Abortion Providers, This Is Your Chance to Make History Again

David J. Garrow, Houston Chronicle, September 5, 2021

Estelle Griswold's surname is legally famous — *Griswold v. Connecticut*, the 1965 Supreme Court ruling that recognized a constitutional right to marital privacy — because she, like her colleague Dr. Lee Buxton, had the courage to openly violate Connecticut's criminal ban on contraceptive use and counseling. Planned Parenthood's previous test case challenges to the state statute had been rebuffed on technical grounds by the high court, so in late 1961 Estelle and Lee publicly opened a clinic, and — to their delight — New Haven police officers soon arrived to confirm that she and Buxton were indeed knowingly violating the law.

At trial, both defendants were convicted, putting Buxton's medical license in jeopardy, and two state appellate courts confirmed their convictions while upholding the old 19th-century prohibition on contraceptives. Their appeal was taken to the U.S. Supreme Court, and this time, faced with two criminal defendants challenging their convictions, justices, such as liberal icon William J. Brennan who had previously ducked the issue, now signed on to a landmark ruling. Justice William O. Douglas's majority opinion not only afforded nationwide constitutional protection for birth control, but its expansive privacy doctrine opened the door to the legal argument that constitutional privacy should protect women's desire to abort a pregnancy as well. In early 1973, in the Dallas case of *Roe v. Wade*, that's exactly what a 7-2 Supreme Court majority affirmed.

The Griswold decision may now be 56-years-old, but even today it offers a potent and pointed lesson for pro-choice advocates who may be only dimly aware of its history.

Texas' SB8, with its novel authorization allowing any Texan to file suit in their home county against any physician elsewhere in the state willing to defy SB8's prohibition of abortions once a fetal heartbeat is detected, has thrown the high court for a loop. Late Wednesday a narrow 5-4 majority declined to block SB8's provisions, confessing that under existing precedent (the most relevant case, *Ex parte Young*, dates from 1908) it was uncertain how it could order local Texas state court judges to dismiss any case filed pursuant to SB8. In dissent, Chief Justice John G. Roberts, citing the "unprecedented" nature of SB8's provisions, wrote that the new law should be held in abeyance, or temporary halted, to consider whether Texas's delegation of law enforcement "to the populace at large" should be tolerated in the United States.

Chief Justice Roberts emphasized that even the majority's order declining to intervene "is emphatic in making clear that it cannot be understood as sustaining the

constitutionality" of SB8. The majority's order hinted in its final sentence that "procedurally proper challenges" to SB8 might best be pursued in "Texas state courts," as is already happening, but Chief Justice Roberts signaled clearly that he looks forward to a federal constitutional challenge to SB8 returning to the Supreme Court itself.

Read Roberts' language carefully: "although the Court does not address the constitutionality of this law, it can of course *promptly* do so when that question is properly presented" (emphasis added). "At such time the question could be decided," along "with consideration of whether *interim* relief is appropriate *should* enforcement of the law be allowed below."

The Chief Justice's prescription is clear: If a Texas abortion provider steps forward to purposefully violate SB8 and welcome a state civil suit from any motivated Texan, that defendant doctor could immediately file suit in federal court against whichever state court judge is assigned to handle the case against them. With that federal litigation underway, even in an unfriendly venue such as Tyler, and notwithstanding the egregiously unprofessional behavior now being demonstrated in abortion cases by judges on the U. S. Fifth Circuit Court of Appeals, a Supreme Court petition by the defendant doctor could indeed be "properly presented."

Chief Justice Roberts' challenge to pro-choice Texas providers is clear: 60 years after Lee Buxton risked his medical license to ensure that the U. S. Supreme Court would decide *Griswold v. Connecticut*, is Texas's pro-choice medical community bereft of even a *single* abortion provider who can muster the courage that Buxton and Estelle Griswold so famously demonstrated?

Garrow is the author of "Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade" and "Bearing the Cross," a Pulitzer Prize-winning biography of Martin Luther King, Jr.