

Casey and the Clinic Closings: When “Protecting Health” Obstructs Choice

Linda Greenhouse & Reva B. Siegel

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Abstract

We offer a fresh understanding of how the Supreme Court’s abortion jurisprudence addresses laws that invoke not potential life, but women’s health as a reason to single out abortion for burdensome regulation that has the effect of closing clinics. The current wave of health-justified restrictions—including laws that require abortion providers to secure admitting privileges at nearby hospitals or to become the functional equivalents of hospitals themselves—is destroying the clinic infrastructure on which women depend in order to exercise their constitutional right to end a pregnancy.

How should judges evaluate the states' claims that such laws protect women's health? We argue that such laws must actually serve the ends claimed for them if they are not to circumvent constitutional limits on the means by which states can protect unborn life. Careful judicial scrutiny is essential to vindicate values at the core of the Court's decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Gonzales v. Carhart*.

We ground our argument in the principles of the undue burden standard as explained in *Casey* and applied there and later in *Carhart*. *Casey* modified *Roe v. Wade* to provide that from the beginning of pregnancy, states may protect two interests, unborn life and women's health. States may express a preference for childbirth by trying to persuade a woman, through a 24-hour waiting period and the provision of information, to forgo abortion, but not in ways that obstruct women from acting on their constitutionally protected choice.

Casey and *Carhart* allow government to express respect for the dignity of human life by means that respect the dignity of women. Regulations that close clinics in the name of women’s health, but without health-related justification, do not persuade; they prevent. In adopting such regulations, states—along with the courts that defer to them—violate the principle at the core of the Supreme Court's protection for the right to abortion.

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Many recently enacted laws restrict abortion not in the name of protecting unborn life, but of protecting women’s health. States require that doctors who perform abortions have admitting privileges at nearby hospitals or require that abortion clinics be outfitted as “ambulatory surgical centers.”¹ These new laws single out abortion for burdensome, health-justified restrictions not imposed on other medical procedures of similar risk.² As legislators know or suspect, the requirements are unattainable for many abortion providers.³ As a result, restrictive laws are forcing large numbers of abortion clinics to close their doors.⁴ Before the enactment of Texas’s admitting-privileges and ambulatory-surgical-center law, there were forty-

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¹ See, e.g., Act of July 12, 2013, 83d Leg., 2d C.S., ch. 1, §§ 1-12, 2013 Tex. Sess. Law Serv. 4795-802 (West) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 171.041-.048, 171.061-.064, & amending §§ 245.010-.011; TEX. OCC. CODE amending §§ 164.052 & 164.055); see also *infra* Part II.A.

² For admitting privileges, see *infra* notes 114-117 and accompanying text.

³ See *infra* notes 104-106 and accompanying text.

⁴ See, e.g., *Jackson Women’s Health Org. v. Currier*, 760 F.3d 448, 457-58 (5th Cir. 2014) (“Under this formulation, [the clinic] has demonstrated a substantial likelihood of proving that H.B. 1390 [effectively] clos[es] the one abortion clinic in the state.”), *petition for cert. filed*, No. 14-997 (Feb. 18, 2015); *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 681 (W.D. Tex. 2014) (“If 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.”), *aff’d in part, vacated in part, rev’d in part sub nom. Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *mandate stayed pending judgment by 135 S. Ct. 2923, cert. granted*, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274); see also Manny Fernandez, *Decision Allows Abortion Law, Forcing 13 Texas Clinics to Close*, N.Y. TIMES, Oct. 3, 2014, at A1. (“Thirteen clinics whose facilities do not meet the new standards were to be closed overnight, leaving Texas — a state with 5.4 million women of reproductive age, ranking second in the country — with eight abortion providers, all in Houston, Austin and two other metropolitan regions. No abortion facilities will be open west or south of San Antonio.”).

one clinics remaining in the state; enforcing the law would close approximately three-fourths of them.⁵

Judges who strike down⁶ and who uphold⁷ these restrictions all cite as authority the same Supreme Court decision from nearly a quarter-century ago: *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁸ This is not as surprising as it might at first seem. *Casey* was crafted by moderates responding to concerns raised both by those who wanted to overturn *Roe v. Wade*⁹ and those who wanted to preserve constitutional protections for the abortion right.¹⁰ The framework they crafted allowed states more latitude to restrict abortion in the interests of protecting potential life, but only as long as women could make the ultimate decision whether to continue a pregnancy. *Casey* has now been the law of the land longer than the unmodified *Roe* itself. Fifteen years after *Casey*, a different majority, while more skeptical of the abortion right, nonetheless applied the *Casey* framework in upholding the Partial Birth Abortion Ban Act in *Gonzales v. Carhart*.¹¹

In what follows, we seek to understand how *Casey* addresses laws that invoke not potential life—the interest at stake in *Carhart*—but women’s health as a reason to single out abortion for burdensome regulation that closes clinics. A sharp circuit conflict over how judges are to evaluate health-justified restrictions on abortion has placed the issue on the Supreme

⁵ See Act of July 12, 2013 §§ 1-12. On the statute’s impact, see *infra* notes 100-101 and accompanying text.

⁶ *E.g.*, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 2015 U.S. Dist. LEXIS 35389 (W.D. Wis. Mar. 20, 2015) (enjoining Wisconsin’s admitting-privileges law); *Planned Parenthood Se., Inc. v. Strange (Strange II)*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014) (enjoining Alabama’s admitting-privileges law).

⁷ *E.g.*, *Whole Woman’s Health v. Cole*, 790 F.3d 563; *Whole Woman’s Health v. Lakey*, 769 F.3d 285 (overturning District Court injunction against Texas ambulatory-surgical-center requirement); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott II)*, 748 F.3d 583 (overturning the District Court’s permanent injunction against the Texas admitting-privileges law).

⁸ 505 U.S. 833 (1992).

⁹ 410 U.S. 113 (1973).

¹⁰ See *infra* text accompanying notes 38-42.

¹¹ 550 U.S. 124 (2007).

Court's docket.¹² Some circuits read *Casey/Carhart* to require courts to examine whether health-justified regulations actually and effectively serve health-related ends. Others construe the cases to prohibit judicial inquiry of this kind and mandate judicial deference to the states' claims.¹³

We argue that *Casey* requires scrutiny of health-justified restrictions to ensure that they actually and effectively advance health-related ends and do not protect potential life in a manner the Constitution prohibits. We ground this argument in an understanding of the constitutional values at *Casey*'s core. *Casey* both modified *and* affirmed *Roe*. *Casey* gave states more latitude to protect potential life but only so long as states employed means that respected women's dignity: "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it"¹⁴ and cannot impose an "undue burden" on the abortion decision.¹⁵ These values at *Casey*'s core should guide review of health-justified restrictions on abortion. When states single out abortion for burdensome health regulations, courts must confirm that the laws actually serve health-related ends and do not provide a back door way of protecting potential life. Scrutinizing the facts that justify laws targeting abortion for onerous health restrictions thus serves a crucial anti-circumvention function: it ensures that legislatures do not employ health restrictions on abortion to protect unborn life by unconstitutional means. Preserving the distinction between abortion restrictions that protect women's health and abortion restrictions that protect unborn life secures constitutional protection for women's dignity.

¹² *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *mandate stayed pending judgment by* 135 S. Ct. 2923, *cert. granted*, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274).

¹³ *See infra* Part II.B.

¹⁴ 505 U.S. at 877.

¹⁵ *Id.* (defining an undue burden as a restriction that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus").

Our reading of *Casey* thus generates a fresh approach to health-justified restrictions on abortion sometimes called “TRAP laws” (targeted regulation of abortion providers).¹⁶ States are enacting laws that impose special health restrictions on abortion—whether expressly or impliedly on the ground that abortion is “exceptional” because it involves the unborn.¹⁷ With an understanding of the protection that *Casey* provides for women’s choices, it becomes clear why states cannot single out abortion for onerous health restrictions that only weakly serve health-related ends. Such laws may in fact seek to protect the unborn in ways that *Casey* prohibits.¹⁸

The undue burden framework is the gateway for making these determinations. The undue burden inquiry examines a law’s purpose and its effects, and courts must attend to both.¹⁹ A weak factual basis for the health interest asserted may supply objective evidence of a purpose to impose a substantial obstacle to women seeking an abortion.²⁰ Examining the factual basis of a health-justified abortion restriction is also important in evaluating the law’s effects. Considering the extent to which a law advances the state’s interest in protecting a woman’s health is crucial in determining whether the burden it imposes on woman’s choices is warranted or “undue.”²¹

In a series of recent judgments, courts emphasize that *Casey* requires inquiry into the facts that justify laws targeting abortion for onerous health restrictions,²² but the Fifth Circuit

¹⁶ See *infra* note 87 and accompanying text.

¹⁷ For a particularly vivid example of abortion exceptionalism, see *infra* text accompanying note 91. For other examples, see *infra* note 88.

¹⁸ See *infra* Part I.B.

¹⁹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (“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.”).

²⁰ See *infra* Part II.C.3.

²¹ See *infra* Part II.C.3.

²² See *infra* Part II.B.

expressly rejected this view in *Whole Woman's Health v. Cole*,²³ the Texas case now in the Supreme Court.²⁴

The Fifth Circuit asserted that it is wholly improper for judges to examine the factual basis of the state's claim that a restriction on abortion promotes women's health.²⁵ The circuit applied deferential rational basis review, crediting without probing the state's claim to regulate in the interests of women's health. To justify its use of hyper-deferential rational basis review, the Fifth Circuit invoked *Gonzales v. Carhart*, the Supreme Court's 2007 decision that upheld the federal Partial Birth Abortion Ban Act.²⁶

But *Carhart* does not require judicial deference to the state's health justifications for closing Texas clinics as the Fifth Circuit asserts. Very different kinds of abortion restrictions are at stake. *Carhart* concerned a law enacted to protect potential life, not women's health. The law prohibited a rarely employed method of performing abortions late in pregnancy. It restricted no woman's access to abortion before viability, and closed no clinics. As importantly, *Carhart* itself applied *Casey*'s undue-burden standard, and insisted that "[t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."²⁷ In determining the whether the ban on a particular method of later-term abortion required a health exception, the Court reviewed and rejected multiple findings of fact by Congress:²⁸ "Uncritical deference to Congress' factual findings in these cases is inappropriate."²⁹ Accordingly, the Fifth Circuit's decision flouted not only *Casey*, but *Carhart* as well, in reasoning about the review of

²³ 790 F.3d 563 (5th Cir. 2015), *mandate stayed pending judgment by* 135 S. Ct. 2923, *cert. granted*, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274).

²⁴ For the Fifth Circuit's reasoning, see *infra* Part II.B.-C.

²⁵ See *infra* text at notes 149-164.

²⁶ See *infra* text at note 151.

²⁷ *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007).

²⁸ *Id.* at 165-66.

²⁹ *Id.* at 166.

abortion restrictions as ordinary social and economic legislation unconnected to constitutional rights.

Our analysis proceeds in two parts. In Part I we develop a framework for analyzing health-justified restrictions on the abortion right that is grounded in an understanding of the core principles animating the *Casey/Carhart* line of cases. After developing this approach to the health-justified restrictions on abortion known as TRAP laws, we then turn in Part II to contemporary litigation over admitting-privileges requirements for abortion providers, the most recent effort to restrict access to abortion in the name of women's health. We argue that courts applying both the purpose and the effects prongs of the undue burden standard must examine whether a health-justified abortion restriction actually and effectively serves the state's asserted health interests. Constitutional guarantees for dignity require active review of this kind.

Part I: Understanding *Casey*: Why Courts Need to Differentiate between Life and Health Interests in Reviewing Abortion Restrictions

In what follows we return to *Casey* and examine the values that guided the Court's decision in that case. We then draw on this understanding of the constitutional values at the core of *Casey* to build a framework for reviewing health-justified restrictions on abortion.

A. The Values at *Casey*'s Core

In *Casey*, justices who sought to reaffirm and modify *Roe* prevailed over those justices who wanted either to reverse or to preserve *Roe*.³⁰ Chief Justice Rehnquist along with Justices

³⁰ For this reason, advocates on both sides greeted the decision with overt dismay. In the immediate aftermath of *Casey*, a prominent supporter of *Roe* declared that the Court had deprived women of a fundamental right, while a prominent opponent of *Roe* declared that the Court had reaffirmed that fundamental right. Compare Roberto Suro, *The Supreme Court: Outside Court, Rival Rallies and Heavy Politicking*, N.Y. TIMES, June 30, 1992, <http://www.nytimes.com/1992/06/30/us/the-supreme-court-outside-court-rival-rallies-and-heavy-politicking.html> [<http://perma.cc/HLH8-6G8R>] (quoting Judith L. Lichtman, an abortion-rights advocate and president of the

Scalia and Thomas failed in their effort to replace *Roe*'s strict scrutiny standard with rational basis review of abortion restrictions.³¹ *Roe*'s author, Justice Blackmun, also failed in his effort to maintain strict scrutiny and to preserve the trimester framework, which prohibited government from restricting abortion to protect potential life until the interest was deemed compelling at fetal viability, in the third trimester of pregnancy.³² What emerged, in an opinion jointly written by Justices O'Connor, Kennedy, and Souter, was the undue burden standard—a standard that reaffirmed and modified *Roe*.

The authors of the joint opinion addressed a nation polarized over abortion, acknowledged core commitments of *Roe*'s critics and proponents, and integrated these competing commitments into the new undue burden framework. Criticizing *Roe*'s strict scrutiny of pre-viability abortion restrictions on the ground that it “undervalues the State’s interest in the potential life within the woman,”³³ the joint opinion asserted that the state’s “profound interest in potential life”³⁴ offered a reason for regulation of abortion *throughout* pregnancy. But the joint

Women’s Legal Defense Fund, declaring shortly after *Casey* that “American women no longer have the fundamental right to make decisions about their own lives.”), with Sara Fritz, *The Abortion Decision: Ruling Pleases Neither Side; Both Vow to Continue Fight: Debate: The Opposing Camps Turn Their Attention to Upcoming Elections and the Future Makeup of the Supreme Court*, L.A. TIMES, June 30, 1992, http://articles.latimes.com/1992-06-30/news/mn-1301_1_supreme-court [<http://perma.cc/7YCD-SNA7>] (quoting James Bopp Jr., general counsel for National Right to Life Committee, declaring shortly after *Casey* that “[i]t’s a major loss to have a fundamental right to abortion upheld by the court.”), and *id.* (quoting Randall Terry, an anti-abortion leader and founder of Operation Rescue, announcing just after Justices O’Connor, Kennedy, and Souter voted in part to strike down an abortion restriction in *Casey* that “[t]oday the three Reagan-Bush appointees have stabbed the pro-life movement in the back and affirmed the bloodshed.”).

³¹ See *Casey*, 505 U.S. at 966 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (“A woman’s interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest.”) (citation omitted); *id.* at 981 (Scalia, J., concurring in the judgment in part and dissenting in part) (“[A]pplying the rational basis test, I would uphold the Pennsylvania statute in its entirety.”).

³² See *id.* at 929-30 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *Planned Parenthood v. Strange (Strange II)*, 33 F. Supp. 3d 1330, 1337-38 (M.D. Ala. 2014) (striking down an admitting-privileges law under *Casey* and describing the undue burden standard as a “‘middle ground’ between those who would impose strict-scrutiny review of such regulations and those who would require only a rational basis.” (quoting *Planned Parenthood v. Strange*, 9 F. Supp. 3d 1272, 1282 (M.D. Ala. 2014))).

³³ *Casey*, 505 U.S. at 875.

³⁴ *Id.* at 878.

opinion nonetheless imposed constitutional limits on the *means* by which government can protect its interest in potential life: “[T]he State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.”³⁵ While government can restrict access to abortion in the interest of persuading a woman to continue a pregnancy, it cannot do so by means that impose an “undue burden” on a woman’s decision. The joint opinion defined an “undue burden” as “a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”³⁶ It explained: “A statute with this purpose is invalid *because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.*”³⁷ In this way, a majority of the *Casey* Court—the three authors of the joint opinion and the two Justices who refused to modify *Roe*’s trimester framework³⁸—reaffirmed the Constitution’s protection for a woman’s decision on whether to carry a pregnancy to term.³⁹ A different majority of the Court—the three authors of the joint opinion and the four Justices who would have construed *Roe* in a rational basis framework—allowed regulation of a woman’s decision whether to carry a pregnancy to term in ways that *Roe* had previously barred.⁴⁰

³⁵ *Id.*

³⁶ *Id.* at 877.

³⁷ *Id.* (emphasis added).

³⁸ These Justices would have preserved *Roe*’s trimester framework and thus were prepared to offer as much protection as the undue burden standard provided—and more. *See id.* at 922, 934 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 914 (Stevens, J., concurring in part and dissenting in part).

³⁹ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

⁴⁰ Although parts of the joint opinion received only three votes, the joint opinion still represents the holding of the Court according to the rule established in *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .’”) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). Chief Justice Rehnquist characterized the *Casey* joint opinion in these terms. *See Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (Rehnquist, C.J.,

From the struggle within the Court emerged a holding that respects both a woman’s constitutionally protected right to decide whether to continue a pregnancy *and* the government’s interest in persuading her to do so. Where *Roe* forbade all efforts to protect potential life before the point of fetal viability,⁴¹ *Casey* permits government efforts to persuade a woman to choose childbirth beginning in the earliest stages of pregnancy—so long as the government protects potential life by means that do not unduly burden a woman’s right to make “the ultimate decision” about whether to carry a pregnancy to term.⁴²

This limitation is crucial. It authorizes the government to protect potential life by means that recognize and preserve women’s dignity: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”⁴³ The Court thus designed *Casey*’s undue burden framework to give legal form to two values—potential life *and* the dignity of women—and to guide the coordination of these values:⁴⁴ “The joint opinion adopts an undue burden framework that allows government to regulate abortion in ways that respect the dignity of life, so long as the regulation respects the dignity of women.”⁴⁵ It is because *Casey* vindicates multiple constitutional values that the government is limited in the ways it can protect

dissenting), in which Chief Justice Rehnquist affirmed that “[d]espite my disagreement with the opinion, under the rule laid down in [*Marks*], the *Casey* joint opinion represents the holding of the Court in that case.”

⁴¹ *Roe v. Wade*, 410 U.S. 113, 163 (1973) (“With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability.”).

⁴² *Casey*, 505 U.S. at 875.

⁴³ *Id.* at 851.

⁴⁴ *See id.* at 876 (“In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”). The Court reiterated this understanding of the undue burden framework in *Gonzales v. Carhart*, *See Gonzales v. Carhart* 550 U.S. 124, 146 (2007) (observing that *Casey*’s undue burden standard “struck a balance” between protecting “the woman’s exercise of the right to choose” and the ability of the state to “express profound respect for the life of the unborn” (quoting *Casey*, 505 U.S. at 877)).

⁴⁵ Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 117 YALE L.J. 1694, 1751 (2008).

potential life. If government wants to protect unborn life, it has to respectfully enlist women in this project and cannot simply commandeer women's lives for these purposes.

In this way the joint opinion structured the undue burden standard as a framework in which Americans might negotiate the conflict over abortion so deeply dividing the nation. The Court allowed the community to give voice to deeply held anti-abortion sentiment while nonetheless insisting that the Constitution protects a woman's right to make her choice. These dual concerns guided the joint opinion's application of the undue burden standard to the provisions of the Pennsylvania statute at issue in the case.

B. How *Casey* Applied the Undue Burden Standard to Life- and Health-Justified Restrictions on Abortion

In reviewing Pennsylvania's restrictions on abortion, *Casey* dealt principally with regulations justified as protecting unborn life. We begin by examining these more familiar portions of the decision and show how the Court's application of the undue burden standard requires that any effort to protect unborn life use dignity-respecting modes of persuading women. We then turn to a short section of the *Casey* decision that upholds record-keeping requirements as promoting women's health. Few attend to this portion of the opinion, but it is an integral part of the undue burden framework and illustrates how courts ought to evaluate restrictions that claim a health-based rationale.

Pennsylvania's Abortion Control Act of 1982⁴⁶ promoted the state's interest in potential life in several ways. The first was a counseling requirement directing doctors to provide information about the abortion procedure, the relative risks of abortion and childbirth, embryonic and fetal development, and available resources should the woman choose to carry the pregnancy

⁴⁶ P.L. 476, No.138 (June 11, 1982).

to term.⁴⁷ Laws requiring statements intended to discourage abortion had been held unconstitutional in the 1983 decision, *City of Akron v. Akron Center for Reproductive Health, Inc.*,⁴⁸ as well as in a subsequent decision, *Thornburgh v. American College of Obstetricians and Gynecologists*.⁴⁹ The Court had held that such efforts at dissuasion improperly deterred women in the exercise of a constitutionally protected choice and interfered with the physician-patient relationship.⁵⁰

Assuming that the Pennsylvania statute required “the giving of truthful, nonmisleading information,”⁵¹ *Casey* overturned those precedents in significant part. The controlling joint opinion of Justices O’Connor, Kennedy, and Souter said: “[W]e permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.”⁵² The Court reasoned that the decision remained the woman’s because, although the state may have engaged in directive counseling at odds with normal informed consent practice,⁵³ it did not supply false or misleading information. The Court thus understood the state to vindicate its interest in protecting unborn life by means consistent with the dignity of women.

⁴⁷ 18 PA. STAT. AND CONS. STAT. ANN. § 3205 (West 1982) (“The department publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.”).

⁴⁸ 462 U.S. 416, 442 (1983).

⁴⁹ 476 U.S. 747, 772 (1986).

⁵⁰ *See, e.g., id.* at 762.

⁵¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

⁵² *Id.* at 883.

⁵³ *See Siegel, supra* note 45, at 1754-58, 1755 n.168 (explaining how *Casey* permits departure from ordinary informed consent, which is designed to provide information sufficient for autonomous decision-making and which, under principles announced by the President’s Commission for the Study of Ethical Problems in Medicine, obliges doctors to avoid “coercion and manipulation of their patients”).

The second Pennsylvania regulation the Court reviewed required a woman to wait twenty-four hours after receiving the information about fetal development before she could proceed with an abortion. Whether this regulation imposed an undue burden was “a closer question,” the joint opinion said, given that it required an additional doctor visit and would predictably lead to additional cost, travel time, and exposure to hostility or harassment. But “[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable,” the opinion said.⁵⁴ The Court allowed the state to impose modest costs and burdens on the exercise of choice *as incidental effects of the state’s efforts to persuade*.⁵⁵ “What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”⁵⁶ Unlike *Roe* and the *Akron* and *Thornburgh* decisions, *Casey* recognizes a community interest in dissuading women from choosing abortion, and authorizes states to facilitate that effort, even if it imposes modest additional costs. States may engage women in conversation with the community that seeks to change her mind, so long as they do so in ways that do not unduly burden or obstruct her ultimate choice.⁵⁷ In this respect, as well, *Casey* understands the state to vindicate its interest in protecting unborn life by means consistent with the dignity of women.

The third significant regulation the Court considered in *Casey* was the requirement for a married woman to notify her husband before obtaining an abortion: Doctors who provided an abortion without receiving a signed statement to that effect would lose their license and would be

⁵⁴ *Casey*, 505 U.S. at 885.

⁵⁵ *See 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.”).

⁵⁶ *Id.* at 877.

⁵⁷ *Id.* (“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.”).

liable to the husband for damages. The Court concluded that the burden imposed by this requirement was undue. At least two different kinds of considerations informed this conclusion. First, the state had structured the decision-making process in a way that risked endangering those women who would not voluntarily discuss the decision with their husbands as, the Court observed, the overwhelming majority of women do.⁵⁸ “We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.”⁵⁹

But the fact that the decision-making process was structured to expose women seeking an abortion to the risk of domestic violence was not the only constitutional flaw in the spousal-notice requirement. In a remarkable four-page discussion, the Court explained that the state could not vindicate its interest in protecting potential life by requiring a woman to notify her husband before obtaining an abortion because structuring the decision-making process in this way reflected and perpetuated a long-standing, but now unconstitutional, understanding of the marital relationship.⁶⁰ “The husband’s interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The

⁵⁸ *Id.* at 894 (observing that “about 95% [of married women] notify their husbands of their own volition”).

⁵⁹ *Id.* In defending the spousal notice requirement, the state had argued that because only 20% of women seeking abortions were married, and 95% of those women voluntarily notified their husbands, the notice requirement affected only one percent of women and thus could not be deemed facially invalid. In rejecting this argument, the joint opinion observed: “The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.” *Id.* at 894. The joint opinion concluded that the impact “must be judged by reference to those for whom it is an actual rather than an irrelevant restriction.” *Id.* at 895. Viewed from this perspective, “in a large fraction of the cases in which [the spousal notice requirement] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.” *Id.* at 895.

⁶⁰ *See id.* at 887-98. *Casey*’s discussion of the spousal-notice requirement ranges over eleven pages, of which the last four cover constitutional concerns raised by its perpetuation of common law understandings of the marriage relationship. *Id.*

contrary view leads to consequences reminiscent of the common law.”⁶¹ *Casey* prohibits the state from requiring a woman to place her constitutionally protected decision in her husband’s hands, even to save potential life; instead, it requires the state to save potential life only by means that respect women’s dignity. “A State may not give to a man the kind of dominion over his wife that parents exercise over their children.”⁶²

These passages of *Casey* do more than prohibit the government from coercing women into continuing a pregnancy. *Casey* goes farther and limits the manner in which the government may persuade women to continue a pregnancy. For example, *Casey* allows government to dissuade women from choosing abortion, but only by providing information that is “truthful” and “nonmisleading.”⁶³ Government may not provide a woman false or misleading information that might persuade her to continue a pregnancy, presumably because it would transform the woman into the government’s instrument for childbearing.⁶⁴ In barring this mode of persuasion, *Casey* prohibits the government from protecting potential life through means that deny women liberty and equality. A principled understanding of this kind also led the Court to strike down the spousal notice provision. Governments may not require a woman to tell her husband of her decision to end a pregnancy, even if it begins a conversation that saves a potential life, because persuasion under these conditions perpetuates the husband’s historic forms of authority over his wife.⁶⁵ *Casey* holds that governments may not structure the decision-making process in this way, even in non-abusive relationships, because it denies women liberty and equality.⁶⁶ These different applications of the undue burden framework show *Casey*’s core values at work: the

⁶¹ *Casey*, 505 U.S.at 898.

⁶² *Id.*

⁶³ *Id.* at 882.

⁶⁴ *Id.*

⁶⁵ *Id.* at 898.

⁶⁶ *Id.*

government may persuade women to forego abortion and thus to protect potential life—but only if the government employs modes of persuasion that are, in the Court’s view, consistent with the dignity of women.

In reviewing the Pennsylvania statute, *Casey* addresses health-justified regulation of abortion as well as fetal-protective restrictions. The joint opinion begins its discussion of how *Casey* governs the regulation of abortion with a statement of principles setting forth how its undue burden standard separately applies to laws promoting each of these state interests.⁶⁷ The joint opinion makes clear that some health-justified regulations are permissible, while others are not:

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.⁶⁸

The Court thus allows regulation of abortion in the interest of protecting women’s health to the extent that it is consistent with ordinary medical practice (“as with any medical procedure”).⁶⁹ But the Court prohibits as an undue burden health-justified regulations that are “unnecessary” and have the “purpose or effect” of making access to abortion substantially more difficult.⁷⁰ As we discuss below, singling out abortion for onerous regulation not applied to other medical procedures of similar risk is thus suspect in this framework.⁷¹

⁶⁷ *Id.* at 878-79. Both *Roe* and *Casey* clearly distinguish between the state’s interest in protecting women’s health and in protecting unborn life. In *Roe*, the Court authorized the state to regulate abortion in the interests of protecting women’s health and protecting unborn life at different stages of pregnancy. *Roe v. Wade*, 410 U.S. 113, 163-64 (1973). While eliminating the trimester framework and authorizing government regulation promoting each of these interests throughout pregnancy, *Casey* continues to treat the two state interests as analytically distinct.

⁶⁸ 505 U.S. at 878.

⁶⁹ *Id.* .

⁷⁰ *Id.*

⁷¹ See *infra* notes 92-94 and accompanying text.

A final section of the joint opinion applies these principles to the one provision of the Pennsylvania statute at issue that regulated abortion in the interests of public health. The Pennsylvania law required providers to report information to the state about their practice of abortion.⁷² The Court viewed Pennsylvania's reporting requirements as protecting women's health, distinguishing that interest from the state's interest in protecting potential life by dissuading women from ending a pregnancy:

*Although [the requirements] do not relate to the State's interest in informing the woman's choice, they do relate to health. The collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult. Nor do we find that the requirements impose a substantial obstacle to a woman's choice. At most they might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.*⁷³

In this passage, *Casey* discusses how the undue burden analysis applies to restrictions on abortion justified on the grounds, not of protecting unborn life, but of protecting women's health. In applying undue burden analysis, the Court separately considers both the purpose and effect of the regulation. In this passage, it is clear that a regulation enacted for the putative purpose of protecting women's health must *in fact* promote health to justify imposing increased costs on the practice of abortion. A restriction on abortion enacted for the claimed purpose of protecting women's health is not constitutional if it "serve[s] no purpose other than to make abortions more difficult." But the Court does not examine purpose as the sole criterion of constitutionality. The undue burden framework is equally concerned with effects, leading the Court to inquire whether

⁷² See 18 PA. STAT. AND CONS. STAT. ANN. § 3214 (West 1982).

⁷³ 505 U.S. at 900-01 (emphasis added). The only section of the reporting requirements the Court declined to uphold required doctors to report to the state a woman's reasons for not notifying her husband about her choice to terminate a pregnancy. *Id.* at 901.

the reporting requirement “impose[s] a substantial obstacle to a woman’s choice.”⁷⁴ The Court allows regulation that promotes health, even if the health regulation had the incidental effect of increasing abortion’s cost “by a slight amount”—reserving the question of the conditions under which increased costs become a “substantial obstacle.”⁷⁵

Few have engaged seriously with these passages discussing the application of undue burden analysis to abortion restrictions enacted in the interest of protecting women’s health as distinct from protecting fetal life.⁷⁶ In what follows, we discuss the constitutional values and practical considerations that might guide courts reviewing health-justified restrictions on abortion known as TRAP laws

C. TRAP Laws in the *Casey* Framework

Casey applies the same undue burden framework to restrictions on abortion enacted in the interest of protecting both potential life and women’s health. Yet, as we show, *Casey* requires applying undue burden with attention to the differences between these two regulatory interests.

⁷⁴ *Id.*

⁷⁵ *Id.* The few lower-court decisions that cite this passage have typically invoked it only for the proposition that a marginal increase in the cost of an abortion does not constitute an undue burden. *See* *A Woman’s Choice-E. Side Women’s Clinic v. Newman*, 904 F. Supp. 1434, 1453 (S.D. Ind. 1995) (“However, the joint opinion in *Casey* shows that increased cost and inconvenience, apparently even for little or no actual benefit, do not establish an undue burden in the sense that the law would actually prevent women from having abortions they would choose to have.”); *see also* *Davis v. Fieker*, 952 P.2d 505, 515 (Okla. 1997) (“[A]n increase in cost, the risk of delay, a limit on a physician’s discretion, and particularly burdensome effects do not necessarily place an undue burden on the right to have an abortion.”); *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 512 (6th Cir. 2012) (Moore, J., dissenting in part) (“*Casey* also affirmed additional reporting requirements, because at most they might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.”) (internal quotation marks omitted).

⁷⁶ No cases appear to engage with the passages of *Casey* discussing the reporting requirement. There are, however, cases that address the discussion of undue burden and health restrictions on abortion that appears in the part of the joint opinion in which its three authors state the principles governing their analysis. For an early case, see *Tucson Women’s Clinic v. Eden*, 379 F.3d 531, 539-40 (9th Cir. 2004) (quoting *Casey* for the proposition that, “[a]s 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”). Several recent decisions quote the language on health restrictions that appears in the summary. *See, e.g., infra* text accompanying note 146.

In discussing the application of undue burden standard to health-justified restrictions on abortion, *Casey* invites judges to distinguish between health restrictions that are needed and those that are “unnecessary” or pretextual.⁷⁷ What might prompt this concern? When the Court cautions against “[u]nnecessary health regulations”⁷⁸ or health-justified restrictions that “serve no purpose other than to make abortions more difficult,”⁷⁹ the Court seems to be concerned about a legislative subterfuge: While talking in terms of women’s health, the legislature is actually trying to make abortions “more difficult” for a different purpose—to protect unborn life. Presumably it is the effort to evade constitutional restrictions on the means by which government may protect unborn life that would animate subterfuge of this kind. Recall that *Casey* imposes constitutional limits on the means by which government can protect its interest in potential life: “[T]he State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their *purpose is to persuade* the woman to choose childbirth over abortion.”⁸⁰

To preserve *Casey*’s core protection for a woman’s decision, judges have to review health-justified restrictions on abortion in order to ensure that they in fact serve health-related ends and do not instead protect potential life by unconstitutional means—by obstructing women’s access to abortion without attempting to reason with them about their decision.

Yet how are judges to distinguish between constitutional and constitutionally suspect forms of health regulation? States are, of course, entitled to regulate the practice of medicine as a

⁷⁷ See *supra* text accompanying notes 68-73.

⁷⁸ 505 U.S. at 878.

⁷⁹ *Id.* at 900-01.

⁸⁰ *Id.* at 878 (emphasis added). See also *id.* at 877 (“[T]he means chosen by the State to further the interest in potential life must be calculated to *inform the woman’s free choice, not hinder it.*”) (emphasis added).

matter of their police power, and judges, as a longstanding matter of federalism, will be loath to interfere with that prerogative. For example, five years after *Casey*, the Court in *Mazurek v. Armstrong*,⁸¹ a brief *per curiam* opinion, upheld a Montana law providing that only a doctor could perform an abortion. The Court emphasized that physician-only requirements of this kind had been sustained in its prior cases, including both *Roe* and *Casey*.⁸² As the regulation at issue in *Mazurek* would not force any woman to travel to a different facility, the Court judged its effects minimal.⁸³ The Court declined to find Montana's physician-only requirement unconstitutional in purpose in light of: the Supreme Court's several cases sanctioning physician-only requirements, the requirement's minimal effects on abortion access, and the fact that similar rules existed in forty other states.⁸⁴

But at some point the state's police power may be exercised in such a way as to violate a constitutionally protected right. *Casey* itself seems to offer some guidance for courts in distinguishing between regulations of the practice of medicine that are a legitimate exercise of the police power and regulations of the practice of medicine that may run afoul of a constitutional right. In upholding Pennsylvania's reporting requirement, the Court emphasizes that "[t]he collection of information with respect to actual patients is a vital element of medical research."⁸⁵ The Court reasons that the reporting requirement conforms to the general regulation

⁸¹ 520 U.S. 968 (1997).

⁸² *Id.* at 973-74 (emphasizing that "[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others" (emphasis omitted) (quoting *Casey*, 505 U.S. at 885)).

⁸³ *Id.*

⁸⁴ *Id.* at 973.

⁸⁵ 505 U.S. at 900-01.

of the practice of medicine outside the abortion context, and that benchmark seems to guide the Court in upholding the law against constitutional challenge.⁸⁶

The reporting requirements upheld in *Casey* differ in this important respect from TRAP laws enacted across the nation that target abortion providers for extraordinary or unusual regulation.⁸⁷ Such regulations impose requirements on abortion providers that are not imposed on other medical practices of similar or even greater risk. It is increasingly common for state health and safety laws to single out abortion in various contexts—including the licensing of clinics and the regulation of practices including telemedicine, admitting privileges, and prescribing drugs off-label—and judges have raised concerns about this differential treatment as an indicator of unnecessary regulation and potential unconstitutionality.⁸⁸

⁸⁶ In summarizing the decision’s guiding principles, the authors of the joint opinion again invoke this comparative benchmark: “As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion.” *Id.* at 878. For the full quotation, see *supra* text accompanying note 68).

⁸⁷ See, e.g., *State Policies in Brief: Targeted Regulation of Abortion Providers*, GUTTMACHER INST. 1 (Sept. 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf [<http://perma.cc/7WQV-9PZY>] (“Efforts to use clinic regulation to limit access to abortion, rather than to make its provision safer resurfaced in the 1990s and have gained steam since 2010.”); see also Dawn Johnsen, “TRAP”ing Roe in Indiana and a Common-Ground Alternative, 118 YALE L.J. 1356, 1369 (2009) (describing as a TRAP bill a bill that “targeted abortion providers with onerous regulations that were not supported by health or safety needs.”); *Targeted Regulation of Abortion Providers (TRAP)*, CENTER FOR REPRODUCTIVE RIGHTS (Aug. 28, 2015), <http://www.reproductiverights.org/project/targeted-regulation-of-abortion-providers-trap> [<http://perma.cc/BE66-MWY4>] (“‘TRAP’ (Targeted Regulation of Abortion Providers) laws single out the medical practices of doctors who provide abortions and impose on them requirements that are different and more burdensome than those imposed on other medical practices.”).

⁸⁸ See, e.g., *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1049 (8th Cir. 1997) (criticizing selective application of certificate of need statute to abortion provider); *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 269 (Iowa 2015) (discussing regulation of telemedicine for abortion and observing that “[t]he Board appears to hold abortion to a different medical standard than other procedures”); *Planned Parenthood of Wisc. v. Schimel*, 806 F.3d. 908 (7th Cir. 2015) at *13 (“A number of other medical procedures are far more dangerous to the patient than abortion, yet their providers are not required to obtain admitting privileges anywhere, let alone within 30 miles of where the procedure is performed.”).

Laws prohibiting the “off-label” use of abortion-inducing medication offer a paradigm case of abortion exceptionalism. In 2011, for example, Oklahoma enacted a law requiring abortion providers to use an outdated protocol in dispensing the medication that produces non-surgical abortion in early pregnancy. OKLA. STAT. ANN. titl. 63, § 1-729a (West 2015). While one-third the dose indicated on the drug’s Final Printed Label is now regarded in the medical community as appropriate practice, the Oklahoma law deemed the lower dose a prohibited “off-label” use. Off-label uses for approved medications are common and do not violate federal law; notably, an Oklahoma law prohibits health insurers from excluding coverage of off-label cancer treatments. OKLA. STAT. ANN. titl. 63 § 1-2604. See Respondents’ Brief in Opposition at 5, *Cline v. Oklahoma Coalition for Reproductive Justice*, No. 12-1094, (Nov. 4, 2013).

What does *Casey* have to say about abortion exceptionalism of this kind? Judges differ profoundly in their understanding of how *Casey*'s undue burden framework applies to laws that single out abortion for health-justified restrictions. A debate among judges on the Fourth Circuit illustrates the nature of this disagreement. At issue was the constitutionality of a South Carolina law that targeted physicians' offices and medical clinics performing five or more first-trimester abortions a month with special licensure and operational requirements.⁸⁹ The District Court struck down the regulations as imposing an undue burden. The requirements were "medically unnecessary," the court said, imposing "costs and other burdens" that were "not justified by the stated interest in protecting the health of the women undergoing the procedure."⁹⁰ The Fourth Circuit reversed, over a dissent that objected that the state law "singles out and places additional and onerous burdens upon abortion providers which are neither justified by actual differences nor rationally related to the state's legitimate interest in protecting the health and safety of

Off-label use of FDA-approved medications and medical devices is so common as to be routine. A Mayo Clinic publication in 2012 observed that "[o]ff-label drug uses [OLDU] can become widely entrenched in clinical practice and become predominant treatments for a given clinical condition.... There are examples of widely practiced OLDUs in every specialty of medicine." Christopher M. Wittich et al., *Ten Common Questions (and Their Answers) About Off-label Drug Use*, 87 MAYO CLINIC PROC. 982, 983 (2012). "The Supreme Court itself has noted that off-label use 'is an accepted and necessary corollary of the FDA's mission.'" *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 915 (9th Cir. 2014) (enjoining a law prohibiting off-label use of mifepristone) (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001)). Judge Moore, dissenting from the Sixth Circuit's decision upholding Ohio's requirement that doctors use the dosage on the outdated label, noted that "the Act focuses solely on abortions" and that Ohio continued to permit off-label uses of the identical medication outside the abortion context. *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 507-08 n.17 (6th Cir. 2012) (Moore, J., dissenting in part).

For examples of laws singling out abortion for burdensome health regulation in the period before *Casey*, see Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 872-73 nn. 25-27 (2007).

⁸⁹ *Greenville Women's Clinic v. Bryant*, 66 F. Supp. 2d 691, 694 (D.S.C. 1999).

⁹⁰ *Id.* at 737.

women seeking first trimester abortions.”⁹¹ The majority upheld the regulations as protecting women’s health and explained the justification for treating abortion differently:

It is regrettable that our good colleague in dissent would rule on the basis that abortion is like any other simple medical procedure that is directed at injury or disease. Thought of in this way, it is understandable that he, like the district court, might find many of South Carolina’s regulations unnecessary. *Why have inspections, keep records, and minimize the medical risks for only the abortion procedure, when such a protocol is not mandated for comparable medical practices addressing injury and disease? But the importance of the deeply divided societal debate over the morality of abortion and the weight of the interests implicated by the decision to have an abortion can hardly be overstated. As humankind is the most gifted of living creatures and the mystery of human procreation remains one of life’s most awesome events, so it follows that the deliberate interference with the process of human birth provokes unanswerable questions, unpredictable emotions, and unintended social and, often, personal consequences beyond simply the medical ones.*⁹²

As these unusually frank judicial exchanges demonstrate, abortion exceptionalism denotes something more than the fact of singling out abortion for special, health-justified restrictions. Visible here, but more often submerged in neutral language, is the notion that there is a special moral valence to abortion that, because it concerns the unborn, warrants special forms of health regulation not imposed on procedures of comparable risk.

Setting the Fourth Circuit’s opinion alongside *Casey* shows how *Casey* rejects abortion exceptionalism of this kind.⁹³ *Casey* treats with utmost gravity the state’s interest in regulating abortion in the interest of protecting unborn life. It provides the community a means of vindicating this interest: dissuading women from having an abortion. Yet the Court does not permit regulation justified as protecting women’s health to function as an additional means of protecting the interest in potential life. *Casey* allows health-justified regulation of abortion where

⁹¹ *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 205 (4th Cir. 2000) (Hamilton, J., dissenting) (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996)) (observing, “its sheer breath is so discontinuous with the reasons offered for it that [Regulation 61-12] seems inexplicable by anything but animus toward the class that it affects”).

⁹² *Id.* at 175 (emphasis added). On the law’s health rationale, see *id.* at 163.

⁹³ Examples of abortion exceptionalism abound. See, e.g. note 88 and accompanying text.

consistent with the ordinary regulation of the practice of medicine. However, *Casey* objects to “unnecessary” health regulation whose purpose or effect is to deter women from acting on a decision to end a pregnancy: “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.”⁹⁴

As this passage shows, the undue burden framework prohibits laws that single out abortion for “unnecessary” health regulations that obstruct access and express moral condemnation of the practice. Under *Casey*, government may not mix regulatory interests and use health-justified regulations to obstruct access to abortion by non-dissuasive means. For this reason, judicial scrutiny of the facts that justify laws targeting abortion for onerous health restrictions is necessary to prevent legislatures from circumventing constitutional limitations that protect women’s dignity.

Part II. The Clinic Closings: Prevention, Not Persuasion

In recent years, states have enacted laws that impose increasingly burdensome health restrictions on abortion providers not required of others who perform health care procedures of similar risk.⁹⁵ Some laws require providers to acquire admitting privileges at hospitals that for reasons of politics, religion, or stigma want nothing to do with doctors who perform abortions;⁹⁶ others require the clinics to be retrofitted as small hospitals at unaffordable expense.⁹⁷ The

⁹⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992).

⁹⁵ *See infra* notes 114-116 and accompanying text.

⁹⁶ *See infra* notes 119-121 and accompanying text.

⁹⁷ Medical and public health authorities reason that ambulatory surgical center (ASC) requirements are unnecessary either for medication abortions, which involve no invasion of the body at all, or for “surgical” abortions, which “do not involve exposure of the uterus to the external environment” and so do not require the highly sterile environment

practical impact of these health restrictions appears to be much greater than that of fetal-protective laws designed to dissuade women from having an abortion; the latter communicate to one woman at a time the state's message that abortion is the wrong choice, while the former shut clinics down, thus preventing access altogether.

The recently enacted health restrictions dramatically shrink abortion providers' infrastructure, closing clinics and disabling doctors from serving their patients.⁹⁸ For example, in overturning Mississippi's admitting-privileges law, the Fifth Circuit concluded that the law imposed an undue burden because it would have the effect of closing the sole remaining abortion clinic in the state.⁹⁹ In Texas, the Federal District Court blocked House Bill 2 after observing that the number of abortion clinics in the state had already shrunk from more than forty to half that number since the law's admitting-privileges requirement took effect in late 2013.¹⁰⁰ On appeal, the Fifth Circuit largely reversed the District Court's injunction, permitting a reduction in the

that ASCs must maintain. "In short, there has never been a substantial argument in any accepted scientific or medical literature that further sterility precautions would improve the already exceptionally low complication rate associated with abortions." Brief of Amici Curiae American College of Obstetricians and Gynecologists and the American Medical Association in Support of Plaintiffs-Appellees and in Support of Affirmance at 12, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2013) (No. 13-51008), Document 00512477474 [hereinafter ACOG Brief].

For an example of these provisions in Texas, see *supra* note 5 and accompanying text. For the cost imposed by requiring that abortion clinics be rebuilt as "ambulatory surgical centers," see, for example, Kathryn Smith, *Va. Tightens Abortion-Clinic Rules*, POLITICO (Apr. 15, 2013), <http://www.politico.com/story/2013/04/virginia-adopts-stricter-rules-for-abortion-clinics-90042.html> [<http://perma.cc/VQ35-3WS5>] (noting that the cost of compliance could require a small abortion and gynecology clinic in Falls Church to "add five rooms and could cost up to \$1 million"); see also Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—And the Women They Serve—Pay the Price*, 16 GUTTMACHER POL'Y REV. 7, 11 (2013).

⁹⁸ See, e.g., Esmé E. Deprez, *Abortion Clinics Close at Record Pace After States Tighten Rules*, BLOOMBERG BUSINESS (Sept. 3, 2013), <http://www.bloomberg.com/news/articles/2013-09-03/abortion-clinics-close-at-record-pace-after-states-tighten-rules> [<http://perma.cc/AN7T-2RFJ>] (reporting that "[a]t least 58 U.S. abortion clinics—almost 1 in 10—have shut or stopped providing the procedure since 2011 as access vanishes faster than ever amid a Republican-led push to legislate the industry out of existence," and reporting that at the time of publication laws that "make[] it too expensive or logistically impossible for facilities to remain in business" were responsible for a third of the closings with a new round of closings anticipated).

⁹⁹ *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 457-58 (5th Cir. 2014), *petition for cert. filed*, 2015 U.S. S. Ct. Briefs LEXIS 606 (U.S. Feb. 18, 2015) (No. 14-997).

¹⁰⁰ *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 681 (W.D. Tex. 2014), *aff'd in part, vacated in part, rev'd in part sub nom. Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *mandate stayed pending judgment by* 135 S. Ct. 2923, *and cert. granted*, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274).

number of clinics to “at least eight” in the state of Texas.¹⁰¹ Judge Richard Posner, in affirming a preliminary injunction against Wisconsin’s admitting-privileges law, which gave doctors one weekend to come into compliance, noted in his opinion for the Seventh Circuit that the law would have shut down two of the state’s four abortion clinics.¹⁰² In Alabama, three of the state’s five abortion clinics sued to block the state’s admitting-privileges law, informing the District Court that if the law went into effect, they would be forced to stop performing abortions.¹⁰³

Some officials involved in enacting these laws expressed hostility to abortion, even as they claimed a health-protective purpose. Shortly after the Texas admitting-privileges and ambulatory-surgical-center bill was sent to the House, then-Lieutenant Governor David Dewhurst tweeted a photo of a map that showed all of the abortion clinics that would close as a result of the bill, writing “We fought to pass SB5 thru the Senate last night, & this is why!”¹⁰⁴

¹⁰¹ *Whole Woman’s Health*, 790 F.3d at 597 (emphasis added); see also Manny Fernandez & Erik Eckholm, *Court Upholds Texas Limits on Abortions*, N.Y. TIMES June 9, 2015, <http://www.nytimes.com/2015/06/10/us/court-upholds-texas-law-criticized-as-blocking-access-to-abortions.html> [<http://perma.cc/W3XE-RZYR>] (reporting that the number of Texas clinics will drop from eighteen to ten when the Fifth Circuit’s decision goes into effect).

¹⁰² *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 789 (7th Cir. 2013).

¹⁰³ *Planned Parenthood Se., Inc. v. Strange (Strange I)*, 9 F. Supp. 3d 1272, 1276 (M.D. Ala. 2014). Judge Myron Thompson declared the law unconstitutional, reasoning that the Supreme Court “gave us our marching orders in *Casey*.” *Planned Parenthood Se., Inc. v. Strange (Strange II)*, 33 F. Supp. 3d 1330, 1380 (M.D. Ala. 2014). Other states where new health-justified regulations have led to clinic closings include Arizona, where the number of clinics has dropped from eighteen to six since 2010. Laura Bassett, *Anti-Abortion Laws Take Dramatic Toll on Clinics Nationwide*, HUFFINGTON POST, Aug. 26, 2013, www.huffingtonpost.com/2013/08/26/abortion-clinic-closures_n_3804529.html [<http://perma.cc/T6ZF-PYJX>]. Five clinics closed in Ohio, leaving nine in operation, as the result of a 2013 law requiring clinics to have a patient-transfer agreement with a nearby private hospital; previously, the clinics could use the more willing public hospitals. Amanda Seitz, *Abortion Clinic Stops Procedures, 9 Facilities Remain in Ohio*, DAYTON DAILY NEWS, Aug. 20, 2014, <http://www.daytondailynews.com/news/news/local/sharonville-clinic-to-stop-performing-abortions/ng56B/> [<http://perma.cc/GF55-3SD3>]. One of the two abortion clinics in Knoxville, Tennessee closed after the state enacted its “Life Defense Act of 2012,” requiring doctors at abortion clinics to have hospital admitting privileges. Kristi L. Nelson, *Abortion Clinic Director Blames New State Law for Closure*, KNOXVILLE NEWS SENTINEL, Aug. 18, 2012, <http://www.knoxnews.com/news/local-news/abortion-clinic-director-blames-new-law-for> [<http://perma.cc/C6MZ-FDQ8>].

¹⁰⁴ David Dewhurst (@DavidHDewhurst), TWITTER (June 19, 2013, 7:41 AM), <https://twitter.com/DavidHDewhurst/status/347363442497302528/photo/1> [<https://perma.cc/H4K3-DD93>]; see also Jim Vertuno, *Dewhurst Tweet Says Bill Attempt To Close Clinics*, STATESMAN (June 19, 2013 2:28 PM), <http://www.statesman.com/news/news/state-regional-govt-politics/dewhurst-tweet-says-bill-attempt-close-clinics/nYPwR/> [<http://perma.cc/2SJQ-5BDB>].

Dewhurst quickly backpedaled, tweeting “I am unapologetically pro-life AND a strong supporter of protecting women’s health. #SB5 does both.”¹⁰⁵

Lawmakers have offered similar observations in Mississippi, where an admitting-privileges law threatened to shut down the last clinic in the state. In a “state of the state” speech delivered on the 41st anniversary of *Roe*, Gov. Phil Bryant said:

I believe we have also done an admirable job in protecting our children both born and unborn. By strengthening the Child Protection Act and by requiring that abortionists obtain admitting privileges at local hospitals, we are protecting women’s health. But let me be clear, on this unfortunate day of *Roe v. Wade*, my goal is to end abortion in Mississippi.¹⁰⁶

It is unsurprising that states enacting and defending admitting-privilege statutes assert that the laws protect women’s health.¹⁰⁷ Acknowledging a fetal-protective justification for the

¹⁰⁵ David Dewhurst (@DavidHDewhurst), TWITTER (June 19, 2013, 10:06 AM), <https://twitter.com/DavidHDewhurst/status/347400087191814145> [<https://perma.cc/D9YQ-Q6YM>]; see also Vertuno, *supra* note 104.

¹⁰⁶ Gov. Bryant’s ‘State of the State’ Speech, *Jackson Free Press*, Jan. 22, 2014, <http://www.jacksonfreepress.com/news/2014/jan/22/gov-bryants-state-state-speech/> [<http://perma.cc/RV77-AP75>]; see also M.J. Lee, *Bill Dooms Only Miss. Abortion Clinic*, POLITICO (Apr. 5, 2015), <http://www.politico.com/news/stories/0412/74871.html> [<http://perma.cc/848V-A3KZ>] (quoting similar statement from Mississippi State Representative Sam Mims, the author of the bill). See also *id.* at 354-65; cf. *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-CV-465-WMC, 2015 WL 1285829, at *3 (W.D. Wis. Mar. 20, 2015) (reporting that Wisconsin’s admitting-privileges legislation was proposed to its legislative sponsor by representatives of the state’s Right to Life chapter and “opposed by the state’s leading medical and public health associations”).

The handbook of model antiabortion legislation published annually by Americans United For Life discusses “admitting privileges” fifty-eight times in its 2015 edition, and includes the requirement in several model laws, including its *Women’s Health Protection Act* and its *Abortion Providers’ Admitting Privileges Act*. See AMERICANS UNITED FOR LIFE, DEFENDING LIFE 2015, http://www.aul.org/downloads/defending-life-2015/AUL_Defending_Life_2015.pdf [<http://perma.cc/JH7U-CE9Y>]. The handbook includes the requirement in several model laws, including its *Women’s Health Protection Act* and its *Abortion Providers’ Admitting Privileges Act*.

¹⁰⁷ See, e.g., *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 789 (7th Cir. 2013) (“The stated rationale of the Wisconsin law is to protect the health of women who have abortions.”); *Strange I*, 9 F. Supp. 3d 1272, 1298 (M.D. Ala. 2014) (“The State contends that the statute was passed only with the purpose of furthering women’s health.”).

But Texas, by contrast, offered shifting rationales for enacting its admitting-privileges law. The official bill analysis for the state senate observes of its admitting-privileges law “[w]omen who choose to have an abortion should receive the same standard of care any other individual in Texas receives, regardless of the surgical procedure performed. H.B. 2 seeks to increase the health and safety of a woman who chooses to have an abortion. . . .” LAUBENBERG ET AL., SENATE RESEARCH CENTER, H.B. 2, BILL ANALYSIS, 83S20017 JSC-F (2013).

Initially, in the District Court in *Abbott*, Texas argued that its admitting-privileges requirement served to protect maternal health. See Defendants’ Trial Brief at 42, *Planned Parenthood of Greater Tex. Surgical Health*

laws—given the laws’ role in forcing clinics to close—would plainly violate the constitutional limits *Casey* imposes on the means by which states can protect unborn life.

In this Part, we briefly examine the most recent health-justified restrictions on abortion. Our focus is on the laws requiring abortion providers to have admitting privileges at local hospitals. We begin by showing that these laws rest on highly contested factual premises. Some but not all courts examine the state’s justifications for health-related restrictions when applying *Casey*. Beginning with Judge Posner’s 2013 decision in *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*,¹⁰⁸ some courts read *Casey* as requiring an inquiry into the question of whether a health-justified regulation of abortion will actually protect women’s health. The Fifth Circuit, by contrast, opposes judicial scrutiny of the state’s claims, insisting instead on a rational basis

Servs. v. Abbott (*Abbott I*), 951 F. Supp. 2d 891 (W.D. Tex. 2013) (No. 1:13CV00862) (“HB 2 was enacted to protect the health and safety of patients”). In trial, *see infra* note 189, and on appeal, however, the state changed course and defended the admitting-privileges requirement as promoting women’s health *and* protecting fetal life: “The Texas Legislature enacted the admitting privileges requirement to promote the health and safety of abortion patients and to advance the State’s interest in protecting fetal life.” Appellants’ Brief at 2, *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott (Abbott II)*, 748 F. 3d 583 (5th Cir. 2014) (No. 13-51008); *see also* Appellants’ Reply Brief at 6, *Abbott II*, 748 F.3d 583 (No. 13-51008) (“The admitting-privileges requirement was enacted to make abortions safer for patients who choose abortion and to protect fetal life for those patients who do not.”). State officials also embraced the two state interests. *See* Manny Fernandez & Erik Eckholm, *Court Upholds Texas Limits on Abortions*, N.Y. TIMES, June 9, 2015, <http://www.nytimes.com/2015/06/10/us/court-upholds-texas-law-criticized-as-blocking-access-to-abortions.html> [<http://perma.cc/AHY4-NYXU>] (“The Texas attorney general, Ken Paxton, called the Fifth Circuit’s decision upholding the law, a ‘victory for life and women’s health.’ ‘H.B. 2 both protects the unborn and ensures Texas women are not subjected to unsafe and unhealthy conditions,’ Mr. Paxton said in a statement. ‘Today’s decision by the Fifth Circuit validates that the people of Texas have authority to establish safe, common-sense standards of care necessary to ensure the health of women.’”).

When, however, the state defended its admitting-privilege and ambulatory-surgical-center requirements at the Fifth Circuit in *Whole Woman’s Health v. Cole*, it returned to describing the state’s interest in enacting the law in terms focused solely on protecting women’s health. *See* Appellants’ Brief at 35-36, *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015) (No. 14-50928) (“The legislature’s stated purpose in enacting HB2 was to improve the standard of care for abortion patients.”), *mandate stayed pending cert. decision by* No. 14A1288, 83 USLW 3927 (U.S. June 29, 2015) (order staying mandate pending filing and disposition of a writ for certiorari), http://www.supremecourt.gov/orders/courtorders/062915zr_6j37.pdf [<http://perma.cc/B5KG-E66W>]; *see also* Appellants’ Reply Brief at 29-31, *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015) (No. 14-50928) (describing how the requirements specifically improve standards of care for patients seeking abortions).

¹⁰⁸ 738 F. 3d 786 (7th Cir. 2013).

review of the state’s justifications for enacting the regulation.¹⁰⁹ We review the courts’ competing approaches for their consistency with the Supreme Court’s decisions in *Casey* and *Carhart*.

A. The Justification for Admitting-Privileges Laws

States claim to protect women’s health by requiring abortion providers to have admitting privileges at a local hospital.¹¹⁰ Yet there are deep questions about whether evidence supports the alleged benefits to women’s health. Abortion during the first trimester of pregnancy, when eighty-nine percent of abortions take place,¹¹¹ is extremely safe, with complications that require a hospital visit occurring in less than 0.05 percent of early abortions.¹¹² Of this small number of complications, many are minor, presenting symptoms similar to those of early miscarriage, which is a common reason for emergency room visits and a condition that emergency room physicians are accustomed to treating.¹¹³

Despite the safety of abortion procedures, states single out abortion for restrictions not imposed on procedures of comparable risk. In Texas, the District Court found that at the time of passage of the state law imposing admitting-privilege and ambulatory-surgical-center requirements on abortion, “abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure. . . . [It was] much safer, in terms of minor and serious complications, than many common medical

¹⁰⁹ See *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 680-81 (W.D. Tex. 2014), *aff’d in part, vacated in part, rev’d in part sub nom.*; *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *mandate stayed pending cert. decision by* 135 S. Ct. 2923 (June 29, 2015) (No. 14A1288).

¹¹⁰ See *supra* note 97 and accompanying text.

¹¹¹ Guttmacher Inst., *Induced Abortion in the United States* (July 2014), http://www.guttmacher.org/pubs/fb_induced_abortion.html [<http://perma.cc/YX7X-PAHR>].

¹¹² *Id.*

¹¹³ See *Abbott II*, 748 F.3d 583, 591 (5th Cir. 2014) (citing testimony of Dr. Jennifer Carnell, an emergency room physician, on the minor nature of abortion complications); see also *Lakey*, 46 F. Supp. 3d at 684 (observing that “abortion in Texas was extremely safe with particularly low rates of serious complications”).

procedures not subject to such intense regulation and scrutiny”¹¹⁴; the legislature had singled out abortion clinics for restrictions that were not imposed on facilities providing comparable medical services.¹¹⁵ In Wisconsin, the state stipulated before trial that for no other outpatient procedures were doctors required to have hospital admitting privileges.¹¹⁶ The state explained neither the reason for singling out abortion for special treatment nor the rush to pass its law, which was enacted “precipitously” in 2013.¹¹⁷

¹¹⁴ *Lahey*, 46 F. Supp. 3d at 684.

¹¹⁵ *Id.* at 685. In particular, the District Court described the legislature’s decision to subject abortion clinics to implementing rules regarding grandfathering and waivers that were harsher than those applied to other ambulatory surgical centers:

The requirement's implementing rules specifically deny grandfathering or the granting of waivers to previously licensed abortion providers. This is in contrast to the “frequent” granting of some sort of variance from the standards which occur in the licensing of nearly three-quarters of all licensed ambulatory surgical centers in Texas. Such disparate and arbitrary treatment, at a minimum, suggests that it was the intent of the State to reduce the number of providers licensed to perform abortions, thus creating a substantial obstacle for a woman seeking to access an abortion. This is particularly apparent in light of the dearth of credible evidence supporting the proposition that abortions performed in ambulatory surgical centers have better patient health outcomes compared to clinics licensed under the previous regime *Id.*

¹¹⁶ *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-CV-465-WMC, 2015 WL 1285829, at *39 (W.D. Wis. Mar. 20, 2015) (noting that “the legislation inexplicably singles out abortion procedures for special treatment when the evidence demonstrates that abortion is at least as safe as, and often much safer than, other outpatient procedures regularly performed in this State.”). Among commonly performed outpatient surgery for which Wisconsin has not sought to require admitting privileges are, e.g., colonoscopy, arthroscopic surgery, and gynecological procedures that are similar to early abortion, including dilation and curettage of the uterus. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F. 3d 786, 789-90 (7th Cir. 2013).

In permanently enjoining enforcement of the law, Judge Richard Posner emphasized that the state had singled out abortion for regulation it did not impose on riskier procedures. *See Planned Parenthood of Wis. v. Schimel*, 806 F.3d. 908 (7th Cir. 2015) at *13 (“A number of other medical procedures are far more dangerous to the patient than abortion, yet their providers are not required to obtain admitting privileges anywhere, let alone within 30 miles of where the procedure is performed.”) Judge Posner observed that Wisconsin does not require that doctors performing outpatient colonoscopies have hospital admitting privileges, yet “...the rate of complications resulting in hospitalization from colonoscopies done for screening purposes is four times the rate of complications requiring hospitalization from first-trimester abortions.” *Id.* at *6. The respective rates of serious complications from both procedures are low. Even so, the rate of complications for colonoscopy appears to be four times that of first-trimester abortions. For colonoscopy, according to the article cited by Judge Posner, it is 0.2 percent. Cynthia W. Ko *et al.*, *Serious Complications Within 30 Days of Screening and Surveillance Colonoscopy Are Uncommon*, 8 CLIN. GASTROENTEROL. HEPATOL. 166, 171-72 (2010). The comparable rate for first-trimester abortion in a recent peer-reviewed study of abortion in California was 0.05 percent (six out of 11,487 abortions.) Tracy A. Weitz *et al.*, *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants Under a California Legal Waiver*, 103 AM. J. PUB. HEALTH 454,459 (2013).

¹¹⁷ *Van Hollen*, 2015 WL 1285829, at *4. Introduced in the state senate on June 4, the legislation cleared both houses of the legislature in nine days and was signed by the governor on July 5, a Friday. The admitting-privileges requirement would have gone into effect immediately after the weekend had the District Court not granted a

In defending the need for admitting privileges, states assert that the requirement serves important credentialing and monitoring functions, assures necessary “continuity of care,” and prevents patient abandonment.¹¹⁸ While the states’ claims imply that doctors who receive admitting privileges are superior in quality, that is not necessarily the case. Requirements for admitting privileges may have nothing to do with quality of care.¹¹⁹ Many hospitals condition the award of admitting privileges on a certain number of patient admissions, setting quotas impossible for most abortion providers to meet when their patients so rarely need hospital care.¹²⁰ Hospitals may refuse to extend admitting privileges to doctors who perform a procedure to which the hospital’s governing body has religious objections.¹²¹ Patient care is not likely to be

temporary restraining order. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858 (W.D. Wis. 2013).

¹¹⁸ See, e.g., *Van Hollen*, 738 F.3d at 789 (“[P]roponents of the law argue that if a woman requires hospitalization because of complications from an abortion she will get better continuity of care if the doctor who performed the abortion has admitting privileges at a nearby hospital.”); *Abbott II*, 748 F.3d at 592 (“The State focused its defense of the admitting-privileges requirement on two of these factors: continuity of care and credentialing.”).

¹¹⁹ Admitting privileges have long been a contentious issue in medical practice. Decisions to withhold or revoke a doctor's right to admit patients to a hospital and to supervise patient care are made by committees of doctors according to policies set by the hospital's board. While on the surface the grant of admitting privileges might appear to signify an objective measure of quality, that may be far from the case. Anti-competitive and profit-maximizing motives come into play. “If the privilege decision is based only on medical staff interests, it may be appropriate to characterize the decision as that of a ‘physician cartel’ . . . economic reasons exist for medical staff recommendations on privilege issues to be generally biased against a competitive and efficient allocation of privileges.” Philip C. Kissam, et al., *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 CAL. L. REV. 595, 604, 610 (1982) (discussing antitrust litigation generated by admissions privileges decisions.) Cases brought against admitting-privileges committees have alleged racial and national origin discrimination, see e.g. *Gaalla v. Brown*, 460 Fed. Appx. 469, No. 10-41332, 2012 WL 512687 (5th Cir. Feb. 16, 2012) and unlawful retaliation for complaints about patient case, e.g. *Fahlen v. Sutter Central Valley Hospitals*, 58 Cal. 4th 655 (Cal 2014).

¹²⁰ For example, in Wisconsin, hospitals typically require doctors to admit twenty patients a year in order to retain their privileges. Three doctors in the Wisconsin litigation were informed by the hospital where they practiced that retaining their admitting privileges would depend on the hospital’s review of five patient admissions within a six-month period, a standard the doctors testified that they could not meet because they did not expect to admit any patients. *Van Hollen*, 2015 WL 1285829, at *29. For an extended discussion of this point, see *Planned Parenthood Southeast, Inc. v. Strange*, 33 F. Supp. 3d 1330, 1342-44 (M.D. Ala. 2014). See also *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 900-901 (W.D. Tex. 2013) *rev'd in part*, 748 F.3d 583 (5th Cir. 2014)

¹²¹ Hospitals with religious affiliations or in communities where hostility to abortion runs deep are particularly likely to reject abortion providers’ applications for admitting privileges, as Judge Thompson explains at length in his opinion striking down Alabama's admitting privileges requirement. See *id.* at 1341-1353. In the Wisconsin case, the

improved by requirements that are medically unnecessary and sufficiently burdensome to shut down the very facilities at which patients seek care.¹²²

There is yet another concern about the evidence offered in support of laws imposing admitting-privilege requirements on abortion providers. An activist named Vincent Rue has organized the set of witnesses who testify across state lines in support of the admitting privilege statutes.¹²³ Rue is no stranger to abortion-related controversy. Decades ago, Vincent Rue played a central role in developing “post-abortion syndrome” or “PAS,” the claim that abortion traumatizes and inflicts psychological harm on women.¹²⁴ When he appeared as an expert witness for the state in Pennsylvania’s initial defense of the abortion regulations at issue in

trial judge noted that the plaintiff clinics “credibly argue that the religious affiliation of hospitals, and in particular Catholic hospitals, may pose a continuing barrier to securing admitting privileges.” *Id.* at *30. The impact of Catholic abortion doctrine on the U.S. health care system is non-trivial. In 2014, Catholic hospitals accounted for over 19.5 million emergency room visits and over 5.2 million admissions every year; one in every six hospital patients received care in a Catholic hospital. United States Conference of Catholic Bishops, *Catholic Health Care, Social Services And Humanitarian Aid*, [http:// www.usccb.org/about/media-relations/backgrounders/health-care-social-service-humanitarian-aid.cfm](http://www.usccb.org/about/media-relations/backgrounders/health-care-social-service-humanitarian-aid.cfm) [[http:// perma.cc/RF5U-4CUH](http://perma.cc/RF5U-4CUH)]. For discussion of other reasons that hospitals deny admitting privileges, see ACOG Brief, *supra* note 97, at 4.

¹²² See ACOG Brief, *supra* note 121, at 2-11 (arguing that the Texas admitting-privileges requirement “does not serve the health of women in Texas” and “jeopardizes women’s health by restricting access to abortion providers”). In the Texas litigation, for example, Dr. Paul Fine, director of one of the plaintiff clinics, testified that fewer than 0.3 percent of patients undergoing first-trimester abortions experience a complication that requires hospitalization. Another of the plaintiff’s witnesses, Dr. Jennifer Carnell, an emergency-room doctor, testified that admitting privileges were unnecessary as doctors who staff emergency rooms are trained to treat abortion-related complications, which are similar to conditions seen with miscarriages, commonly seen in emergency rooms. *Abbott II*, 748 F. 3d at 591. Yet the imposition of these requirements can close clinics, which in itself imposes health risks. “The farther a woman must travel to reach an abortion provider, the less likely she will be to return to that provider for follow-up care and the more dangerous it would be for her to return in the case of an emergency.” Plaintiff’s Application to Vacate Stay of Final Judgment Pending Appeal at 17, *Whole Woman’s Health v. Lakey* (Oct. 6, 2014) (No. 14A365).

¹²³ Because courts have questioned Rue’s professional credibility, he seems to have played a behind-the-scenes role in organizing expert witnesses who testified that recent restrictions on abortion promote women’s health. See, e.g., Irin Carmon, *Who is Vincent Rue?*, MSNBC (June 10, 2014), <http://www.msnbc.com/msnbc/who-vincent-rue> [<http://perma.cc/8EHM-EJ9K>] (“Rue was involved in recruiting many of the witnesses for the trials in Wisconsin and Alabama Many of the same experts had been called upon to justify admitting privileges laws in other states, including in Texas, where the law has shut down over one third of the state’s abortion clinics.”); Molly Redden, *Texas Pays ‘Thoroughly Discredited’ Expert \$42,000 to Defend Anti-Abortion Law*, MOTHER JONES, Aug. 13, 2014, <http://www.motherjones.com/politics/2014/08/texas-vincent-rue-anti-abortion-law> [<http://perma.cc/U8D4-VD4X>] (“In the past two years, Republican administrations in four states—Alabama, North Dakota, Texas, and Wisconsin—have paid or promised to pay Rue \$192,205.50 in exchange for help defending anti-abortion laws.”).

¹²⁴ See, e.g., Reva B. Siegel, *2007 Brainerd Currie Lecture - The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1657-60, 1665 n.85, 1681 (2008).

Casey, the District Court dismissed his testimony, finding it “devoid of the analytical force and scientific rigor” of the testimony presented by the plaintiff’s expert witnesses.¹²⁵ Thereafter, Rue largely disappeared from courtrooms, only to reemerge as a behind-the-scenes paid consultant to states defending their admitting-privileges requirements as protecting women’s health, where his role included recruiting witnesses to appear in court and sometimes ghostwriting their testimony.¹²⁶

Rue’s conduct has drawn reproach from judges in Alabama, Texas, and Wisconsin.¹²⁷ For example, Judge Thompson, rejecting one Rue-recruited expert, said, “Whether Anderson lacks judgment, is dishonest, or is profoundly colored by his bias, his decision to adopt Rue’s supplemental report and submit it to the court without verifying the validity of its contents deprives him of credibility.”¹²⁸ In the Texas case, Judge Yeakel had this to say:

The credibility and weight the court affords the expert testimony of the State’s witnesses Drs. Thompson, Anderson, Kitz, and Uhlenberg is informed by ample evidence that, at a very minimum, Vincent Rue, Ph.D., a non-physician consultant for the State, had considerable editorial and discretionary control over the contents of the experts’ reports and declarations. The court finds that, although the experts testified that they personally held the opinions presented to the court, the level of input exerted by Rue undermines the appearance of objectivity and reliability of the experts’ opinions. Further, the court is dismayed by the

¹²⁵ Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1333-34 (E.D. Pa. 1990).

¹²⁶ See, e.g., Emily Bazelon, *A Huge Abortion Win in Texas*, SLATE (Sept. 2, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/abortion_ruling_in_texas_judge_lee_yeakel_strikes_down_restrictive_clinic.html [<http://perma.cc/7PFL-7NG5>] (“Texas has paid Rue thousands, yet other witnesses tried to mask his role in the case, denying that he helped draft documents.”); Judith Davidoff, *Pro-life Advocate Vincent Rue Assists State in Wisconsin Abortion Law Defense*, ISTHMUS (June 5, 2014), <http://www.isthmus.com/news/news/pro-life-advocate-vincent-rue-assists-state-in-wisconsin-abortion-law-defense/> [<http://perma.cc/N9D8-AM44>] (“According to the agreements, Rue was hired to assist the DOJ in the ‘development of case strategy, procurement of expert witnesses’ and in ‘discovery and trial preparation.’ He is also a ‘liaison between the Office and the experts.’”); see also *supra* note 122 (discussing Rue’s role in litigation).

¹²⁷ See, e.g., Planned Parenthood v. Strange (*Strange III*), 33 F. Supp. 3d 1381, 1386-88 (M.D. Ala. 2014); Whole Woman’s Health v. Lakey, 46 F. Supp. 3d 673, 680 n.3 (W.D. Tex. 2014) *aff’d in part, vacated in part, rev’d in part sub nom.* Whole Woman’s Health v. Cole, 790 F.3d 563 (5th Cir. 2015), *mandate stayed pending cert. decision by* 135 S. Ct. 2923 (June 29, 2015) (No. 14A1288); Planned Parenthood of Wis., Inc. v. Van Hollen, No. 13-CV-465-WMC, 2015 WL 1285829, at *62 n.24 (W.D. Wis. Mar. 20, 2015) (describing Rue as “an advocate of abortion regulations who has been discredited by other courts because of his lack of analytical rigor and possible personal biases”).

¹²⁸ *Strange III*, 33 F. Supp. 3d 1381, 1388 (M.D. Ala. 2014).

considerable efforts the State took to obscure Rue’s level of involvement with the experts’ contributions.¹²⁹

B. Judicial Review of Admitting-Privileges Litigation

How does the dispute over the justification for admitting-privileges laws arise in litigation over the laws’ constitutionality? Factual questions concerning the health justification of such laws are distinct from questions concerning their impact on abortion access—the “effects” prong of the undue burden inquiry.

As we will discuss, courts have divided over this issue. Led by the Seventh Circuit, some courts require the state to demonstrate the factual basis of its claim that restricting abortion promotes women’s health, and apply undue burden analysis in a weighted balancing test that attends to the strength of the state’s showing that the restriction achieves that goal.¹³⁰ The Fifth Circuit, by contrast, asserts that it is wholly improper for judges to examine the factual basis of the state’s claim that a restriction on abortion promotes women’s health. The circuit applies deferential rational basis review, simply credits the state’s claim to regulate in the interests of women’s health, and then determines whether the law’s impact creates a substantial obstacle.¹³¹ In short, the Seventh Circuit reads *Casey* as requiring courts to evaluate the factual basis of the state’s claim to restrict abortion to promote women’s health; the Fifth Circuit reads *Casey* to prohibit this very inquiry. In what follows, we contrast these two very different approaches to applying undue burden analysis to health-justified restrictions on abortion.

¹²⁹ *Lahey*, 46 F. Supp. 3d at 680 n.3. The Fifth Circuit, in upholding the ambulatory-surgical-center regulation in the most recent opinion, failed to note that Judge Yeakel at trial had rejected the credibility of the only defense expert to testify that the regulation offered health benefits to abortion patients. That witness, Dr. Thompson, testified that Vincent Rue had written portions of her report and testimony. See Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari at 17 n.7, *Whole Woman’s Health v. Cole* (June 19, 2015) (No. 14A1288).

¹³⁰ See *infra* text accompanying notes 132-148.

¹³¹ See *infra* text accompanying notes 149-164.

The Seventh Circuit’s approach to review of admitting-privileges legislation, first articulated by Judge Richard Posner, makes factual support for the state’s health interest central in applying the undue burden test. In December 2013, the Seventh Circuit affirmed an order preliminarily enjoining enforcement of a recently enacted Wisconsin admitting-privileges requirement.¹³² Judge Posner observed that while the state justified the requirement solely on the ground of protecting women’s health, the state’s lawyer at oral argument “did not mention any medical or statistical evidence” and “[n]o documentation of medical need for such a requirement was presented to the Wisconsin legislature when the bill that became the law was introduced on June 4 of this year.”¹³³ The medical evidence was “feeble,” Judge Posner said, “yet the burden [was] great.”¹³⁴ He explained that the judge had to consider the evidentiary basis of the state’s claim that it had health justifications for restricting abortion when the judge applied the undue burden test:

The cases that deal with abortion-related statutes sought to be justified on medical grounds require not 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. The feebler the medical grounds, the likelier the burden, even if slight, to be “undue” in the sense of disproportionate or gratuitous.¹³⁵

Judge Posner derived from *Casey* two crucially important messages: that states seeking to justify a health-related restriction must produce evidence supporting the health-basis of their restriction, and that the strength of this evidentiary showing was relevant in determining whether any related burden on access was, in *Casey*’s terms, undue. Judge Posner reaffirmed this

¹³² *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013).

¹³³ *Id.* at 789-90.

¹³⁴ *Id.* at 798. Judge Posner noted that the requirement would shut down two of the state’s four abortion clinics. *Id.* at 789.

¹³⁵ *Id.* at 798 (citations omitted) (citing *Casey* and *Mazurek*).

understanding in a subsequent opinion permanently enjoining enforcement of Wisconsin’s admitting privileges law.¹³⁶

Judge Posner’s opinion adopting this weighted balancing test in *Planned Parenthood of Wisconsin v. Van Hollen* has proven influential. Judge Thompson cited it in his Alabama admitting-privileges decision three months later, observing, “[I]t is not enough to simply note that the State has a legitimate interest; courts must also examine the weight of the asserted interest, including the extent to which the regulation in question would actually serve that interest.”¹³⁷ On this account, the “weight” of an interest turns on a question of fact: how well the challenged regulation would in fact—“actually”—advance the interest it is asserted to serve. Judge Thompson explained that the court was to take the evidence the state amassed justifying the regulation into account in applying the undue burden framework; he reasoned that “the court examines the severity of obstacles created by the regulation as well as the weight of the State’s justifications for the regulation, and then determines whether the obstacle is more significant than is warranted by the justifications.”¹³⁸

Another recent opinion requiring an inquiry into the factual basis for a health-justified abortion restriction came from the Ninth Circuit in June 2014. In *Planned Parenthood of Arizona v. Humble*, the panel preliminarily enjoined an Arizona law requiring doctors to use an outdated protocol for administering the medication that causes an early-term abortion.¹³⁹ States have increasingly attempted to curb the growing popularity of medication abortion¹⁴⁰ by forbidding

¹³⁶ *Planned Parenthood of Wis. v. Schimel*, 806 F.3d 908 (7th Cir. 2015) (discussed *infra* Part II.C.).

¹³⁷ *Strange I*, 9 F. Supp. 3d at 1296 (citing *Van Hollen*). As the judge also stated, “[T]he court must determine whether, examining the regulation in its real-world context, the obstacle is more significant than is warranted by the State’s justifications for the regulation.” *Id.* at 1287.

¹³⁸ *Id.* at 1296-97 (citing *Van Hollen*).

¹³⁹ 753 F.3d 905 (9th Cir. 2014), *cert. den.* 135 S. Ct. 870 (Dec. 15, 2014).

¹⁴⁰ At Planned Parenthood clinics, medication abortion—accomplished by administering two prescription drugs, mifepristone and misoprostol—accounts for forty-one percent of first-trimester abortions. *Id.* at 907-08.

doctors to deviate from the dosage on the FDA-approved label—despite the fact that such “off-label” uses of approved medications are common outside the abortion context,¹⁴¹ and the fact that the medical profession has concluded that, in this instance, a smaller dose is safer and more effective.¹⁴² While we have not focused on the medication-abortion controversy,¹⁴³ *Humble* reviews a health-justified restriction on abortion and so is directly relevant to our discussion.

In *Humble*, the Ninth Circuit applies *Casey* with attention to the question of whether restrictions on abortion are asserted to serve the state’s interest in protecting fetal life or women’s health.¹⁴⁴ In examining laws asserted to promote women’s health, the circuit employs a weighted balancing test:

[C]ompar[ing] the extent of the burden a law imposes on a woman’s right to an abortion with the strength of the state’s justification for the law. . . . The more substantial the burden, the stronger the state’s justification for the law must be to satisfy the undue burden test; conversely, the stronger the state’s justification, the greater the burden may be before it becomes “undue.”¹⁴⁵

Reviewing Arizona’s restriction on medication abortion in *Humble*, Judge Fletcher observed that the Ninth Circuit’s approach followed from *Casey*’s direction to determine whether health

¹⁴¹ See *supra* note 93 (noting the Supreme Court’s recognition of the ordinary practice of off-label use).

¹⁴² *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 916-17 (9th Cir. 2014) (citing Brief for American College of Obstetricians & Gynecologists and the American Medical Ass’n as Amici Curiae at 13-17).

¹⁴³ Restrictions of this kind have been upheld in the Fifth and Sixth Circuits and struck down in the Ninth Circuit. Compare *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott II)*, 748 F.3d 583, 604-05 (5th Cir. 2014) (upholding law restricting medication abortion to dosage on FDA-approved label) and *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 514-15 (6th Cir. 2012) (same) with *Humble*, 753 F.3d at 917 (preliminarily enjoining the prohibition on off-label use as an undue burden). See also *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 264 (Iowa 2015) (striking down an Iowa regulation prohibiting the use of telemedicine in administering medication abortion under the Iowa Constitution and applying the federal undue burden test, reasoning that “[I]ike the Seventh and Ninth Circuits, we believe the ‘unnecessary health regulations’ language used in *Casey* requires us to weigh the strength of the state’s justification for a statute against the burden placed on a woman seeking to terminate her pregnancy when the stated purpose of a statute limiting a woman’s right to terminate a pregnancy is to promote the health of the woman.”).

¹⁴⁴ *Humble*, 753 F.3d at 912 (observing “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”) (quoting *Tucson Women’s Clinic v. Eden*, 379 F.3d 531, 539-40 (9th Cir. 2004)).

¹⁴⁵ *Id.* at 912 (citing *Eden*, 379 F.3d at 542).

regulations were “unnecessary,” and approvingly referenced the framework Judge Posner had set forth in *Van Hollen* as “an approach much like ours”.¹⁴⁶ “The court in *Van Hollen* granted a preliminary injunction against the enforcement of the Wisconsin law on the ground that ‘the medical grounds thus far presented . . . are feeble, yet the burden great.’ Here, the ‘medical grounds thus far presented’ are not merely ‘feeble.’ They are non-existent.”¹⁴⁷ Judge Fletcher noted that, “Arizona has introduced no evidence that the law advances in any way its interest in women’s health.”¹⁴⁸

The Fifth Circuit’s approach to applying *Casey* differs dramatically. In a challenge to the Texas admitting privilege requirement in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott (Abbott II)*,¹⁴⁹ Judge Edith Jones asserted that she was following *Casey*’s undue burden framework, but she then invoked the Supreme Court’s decision in *Gonzales v. Carhart*¹⁵⁰ to infuse the undue burden inquiry with rational basis review.¹⁵¹ At issue was precisely the question we have been discussing: whether the undue burden framework of *Casey/Carhart* requires judges to examine the factual basis of a state’s claim to restrict abortion in the interests of protecting women’s health.

Judge Jones initially characterized *Carhart* as “holding that the State may ban certain abortion procedures and substitute others provided that ‘it has a rational basis to act, *and* it does not impose an undue burden.”¹⁵² She then reversed the District Court’s finding that the state’s

¹⁴⁶ *Id.* at 913.

¹⁴⁷ *Id.* at 917 (citation omitted).

¹⁴⁸ *Id.* at 916.

¹⁴⁹ 748 F.3d 583 (5th Cir. 2014).

¹⁵⁰ *Id.* at 590.

¹⁵¹ *Id.* at 590, 594-99.

¹⁵² *See id.* at 590 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (emphasis added)).

admitting-privileges law had no rational relationship to protecting women’s health¹⁵³ with a *much* more far-reaching claim about the *Casey-Carhart* framework:

*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. It is not the courts’ 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. . . . Under rational basis review, courts must presume that the law in question is valid and sustain it so long as the law is rationally related to a legitimate state interest. . . . As the Supreme Court has often stressed, the rational basis test seeks only to determine whether any conceivable rationale exists for an enactment. . . . A law “based on rational speculation unsupported by evidence or empirical data” satisfies rational basis review.*¹⁵⁴

In this remarkable passage, the Fifth Circuit takes the language in *Carhart* that applies the undue burden test and uses it to characterize the undue burden test as rational basis review—the standard of review championed by the *dissenting* justices in *Casey*.¹⁵⁵ Judge Jones suggests that it is beyond the proper role of a court in a constitutional democracy to inquire into the factual basis of a legislature’s claim that restricts the exercise of the abortion right: “*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.*”¹⁵⁶ She thereafter proceeds to reject the *Van Hollen* approach to applying undue burden: “The first-step in the analysis of an abortion regulation, however, is *rational* basis review, not *empirical* basis review.”¹⁵⁷

In so reasoning, the Fifth Circuit breaks with the Seventh and Ninth Circuits, which, as we have seen, understand the inquiry into the evidentiary basis of the state’s claim to regulate in the interests of women’s health *as part of the undue burden inquiry*. The Seventh and Ninth

¹⁵³ *Id.* at 595.

¹⁵⁴ *Id.* at 594 (emphasis added) (citations omitted).

¹⁵⁵ See *supra* text accompanying notes 31-32.

¹⁵⁶ *Abbott II*, 748 F.3d at 594.

¹⁵⁷ *Id.* at 596.

Circuits understand it as part of the question of whether the health-justified law was “unnecessary” and (un)warranted in light of the burdens it imposes on women’s access.¹⁵⁸ In the Fifth Circuit, by contrast, a court has no reason to examine the state’s factual support for a health-justified restriction on abortion because “[a] law ‘based on rational speculation unsupported by evidence or empirical data’ satisfies rational basis review.”¹⁵⁹ The Fifth Circuit refuses to consider the strength of the state’s justification for regulating as part of the undue burden inquiry.¹⁶⁰

As Judge Jennifer Elrod explains in the Fifth Circuit’s subsequent opinion in *Whole Women’s Health v. Lakey*¹⁶¹ admonishing the District Court for “evaluat[ing] whether the ambulatory surgical center provision would actually improve women’s health and safety,” “[i]n our circuit we do not balance the wisdom or effectiveness of a law against the burdens the law imposes.”¹⁶² Objecting that examining the factual basis of the state’s claim to protect women’s health would “ratchet[] up rational basis review into a pseudo-strict-scrutiny approach by examining whether the law advances the State’s asserted purpose,” she reasons, “Under our precedent, we have no authority by which to turn rational basis into strict scrutiny under the guise of the undue burden inquiry.”¹⁶³ The Fifth Circuit has recently reaffirmed this line of cases

¹⁵⁸ See *supra* text accompanying notes 130-148.

¹⁵⁹ *Abbott II*, 748 F.3d at 594 (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993), a rational basis case involving an equal protection challenge to a provision of the Cable Communication Policy Act by a regulated party complaining of market inequities).

¹⁶⁰ *Id.*; see also *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott I)*, 734 F.3d 406, 411 (5th Cir. 2013) (staying District Court judgment) (“The district court’s finding to the contrary is not supported by the evidence, and in any event, ‘a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.’”) (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)).

¹⁶¹ 769 F.3d 285, 304-05 (5th Cir. 2014) (overturning District Court injunction against Texas ambulatory-surgical-center requirement), *vacated in part*, 135 S. Ct. 399 (2014).

¹⁶² *Id.* at 297 (emphasis added).

¹⁶³ *Id.* (emphasis added).

applying rational basis review to the claim that Texas's interest in protecting women's health justified enacting the law.¹⁶⁴

C. Returning to *Casey/Carhart*

Is a court required to examine the factual basis of a health-related regulation, or is it forbidden from doing so? *Casey* and *Carhart* offer a clear answer to the question. In what follows we show how fundamentally the Fifth Circuit has misapplied those decisions.

The Fifth Circuit has collapsed the *Casey/Carhart* framework into a form of rational basis review that accords virtually no protection to the abortion decision as a constitutionally protected right. We show, first, that the Fifth Circuit's use of rational basis review is inconsistent with the Court's reasoning in *Carhart*. We then demonstrate that the Fifth Circuit's use of rational basis review destroys the distinction between the state's interests in protecting potential life and its interest in women's health, and in so doing, permits states to violate the restrictions *Casey* imposes on the means by which the state may protect unborn life.¹⁶⁵ Finally, we show that the weighted balancing test employed by the Seventh and the Ninth Circuits is faithful to constitutional values underlying the *Casey/Carhart* framework, whereas the Fifth Circuit's rational basis review is not.

1. Rational Basis and the *Casey/Carhart* Framework

The Fifth Circuit's claims about rational basis are not entirely clear. In *Abbott II*, Judge Jones initially acknowledges that *Carhart* applied the undue burden framework,¹⁶⁶ but she thereafter characterizes the undue burden framework as a rational basis test,¹⁶⁷ as does Judge

¹⁶⁴ *Whole Woman's Health v. Cole*, 790 F.3d 563, 584 (5th Cir. 2015) (affirming the rational basis reasoning of *Abbott II*), *mandate stayed pending judgment by* 135 S. Ct. 2923, *and cert. granted*, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274).

¹⁶⁵ *See supra* Part I.B.

¹⁶⁶ *See supra* text accompanying note 152 (quoting Judge Jones quoting *Carhart*).

¹⁶⁷ *See supra* text accompanying notes 149-154.

Elrod in *Whole Woman’s Health v. Lakey*.¹⁶⁸ The Fifth Circuit’s *per curiam* decision in *Whole Woman’s Health v. Cole*¹⁶⁹ again goes out of its way to reaffirm *Abbott II*’s rational basis reasoning.¹⁷⁰ Sometimes the Fifth Circuit treats only the question of whether an abortion restriction serves the interests of women’s health as subject to rational basis review.¹⁷¹ At other times, the Circuit makes a broader claim: that the entirety of the undue burden framework *is* a form of rational basis review.¹⁷² Whichever account the Circuit embraces, its rational-basis claims flout both *Casey* and *Carhart*.

The *Casey* framework is not rational basis. As we have observed, rational basis was the standard of review championed by the *dissenting* justices in *Casey*.¹⁷³ Nor did the Court’s ensuing decision in *Carhart* collapse the undue burden framework into rational basis review. Without a doubt, the *Carhart* decision bitterly disappointed the Justices who most fervently defended the abortion right.¹⁷⁴ That said, Justice Kennedy wrote *Carhart* to uphold the Partial Birth Abortion Ban Act on terms that accepted the continuing authority of *Casey*’s undue burden framework and the protection it provides for first and second-trimester abortions.¹⁷⁵

¹⁶⁸ See *supra* text accompanying note 163.

¹⁶⁹ 790 F.3d 563, *mandate stayed pending judgment by* 135 S. Ct. 2923, *and cert. granted*, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274).

¹⁷⁰ *Id.*

¹⁷¹ See *supra* text accompanying notes 149-157.

¹⁷² See *supra* text accompanying notes 154, 163.

¹⁷³ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 966 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (“States may regulate abortion procedures in ways rationally related to a legitimate state interest.”) (citation omitted); *id.* at 981 (Scalia, J., concurring in the judgment in part and dissenting in part) (“[A]pplying the rational basis test, I would uphold the Pennsylvania statute in its entirety.”).

¹⁷⁴ See *Gonzales v. Carhart*, 550 U.S. 124, 169-91 (2007) (Ginsburg, J., dissenting).

¹⁷⁵ See *id.* at 146 (reaffirming undue burden and observing “*Casey*, in short, struck a balance. The balance was central to its holding. We now apply its standard to the case at bar”); *id.* at 153-54 (construing the statute to avoid constitutional questions and protect ordinary second-trimester abortions).

It is true that the *Carhart* Court refers to rational basis—as we have seen, in the very sentence in which the Court expressly invokes the undue burden framework.¹⁷⁶ Whatever *Carhart*'s reference to “rational basis” means, it is not directing extravagant deference to the legislature of the kind the Fifth Circuit requires. In *Carhart* itself, the Court does not simply defer to Congress. Significantly, in upholding the Partial Birth Abortion Ban Act, Justice Kennedy observes, “The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake. . . . Uncritical deference to Congress’ factual findings in these cases is inappropriate.”¹⁷⁷ The *Carhart* Court probed and, in two instances, rejected congressional findings invoked by the government as reasons for enacting the Partial Birth Abortion Ban Act.¹⁷⁸ Probing Congress’s reasons behind enacting the challenged statute is not rational basis review of the kind that the Fifth Circuit mandates, especially when the Circuit observed that “[a] law ‘based on rational speculation unsupported by evidence or empirical data’ satisfies rational basis review.”¹⁷⁹

In *Carhart*, the Court does employ a form of deference—though not the rational basis review that swallows or supplants *Casey*'s undue burden framework. In *Carhart*, the Court rejects the argument that Congress was obliged to provide a health exception to the banned procedure, concluding that the statute withstood at least a facial challenge. The Court grounds this conclusion in the District Courts’ findings that medical opinion was divided on the need for

¹⁷⁶ *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007); see *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott II)*, 748 F.3d 583, 590 (5th Cir. 2014) (characterizing *Carhart* as “holding that the State may ban certain abortion procedures and substitute others provided that ‘it has a rational basis to act, and it does not impose an undue burden’” (quoting *Carhart*, 550 U.S. at 158)).

¹⁷⁷ 550 U.S. at 165-66 (2007) (“In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.” (quoting *Crowell v. Benson*, 285 U.S. 22, 60 (1932))); see also *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014) (following these passages of *Carhart*).

¹⁷⁸ *Carhart*, 550 U.S. at 165-66 (drawing on evidence presented in the district courts to reject the claim that no medical schools provided training in the abortion method, the statute banned and the claim that “the prohibited procedure is never medically necessary.”).

¹⁷⁹ *Abbott II*, 748 F.3d at 594 (citations omitted).

such an exception,¹⁸⁰ reasoning that “[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.”¹⁸¹ The condition of medical uncertainty is established through judicial review—in *Carhart* itself, this was done through the fact finding of the District Courts.

In *Whole Woman’s Health v. Cole*, the Fifth Circuit seizes on this language as additional warrant for judicial deference, asserting that “medical uncertainty underlying a statute is for resolution by legislatures, not the courts.”¹⁸² The Circuit is wrong to rely on this language as it does. The medical uncertainty of which the Court spoke in *Carhart* was anchored in the fact-finding of the two District Courts whose judgments were on review. By contrast, the Fifth Circuit finds uncertainty by *rejecting* the fact-finding of the District Court. In the Texas case, the District Court probed the justification of the legislature for enacting H.B. 2 and found no credible evidence to support either the admitting-privilege requirement or the ambulatory-surgical-center requirement. The Fifth Circuit found uncertainty in the record, rejecting the District Court’s findings and instead crediting the State’s contrary assertions.¹⁸³ Throughout, the Circuit Court chastised the District Court, admonishing that “[i]t is not the courts’ 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.”¹⁸⁴ In short, the “uncertainty” the Fifth Circuit finds to warrant deference to the legislature is produced in significant part by deferring to the legislature.

¹⁸⁰ See *Carhart*, 550 U.S. at 143-44.

¹⁸¹ *Id.* at 163.

¹⁸² *Whole Woman’s Health v. Cole*, 790 F.3d 563, 587 (5th Cir. 2015) (chastising the trial court for “substituting its own judgment for that of the legislature”), *mandate stayed pending judgment by* 135 S. Ct. 2923, *and cert. granted*, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274).

¹⁸³ On admitting privileges, see *Cole*, 790 F.3d at 587 (explaining why *Abbott II* “disavowed the inquiry employed by the district court”). On the ambulatory-surgical-center requirement, see *id.* at 584-86.

¹⁸⁴ *Id.* at 587 (quoting *Abbott II*, 748 F.3d at 594). The same opinion says “[t]he district court erred by substituting its own judgment for that of the legislature” *Id.*

If appellate courts can justify deference to the legislature by invoking medical uncertainty that is untethered from facts found and credibility determinations made by the trial court,¹⁸⁵ they can easily erode protections for constitutional rights. Whatever deference *Carhart* might be read to warrant, it cannot be the extravagant deference to the legislature that the Fifth Circuit practices here.

2. How Review of Health-Justified Restrictions Protects the Decisional Right *Casey* Recognizes

At root, the Fifth Circuit’s extravagantly deferential “rational basis” decisions err in reasoning about the review of abortion restrictions as if they were ordinary social and economic legislation unconnected to constitutional rights. The Circuit fails to protect the decisional right the *Casey/Carhart* framework recognizes. States may have a right to regulate the practice of abortion, but, even after *Carhart*, that prerogative is by no means unconstrained or absolute. In *Carhart*, the Court emphasized that *Casey*’s undue burden standard “struck a balance” between protecting “the woman’s exercise of the right to choose” and the ability of the state to “express profound respect for the life of the unborn.”¹⁸⁶ To preserve this balance and protect a woman’s right to make “the ultimate decision”¹⁸⁷ about whether to carry a pregnancy to term, *Casey* imposed constitutional limits on the means by which the state could vindicate its interest in

¹⁸⁵ The District Court found that the testimony of the state’s key expert witnesses lacked “the appearance of objectivity and reliability” because a non-physician third party exerted “considerable editorial . . . control” over the contents. *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 680 n.3 (D. Tex. 2014), *aff’d in part, vacated in part, rev’d in part sub nom. Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *mandate stayed pending judgment by* 135 S. Ct. 2923, *and cert. granted*, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274). In finding “medical uncertainty,” the Fifth Circuit rejected the findings of the District Court and endorsed the state’s evidence without ever mentioned the adverse credibility findings made by Judge Yeakel. *See Cole*, 790 F.3d at 585 (5th Cir. 2015).

¹⁸⁶ *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

¹⁸⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992).

protecting potential life.¹⁸⁸ Government must persuade women to continue a pregnancy; it cannot obstruct women's access to abortion.

As we have shown, protecting the woman's exercise of the right to choose requires judges sharply to distinguish between restrictions on abortion asserted to protect women's health from those asserted to protect unborn life, in order to ensure that state efforts to protect unborn life remain dissuasive in form, as *Casey* requires. Judicial review that probes the factual basis of the state's claim to restrict abortion in the interests of protecting women's health thus protects the exercise of the decisional right that *Casey* recognizes.

The Texas law demonstrates how a state can enact weakly justified health restrictions on abortion that obstruct women's efforts to end a pregnancy in ways that do not involve reasoning with women or attempting to dissuade them as *Casey* requires. Strikingly, as it defended the Texas statute, the state offered a series of different characterizations of its underlying justification, over time coming to describe the admitting-privileges law as protecting *both* women's health *and* unborn life.¹⁸⁹ Judge Yeakel criticized the state for attempting to

¹⁸⁸ See *supra* text accompanying note 37 (quoting *Casey*).

¹⁸⁹ See *supra* note 107 (discussing the state's shifting characterization of its interests in enacting the admitting-privileges and ambulatory-surgical-center requirements in *Abbott I* and *Cole*). In *Abbott I*, the state began by defending the admitting-privileges requirement as protecting women's health, see *supra* note 107, but, in arguing the case, the State's Solicitor General invoked both women's health and fetal life as rationales:

The plaintiffs' arguments in this case rest on a mistake in premise, that the challenged provisions of House Bill 2 were enacted exclusively for the purpose of protecting the health and safety of abortion patients. House Bill 2 was indeed enacted for that purpose. But the hospital admitting privileges requirement and the regulations on abortion-inducing drug also served to advance the State's interest in protecting fetal life, an interest that the plaintiffs never acknowledge in any of their briefing. . . . It's important to consider our disagreements with the plaintiffs in light of these dual interests at stake—the State's interest in promoting maternal health and the State's interest in protecting the life of the unborn child. . . . First, these laws were not enacted solely to advance the State's interest in maternal health. They were also enacted to advance the State's interest in promoting and protecting fetal life. A law that is enacted to advance the State's interest in the life of the unborn need not be medically necessary to survive constitutional challenge.

Transcript of Record at 27-28, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott I)*, 951 F. Supp. 2d 891 (2013) (No. 99) (quoting Jonathan Mitchell, Texas Solicitor Gen., in his opening argument).

supplement health-protective justifications with fetal-protective justifications, reasoning that under *Casey* it was unconstitutional for the state to protect unborn life by creating “obstacles to previability abortion” rather than by counseling against the decision to seek an abortion:

The primary interest proffered for the act’s requirements relate to concerns over the health and safety of women seeking abortions in Texas. To the extent that the State argues that the act’s requirements are motivated by a legitimate interest in fetal life, the court finds those arguments misplaced. *In contrast to the regulations at issue in Casey, the act’s challenged requirements are solely targeted at regulating the performance of abortions, not the decision to seek an abortion.* Here, the only possible gain realized in the interest of fetal life, once a woman has made the decision to have a previability abortion, comes from the ancillary effects of the woman’s being unable to obtain an abortion due to the obstacles imposed by the act. *The act creates obstacles to previability abortion. It does not counsel against the decision to seek an abortion.*¹⁹⁰

Judge Yeakel thus understood that preserving *Casey*’s framework requires first distinguishing fetal-protective and health-protective justifications for abortion restrictions, and second probing the factual basis of health-justified restrictions to ensure they serve health-related ends.

In reversing Judge Yeakel and rebuking him for examining the evidence that supported the state’s claim to restrict abortion in the interests of protecting women’s health,¹⁹¹ Judge Elrod never responded to his objection that Texas was protecting potential life by nondissuasive means, and was therefore violating *Casey*’s protection for women’s decisional autonomy. The Fifth Circuit’s hyper-deferential practice of rational basis review expressly sanctions this fusion and scrambling of rationales.

In closing argument, the State’s Deputy Solicitor General also invoked both interests to justify the admitting-privileges law:

Well, Your Honor, abortion is unique in the sense that there are competing interests that are at stake that are not just maternal health. As we have explained, there’s an ample maternal health justification for the provision, but there’s also the fetal life interest that the State has. So the fact that there are both of those interests makes it a little bit different than having an outpatient tonsillectomy or something.

Transcript of Record at 40–41, *Abbott I*, 951 F. Supp. 2d 891 (2013) (No. 101) (quoting Andrew Oldham, Texas Deputy Solicitor Gen., in his closing argument).

¹⁹⁰ *Lahey*, 46 F. Supp. 3d at 684 (emphasis added).

¹⁹¹ *Whole Woman’s Health v. Lahey*, 769 F.3d 285, 297 (5th Cir. 2014) (“In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes.”), *vacated in part*, 135 S. Ct. 399 (2014).

One could explain the Fifth Circuit’s failure to protect women’s decisional autonomy as an expression of deference to the state’s interest in protecting potential life. But one could also explain the Fifth Circuit’s failure to protect women’s decisional autonomy as an expression of a very particular view of women, one that elevates their reproductive capacity over other attributes of personhood in an explicit manner not seen in a judicial opinion for many years. When the parties in *Abbott II* called upon the Fifth Circuit to differentiate review of abortion laws enacted to protect potential life and to protect women’s health, Judge Jones refused, reasoning that “no such bifurcation has been recognized by the Supreme Court.”¹⁹² She then asserted that the two interests *cannot* be bifurcated because laws that protect a woman’s health protect her *as* a childbearer: “[T]he state’s regulatory interest cannot be bifurcated simply between mothers’ and children’s health; every limit on abortion that furthers a mother’s health also protects any existing children and her future ability to bear children even if it facilitates a particular abortion.”¹⁹³

As the Ninth Circuit understands but the Fifth Circuit does not, *Casey*’s undue burden framework *requires* courts to differentiate the state’s interests in protecting potential life and women’s health.¹⁹⁴ In protecting women’s health, government is *not* protecting potential life, a conflation of interests the Fifth Circuit sanctioned in *Abbott II*, and the Fourth Circuit sanctioned

¹⁹² Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (*Abbott II*), 748 F.3d 583, 590 (5th Cir. 2014). Judge Jones is wrong. Both *Roe* and *Casey* clearly distinguish the government’s interest in regulating abortion to protect women’s health and to protect unborn life. *See supra* note 67.

¹⁹³ *Id.* We observe that in its most recent decision the Fifth Circuit seems to have retreated from this position. It there characterizes the purpose of the Texas law as protecting “the health and welfare of women seeking abortions.” Whole Woman’s Health v. Cole, 790 F.3d 563, 584 (5th Cir. 2015) (citing the state senate committee’s bill analysis), *mandate stayed pending judgment by* 135 S. Ct. 2923, *and cert. granted*, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274).

¹⁹⁴ For the Ninth Circuit’s insistence on separating review of legislation protecting potential life and review of legislation protecting women’s health, see *supra* note 144 and accompanying text.

in *Greenville*.¹⁹⁵ The government has long regulated women’s conduct with the view that women are defined by their role in childbearing, an understanding the Court endorsed more than a century ago in *Muller v. Oregon*.¹⁹⁶ But *Casey* rejects this traditional view of women¹⁹⁷ and instead insists that respect for women’s dignity requires giving women control over the decision whether to become a mother.¹⁹⁸ That is *why* the undue burden test restricts the means by which government may protect unborn life: government cannot prevent women from obtaining an abortion but instead must, if it chooses, seek to persuade women to bring a pregnancy to term through the provision of truthful, non-misleading information.

3. Comparing Review of Health-Justified Restrictions Across Circuits

As courts outside the Fifth Circuit understand, judicial review that differentiates between the state’s interest in protecting potential life and the state’s interest in protecting women’s health secures *Casey*’s protection for women’s decisional autonomy. Ensuring that health-justified restrictions actually and effectively serve health-related ends is, of course, also required by *Casey*’s language prohibiting “unnecessary” health laws that impose “undue burdens.”¹⁹⁹

¹⁹⁵ *Greenville Women’s Clinic v. Bryant*, 222 F. 3d 157, 205 (4th Cir. 2000) (discussed *supra* text accompanying notes 91-93). The Texas Solicitor General’s office also embraces the dual-interest account of its own health restrictions, see *supra* note 189, or what we have termed “abortion exceptionalism.” See *supra* note 93 and accompanying text.

¹⁹⁶ See 208 U.S. 412, 422 (1908) (“Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.”).

¹⁹⁷ The portion of the *Casey* decision attributed to Justice Kennedy rejects this traditional understanding of women’s roles precisely as it affirms women’s liberty interest in deciding whether to become a mother, free of government control. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992):

[A woman’s] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

¹⁹⁸ See *supra* note 43 and accompanying text.

¹⁹⁹ See *supra* text accompanying note 68.

Outside the Fifth Circuit, proper judicial review under *Casey* takes at least two forms. First, judges look to weak evidence in support of a health-restriction in finding violations of the undue burden standard's purpose prong.²⁰⁰ For example, in *Wisconsin*, Judge Conley ruled that the state's admitting-privileges law was enacted for the improper purpose of imposing a substantial obstacle to obtaining an abortion.²⁰¹ He rested this judgment on classic indicia of pretext: The state introduced no evidence in support of the admitting-privileges law, imposed the requirement with one weekend's notice, and targeted abortion providers only, exempting procedures of greater risk.²⁰² In affirming the trial court's finding of a purpose to impose a substantial obstacle, Judge Posner additionally emphasized the fact that the state had singled out abortion for health requirements that it hadn't imposed on procedures of greater risk:

Opponents of abortion reveal their true objectives when they procure legislation limited to a medical procedure—abortion—that rarely produces a medical emergency. A number of other medical procedures are far more dangerous to the patient than abortion, yet their providers are not required to obtain admitting privileges anywhere, let alone within 30 miles of where the procedure is performed.²⁰³

Inconsistent conduct, singling out abortion, or weak factual support for the restriction can supply objective evidence of unconstitutional purpose. (“*Wisconsin* appears to be indifferent to

²⁰⁰ *Casey*, of course, invites this inquiry into improper purpose when it explains that “[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.” *Casey*, 505 U.S. at 877 (1992).

²⁰¹ *Planned Parenthood of Wis., Inc. v. Van Hollen*, 2015 U.S. Dist. LEXIS 35389, at *129-32; cf. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott I)*, 951 F. Supp. 2d 891, 901 (W.D. Tex. 2013) (finding health-justified restriction lacked a rational basis), *rev'd*, 748 F.3d 583 (5th Cir. 2014).

²⁰² See *Van Hollen*, 2015 U.S. Dist. LEXIS 35389, at *129-32. For another example of a trial judge finding improper purpose under the undue burden framework, see *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 685 (W.D. Tex. 2014) (concluding “that the ambulatory-surgical-center requirement was intended to close existing licensed abortion clinics”), *aff'd in part, vacated in part, rev'd in part sub nom.* *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *mandate stayed pending judgment by* 135 S. Ct. 2923, *and cert. granted*, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274).

²⁰³ *Planned Parenthood of Wisc. v. Schimel*, 806 F.3d. 908 (7th Cir. 2015), at *13.

complications of any other outpatient procedures, even when they are far more likely to produce complications than abortions are.”²⁰⁴)

Yet proof of collective purpose is difficult—even when purpose is not defined by difficult-to-satisfy liability rules of the kind that prevail in the equal protection area²⁰⁵—because judges are generally reticent to accuse state legislators of bad faith.²⁰⁶ This problem seems especially acute in the abortion context. Even if the legislators who enact a health-justified restriction on abortion publicly announce their aim to limit access to the procedure,²⁰⁷ judges may understand such legislators to act for benign rather than bigoted ends, a difference that, for many may mitigate the legislators’ choice of unconstitutional means—especially if the purpose of the law is considered without attention to the law’s impact on women.

Considering the factual support for a health-restriction under the effects prong of the undue burden inquiry avoids some of the difficulties of a purpose-focused approach. The weighted balancing test that Judge Posner employed in applying the undue burden framework to health-justified restrictions can be understood as smoking out unconstitutional motivation without ever requiring judges to identify direct evidence of illicit purpose. Examining the facts that justify a health regulation is also important in evaluating the law’s effects. Considering the extent to which a law advances the state’s interest in protecting health is crucial in determining whether the burden it imposes on women’s choice is warranted : “The feebler the medical

²⁰⁴ *Id.* at *6.

²⁰⁵ For evolution of the standards for proving discriminatory purpose toward an increasingly difficult to satisfy liability rule, see Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 9-23 (2013).

²⁰⁶ See, e.g., *Planned Parenthood of Wis. v. Van Hollen*, 738 F.3d 786, 791 (7th Cir. 2013):

Discovering the intent behind a statute is difficult at best because of the collective character of a legislature, and may be impossible with regard to the admitting-privileges statutes. Some Wisconsin legislators doubtless voted for the statute in the hope that it would reduce the abortion rate, but others may have voted for it because they considered it a first step toward making invasive outpatient procedures in general safer.

²⁰⁷ See *supra* text accompanying notes 104-105.

grounds, the likelier the burden, even if slight, to be ‘undue’ in the sense of disproportionate or gratuitous.”²⁰⁸ A weighted balancing test of this kind seems to faithfully implement *Casey*’s directions to judges to distinguish between necessary and “unnecessary” health regulations.²⁰⁹ The weight of the health justification for a law is thus relevant to the effects as well as the purpose prongs of the *Casey* inquiry: As Judge Posner observed, if the state’s showing of health need is weak, a judge has stronger grounds for finding the law’s impact on access to be “undue.”²¹⁰ This method of incorporating the evidence in support of a health-justified restriction on abortion into the undue burden inquiry seems to us unquestionably correct. Undue means unwarranted. Undue means disproportionate. Undue is a *relative* judgment. As the judges who employ the weighted balancing test understand, the question of what adverse effects are “undue” depends on the strength of the state’s demonstration of a health justification for the restriction on abortion—on whether a restriction is “unnecessary” to protect women’s health, hence imposes an “undue burden” on women’s access to abortion.

²⁰⁸ *Van Hollen*, 738 F.3d at 798. Judge Posner has expressly reaffirmed this framework. *See* *Planned Parenthood of Wisc. v. Schimel*, 806 F.3d. 908 (7th Cir. 2015), at *11:

To determine whether the burden imposed by the statute is “undue” (excessive), the court must “weigh the burdens against the state’s justification, asking whether and to what extent the challenged regulation actually advances the state’s interests. If a burden significantly exceeds what is necessary to advance the state’s interests, it is ‘undue,’ ” *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir.2014), which is to say unconstitutional. The feebler the medical grounds (in this case, they are nonexistent), the likelier is the burden on the right to abortion to be disproportionate to the benefits and therefore excessive.

²⁰⁹ *See Casey*, 505 U.S. at 878 (“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.”). The Ninth Circuit similarly justifies the weighted balancing test it employs to enforce *Casey* as following from the Court’s instructions to bar “undue” burdens and “unnecessary” health regulations. *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 912-13 (9th Cir. 2014).

²¹⁰ *See supra* text accompanying note 135. In reversing Judge Yeakel’s conclusion that Texas’s ambulatory-surgical-center requirement was enacted for the purpose of closing clinics, the Fifth Circuit dismissed the evidence on which the District Court judge focused as “purely anecdotal” and, citing *Casey*, reasoned that the plaintiffs “failed to prove that [the law] ‘serve[s] no purpose other than to make abortions more difficult.’” *Whole Woman’s Health v. Cole*, 790 F.3d 563, 585-86 (5th Cir. 2015) (citing *Casey*, 505 U.S. at 901), *mandate stayed pending judgment by* 135 S. Ct. 2923, *and cert. granted*, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274). But *Casey* does not only inquire into improper purpose. It asks judges to evaluate whether the evidence shows that health-justified abortion restrictions are “unnecessary.”

Precisely because undue means unwarranted or disproportionate, the judgment about which adverse effects are undue *will vary across contexts*. The proposition might seem unremarkable, but it stands dramatically at odds with the practice of courts that derive rules from *Casey* about the kinds of adverse effects that are licit under the undue burden test.

Exemplary are decisions of the Fifth Circuit that purport to derive from *Casey* rules of general application about driving distances and undue burdens. Consulting the record in *Casey*, Judge Priscilla Owen observed:

In *Casey*, the Supreme Court considered whether a Pennsylvania statute that de facto imposed a twenty-four-hour waiting period on women seeking abortions constituted an undue burden. The Court concluded that it did not, despite the fact that it would require some women to make two trips over long distances. An increase in travel distance of less than 150 miles for some women is not an undue burden on abortion rights.²¹¹

Judge Edith Jones approvingly affirmed and extended this reasoning.

[T]he Supreme Court recognized that the 24-hour waiting period would require some women to make two trips over these [long] distances ... [and] nonetheless held that the Pennsylvania regulation did not impose an undue burden. We therefore conclude that *Casey* counsels against striking down a statute solely because women may have to travel long distances to obtain abortions.²¹²

Here, as elsewhere, the Fifth Circuit distorts *Casey*. The joint opinion evaluated the constitutionality of the driving distances in question *as effects of a statute imposing a twenty-four-hour waiting period*;²¹³ the joint opinion judged these burdens acceptable (not “undue”)

²¹¹ Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (*Abbott I*), 734 F.3d 406, 415 (5th Cir. 2013) (footnote omitted). The joint opinion did not in fact establish any mileage limit below which a regulation might be immunized from undue burden review. It simply acknowledged that the waiting period might require “some women” to make a prior trip of some unspecified distance before obtaining an abortion on the second trip. *Casey*, 505 U.S. at 886-887. The District Court in *Casey* had found as a matter of fact that the nearest abortion clinic for women in sixty-two of the state’s sixty-seven counties was at least one hour and as many as three hours away. Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1352 (E.D. Pa.1990), *aff’d in part, rev’d in part*, 947 F.2d 682 (3d Cir. 1991), *aff’d in part, rev’d in part*, 505 U.S. 833 (1992).

²¹² Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (*Abbott II*), 748 F.3d 583, 598 (5th Cir. 2014).

²¹³ See *Casey*, 505 U.S. at 885-87.

because they were an incident of the state's effort to dissuade women from ending a pregnancy.

The opinion could not be clearer: “Because the informed consent requirement facilitates the wise exercise of [the abortion] right, it cannot be classified as an interference with the right *Roe* protects.”²¹⁴ The *form* of the restriction mattered centrally to authors of the joint opinion as they determined what burdens on exercise of the right were undue:

What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. 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.²¹⁵

As these passages of *Casey* illustrate, the question of whether an adverse effect or burden is undue depends on the manner in which the state is vindicating its interest in regulating abortion. Burdens that the joint opinion found acceptable as an incident of the state's efforts to dissuade women from seeking an abortion do *not* represent generally acceptable measures of the burdens the state may inflict on women when it closes clinics for unnecessary or weakly supported health reasons.

Beyond this, the deeper error of the Fifth Circuit's reading of *Casey* is its claim to apply the undue burden standard—a standard that vindicates a constitutional value—as a context-*insensitive* rule. The Court embraced the undue burden framework as a way to protect women's liberty: the conditions in which women would exercise their constitutionally protected choice whether to become a mother.²¹⁶ *Casey* protects women's liberty by restricting the means by which government may protect potential life. If government chooses to protect potential life, it

²¹⁴ *Id.* at 887.

²¹⁵ *Id.* at 877.

²¹⁶ *See id.* at 874 (“Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”); *see also supra* note 43 and accompanying text (quoting Justices O'Connor, Kennedy, and Souter's opinion in *Casey*).

may not obstruct women’s access to abortion, but must persuade women to choose motherhood by means that respect women’s dignity.

In upholding a law that was enacted for the nominal purpose of protecting women’s health, yet would foreseeably shut down most abortion clinics in the state—leaving millions of Texas women to exercise the choice *Casey* protects by driving hundreds of miles, if they can²¹⁷—the Fifth Circuit mocks *Casey*,²¹⁸ if not the Constitution itself.

Conclusion

Casey’s language *and* its logic both point in the same direction: *Casey* requires judges to weigh the evidence supporting a health restriction on abortion against its impact on women’s access. If judges do not do so, “unnecessary health regulations” will erode constitutional protection for women’s choices. *Casey* requires states to protect potential life by means that respect women’s dignity. The Court has reaffirmed constitutional protections for dignity in *Lawrence v. Texas*²¹⁹ (where Justice Kennedy quotes *Casey* explicitly²²⁰), and more recently in *United States v. Windsor*²²¹ and *Obergefell v. Hodges*.²²² No less is required here.

²¹⁷ See *supra* notes 211-212 and accompanying text (discussing the kinds of burdens the Fifth Circuit claims that *Casey* allows government to impose on a woman deciding whether to become a mother).

²¹⁸ In a state where public officials openly discuss a law that purports to protect women’s health as designed to close abortion clinics, see *supra* note 104-107 and accompanying text, the Fifth Circuit repeatedly reverses and rebukes a trial judge for examining the state’s justification for enacting the law, see *supra* notes 153, 162, 191, and 202 and accompanying text. In so doing, the Fifth Circuit purports to apply *Casey* and *Carhart*, yet ignores language in those cases that directs a court to examine the factual basis of the state’s claim to protect women’s health. See *supra* notes 67-75, 177-178 and accompanying text.

As the Fifth Circuit well appreciates, if courts cannot examine the state’s reasons for restricting the exercise of constitutional rights, they are scarcely rights at all. Cf. *New Anti-Abortion Legislation Requires Doctors To Scale 18-Foot Wall Surrounding Clinic*, THE ONION (July 22, 2014), <http://www.theonion.com/article/new-anti-abortion-legislation-requires-doctors-to--36514> [<http://perma.cc/43HB-2SSG>] (reporting a new state law that requires doctors to climb an 18-foot wall to enter a medical facility that provides abortions, explaining that “[t]he Clinic Fortification and Physician Excellence Act calls for the construction of concrete barriers nearly two stories tall and 4 feet thick around all clinics offering abortion services, and for physicians working at these sites to scale such barricades unassisted, a landmark piece of legislation that supporters hailed as a victory for women’s health”).

²¹⁹ 539 U.S. 558 (2003).

²²⁰ *Id.* at 574 (quoting *Casey*, 505 U.S. at 851) (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of

Casey is not the opinion either of us would have written. Each of us believes the Constitution rightly understood provides more substantial protections for a woman’s decision whether to become a mother, especially given the exclusionary ways this nation has treated those who bear and rear children.

That said, there are reasons for the Court to stand behind its quarter-century-old decision that reach beyond *stare decisis*. We understand *Casey* to represent the Court’s good faith effort to pronounce the Constitution’s meaning for a divided nation. With Americans in bitter disagreement about the abortion question, the Court invoked the Constitution as a ground on which they were united and on which they could be asked to recognize each others’ views. In *Casey*, the Court interpreted the Constitution in a “call[] [for] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”²²³ The Court allowed the states more latitude to protect potential life *if* the states acted to protect potential life by means the Court understood to respect a women’s constitutionally protected decision whether to become a mother. As a nation divided, we need practices of mutual respect no less today than we did in 1992.

Casey did not authorize health-justified restrictions on abortion that are in fact unnecessary to protect women’s health and that obstruct women’s access to abortion. Judges who are willing to accept *Casey* understand this and strike down the regulations we have discussed

meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”)

²²¹ 133 S.Ct. 2675 (2013). *See, e.g., id.* at 2691-92, 2696.

²²² 135 S.Ct. 2585 (2015). *See, e.g., id.* at 2597, 2608.

²²³ *See Casey*, 505 U.S. 866-67 (“Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”).

here. Judges at war with *Casey* defer to the states' rationales in the face of overwhelming evidence that the health justifications for the restrictions offer a fig leaf for the expression of anti-abortion sentiment.

The stakes are high as the Court reviews a new generation of abortion restrictions that do not simply communicate the state's preference for childbirth but instead threaten wholesale destruction of the clinic infrastructure that enables women to exercise their constitutional right. Will states be permitted to restrict abortion in ways the Constitution prohibits merely by relabeling an interest in protecting unborn life as an interest in protecting women's health? Sanctioning laws of this kind threatens to make hollow the right *Casey* reaffirmed—all the more acutely so for the growing number of women living in jurisdictions hostile to abortion.

We have frequently referred here to women's dignity as a value that *Casey* sought to protect. At this crucial juncture in the never-ending abortion controversy, we suggest that courts must also be attentive to another claim to dignity: the dignity of law itself. If the decision announced nearly a generation ago under an intense public spotlight can be so easily manipulated and evaded, among the betrayed will be not only the women of America, but the understanding that *Casey* affirmed: that constitutional law matters, and matters especially in those precincts where we most deeply disagree.