HELLERSTEDT - 2016 – How The United States Supreme Court Aborted The Texas Abortion Statute

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I. Introduction

As a result of a determined political effort to dismantle women’s reproductive rights and health care services, a sharp split developed among the Circuit Courts over the constitutionality of state restrictions of abortion practices and facilities.¹ State legislatures across the United States enacted restrictive measures in hostility towards a woman’s right to choose to have an abortion.² The legal community eagerly anticipated

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¹ Brief of Amici Curiae 163 Members of Congress in Support of Whole Women’s Health, et al. at 4, Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274). See TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031(a), 245.010(a) (2015 regular session, 84th Legislature) (describing requirements of physicians performing abortions on pregnant women); Whole Woman’s Health v. Cole, 790 F.3d 563 (5th Cir. 2015) (ruling on constitutionality of Texas statutes); Planned Parenthood of Ariz. v. Humble, 753 F.3d 905 (9th Cir. 2014) (overturning injunction on Arizona statute restricting methods of abortion); Planned Parenthood of Wis. v. Van Hollen, 738 F.3d 786 (7th Cir. 2013) (affirming injunction of Wisconsin statute barring physicians from performing abortions); Tucson Woman’s Clinic v. Eden, 379 F.3d 531 (9th Cir. 2004) (upholding constitutionality of abortions performed in private medical practices). See also infra Part IV (comparing Fifth, Seventh, and Ninth Circuit Appeals Courts opinions).

judicial resolution of the parameters on legislative regulation regarding reproductive rights. On June 27, 2016, in a 5 - 3 ruling, the United States Supreme Court, invalidated the 2013 Texas statute regulating abortions in their decision of Whole Woman’s Health v. Hellerstedt.

The Texas abortion law, known as H.B. 2, a prototype of similar restrictive state statutes, introduced new measures to the legislative landscape of abortion. In their brief to the Court, the petitioners, Whole Woman’s Health, LLC, argued that the Fifth Circuit distorted the careful balance struck in Planned Parenthood of Southeastern Pennsylvania v. Casey, by utilizing a “blind” and “overly deferential” standard of judicial review of the Texas abortion statute. Leading up to this recent case, in a similar case in 2015, the


5 See Hellerstedt, 136 S. Ct. at 2296 (introducing House Bill 2 enacted in July 2013). The two provisions challenged in Hellerstedt were a requirement to submit the abortion facility to the same licensing, building, staffing and building requirements as other ambulatory care centers, as well as a mandate that physicians maintain admitting privileges at a hospital within thirty miles of the abortion facility. TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031(a), 245.010(a), invalidated by Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016). See also H.R. 2, 83rd Leg., 2nd Reg. Sess. (Tx. 2013) (providing statutory text of H.R.2) [hereinafter H.B. 2].

Court reversed a Fifth Circuit decision and upheld a woman’s constitutionally guaranteed right to choose, as established forty-three years ago in the landmark decision of Roe v. Wade.\(^7\) In Hellerstedt, Whole Women’s Health argued that the true purpose of the Texas statute, which purportedly was enacted to protect maternal health and safety, was actually to “close the vast majority of Texas abortion clinics” by singling them out with heightened medical regulation when the abortion procedure is safer than other common medical procedures.\(^8\) They believed the statute should be invalidated for two reasons: (1) failure to confirm that the legislation was designed to serve a valid state reason, and (2) both the purpose and effect prongs of the Casey undue burden test had been violated.\(^9\)

With an eight-member, ideologically-divided Court expected for the next two years, the distinct reality quite possibly could have been that the legislative chipping away of reproductive rights might not be reversed.\(^10\) Yet the Court was compelled by precedent, the bedrock of our common law judicial system, and retained the constitutionally enshrined right to choose, settled the conflict in the circuits, and doomed future state efforts to block access to abortion.\(^11\) How far may states go without violating a woman’s constitutional right to choose? Some legislatures justified

\(^7\) Whole Woman’s Health v. Cole, 790 F.3d 563 (5th Cir. 2015); Roe v. Wade, 410 U.S. 113 (1973).
\(^8\) Cole Brief, supra note 6, at 31.
\(^9\) Cole Brief, supra note 6, at 33-34, 36.
\(^10\) See Richard Wolf, Supreme Court face historic transformation after election, USA TODAY (Sept. 30, 2016), http://www.usatoday.com/story/news/politics/2016/09/30/supreme-court-liberal-conservative-transformation-clinton-trump-garland/89957976/ (last visited Feb. 25, 2017) (describing legal impact of Justice Scalia’s vacant Supreme Court seat). See also Associated Press, This is what happens if there’s only 8 Supreme Court justices, N.Y. POST (Feb. 17, 2016), http://nypost.com/2016/02/17/this-is-what-happens-if-there-s-only-8-supreme-court-justices/ (last visited Feb. 25, 2017) (describing impact liberal or conservative judicial appointments may have on court dynamics).
\(^11\) Hellerstedt, 136 S. Ct. at 2298.
such state mandates in the name of women’s health. Others, such as South Dakota, denigrated these very same regulations as unconstitutional restrictions, made in the guise of women’s health, but with the real goal of restricting the right to terminate a pregnancy.\textsuperscript{12} The unexpected and untimely death of Justice Antonin Scalia following oral arguments in the Hellerstedt case in conjunction with a partisan-gridlocked and dysfunctional Congress of an election year increased the likelihood that no replacement nomination for the vacancy of the late Justice Scalia’s seat on the court would present for a vote before the Senate Judiciary Committee.\textsuperscript{13}

This paper will first examine the Court’s decision in Hellerstedt, and the lower courts’ decisions on the Texas H.R. 2 statute,\textsuperscript{14} second assess the history of abortion jurisprudence and place Hellerstedt into the context of this history,\textsuperscript{15} and third analyze


\textsuperscript{14} See infra Section I and accompanying text (providing analysis regarding Texas’ statute H.B. 2 and the Texas decisions).

\textsuperscript{15} See infra Section II and accompanying text (providing analysis regarding the Supreme Court
and evaluate the contradictory decisions of the appellate courts from the Fifth, Seventh and Ninth Circuits. This paper will conclude by clarifying how the Court, despite being only an eight-member composition, could arrive at no other legal conclusion in Hellerstedt.

II. H.B. 2 AND THE TEXAS DECISIONS

In 2013, on the pretext of maternal health and safety, the Texas Legislature enacted a statute known as H.B. 2, adding several new provisions to the State's legislative horizon regarding abortion. Among these provisions, two controversial mandates were included to require physicians to maintain admitting privileges within thirty miles of an abortion practice as well as required that abortion facilities should meet the same heightened requirements that were established for Ambulatory Surgical Centers (ASC).

Prior to the enactment of the statute, Texas did not require the abortion decision in Hellerstedt. See infra Section III and accompanying text (providing analysis regarding contradictory decisions of appellate courts).

See infra Section IV and accompanying text (providing analysis regarding how court should decide Hellerstedt).

TEX. HEALTH & SAFETY CODE ANN. § 171.003 (outlining physician licensing requirements to perform abortions); TEX. HEALTH & SAFETY CODE ANN. § 245.010 (outlining abortion facility requirements).

TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (1) (outlining privileges requirements for doctors' whom provide abortions in Texas); TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (outlining building requirements for abortion centers in Texas). By implementing minimum standards for abortion clinics, the Texas legislature required these clinics to maintain emergency-room-like facilities that were too expensive to maintain for such operations. Nina Totenberg, Supreme Court Tests Texas' New Restrictions On Abortion, NPR (Mar. 2, 2016), http://www.npr.org/2016/03/02/468656213/supreme-court-tests-texas-new-restrictions-on-abortion (last visited Feb. 25 2017). See TEX. HEALTH & SAFETY CODE ANN. § 243.010 (defining minimum standards for Ambulatory Service Centers). The American College of Obstetricians and Gynecologists, along with other prominent national physician organizations such as the American Medical Association and the American Academy of Family Physicians, urge the courts to rule in favor of finding these provisions as barriers to women's health and safety. Totenberg, supra. For example, § 243.010(a)(3) required these facilities to have "equipment essential to the health and welfare of the patients". TEX. HEALTH & SAFETY CODE ANN. § 243.010(a)(3).
provider to have local hospital admitting privileges. Abortion clinics were only required to maintain a working arrangement or a written protocol for managing medical emergencies should a patient require transfer to a hospital. Evidence probative of the argument driven by Whole Women’s Health, LLC (“Whole Women’s Health”) spotlighted the exorbitant costs, estimated in millions of dollars, necessary for bringing a clinic into compliance with the new rules. Whole Women’s Health claimed that a few of these new regulations were excessively onerous for a procedure deemed safer than other common medical procedures.


22 Hellerstedt, 136 U.S. at 2318-19. See Brian M. Rosenthal, Abortion clinics say cost of complying with Texas law too high, Houston Chronicle (Feb. 28, 2016), http://www.houstonchronicle.com/news/politics/texas/article/Abortion-clinics-say-cost-of-complying-with-Texas-6859742.php (last visited Feb. 25, 2017) (detailing cost to abortion providers and Texas’ testimony); Ian Millhiser, A Federal Judge Just Called Out The Big Lie Behind Texas’s Latest Abortion Restriction, THINKPROGRESS (Aug. 29, 2016), https://thinkprogress.org/a-federal-judge-just-called-out-the-big-lie-behind-texass-latest-abortion-restriction-dcd96ff177d5#.x97rs9h04 (last visited Feb. 25, 2017) (analyzing circular logic used to justify abortion restrictions). H.B. 2 requires abortion facilities to at least meet the minimum standards set out in the Health and Safety Code, § 243.010, which provides that plumbing, heating, equipment, a quality assurance program for patient care, and qualifications of the professional staff and other personnel, among other things are minimal requirements for an ambulatory surgical center. Tex. Health & Safety Code Ann. § 243.010 (2015). Even if an abortion clinic only provides medication abortion, it must comply with the requirements. Whole Woman’s Health v. Lakey, 46 F. Supp. 3d 673, 682 (W.D. Tex. 2014). Some facilities were barred from being compliant because of limitations to physical size. Id. Clinics incapable of compliance due to physical limitations would need to acquire land and construct a new, compliant clinic, resulting in costs likely to exceed three million dollars. Id.; Rosenthal, supra. One of the requirements of H.B. 2 is that main corridors must be at least eight feet wide, which is much wider than in most clinics, requiring renovations that are not allowed under the leases binding some of the clinics. See Totenberg, supra note 19 (noting unreasonableness of statutory requirement by discussing width of a stretcher).

23 Hellerstedt, 136 U.S. at 2302, 2342. In terms of minor and serious complications, abortions are deemed to be much safer than colonoscopies, vasectomies, or plastic surgery. Id. at 2302. Colonoscopies typically occur outside of hospitals and have mortality rates that are ten times
The H.B. 2 provisions were challenged even before the new statutes took effect. The first challenge came about in Planned Parenthood of Greater Texas Surgical Health Services v. Abbott ("Abbott I") as it related to the constitutionality of the admitting privileges and the medical abortion provisions, however, Abbott I failed to challenge the ASC provision of the statute. In Abbott I, the lower court issued an injunction that was later partially reversed by the Fifth Circuit in Planned Parenthood of Greater Texas Surgical Health Services v. Abbott ("Abbott II") which allowed the Texas statute to take effect. A challenge to the ASC provision of the statute was raised in court only after the adverse decision of Abbott II. In response, Texas mounted the defense of res judicata, to which the plaintiffs argued that they could not have raised a constitutional challenge at an earlier time because the regulations necessary for enforcement of the statutory mandate higher than those of abortions. Id. at 2315. Furthermore, childbirth is fourteen times more likely to cause death than an abortion. Id.

24 Id. at 2337-38 (stating that eight abortion clinics closed in anticipation of H. B. 2 going into effect). A survey conducted by petitioners revealed that out of the twenty-seven clinics surveyed, fifteen would close if the admitting privileges requirement became effective. Id. at 2338.

25 Planned Parenthood of Greater Tex. Surgical Health Serv. v. Abbott, 951 F. Supp. 2d 891 (W.D. Tex. 2013) (admitting that physicians' due process rights were violated by admitting privileges), rev'd, 748 F.3d 583 (5th Cir. 2014)(deciding on lower court W.D. Texas case decision); Planned Parenthood of Greater Tex. Surgical Health Serv. v. Abbott, 734 F. 3d 406, 576 (5th Cir. 2013) (granting emergency stay based on Texas' likelihood of success), cert. denied, 769 F.3d 330 (5th Cir. 2014)(denying petition for rehearing). A rational basis exists for requiring abortion physicians to have hospital admitting privileges because it allows the woman to seek consultation complications directly from her physician, prevents patient abandonment by physicians, and helps to ensure credentialing of physicians after initial licensing and periodic license renewals. Id. at 9; TEX. HEALTH & SAFETY CODE ANN. §§ 171.003 (admitting privileges), 243.001 (abortion legislation) (2003).

26 Abbott, 748 F.3d 583, 605. See Abbott, 951 F. Supp. 2d at 908-09 (finding H.B. 2 creates undue burden on women with significant health risks requiring surgical abortion).

27 Whole Woman's Health v. Cole, 790 F.3d 563, 594-96 (5th Cir. 2015), rev'd, 136 S.Ct. 2292 (2016). Cole held that requiring providers to determine that the ASC requirement was facially unconstitutional. See also Abbott, 748 F.3d at 583 (affirming lower court's decision hampered woman's right to have an abortion). The controversial nature of Abbott II was rooted in the Fifth Circuit's position siding with the State that Planned Parenthood's argument did not overcome the burden to prove that "no set of circumstances under which the statute would be constitutional" existed. Abbott, 734 F.3d at 414. The Fifth Circuit required a heavier burden of proof from Planned Parenthood because they brought only a facial challenge to the privileges provision of H.B. 2. Id.
had not yet been implemented.\textsuperscript{28} The Fifth Circuit agreed with the State, finding that "the issue should have been resolved at the time of \textit{Abbott II}."\textsuperscript{29} However, the Fifth Circuit put aside their legal conclusion on the \textit{res judicata} argument and proceeded to analyze the constitutionality of the ASC requirement as if the \textit{res judicata} argument was superfluous.\textsuperscript{30} The Fifth Circuit concluded that, under a rational basis standard of judicial review, both the admitting privileges mandated as well as the ASC requirements "were rationally related to a legitimate state interest" and that the "state is not required to prove that the objective of the law would be fulfilled."\textsuperscript{31}

In \textit{Cole}, the Fifth Circuit specifically referenced its earlier decision, \textit{Whole Woman's Health v. Lakey}, which followed the \textit{Abbott II} precedent and held that both the admitting privileges as well as the ASC requirements met the low bar of rational basis judicial review.\textsuperscript{32} In the lower court's decision in \textit{Lakey}, Judge Yeakel cited to the Supreme Court's decision in \textit{Gonzales}, and held that despite any finding of a rational basis, the court must still determine whether the Texas statute imposed an undue burden before a woman seeking to have an abortion.\textsuperscript{33} Although the Fifth Circuit's decision in \textit{Lakey} ultimately found the statutory provisions constitutional, the court held the requirements did constitute an undue burden to particular locations after examining

\textsuperscript{28} See \textit{Cole}, 790 F.3d at 581 (mandating lower court not free to disregard directly applicable holding from higher appellate court).
\textsuperscript{29} \textit{Id.} at 583.
\textsuperscript{30} \textit{Id.} at 584.
\textsuperscript{31} See \textit{id.} at 584, 587 (concluding mandate did not present an undue burden based on a rational basis standard of review).
\textsuperscript{32} \textit{Cole}, 790 F.3d at 577. Plaintiffs do not argue against the medical basis for the ASC and admitting requirements, but challenge the provisions as substantial obstacles in the path of a woman seeking an abortion of a nonviable fetus. \textit{Id.} at 584. See also \textit{Whole Woman's Health v. Lakey}, 769 F.3d 285, 293 (5th Cir. 2014) (establishing two-step approach to determine whether law at issue satisfies rational basis), \textit{vacated in part}, \textit{Whole Woman's Health v. Lakey}, 135 S. Ct. 399 (2014).
\textsuperscript{33} \textit{Whole Woman's Health v. Lakey}, 46 F. Supp. 3d 673, 680 (W.D. Tex., 2014) ("'[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power'" (emphasis added)) (quoting Gonzales v. Carhart, 550 U.S. 124, 158 (2007)).
supporting evidence showing that before the enactment of the abortion statute, Texas had more than forty abortion facilities. After the statute's passage into law, the number of abortion facilities in the state was reduced to seven and possibly eight clinics. The Fifth Circuit further concluded that the practical and financial consequences of updating existing facilities to comply with the statute's requirements were onerous. The extraordinary financial burdens associated with compliance would lead to abortion facilities closing, thereby reducing "meaningful access" to abortion.

In Lakey, the Fifth Circuit considered practical concerns such as increased travel distances, unreliable transportation, lack of childcare options, and the immigration status of some women to conclude that these factors created a "cumulative effect" and a *de facto* barrier to abortion. The Fifth Circuit ultimately overturned the lower court's

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34 Lakey, 769 F.3d at 292, 302. The Fifth Circuit found the ambulatory surgical provisions unconstitutional when considered together with the admitting privileges "as applied to all women" of a reproductive age. *Id.* at 291-92. The provisions would have required certain abortion clinics located in Texas to cease providing abortions. *Id.* at 302. Physicians would be unable to obtain admitting privileges due to the clinic's physical distance from the nearest available hospital. *Id.* However, abortion clinics in major metropolitan areas across the state of Texas remained unaffected by the admitting privileges requirement. *Id.*

35 TEX. HEALTH & SAFETY CODE ANN. § 171.0031 (performing physician requirements regarding abortion procedure). See Lakey, 46 F. Supp. 3d at 679 (discussing a state's rights for regulating abortions). The court reasoned that, "[i]f allowed to go into effect, the act's ambulatory-surgical-center requirement will further reduce the number of licensed abortion-providing facilities to, at most, eight." *Lakey*, 46 F. Supp. 3d at 681. *But see Abbott II*, 748 F.3d at 599 (noting some clinics had closed for reasons other than the admitting privileges requirement).

36 See Lakey, 769 F.3d at 294 (discussing grandfathering in ambulatory-surgical facilities); Lakey, 46 F. Supp. 3d at 682 (grandfathering of existing facilities into compliance is prohibited for abortion providers). The statute's ambulatory-surgical-center requirement applies equally to facilities that provide medication abortions, despite the lack of intrusion to a woman's body. *Lakey*, 46 F. Supp. 3d at 682. Further, statute changes would effectuate new electrical, heating, plumbing, and parking design requirements for these facilities. *Id.* at 682.

37 Lakey, 46 F. Supp. 3d at 682. While travel distance alone cannot act as an undue burden on the right to an abortion, the practical concerns involved with traveling to an abortion facility combined with travel distances "establish a *de facto* barrier to obtaining an abortion." *Id.* at 683.

38 See Lakey, 769 F.3d at 303-04 (noting that a large travel distance may create an undue burden); Lakey, 46 F. Supp. 3d at 681-83 (discussing impact of H.B. 2 through various potential impositions court contends to expect).
decision in *Cole* and upheld the constitutionality of the 2013 Texas statute.\(^{39}\) The Fifth Circuit validated the statute by applying *Abbott II* precedence without addressing the statutory restrictions beyond a mere facial challenge analysis.\(^{40}\)

These cases raised two linked legal questions: first, what is the role of the judiciary in its oversight of legislation; and second, by what standard is that judicial determination measured?\(^{41}\) *Abbott I*, like *Cole*, challenged Texas' statutory provision that required local admitting privileges from the operating physician.\(^{42}\) In *Abbott I*, Planned Parenthood of Greater Texas Surgical Health Services, the plaintiff bringing forth the challenge, argued that the state's regulatory interest lacked a rational basis because women seeking an abortion during the first trimester experienced an extremely low risk of complications.\(^{43}\) Texas defended its statutory restrictions because of an interest in the continuity of care for its patient population and the state's interest in physician credentialing.\(^{44}\) The Fifth Circuit ruled in *Abbott II* that,

\(^{39}\) Whole Woman's Health v. Cole, 790 F.3d 563, 598 (5th Cir. 2015) (reasoning that the travel distance imposed a "substantial obstacle" for women seeking an abortion).

\(^{40}\) See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 605 (5th Cir. 2014) (finding regulations do not facially require a court-imposed exception).

\(^{41}\) See *Cole*, 790 F.3d at 587 (discussing "medical uncertainty underlying a statute is for resolution by legislatures, not the courts"); *Abbott*, 748 F.3d at 594 (reasoning that courts may not replace rational "legislative predictions"). Moreover, courts may only invalidate a law on its face if "no possible application of the challenged law would be constitutional." *Abbott*, 748 F.3d at 588.

\(^{42}\) See *Abbott*, 951 F. Supp. 2d at 895 (arguing that provisions in the statute "fail constitutional review"). Planned Parenthood presented four grounds for invalidating the hospital admitting privileges: violation of patients' substantive due process rights, violation of physicians' procedural due process rights, unlawful delegation of authority to hospitals, and vagueness. *Id.*

\(^{43}\) See *id.* at 905 (arguing that abortion-inducing drugs to the FDA protocol are not medically necessary). Further, the plaintiff argued that a woman should be allowed to choose between an FDA or off-label protocol that allows her the safest means for receiving an abortion. *Id.* The law is burdensome since it restricts "a women's access to a preferred and arguably safer method of abortion and eliminate[s] it's availability from 50 to 63 days LMP." *Id.* at 906.

\(^{44}\) See *id.* at 899 (arguing that abortion providers admitted at local hospitals "more likely" to manage patient complications effectively). Most notably for its argument, the State pointed "to evidence that 80% of significant negative outcomes at emergency rooms relate to difficulties with physician communication and patient handoff." *Id.* However, the court remained unconvinced, reasoning that the State offered no "evidence of correlation" between admitting privileges and a
nothing in the Supreme Court’s abortion jurisprudence deviates from the essential attributes of the rational basis test, which affirms a vital principle of democratic self-government and it is not the court’s duty to second guess legislative factfinding, “improve” on or “cleanse” the legislative process by allowing relitigation of the facts that led to the passage of a law.\textsuperscript{45}

The Fifth Circuit reasoned that so long as the enacted legislation is rationally related to a legitimate state interest, that legitimate objective must be accepted by the judiciary without further judicial inquiry.\textsuperscript{46} This affirmed that it is not the role of the judiciary to conduct an empirical investigation to “prove that the objective would be fulfilled.”\textsuperscript{47} In writing for the Fifth Circuit Court of Appeals, Judge Edith Jones easily accepted that argument because the legislative enactment is made by the “peoples’ representatives” for the benefit of the community.\textsuperscript{48} The Circuit Court of Appeals was not constitutionally in any position to “replace legislative predictions or calculations of probabilities with its own, else it usurps the legislative power.”\textsuperscript{49}

In conceding that reasonable people may still disagree on legislation, Judge Jones reasoned that so long as the legislative branch has a rational basis for its mandate such legislation could not be questioned by the judiciary.\textsuperscript{50} The legislature, not the judiciary, is solely empowered by the constitution to change the law should the

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\textsuperscript{45} Id. at 594.

\textsuperscript{46} Id. See also Whole Woman's Health v. Cole, 790 F.3d 563, 587(5th Cir. 2015) (finding that judiciary must accept objective).

\textsuperscript{47} Abbott, 748 F.3d at 594.

\textsuperscript{48} Id.

\textsuperscript{49} Id. Daniel J. Glass, Not in My Hospital: The Future of State Statutes Requiring Abortion Providers to Maintain Admitting Privileges at Local Hospitals, 49 Akron L. Rev. 249.

\textsuperscript{50} Id.
legislation not accomplish its stated purpose or predictions.\textsuperscript{51} Further to this understanding of the interplay between the legislative and the judicial branches of government, the judiciary is not competent to question whether the connection of the legislatively enacted privileges rule and its goals are effectuated.\textsuperscript{52} \textit{Abbott II} prohibited all exertion of judicial scrutiny, provided that some connection, no matter how thin, existed between legislation in question and its stated state purpose.\textsuperscript{53} \textit{Cole} reinforced this interpretation by emphasizing that application of a standard other than the lower deferential rational basis test would improperly heighten the level of judicial review to that akin to “strict scrutiny under the guise of the undue burden inquiry.”\textsuperscript{54}

III. UNITED STATES SUPREME COURT & HELLERSTEDT

The \textit{Hellerstedt} precedent will be seen as the seminal decision of the Supreme Court’s 2015 term.\textsuperscript{55} The Court swept away any lingering doubts that a state, on the ruse of protecting maternal health, can erode the safeguards conferred by the Constitution and the \textit{Casey} undue burden test.\textsuperscript{56} The United States Supreme Court found that the Texas statute evinced “no significant health related problem that the new law helped to cure.”\textsuperscript{57} The majority opinion confirmed that a law must serve a real

\textsuperscript{51} Id. Circuit Judge Edith Jones stated that “[i]f legislators’ predictions about a law fails to serve their purpose, the law can be changed.” \textit{Abbott}, 748 F. 3d at 594.

\textsuperscript{52} Id.

\textsuperscript{53} Id. at 597.

\textsuperscript{54} \textit{Cole}, 790 F. 3d at 578. See \textit{Whole Woman's Health v. Lakey}, 769 F.3d 285, 297 (5th Cir. 2014) (affirming Fifth Circuit's unwillingness to utilize strict scrutiny standard on grounds of precedence).

\textsuperscript{55} \textit{Hellerstedt}, 136 US at 2292.

\textsuperscript{56} See id. at 2321 (stating “Targeted Regulation of Abortion Providers laws like H.B. 2 that ‘do little or nothing for health, but rather strew impediments to abortion’ . . . cannot survive judicial inspection’); \textit{Planned Parenthood of Se. Pa. v. Casey}, 505 U.S. 833, 837 (1992) (affirming appropriateness of undue burden test for evaluation of abortion restrictions prior to viability). See also infra notes 83-153 and accompanying text (providing detailed analysis of \textit{Casey} undue burden standard).

\textsuperscript{57} \textit{Hellerstedt}, 136 US at 2311.
health purpose lest the legislation fails to pass judicial muster.\textsuperscript{58} The 2013 Texas statute failed to comply with such review.\textsuperscript{59} In writing for the majority, Justice Breyer concluded that,

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neither of these provisions offers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access and each violates the federal Constitution.\textsuperscript{60}

The Supreme Court, in its articulation of the undue burden test, reformulated \textit{Casey} in that the "rule ... requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."\textsuperscript{61}

The Court also confirmed that the state's justification for the enactment of a statute, in this case to protect maternal health, must pass judicial review in that the legislation in fact protects "constitutional rights at stake."\textsuperscript{62} The Court remained unpersuaded by Texas' argument that the legal doctrine of \textit{res judicata} barred any decision made on the merits of the case.\textsuperscript{63} The majority opinion emphasized that since the consequences of post enforcement rules were not known or knowable at the time of the first legal challenge in \textit{Abbott I}, Whole Woman's Health would not be barred from

\textsuperscript{58} \textit{See id.} at 2309 (noting that courts must consider "the existence or nonexistence of medical benefits").

\textsuperscript{59} \textit{See id.} at 2298-99 (holding admitting-privileges and surgical-center requirements of 2013 Texas abortion statute unconstitutional).

\textsuperscript{60} \textit{Id.} at 2300 (citations omitted).

\textsuperscript{61} \textit{See id.} at 2309 (highlighting existence or nonexistence of medical benefits as key consideration of the undue burden test); \textit{Cole Brief, supra} note 6, at 30 (outlining guidelines set forth in \textit{Casey}).

\textsuperscript{62} \textit{See Hellerstedt}, 136 S. Ct. at 2309-10 (underscoring courts may "resolve questions of medical uncertainty" in determining the constitutionality of abortion procedures).

\textsuperscript{63} \textit{See id.} at 2306-07 (arguing new challenge to constitutionality of admitting-privileges requirement is not barred).
raising the ASC challenge in any subsequent lawsuit.\textsuperscript{64} In a scathing dissent to this point, Justice Alito argued that Whole Woman's Health was re-litigating the same cause of action, a position which he stated to be "unsupported by authority and plainly wrong."\textsuperscript{65} The majority opinion refuted Justice Alito's position by stating that the "Court of Appeals' articulation of the relevant standard is incorrect," and deferring to the Gonzales decision to hold that legislature's findings of fact are not dispositive.\textsuperscript{66}

The earlier Fifth Circuit decision applied an extremely low bar of judicial review and ceded to the legislature the exclusive role of determining what constituted a legitimate state interest.\textsuperscript{67} Hellerstedt confirmed that the judiciary's role was not to defer to a state's justification of the purported health benefits of restrictive abortion

\textsuperscript{64} See id. at 2297 (distinguishing the facial challenge brought forth in Abbott from Hellerstedt). See also Planned Parenthood of Greater Tex. Surgical Health Services v. Abbott, 951 F. Supp. 2d 891, 902 (W.D. Tex. 2013) (concluding admitting-privileges provision places an undue burden on women seeking to abort a nonviable fetus). The plaintiffs in Abbott challenged the constitutionality of hospital admitting-privileges under the Texas Health & Safety Code but lost because this provision placed an "undue burden" on women seeking an abortion. \textit{Id.} at 900. As to the challenge to admitting privileges in \textit{Hellerstedt}, which the State argued should have been raised, Justice Breyer cited to the Restatement, which provides that, "where important human values . . . are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought." \textit{Hellerstedt}, 136 S. Ct. at 2305; \textit{RESTATEMENT (SECOND) OF JUDGMENTS} § 24, cmt. f (1982).

\textsuperscript{65} See \textit{Hellerstedt}, 136 S. Ct. at 2332 (Alito, J., dissenting). Justice Alito was joined by Chief Justice Roberts and Justice Thomas in a lengthy dissent and claimed the decision that the majority disregarded some long-standing basic rules of the law. \textit{Id.} at 2330. Although both the majority and the dissent refer to the applicability of res judicata, this paper focuses specifically on the Supreme Court's application of the \textit{Casey} undue burden test. \textit{Id.} at 2321 (Thomas, J., dissenting) (stating the undue burden test in \textit{Casey} bears "little resemblance" to standard adopted by majority).

\textsuperscript{66} See id. at 2309-10 (weighing arguments and evidence in judicial proceedings to determine constitutionality of abortion laws). See also Gonzales v. Carhart, 550 U.S. 124, 150 (2007) (holding dispositive weight should not be placed on legislative fact findings). Justice Breyer discounted, as did the earlier Supreme Court's decision in Gonzales, that the legislature's fact findings are not dispositive. See \textit{Hellerstedt}, 136 S. Ct. at 2310; Gonzales, 550 U.S. at 165. Instead, as in Gonzales, Justice Breyer mandated that the judiciary retains an "independent constitutional duty to review factual findings where constitutional rights are at stake." \textit{See Hellerstedt}, 136 S. Ct. at 2310 (quoting Gonzales, 550 U.S. at 165) (reviewing legislative fact-finding under deferential but not dispositive standard).

\textsuperscript{67} See \textit{Hellerstedt}, 136 S. Ct. at 2298 (analyzing the Fifth Circuit's mistakes when applying the judicial review standard).
legislation, but to judicially validate whether the legislative enactment served a genuine
health purpose and that the stated health justification was in fact advanced.\textsuperscript{68} The Fifth
Circuit, however, held that because medical uncertainty surrounded the facts underlying
the abortion practice and its legislation, it was for the legislature and not the courts to
resolve whether legislative findings for the statute's enactment were justified.\textsuperscript{69} In
relying on \textit{Casey}, considerable weight was placed on the evidence precisely because the
"Court retains an independent constitutional duty to review factual findings."\textsuperscript{70}

Furthermore, Justice Thomas' trenchant dissent denounced "today's opinion"
to allow that the court "need not defer to the legislature, and must instead assess
medical justifications for abortion restrictions by scrutinizing the records themselves."
In his opinion, the majority had placed a burden on the State that was "ratcheted to a
level that has not applied for a quarter century."\textsuperscript{71} Justice Thomas's dissent further
refuted the majority opinion as he quarreled with what he deemed a discarding of the
\textit{Casey} undue burden test.\textsuperscript{72} Although the majority retains the \textit{Casey} undue burden
standard, it would appear that under a strict scrutiny standard, the Court has made
compliance more difficult with a test more stringent.\textsuperscript{73} In \textit{Casey}, the Court stipulated
that once a judicial finding that the state justified an appropriate state interest is made,

\begin{footnotesize}
68 \textit{Hellerstedt}, 136 S. Ct. at 2310 (explaining that Court places considerable weight on arguments
made in judicial proceedings). \textit{Id.} at 2309-10 (clarifying standard of judicial review).
69 \textit{Id.} at 2309.
70 \textit{Id.} at 2310.
71 \textit{Id.} at 2324 (Thomas, J., dissenting). Justice Thomas concludes his analysis of the interplay
between the legislature and judicial review in his statement that "these precepts are nowhere to
be found in Casey or its successors, and transform the undue burden test to something more
akin to strict scrutiny." \textit{Id.} at 2326 (Thomas, J. dissenting).
72 \textit{See id.} at 2326 (Thomas, J., dissenting) (describing Court's undue burden test as more closely
resembling a strict scrutiny standard). \textit{See also} Planned Parenthood of Se. Pa. v. \textit{Casey}, 505 U.S.
833, 874-75 (describing undue burden standard).
73 \textit{See Hellerstedt}, 136 S. Ct. at 2326 (Thomas, J., dissenting) (criticizing majority for moving toward
strict scrutiny, which was rejected in \textit{Casey}).
\end{footnotesize}
the court may proceed to the next level of analysis and apply the purpose-effect test to complete its evaluation of the challenged state regulations. If either the purpose or the effect of the abortion statute imposed a substantial obstacle on a woman's right to choose, an analysis under *Casey* would subsequently deem such restrictions an undue burden. In *Hellerstedt*, the Court does not reference the purpose-effect test but instead, Justice Breyer appears to reformulate the *Casey* undue burden test when discussing a benefit versus burden analysis. Pursuant to a benefits-burden analysis, Texas could not justify that H.B. 2 served a real health purpose and therefore deemed an undue burden and unconstitutional. This re-imagined undue burden standard may be an easier standard for challengers to satisfy in comparison to the purpose-effect test.

The majority in its benefits versus burden reckoning permitted fact-finding evidence, which neither the dissent nor earlier cases adjudicated by the Fifth Circuit Court of Appeals had previously allowed. Additionally, *Hellerstedt* admitted expert

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74 *See Casey*, 505 U.S. at 925 (Blackmun, J., concurring) (explaining framework for evaluating abortion regulations).

75 Id.

76 *See Hellerstedt*, 136 S. Ct. at 2300 (concluding provisions of Texas statute do not confer enough medical benefits to outweigh their burdens).

77 *See id.* at 2318 (explaining burdens imposed by H.B. 2).


79 *See Hellerstedt*, 136 S. Ct. at 2326 (Thomas, J., dissenting) (comparing court's holding to reasoning in *Casey*); Cole, 790 F.3d at 587 (determining uncertainty regarding an underlying statute is resolved by legislatures not courts); Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d at 594 (explaining courts should not second guess legislative fact-finding). "As in [Casey], today's opinion 'simply... highlight[s] certain facts in the record that apparently strike the... Justices as particularly significant in establishing (or refuting) the existence of the
testimony and peer-reviewed studies on complications to the abortion procedure, which Chief Justice Roberts and Justice Alito both opined to be unsupported. The majority opinion in *Hellerstedt* hewed the line of case law on abortion which traditionally compelled the courts to a heightened level of scrutiny by which to evaluate legislative mandates. In advocating for the benefits versus burden balancing standard, the *Hellerstedt* opinion has re-imagined the standards for judicial scrutiny in facial challenges to constitutionality of state legislation, perhaps rendering it a less onerous standard to meet in the future.

IV. HISTORY OF ABORTION JURISPRUDENCE

In 1973, a 7-2 Supreme Court ruling, which held that a woman was entitled to constitutional protection of her right to elect an abortion, formed the landmark case that
the public now commonly understands to be Roe v. Wade. Prior to Roe v. Wade, the right to choose to terminate a pregnancy did not exist. The state’s interest in potential life as well as its interest in the regulation of the medical profession was found to trump an individual’s right to personal autonomy and its corollary, the ability to determine the right to her bodily integrity which includes the right to abort. Roe eliminated that assumption by endowing the woman with the constitutionally guaranteed right of choice. To balance the tension between the equally valuable but competing individual and state interests, the Court devised a trimester framework for the state of pregnancy. Roe allocated interests of a distinct individual versus the state’s interests based on this medical stratification. The state’s legitimate interests were triggered at a “compelling”
point, which the Court defined under the concept of viability. During the first trimester, the woman alone was entitled to elect to abort without any interference from the state. During the second trimester, the stage when the fetus could exist independently outside the womb, the woman and the state share interests in the pregnancy. During the third and final trimester of the pregnancy, the state's interest in the unborn child's life was paramount, and the woman's right to choose to terminate was severely circumscribed, limited only to dangers to maternal health.

Since the majority opinion was fractured, the Roe precedent was immediately subject to criticism on both legal and medical grounds. As to the governing principle or the ratio decidendi in Roe v. Wade, the seven Justices in the majority had no doubt.

responsibility rests with physician). Justice Blackmun explains that the trimester framework is grounded “in the light of present medical knowledge...” Id. at 163. See also supra note 80 and accompanying text (arguing right to make a decision regarding abortion is not an unqualified right).

89 Roe, 410 U.S. at 163. Justice Blackmun defines the “compelling” point at viability because the fetus then has the capability of “meaningful life” outside the womb. Id. See also Colautti v. Franklin, 439 U.S. 379, 387 (1979) (defining “meaningful life” as “not mere momentary survival”).

90 See Roe v. Wade, 410 U.S. 113, 164 (1973) (outlining when state and physician may regulate woman's right to abortion). Before the end of the first trimester, the abortion decision must be left to the judgment of the pregnant woman's physician. Id. See also Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976) (explaining state cannot regulate abortion during first stage and require spousal consent). The state cannot delegate a “veto power” over an abortion to a spouse that the state itself is prohibited from exercising during the first trimester of pregnancy. Id.

91 See Roe, 410 U.S. at 164 (explaining broad reach of Texas statute). The state may choose to regulate abortion procedures in ways reasonably related to material health before the end of the first trimester. Id.

92 Id. at 164-65. During the third trimester the state may regulate or proscribe abortion except where necessary for the life or health of the mother. Id.

93 See Montrose A. Pallen, Foeticide, or Criminal Abortion, 3 MED. ARCHIVES 193, 205 (1869) (paper read before the Missouri State Medical Association, April, 1868) (conceptualizing that life begins when the ovum is impregnated). The definition of life has long been debated amongst medical professionals as they argue the various definitions of the point at which life begins. Reva Siegal, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Question of Equal Protection, 44 Stan. L. Rev. 261, 287 (1991).

94 See Roe, 410 U.S. at 153 (holding right of privacy encompasses a woman's decision whether or not to terminate pregnancy); Jules B. Gerard, Roe v. Wade is Constitutionally Unprincipled and Logically Incoherent: A Brief in Support of Judicial Restraint, 15 AM. J. L. AND MED. 222, 224-26 (1989) (arguing Roe v. Wade is unsupported by principle and written incoherently); Laura Mansnerus, What is
The Justices were in firm agreement that the Constitution guaranteed the woman's right to choose.\textsuperscript{95} The Justices splintered in how they reached this legal conclusion.\textsuperscript{96} The plurality opinion was undermined solely because Justice Blackmun signed onto the trimester framework as the medical basis for the legal opinion.\textsuperscript{97} In his concurrence, Justice Douglas grounded his opinion in the right to privacy and Justice Stewart framed his opinion in terms of the Fourteenth Amendment and the individual's right not to be deprived of liberty without due process.\textsuperscript{98}

For a period of twenty years following \textit{Roe}, the parameters of the woman's right to choose was viewed as not absolute, but rather subject to the state's vested and compelling interest in potential life, and parallel individual and state interests intersected only at the moment of viability.\textsuperscript{99} Any state restriction that collided with a woman's right to choose was unconstitutional when such regulatory limitations impacted such right prior to this moment of viability.\textsuperscript{100} Many such decisions rendered during the intervening twenty years between \textit{Roe} and \textit{Casey} held statutory restrictions to be unconstitutional.\textsuperscript{101} These restrictions included legislative efforts mandating parental

\textsuperscript{95} See \textit{Roe}, 410 U.S. at 153 (finding that right of privacy in either Ninth or Fourteenth Amendment includes decision over abortion).
\textsuperscript{96} \textit{Id.} at 163 (announcing trimester framework).
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} See \textit{Roe} v. Wade, 410 U.S. 113, 170-71 (1973) (Stewart, J., concurring) (agreeing with majority that abortion statute is invalid under the Due Process Clause); Doe v. Bolton, 410 U.S. 179, 209-13 (1973) (Douglas, J., concurring) (explaining that right to abortion is grounded in right to privacy).
\textsuperscript{100} See \textit{Casey}, 505 U.S. at 846 (reaffirming holding in \textit{Roe} v. Wade).
\textsuperscript{101} See \textit{Casey}, 505 US at 858 (discussing post-\textit{Roe} cases that expanded on \textit{Roe}'s holding).
consent for a pregnant minor’s abortion, mandatory twenty-four hour waiting period between the initial visit and the procedure, compulsory distribution of abortion related literature, and mandatory reporting requirements to the state.\(^\text{102}\)

In 1992, the *Planned Parenthood of Southeastern Pennsylvania v. Casey* decision upended the *Roe* interpretation.\(^\text{103}\) In *Casey*, the Supreme Court eliminated the *Roe* trimester test and replaced that framework with the undue burden standard.\(^\text{104}\) The impugned Pennsylvania statute challenged in *Casey* enshrined the legislature’s belief that life began at conception.\(^\text{105}\) As a result, four provisions restricting a woman’s abortion rights had been enacted.\(^\text{106}\) These four provisions included an informed consent

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\(^\text{102}\) See *Casey*, 505 U.S. at 833 (discussing how the 24 hour waiting period led to the undue burden standard). See *Akron*, 462 U.S. at 424 (invalidating Ohio statute mandating requirements for abortions). Included in the Ohio statute were provisions that mandated parental consent for a minor under the age of fifteen years and a twenty-four hour waiting period from the time of her signing a consent form. *Id.* at 422. The twenty-four hour wait period was held unconstitutional since there was no evidence that requiring such wait time rendered the procedure safer. *Id.* at 450. Therefore, the court did not view this as a regulation justified by a state’s interest in maternal health, and § 1870.07 of the Ohio ordinance was held unconstitutional. *Id.* at 450-51. *Akron* held that a state’s concern over the informed decision of a woman is not served by an inflexible twenty-four hour delay and such regulation lacked medical basis. *Id.* at 450. See also *Thornburgh*, 476 U.S. at 769 (rendering the Pennsylvania statute mandating reporting requirements unconstitutional). The challenged Pennsylvania statute also included §§ 3205(a)(i)(ii) and (iii) which required the medical provider to inform the woman seeking an abortion of the “detrimental physical and psychological effects” of the procedure. *Id.* at 760. The reporting requirement provisions were also challenged since it allowed information regarding abortions to be available for inspection by the public, even though they were not deemed public documents. *Id.* at 767. The majority justified striking these provisions due to a woman’s guaranteed right to liberty, which includes the fundamental right to individual decisions in childbearing without unwarranted governmental intrusion. *Id.* at 775.

\(^\text{103}\) See *Casey*, 505 U.S. at 833 (holding state may not place undue burden on woman’s right to choose).

\(^\text{104}\) See id. at 844. The Court invalidated the trimester framework as placing a “substantial obstacle in the path of the woman seeking an abortion of a nonviable fetus.” *Id.* at 877.


\(^\text{106}\) See *Casey*, 505 U.S. at 833 (describing four challenged provisions).
provision, a twenty-four hour wait period between the receipt of this information and the abortion procedure, the imposition of a spousal notification requirement to the husband of a married woman, and the imposition of a notification for parental consent for a pregnant minor’s abortion.107

*Casey* vigorously maintained that the “essential holding” of *Roe*, the constitutional right which guaranteed a woman’s right to choose, had been retained in their decision.108 *Casey* formulated that the undue burden test be the single index by which the constitutionality of a state’s abortion regulations is measured.109 Unlike *Roe’s* standard, the undue burden test is predicated on the assumption that the state’s compelling interest in potential life is present throughout the pregnancy and is not sequestered to a point past viability, as the *Roe* decision seemed to suggest.110 The undue burden test postulates that because a state’s interests are to be promoted throughout the woman’s pregnancy, the state is permitted to enact regulations justified

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107 See 18 PA. CONS. STAT. § 3205.1 (requiring a twenty-four hour waiting period and informed consent); § 3206 (requiring the consent of the parents of a minor seeking an abortion); § 3209 (requiring the consent of the husband of the woman seeking an abortion). *See also Casey*, 505 U.S. at 882 (plurality opinion). “We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health.” *Id.*

108 See *id.* at 845-46. “The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.” *Id.* at 871. “We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.” *Id.* at 873 (citing *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989)). *See also Webster*, 492 U.S. at 529 (O’Connor, J., concurring in part and concurring in judgment) (describing trimester framework as “problematic”).

109 See *Hellerstedt*, 136 S.Ct. at 2309-10 (affirming that abortion regulations require judicial balancing burden of a restriction against its benefits) (citing *Casey*, 505 U.S. at 887-889 (plurality opinion)).

110 *Casey*, 505 U.S. at 875-76 (plurality opinion). “Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman’s decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy.” *Id.* at 876.
by its interests in both fetal life and maternal health. The undue burden test reconciles the tension between the parallel state's interest in life and the woman's constitutionally protected interest in reproductive integrity and the right to terminate a pregnancy. The test evolved as a judicial effort to more effectively calibrate the tension between the parallel individual and state interests. Critics have posited the view that Roe deferred the state's interest in potential life until too late a stage in the pregnancy, and seriously undermined the state's position. Scholars have suggested that the Casey undue burden standard is a finely tuned compromise that permitted the state to claim that its interest in potential life is present throughout the pregnancy while simultaneously respecting the woman's right to terminate. This theme is echoed throughout the joint opinions of Justices Kennedy, O'Connor, and Souter, within their findings that the state's interests in life is present from the inception of the woman's pregnancy. To permit a woman to terminate a

111 Casey, 505 U.S. at 877-878 (plurality opinion).
112 Hellerstedt, 136 S. Ct. at 2309-10.
114 See Symposium, State Interests and the Duration of Abortion Rights, 44 MCGEORGE L. REV. 31, 54-56 (2013) (arguing that interest in potential life should be considered legitimate before fetus is viable); Stephen G. Gilles, Why the Right of Elective Abortion Fails Casey's Own Interest-Balancing Methodology— and Why It Matters, 91 NOTRE DAME L. REV. 691, 711-21 (2015) (arguing that state's interest in pre-viable lives outweighs countervailing liberty interest).
pregnancy does not mean that her right is so unfettered as to not be subject to persuasion otherwise. In replacing the Roe trimester framework, the Court specifically looked to correct what Roe had determined to be an undervaluation of a state’s interest in protecting life; however, Casey failed to elucidate what test they believed the judiciary should utilize in making such evaluations.

It would appear that, in their formulation of the undue burden standard, the authors of the majority decision in Casey crafted a heretofore amorphous test. Justice Stevens’ required the courts to analyze and make a determination of a clear legislative purpose. His concurring opinion distinguished that a “state imposed burden on the exercise of a constitutional right ... may be ‘undue’ either because the burden is too severe or because it lacks a legitimate, rational justification.”

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117 See id. at 869 (plurality opinion) (concluding that state’s interest in life can restrict woman’s right to terminate pregnancy); Roe v. Wade, 410 U.S. 113, 153-54 (1973) (determining state has interest in safeguarding health and maintaining medical standards).

118 Casey, 505 U.S. at 873. See Karlin v. Foust, 188 F.3d 446, 459-60 (7th Cir. 1999) (describing difficulties involved in assessing statute under undue burden standard given limited guidance from Casey). The Court’s failure to clarify the test in Casey and the Fifth Circuit’s improper application in Cole left courts unsure of how to effectively apply the test. See Casey, 505 U.S. at 876 (plurality opinion) (holding that the undue burden standard is the proper analysis without clarifying what the test entails); Whole Woman’s Health v. Cole, 790 F.3d 563, 584 (5th Cir. 2015) (considering whether law created substantial obstacle rather than undue burden).

119 See Casey, 505 U.S. at 876 (reasoning why undue burden standard is correct standard). “The concept of an undue burden has been utilized by the Court as well as individual Members of the Court, including two of us, in ways that could be considered inconsistent. Because we set forth a standard of general application to which we intend to adhere, it is important to clarify what is meant by an undue burden.” Id. (citations omitted).

120 See id. at 921 (Stevens, J., dissenting) (emphasizing the importance of a useful and legitimate purpose in applying the undue burden test). “Whenever government commands private citizens to speak or to listen, careful review of the justification for that command is particularly appropriate.” Id.

121 Casey, 505 U.S. at 920 (emphasis added).

My disagreement with the joint opinion begins with its understanding of the trimester framework established in Roe .... it is not a “contradiction” to recognize that the State may have a legitimate interest in potential human life and, at the same time, to conclude that that interest does not justify the regulation of abortion before viability... the fact that the State’s interest is legitimate does not tell us when, if ever, that interest outweighs the pregnant woman’s interest in personal liberty.
provided evidence that the regulation would be justified only by a “useful and legitimate” purpose.\textsuperscript{122} This suggests that a state legislature simply stating that a statute serves a legitimate purpose and then expecting the judiciary to accept such legislative declarations without question would not suffice.\textsuperscript{123}

Two Justices of the \textit{Casey} majority, Justice O’Connor and Justice Kennedy, were notably not members of the Supreme Court at the time of \textit{Roe}.\textsuperscript{124} Prior to \textit{Casey}, Justice O’Connor had continuously ruled against expanding the applicability of \textit{Roe}.\textsuperscript{125} The obvious question is why did Justice O’Connor, who had on previous occasions voted with the dissent, apparently reverse herself? Justice O’Connor’s changed opinion suggested that perhaps something shifted her understanding of the law on reproductive rights and persuaded her to alter her vote.\textsuperscript{126} In her earlier dissenting opinions in \textit{Akron} and \textit{Thornburgh}, Justice O’Connor had stated that the State’s “compelling” interests in

\textit{Id.} at 914.
\textsuperscript{122} \textit{See id.} at 921 (Stevens, J., concurring) (explaining how correct application of the test results in the same conclusion of constitutionality).
\textsuperscript{123} \textit{See id.} at 870 (plurality opinion) (noting that legislatures may draw lines without proffering justification but courts may not).
\textsuperscript{125} \textit{See Thornburgh v. Am. C. of Obstetricians and Gynecologists}, 476 U.S. 747, 814 (1986) (dissenting opinion of O’Connor to majority’s abortion ruling); \textit{Akron}, 462 U.S. at 452 (writing the dissenting opinion in abortion case).
ensuring maternal health does not depend on the trimester system, but, are present throughout pregnancy.\textsuperscript{127} Judicial scrutiny should be limited in focus on the legitimate purpose of a state’s abortion laws and regulation, such as advancement of compelling interests, with heightened scrutiny reserved only for when the state imposes an undue burden on the woman’s decision.\textsuperscript{128} Justice Kennedy expressly acknowledges this standard and adopted this very test in \textit{Casey}, using exact language from Justice O’Connor’s dissenting opinion in \textit{Akron}.\textsuperscript{129} This deference was perhaps a clear attempt to unite the court and persuade Justice O’Connor to join the \textit{Casey} majority opinion, as it unmistakably articulated her original undue burden standard.\textsuperscript{130} His insistence to ensure that state interests were not to be compromised by a failure to provide women with information that is less than truthful, and therefore misleading, afforded greater deference to state interests than the Supreme Court has historically shown.\textsuperscript{131}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Thornburgh}, 476 U.S. at 828 (highlighting the state’s compelling interest in maternal health and potential human life throughout pregnancy); \textit{Akron v. Akron Center for Reproductive Health Inc.}, 462 U.S. 416, 459 (1983) (underscoring state’s interests in patient safety and human life eclipses trimester framework).
\item \textit{Thornburgh}, 476 U.S. at 828.
\item Compare Planned Parenthood of Se. Pa. v. \textit{Casey}, 505 U.S. 833, 877 (1992), with \textit{Akron}, 462 U.S. at 464 (identifying absolute obstacles or severe limitations on the abortion decision as an undue burden). “The concept of an undue burden has been utilized by the Court as well as individual Members of the Court, including the two of us.” \textit{Casey}, 505 U.S. at 876. Justice Kennedy explicitly cites the dissenting opinions in Akron and Thornburgh. \textit{Id}.
\item \textit{Casey}, 505 U.S. at 877. “A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” \textit{Id}.
\item See id. at 877 (“A statute . . . must be calculated to inform the woman’s free choice, not hinder it.”).
\end{enumerate}
\end{footnotesize}

“To the extent \textit{Akron I} and \textit{Thornburgh} find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus, those cases go too far, are inconsistent with Roe’s acknowledgment of an important interest in potential life, and are overruled. This is clear even on the very terms of Akron I and Thornburgh. Those decisions, along with Danforth, recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth.”
supportive of the woman's right to choose, *Casey* accepts the distinct role that the state may play in persuading the woman to carefully contemplate the decision to terminate.\(^{132}\) However, such careful deliberation may be achieved only after a woman possesses all the necessary information to make that decision.\(^{133}\) When her decision reflects a deliberative process, that woman's thoughtful decision may not be challenged.\(^{134}\) The state's interest now permits for the constitutionality of state regulations and seek to persuade a woman not to terminate, if such persuasion does not block her decision or cross over into active obstruction.\(^{135}\)

*Casey* held that the legislative regulations must, additionally, meet the litmus test in that the restrictions have neither the "purpose" nor the "effect" of rendering a woman's access to abortion substantially more difficult.\(^{136}\) The Court distinguished between restrictions that had the consequence of "incidental" burdens as opposed to

\[^{132}\text{Id. at 882 (citing e.g., Danforth, 428 U.S. at 66–67).}\]
\[^{133}\text{Id. at 878. "Unless it has that [substantial obstacle] effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal." Id.}\]
\[^{134}\text{Id. at 879. "Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." Id.}\]
\[^{135}\text{Id. at 877–78.}\]

Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.

\[^{136}\text{Id. at 877.}\]
\[^{136}\text{*Casey*, 505 U.S. at 883. "[R]equiring that the woman be informed of the availability of information . . . is a reasonable measure to ensure an informed choice." Id.}\]
\[^{136}\text{Id. at 879. "As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." Id.}\]
those regulations that created a "substantial obstacle". Only those enactments in the latter category are considered unconstitutional. Case law does not indicate that courts recognize both the purpose and the effect prongs of the undue burden test are to be cumulative requirements. Either prong, if met, is a substantial obstacle and constitutes an undue burden. Not all restrictions, even those deemed cumbersome in practice will constitute an undue burden; only a substantial burden is undue. Regulations that require greater traveling time, such as the twenty-four hour wait period, do not necessarily constitute an undue burden. On the other hand, spousal notification for a married woman seeking an abortion has been held to be an undue burden in comparison to a parental notification, because the courts presume that

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137 Id. at 874-77. The court recognized that all state regulations on abortions interfere, to some degree, with a woman's ability to decide whether to turn to abortion, but some state intrusion in the matter can be warranted because of the state's substantial interest in potential life. Id. at 875-76. Incidental burdens include an increase in cost or a risk of delay of abortions, while a substantial obstacle is an undue burden placed on a woman's ability to decide on an abortion of a nonviable fetus. Id. at 877, 886.

138 Id. at 874. "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." Id.

139 Id. at 876. Roe and cases which were subsequently decided, viewed all government attempts at influencing a woman's decision to choose as unwarranted. Id.

140 See Casey, 505 U.S. at 877 (explaining the purpose of imposing an undue burden). A statute has the purpose of imposing an undue burden on a woman's decision to choose abortion if the means employed further the state's interest in potential life while hindering the woman's free choice. Id. On the other hand, a statute imposes an undue burden when it seeks to serve a legitimate state interest, but its effect is to impose a substantial obstacle in the path of a woman's choice to terminate her pregnancy. Id. For example, the twenty-four hour waiting period does not meet either prong because its purpose is to further the valid interest in potential life and its potential effect of increased costs or health risks due to delay of abortion do not constitute a substantial obstacle. Id. at 886-87.

141 Id. at 876 (stating that state's interests are to be considered in relation to woman's constitutional liberties). When determining whether an undue burden exists, restrictions such as those serving the state's substantial interest in potential life are warranted. Id.

142 See Casey, 505 U.S. at 885-86 (finding that the wait period was not unduly burdensome despite travel distance for appointments). The twenty-four hour wait period requires a woman to have at least two doctor's visits which means more travel, especially for those who do not reside near an abortion clinic. Id. at 885. A further effect of such a regulation is more exposure to harassment from protestors outside of the clinic. Id. at 886. However, the court still determined that these effects do not amount to a substantial obstacle. Id.
parents have the minor's best interest at heart.\textsuperscript{143}

The dissent in \textit{Casey} deplored the undue burden test.\textsuperscript{144} Justice Scalia, the author of the dissenting opinion, cautioned that this standard did not conform to any known constitutional law standard or legal precedent.\textsuperscript{145} The undue burden test, the dissent indicated, had "no basis in constitutional law" and risked the potential for inconsistent and a more subjective application than had the \textit{Roe} trimester framework because, "the standard is inherently manipulable and will prove hopelessly unworkable in practice... [t]he ultimately standardless nature of the "undue burden" inquiry is a reflection of the underlying fact that the concept has no principle or coherent legal basis."\textsuperscript{146} In fact, the dissent's prediction came to pass in the 2007 United States Supreme Court decision in \textit{Gonzales v. Carhart} where the constitutionality of the Nebraska statutory ban on partial birth abortion, and, a specific medical method used for late term abortions, known as the D & E, as challenged.\textsuperscript{147} The legal argument, in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{143} \textit{Id.} at 893-95 (determining that spousal notification requirement poses substantial burden on women seeking an abortion). The majority of women inform their spouse about their decision to terminate a pregnancy. \textit{Id.} at 892. In cases where the woman chooses not to notify her husband, her decision is due to problems within the marriage such as abuse or an extramarital affair that resulted in the pregnancy. \textit{Casey}, 505 U.S. at 892-93. Women may fear the consequences of notifying their husband of their pregnancy and decision to terminate it, preventing some women from obtaining an abortion due to the substantial burden the notification requirement places on the woman. \textit{Id.} at 894.
\item \textsuperscript{144} \textit{See} \textit{Casey}, 505 U.S. at 980-1002 (Scalia, J., dissenting) (discussing the inconsistency in applying the undue burden test and its unprincipled origin).
\item \textsuperscript{145} \textit{Id.} at 965, 987. "[T]he 'undue burden' standard, which is created largely out of whole cloth by the authors of the joint opinion... is a standard which is not built to last." \textit{Id.}
\item \textsuperscript{146} \textit{See} \textit{Casey}, 505 U.S. at 886, 986-988 (concluded that undue burden standard had no basis in constitutional law).
\end{itemize}
\end{footnotesize}
that case, was grounded in the Nebraska legislation’s language, which failed to make an exception for maternal health.\textsuperscript{148} Justice Kennedy stated that there was no doubt as to the state’s legitimate interest in maternal health and, in doing so, reaffirmed that the
\textit{Casey} opinion struck a balance between the state’s and the individual’s parallel interests.\textsuperscript{149} The two prongs of the undue burden test now require separate inquiry.\textsuperscript{150}

Beginning with the judicial examination of the legislature’s justification of its state interest, the Court must first determine that the state “has a rational basis to act,” and only then may proceed to determine whether the state mandate met the two-prong, purpose-effect test and, therefore, imposed an undue burden.\textsuperscript{151} In \textit{Casey}, Justice Kennedy repeated his previously held position and created the foundation for “ample justification for the regulation.”\textsuperscript{152} Although Justice Kennedy referred to a rational basis for the constitutionality of the legislation, his analysis is closer to that of the heightened

vaginally delivers a living fetus until; in the case of a head – first presentation, the entire fetal head is outside the [mother’s] body..., or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the [mother’s] body ..., for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the...fetus...”

\textsuperscript{148} Gonzales, 550 U.S. at 161-165 (analyzing whether the language of the statute was facially unconstitutional).

\textsuperscript{149} Id. at 158-165 (sustaining validity of Partial-Birth Abortion Ban Act of 2003); see generally \textit{Casey}, 505 U.S. at 846 (analyzing state’s legitimate interest in respecting termination of pregnancies by abortion procedures). See Gonzales, 550 U.S. at 145 (concluding that government has a legitimate state interest in preserving life of infants); \textit{Casey}, 505 U.S. at 846 (adhering to rights of both individual and state).

\textsuperscript{150} See Gonzales, 550 U.S. at 146 (discussing state’s legitimate interest in furthering Partial-Birth Abortion Ban Act of 2003). See generally \textit{Casey}, 505 U.S. at 846 (reaffirming holding from \textit{Roe v. Wade}).

\textsuperscript{151} Id. at 146 (applying rational basis test).

\textsuperscript{152} Id. at 159 (identifying the way in which a fetus is killed as a legitimate state interest). See Gonzales, 550 U.S. at 160 (noting that the medical profession may uncover a less shocking means to abort a fetus). See generally \textit{Casey}, 505 U.S. at 873 (allowing states to create a reasonable framework to guide women with making difficult decisions). Justice Kennedy posited that the state’s interest in life is “advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.” Gonzales, 550 U.S. at 160.
strict scrutiny standard.\textsuperscript{153}

V. APPELLATE DECISIONS OF THE SEVENTH AND NINTH CIRCUITS

In 2013, about two years prior to \textit{Cole}, the Seventh Circuit held Wisconsin's abortion statute unconstitutional in \textit{Planned Parenthood of Wisconsin v. Van Hollen}.\textsuperscript{154} The Wisconsin statute contained language identical to the 2013 Texas statute which mandated that a physician maintain admitting privileges at a hospital within thirty miles from the abortion facility.\textsuperscript{155} Echoing Texas's argument in \textit{Cole}, Wisconsin defended the constitutional challenge to their regulation by arguing that the state's only interest was to protect the "health of the woman."\textsuperscript{156} The Seventh Circuit upheld the lower court's decision to enjoin the Wisconsin legislation and found that the state must present evidence of a maternal health benefit to justify its declared state interest.\textsuperscript{157}

The language in \textit{Van Hollen} does not specify a standard by which the state's regulatory interest be measured, instead the Seventh Circuit required only "evidence...that the medical grounds are legitimate."\textsuperscript{158} The court implicitly accepted that a speculative connection to maternal health justified on a rational basis standard is

\textsuperscript{153} See \textit{Gonzales}, 550 U.S. at 165 (declining to accept congressional findings as conclusory and final absent judicial interpretation). In very precise language, Justice Kennedy stated that, "the court retains an independent constitutional duty to review factual findings where constitutional rights are at stake." \textit{Id.}


\textsuperscript{156} Planned Parenthood of Wis. v. Van Hollen, 738 F.3d 786, 788-9 (7th Cir. 2013).

\textsuperscript{157} See \textit{id.} at 795 (noting Wisconsin’s failure to provide sufficient evidence).

\textsuperscript{158} See \textit{id.} at 798 (providing cases that have dealt with abortion-related statuses). "[A]bortion-related statutes sought to be justified on medical grounds require . . . evidence (here lacking) that the medical grounds are legitimate." \textit{Id.}
Wisconsin was required to adduce sufficient evidence to justify its regulation.\(^{159}\) \textit{Van Hollen} examined the practical consequence of the legislative restrictions, which would have closed half the clinics and would adversely affect “60\% of the clinics’ patients [who] have incomes below the federal poverty line.”\(^{161}\) The Seventh Circuit utilized a strict scrutiny standard without expressly applying such heightened standard.\(^{162}\) The court recognized the nature of the clinics’ population and that closure of half of the clinics in the state would drastically limit access to an abortion and subject the women to a less safe and possibly an illegal abortion.\(^{163}\) Under the strict scrutiny test, the Seventh Circuit discounted Wisconsin’s case precisely because the state “made no attempt to show an offsetting harm from a delay.”\(^{164}\) The Seventh Circuit would not have asked Wisconsin to defend their position had the rational basis test been utilized.\(^{165}\) \textit{Van Hollen} ensured that Wisconsin must justify its declared state interests in abortion related statutes with supporting evidence of two criteria: (1) that the medical

\(^{159}\) \textit{See id.} at 795 (noting uncertainty of balance test application to preliminary injunction hearing).

\(^{160}\) \textit{See Van Hollen,} 738 F.3d at 798 (recommending both parties obtain a neutral medical expert to testify).

\(^{161}\) \textit{See id.} at 796 (recognizing problems women from certain parts of state may have).

\begin{quote}
"If two of the four abortion clinics in the state close and a third shrinks by half, some women wanting an abortion may experience delay in obtaining, or even be unable to obtain, an abortion yet not realize that the new law is likely to have been the cause. Those women are unlikely to sue."
\end{quote}

\(^{162}\) \textit{See id.} at 794 (discussing future difficulties in obtaining an abortion due to the new law).

\(^{163}\) \textit{See id.} at 798 (ruling that preliminary injunction must be upheld). \textit{See generally Loving v. Virginia,} 388 U.S. 1, 11 (1967) (defining strict scrutiny test applied to Equal Protection Clause regarding racial classifications).

\(^{164}\) \textit{See Van Hollen,} 738 F.3d at 795-96 (noting full range of effects this law would have).

\(^{165}\) \textit{See Van Hollen,} 738 F.3d at 797 (holding that the state could not show harm from delaying implementation of the law). \textit{See generally Loving,} 388 U.S. at 11 (defining strict scrutiny as it applies to the Equal Protection Clause).

\(^{165}\) \textit{See generally Nebbia v. New York,} 291 U.S. 502, 537 (1934) (defining rational basis as having a reasonable relation to legislative purpose and satisfying due process). \textit{See also United States v. Carolene Products Co.,} 304 U.S. 144, 152 n.4 (1938) (explaining that stricter standards may apply in other cases).
grounds are legitimate, and (2) that the statute not impose an undue burden.\textsuperscript{166} The Seventh Circuit’s holding provided that,

the feebler the medical grounds, the likelier the burden, even if slight, to be “undue” in the sense of disproportionate or gratuitous...An undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus.\textsuperscript{167}

With the application of the rational basis standard, the state is afforded broad latitude.\textsuperscript{168} Simply putting forward a conceivable state of facts can satisfy a legitimate state interest.\textsuperscript{169} If a state is not relying on evidence or data, their assertion must still be based on ‘rational speculation’.\textsuperscript{170} On the other hand, the strict scrutiny standard would demand nothing less than objective satisfaction, supported by data, of the connection between a legitimate state interest and the legislation.\textsuperscript{171} Such conclusions beg the

\textsuperscript{166} See Van Hollen, 738 F.3d at 798. These cases require “[n]ot only evidence (here lacking as we have seen) that the medical grounds are legitimate but also that the statute not impose an ‘undue burden’ on women seeking abortions.” \textit{Id.}

\textsuperscript{167} \textit{Id.} (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion)).

\textsuperscript{168} \textit{Id.} at 800 (Manion, J., concurring in part).

\textsuperscript{169} See id. \textit{See also} St. John’s United Church of Christ v. City of Chicago, 502 F.3d 616, 637-38 (7th Cir. 2007) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)).

\textsuperscript{170} See Van Hollen, 738 F.3d at 800 (Manion, J., concurring in part) (concluding that courts do not need evidence under rational basis review). \textit{See also} F.C.C. v. Beach Comm., Inc., 508 U.S. 307, 315 (1993) (explaining that a rational-based review may be unsupported by evidence or empirical data).

\textsuperscript{171} See Loving, 388 U.S. 1, 11 (1967) (holding racial classifications subject to “most rigid scrutiny” under equal protection clause analysis). \textit{But see Van Hollen}, 738 F. 3d at 798 (finding abortion-related statutes not subject to strict scrutiny based on qualified state’s medical grounds). While the undue burden standard calls for a more pressing inquiry than rational basis review alone, it can not convert the government’s burden into that required by strict scrutiny. \textit{See Whole Woman’s Health v. Lakey}, 769 F.3d 285, 294 (5th Cir. 2014), \textit{vacated in part}, 135 S. Ct. 399 (2014) (Mem) (concluding that requiring abortion centers to have the same standards as surgical centers is unconstitutional). The same Court of Appeals for the Fifth Circuit decided six months earlier
question: how is one to understand the distinction between these two legal standards of review? Furthermore, how does each standard apply in practice?

*Van Hollen* allowed testimony into evidence that severed the presumption that a physician’s competence is the only measure for admitting privileges at a hospital. The Seventh Circuit further permitted the admission into evidence of testimony that negated the nexus between the provider’s medical competence and hospital credentialing. *Van Hollen* recognized “multiple, various, and unweighted” criteria required to grant admitting privileges and further concluded that the “absence of definite standards ... makes it difficult not only to predict who will be granted such privileges ... but also to prove an improper motive for denial.” Under a rational basis standard, such inquiry would not be necessary.

*Van Hollen* is consistent with an earlier Ninth Circuit decision in *Tuscon Woman's Clinic v. Eden*. The challenged Arizona statute attempted to submit abortion facilities to hold fast to the identical juridical philosophy stating, “[w]e do not second guess the legislature regarding the law’s wisdom or effectiveness. Nor is the State 'required to prove that the objective would be fulfilled.'” *Id.* (citing Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 594 (2014)). The court explained their position,

[T]he district court's approach ratchets up rational basis review into a pseudo-strict-scrutiny approach by examining whether the law advances the State's asserted purpose. Under our precedent, we have no authority by which to turn rational basis into strict scrutiny under the guise of the undue burden inquiry. Plaintiffs argue that the district court's balancing approach is used by other circuits. We agree with Plaintiffs that some circuits have used the balancing test to enjoin abortion regulations; other circuits—including ours—have not.

*Id.* at 297.


173 See *Van Hollen*, 738 F.3d at 792 (explaining evidence that was not admitted may critically alter facts).

174 See *id.* (finding rational basis to only weigh government’s action as irrational against its legitimate interest).

175 *Id.* at 800 (Manion, J., concurring in part).

176 See *Tuscon Woman's Clinic v. Eden*, 379 F.3d 531, 539-41 (9th Cir., 2004) (discussing undue
performing a minimum of five abortions in the first trimester and any second or third term abortions to the same licensing requirements as those imposed on Ambulatory Service Centers (ASC). Violations of this statutory scheme would result in criminal and civil penalties. Following a critical analysis of the undue burden standard set in Casey, the Ninth Circuit remanded the lawsuit to return to the lower court for further proceedings on the undue burden claim. Nonetheless, Eden analyzed Casey in a unique manner that seemed to distinguish between two separate state interests: the protection of fetal life as opposed to the protection of maternal health. Eden suggested that Casey cautioned against the conflation of the state’s interest in the protection of fetal life with its interest in protecting maternal health. By clearly separating the two distinct state interests, Eden strongly endorsed a more careful examination of states’ interests in maternal health to ensure that statutory regulation not be a pretext for enacting restrictions on a woman’s constitutionally protected burden standard in context of facility licensing requirements). The challenge in Eden similarly required determining the constitutionality of purported health regulation passed by the Arizona state government. Id at 537. The statutory and regulatory scheme would require licensing of any medical facility where five or more first-trimester abortions are performed per month, and any second or third trimester abortions are performed. Id. 177 Id. at 536. 178 ARIZ. REV. STAT. §36-431 (2016) (classifying a violation as a Class 3 misdemeanor); ARIZ. REV. STAT. §36-431.01 (2016) (outlining civil penalties). See Eden, 379 F.3d at 539 (explaining when undue burden standard from Casey is triggered). See also Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (establishing undue burden standard because state has interest in regulating abortion). The Ninth Circuit recognized that the earlier Roe strict scrutiny standard had been replaced by the Casey undue burden standard. Eden, 379 F.3d at 545. The Ninth Circuit stated that the “legislatures are more properly suited than courts to predicting these effects, and we do not believe that the legislative response ... is per se subject to strict scrutiny in all situations.” Id. 180 Eden, 379 F.3d 531, 539-41. See Emma Freeman, Giving Casey Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis, 48 HARV. C.R.-C.L. L. REV. 279, 313-14 (2013) (discussing Eden reasoning for distinguishing fetal life and maternal health as separate state interests). 181 Eden, 379 F.3d at 539. “Casey largely dealt with a law aimed at promoting fetal life, its application of the “undue burden” standard is often not extendable in obvious ways to the context of a law purporting to promote maternal health” Id.
The clear suggestion is made that whatever obstacles laws that protect fetal life create, these obstacles still may not be appropriate for state interests in the protection of maternal health. Eden demanded a showing that the state interest is actually served by the challenged statutory restriction.

Subsequent to Eden, the Ninth Circuit had a second chance at affirming their opinion in a challenge to the Arizona legislation requiring medications used to induce medical abortions be administered in compliance with the Federal Drug Administration (FDA) labeling rules. At the time, however, the FDA had not yet caught up with the science of medical abortions. The off-label protocol of mifepristone extended the window for a medical abortion by fourteen days, a regimen in accordance with the latest pharmacological understanding at that time. The Ninth Circuit permitted evidence that the American College of Obstetrics and Gynecology strongly favored this evidence-based regimen over the then current FDA-based guidelines and ultimately promoted the

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182 Id. at 539-41. See Freeman, supra note 180, at 314.
183 Eden, 379 F.3d at 540. “By contrast, in the context of a law purporting to promote maternal health, a law that is poorly drafted or which is a pretext for anti-abortion regulation can both place obstacles in the way of women seeking abortions and fail to serve the purported interest very closely, or at all.” Id.
184 Id. at 540.
off-label use of the drug.\(^{188}\) Other testimony presented showed that medical abortions accounted for almost half (41\%) of all first trimester abortions.\(^{189}\) In challenging the Arizona statute, Planned Parenthood Arizona argued that prohibiting off-label use of mifepristone constituted an undue burden.\(^{190}\) The Ninth Circuit overturned the lower court’s denial of an injunction and held that the legislative restriction did not advance the State’s interests.\(^{191}\)

The Ninth Circuit critically examined the *Casey* and *Carhart* decisions in its analysis of the abortion jurisprudence and adopted a judicial standard of review that shunned an “uncritical deference” to the legislature.\(^{192}\) In citing Gonzalez, the Court held that a court applying the undue burden test should not “place dispositive weight on [legislative] findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake. Uncritical deference to factual findings to the legislature’s factual findings in these case is inappropriate.”\(^{193}\) Humble incorporated within its decision the written opinion of the Seventh District in *Van Hollen* and quoted that portion of the opinion in *Eden* holding that a weaker state’s justification for a restrictive abortion proscription had an increased likelihood for the judiciary to find the restriction constituted an undue burden.\(^{194}\) The Ninth Circuit specifically rejected the rational basis judicial review standard and concluded that the Fifth Circuit’s justification of the rational basis test in its deference to the legislature was

\(^{188}\) *Humble*, 753 F.3d at 908.

\(^{189}\) Id. at 908.

\(^{190}\) See id. at 905, 911 (describing Planned Parenthood Arizona’s claims against Arizona statute).

\(^{191}\) See id. at 917-18 (explicating Ninth Circuit’s holding).

\(^{192}\) Id. at 913.

\(^{193}\) *Humble*, 753 F.3d at 913 (quoting Gonzales v. Carhart, 550 U.S. 124, 160 (2014)).

\(^{194}\) Id. at 914. “The cases that deal with abortion-related statutes sought to be justified on medical grounds are legitimate but also that the statute not impose an ‘undue burden’ on women seeking abortions. The feebleer the medical grounds, the likelier the burden ... to be ‘undue’ in the sense of disproportionate or gratuitous.” *Id.*
incorrect. Humble concluded that Cole was inconsistent with the undue burden test enunciated in Casey and Gonzales, and instead chose to echo the decisions of Eden and Van Hollen by weighing the extent of the burden placed upon the woman against the strength of the state’s justification of each statute or regulation individually. The state has the ultimate burden of introducing evidence of their interest in women’s health that the law purports to advance.

The sharp split in the circuits’ decisions appears to relate most particularly to the nexus of judicial oversight to legislatively enacted laws or statutes. As an outlier, the Fifth Circuit alone, in a series of cases dating from Abbott I, Abbott II, Lakey, and more recently in Cole, took an extremely deferential judicial assessment of any legislative mandate. Unlike the Seventh and Ninth Circuits, the Fifth Circuit charted a lone course of extreme deferential review of the legislature’s acts.

VI. CONCLUSION

The division among the Circuit Courts on the constitutionality of statutory restrictions reflects deep differences in judicial philosophy. The legal argument in Hellerstedt confronts legislative restrictions to access to reproductive rights, and also questioned the role of the judiciary in their oversight of the legislative branch. An

195 Id. “[I]nconsistent with the undue burden test as articulated and applied in Casey and Gonzales … [w]e adhere to the approach in Eden and Van Hollen, which requires us to weigh the extent of the burden against the strength of the state’s justification in the context of each individual statute or regulation.” Id.
196 Humble, 753 F.3d at 914.
197 Id. at 916.
198 Id. at 905-915.
199 See Cole, 790 F.3d at 566 (responding to Texas state officials’ enforcement of recent amendments to Texas abortion laws); Abbott II, 748 F.3d at 586 (seeking injunction of two provisions of Texas H.B. 2); Lakey, 769 F.3d at 288 (responding to plaintiff’s request for injunction of Texas H.B. 2); Abbott I, 734 F.3d at 409 (deciding upon plaintiff’s request for injunction on Texas H.B. 2).
200 See Humble, 753 F.3d at 909-15 (expanding upon Ninth, Fifth, and Seventh Circuits’ positions on judicial review of legislative actions).
examination of *Casey*, and the progeny spawned by *Casey* and its undue burden test, suggested that the decisions of the Fifth Circuit were legal outliers. *Eden* and *Humble* further clarified this analytic approach through clear language targeted at the perceived judicial error of the Fifth Circuit as a result of their unquestioning deference to the Texas legislature's declaration of its state interests. The Fifth Circuit Court of Appeals misunderstood the nexus between the judicial and the legislative branches of government and misapplied the *Casey* undue burden test. Despite the current eight-member, ideologically-divided Court, faithful adherence to precedent, the hallmark of our common-law system, compels the conclusion that the Fifth Circuit rulings are in error and must reverse *Cole* to realign the Fifth Circuit.

On June 27, 2016, the Supreme Court reaffirmed a woman's constitutional right to an abortion which was established forty-three years earlier in *Roe*, and ratified its own decisions in *Casey* and *Gonzales* in *Hellerstedt*. The Court's decision further confirmed the legal reasoning expressed in the opinions of the Seventh and Ninth Circuits, which held the standard for judicial review of legislative statutes to be closer to that of strict scrutiny. *Hellerstedt* effectively put "judicial teeth" into the *Casey* undue burden test when it demanded that a restrictive abortion statute not be enforced absent a real health purpose justification. If a benefit versus burden analysis does not support a justification of maternal health, that statute imposes an undue burden and must be invalidated. In overturning the 2013 Texas statute, *Hellerstedt* struck down a harsh anti-abortion law and rolled back what had become a template of increasingly bold state efforts to weaken and annihilate abortion rights.