; that the State of Idaho has an obligation, constitutional obligation, to make – to expand abortion access and make it more conveniently available so that Planned Parenthood can offer abortions more frequently than Wednesday, Thursday, and Friday, including nights and weekends.

THE COURT: Well, we're here on a motion to dismiss, so we're not digging into the facts. We are trying to decide whether or not there is a per se rule, which is really the basis for a motion to dismiss, is that it's – I think the state is saying there is just no grounds for discussion here. If the only restriction at issue is requiring a physician only – well, imposing a physician-only requirement for abortion, end of discussion. Because *Mazurek* is here, it binds the court, and there is no reason to even discuss or develop the facts in this case.

So I think it's important that we limit ourselves just [33] to that issue.

MS. YEE-WALLACE: Well, I certainly don't believe that plaintiffs did. But, regardless, I can respect –

THE COURT: Well, if not, shame on them as well. Because, again, it's a motion to dismiss.

MS. YEE-WALLACE: Right.

And, Your Honor, so in speaking about what I was just talking about, because the plaintiffs have alleged a substantive due process claim and this is a motion to

dismiss, the court is required to look at the complaint and to determine whether they have pled a cognizable deprivation that the Constitution protects.

So when I'm referring to these allegations, I'm referring to the complaint, the face of the complaint itself. And what the face of the complaint alleges does not constitute a cognizable claim.

So we also are seeking 12(b)(6) dismissal. Because what the plaintiffs are claiming is the interference in this case is not encompassed in the right that was recognized by *Roe vs. Wade.*

A woman's right to a previability abortion doesn't carry with it an entitlement to conveniently accessible abortions or to abortions that can be scheduled more often than Wednesday, Thursday, and Friday.

That is the burden, that is the interference that they [34] are claiming the state law – that they have pled that the state law created. And for the court to allow that to go forward, the court would be saying: Yes, you do have a cognizable substantive due process claim, and I'm going to hear argument on whether the state is constitutionally required to fix that.

THE COURT: So are you saying – you're not saying that *Mazurek* just forecloses any discussion at all on this issue; but under *Whole Woman's Health*, the plaintiffs' complaint is insufficient?

MS. YEE-WALLACE: No, Your Honor. I'm saying our grounds for dismissal is twofold. Number one, *Mazurek* disposes of this case. And number two,

they haven't asserted a cognizable substantive due process claim on its face.

THE COURT: Under *Whole Woman's Health?*

MS. YEE-WALLACE: Under *Roe vs. Wade* and *Harris* vs. *McRae* that the due [sic] clause does not place an affirmative obligation on the states to correct Planned Parenthood's scheduling problems.

It's not an undue burden analysis. It's simply a – what plaintiffs are claiming is their right in this case is not just the ability to have a previability abortion. They are not alleging that there is a prohibition on that right. They are not alleging that the right itself is being stricken or that the state is ultimately precluding women from choosing to terminate their pregnancy.

[35] What they are claiming they have a right to is publicly accessible abortions on evenings and weekends. And that's what they are asking the court to remedy.

And so what we are saying is that the relief that they are seeking is not cognizable. Because the right that was recognized in *Roe vs. Wade* does not encompass that entitlement. And they can't use the substantive due process claim to place that affirmative obligation on the state.

It's not touching the undue burden analysis. It's simply saying: Do the plaintiffs even have a cognizable substantive due process claim? And our argument is that they do not.

THE COURT: Okay.

MS. YEE-WALLACE: Your Honor, finally, with respect to the equal protection claim, they – there is the distinction that's being made here. We feel like that claim is also ripe for dismissal with prejudice.

The distinction that's being made here is between physicians and nonphysicians. And there is just no legal room for dispute that neither APCs or physicians are a suspect class, and neither is the right to perform abortion a fundamental right.

So this statute is subject to rational basis review. And because the Supreme Court has already held that the Constitution gives states wide latitude to determine what [36] functions can be performed by licensed physicians only, and specifically that states may prohibit abortions from being performed by anyone other than nonphysicians, the Supreme Court has essentially already held that there is a rational basis for this law.

So we think that the equal protection claim is also ripe for dismissal.

THE COURT: All right.

I think, Ms. Power, you left a minute or so on the clock. The equal protection claim, what standard applies to the APC – the claim essentially brought on behalf of those holding an APC status, claiming equal protection because they are not provided the same privileges as a physician?

MS. POWER: Yes, Your Honor. We don't suggest that that's a suspect class. It would be rational basis review.

THE COURT: Okay.

MS. POWER: And even under rational basis review, we don't believe that there is – we believe that there is an equal protection violation that's at issue here, Your Honor.

THE COURT: All right. I just wanted to pin that down.

Is there anything else you wanted to add?

MS. POWER: Just one last –

THE COURT: I can only give you about 44 seconds or a minute and 44 seconds.

[37] ARGUMENT BY PLAINTIFFS

MS. POWER: I will be very brief, Your Honor.

The argument that the state has made has misconstrued the relief that is being requested here.

What the plaintiffs request here is that the state's restriction be lifted. Plaintiffs are not asking for funding. Plaintiffs are not asking for some affirmative obligation from the state. Plaintiffs are asking for a restriction that the state has created and put in place to be lifted.

And so the discussion about entitlement, the reference to *Harris* and to related cases, those cases relate

to funding and whether there was an entitlement to funding in the context of Medicaid or under the Hyde Amendment.

Those aren't at issue here. So I just wanted to clarify that for the court. Thank you.

THE COURT: All right. Counsel, we'll take the matter under advisement. I've still got a little bit of reading I need to do, and there's also the question of judicial notice, which we didn't take up here, that I need to address.

I appreciate the quality of the briefing. Obviously, very strong feelings on both sides of this issue, which came out pretty much loud and clear. But we'll hopefully get a decision out in a few weeks, but we'll do the best we can. That's our goal, and hopefully we can meet that deadline.

All right. We will be in recess. (Proceedings concluded at 11:50 a.m.)

[38] REPORTER'S CERTIFICATE

I, TAMARA I. HOHENLEITNER, CSR, RPR, CRR, certify that the foregoing is a correct transcript of proceedings in the above-entitled matter.

/s/ Tamara I. Hohenleitner 08/09/2019

TAMARA I. HOHENLEITNER, CSR, RPR, CRR — Date