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Note

PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES

V.

ABBOTT

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Abstract:

In the 1992 landmark case *Planned Parenthood v. Casey*, the United States Supreme Court famously upheld those portions of a Pennsylvania abortion statute imposing informed consent measures, a twenty-four hour waiting period, a parental notification requirement, and a reporting and record keeping system.[1] Under a newly articulated (and notoriously vague) "undue burden" test, the Court struck down only the statute's spousal notification requirement.[2] However, in establishing *Casey*'s unwieldy constitutional test for abortion regulation, the Court ushered in a new era of congressional and state abortion regulations and constitutional challenges thereto, leaving numerous unanswered questions and persistent uncertainty in its wake.

Among its most recent progeny, *Casey* spawned *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*,[3] the Fifth Circuit Court of Appeal's decision that upheld controversial abortion

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

2 *See id*. at 898.

3 748 F.3d 583, 587 (5th Cir. 2014).

regulations enacted by Texas under House Bill No. 2.[4] Focusing primarily on the *Abbott* court's application of *Casey's* "large fraction test," while also touching on the Court's treatment of legislative purpose, this Note demonstrates how *Abbott* got it wrong, and how future courts may apply *Casey's* standards in a manner consonant with the spirit of the law articulated by the Supreme Court in *Casey* nearly twenty-five years ago.

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4 *See generally* H.B. 2, 83rd Leg., 2d Spec. Sess. (Tex. 2013) (implementing new abortion regulations in Texas).

INTRODUCTION

According to the Supreme Court in *Planned Parenthood v. Casey*, "only where state regulation imposes an undue burden on a woman's ability to make [the abortion] decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."[5] In the two-plus decades following the Court's decision in *Casey*, scholars and various lower courts have grappled with what it means for a statute to impose an "undue burden" on a pregnant woman's choice to obtain an abortion.[6] Although the phrase itself suggests the possibility of a simple balancing test, involving both "an examination of the justifications offered in defense of a regulation as well as of the extent of its effects," the Court in *Casey* does not clearly purport to develop such a standard.[7] Instead, under *Casey*, "[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."[8]

Casey sternly warns: "Not every law which makes a right more difficult to exercise is, *ipso facto,* an infringement of that right. . . . [Thus,] 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."[9] The central concern then, with any challenge to an abortion regulation, lies in whether the law has an invalid purpose or if the law has the effect of placing a *substantial* obstacle in the way of a woman's right to an abortion.[10] Unfortunately, the Court's explanations hardly add clarity to the test. In fact, the majority opinion in *Casey* offers no explicit guidance on the application of the "purpose"

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5 *Casey*, 505 U.S. at 874.

6 *See, e.g.*, Planned Parenthood of Wisc., Inc. v. Van Hollen, 738 F.3d 786, 798–99 (7th Cir. 2013), *cert. denied,* 134 S. Ct. 2841 (2014); Lucy E. Hill, Note, *Seeking Liberty's Refuge: Analyzing Legislative Purpose Under Casey's Undue Burden Standard*, 81 FORDHAM L. REV. 365, 369, 391–401 (2012); Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2034 (1994).

7 Metzger, *supra* note 6, at 2025, 2034.

8 *Casey*, 505 U.S. at 877.

9 *Id*. at 873–74.

10 *See id*. at 877.

prong of the *substantial obstacle* test and fails to provide a very clear picture of what might actually constitute a "substantial obstacle."[11]

However, in striking down the spousal notification requirement, the majority opinion in *Casey* does hone the operative language of the undue burden test by limiting the inquiry to those "for whom the law is a restriction, not the group for whom the law is irrelevant."[12] Thus, courts reviewing abortion regulations must decide whether the regulation places a "substantial obstacle" in the path of a "large fraction" of the women "for whom the law . . . is relevant." Using these principles, the Court in *Casey* concludes that "[t]he spousal notification requirement is . . . likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle."[13]

In *Planned Parenthood of Greater Texas Health Services v. Abbott*, the Fifth Circuit Court upheld the two challenged portions of Texas House Bill 2, regulations that would (1) require physicians performing abortions to have admitting privileges at a hospital within 30 miles,

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11 *Id.* at 878 ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.").

12 *Id.* at 894–95 ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant. Respondents' argument itself gives implicit recognition to this principle, at one of its critical points. Respondents speak of the one percent of women seeking abortions who are married and would choose not to notify their husbands of their plans. By selecting as the controlling class women who wish to obtain abortions, rather than all women or all pregnant women, respondents in effect concede that § 3209 must be judged by reference to those for whom it is an actual rather than an irrelevant restriction. Of course, as we have said, § 3209's real target is narrower even than the class of women seeking abortions identified by the State: it is married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement. The unfortunate yet persisting conditions we document above will mean that in a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.").

13 *Id*. at 893–94.

and (2) require widely used forms of "medication abortion"[14] to meet certain FDA standards.[15]

However, the Fifth Circuit Court has since found that (1) H.B. 2's admitting privileges requirement is unconstitutional *as-applied* to the abortion facility in McAllen, Texas and 2) H.B. 2's requirement that abortion clinics meet standards set for ambulatory surgical centers is constitutional as-applied to the physician at the abortion facility in McAllen, Texas.[16] In *Whole Woman's Health v. Cole*, the Fifth Circuit Court substantially upheld the trial court's injunction prohibiting the enforcement of the law against the McAllen abortion facility, "until such time as another licensed abortion facility becomes available to provide abortions at a location nearer to the Rio Grande Valley than San Antonio," because "women in the Rio Grande Valley will have to travel approximately 235 miles to San Antonio or farther to obtain an abortion."[17] On appeal to the United States Supreme Court, Whole Woman's Health has renewed its facial challenge of H.B.2, attacking both the ASC requirement and the admitting privileges requirement.[18]

In the sections that follow, this Note will demonstrate (1) how the Fifth Circuit Court in *Abbott* incorrectly applied *Casey's* "undue burden" test in deciding that H.B. 2 did not have the improper purpose and effect of placing a substantial obstacle in the way of women seeking an abortion in Texas and (2) how the Supreme Court may both correct the lower courts' errors and revive the right of women in the United State to seek an abortion. This Note will first analyze and clarify *Casey's* "undue burden" test, drawing upon subsequent holdings, scholarly analysis, as well as the text of the opinion itself. It will then demonstrate how the Court in *Abbott* incorrectly applied the "undue burden" test to, and how a correct reading of *Casey* along with the newly developed facts of the case may, enable the court to vindicate

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14 Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 587 (5th Cir. 2014) (using the unscientific term "medication abortion" to describe an abortion treatment involving a particular abortifacient).

15 *Id*. at 600–01.

16 Whole Woman's Health v. Cole, 790 F.3d 563, 596 (5th Cir. 2015), *modified*, 790 F.3d 598, 598 (5th Cir. 2015).

17 *Id*. at 593–94; *Cf. Abbott*, 748 F.3d at 597–98.

18 *Cole*, 790 F.3d at 566–67.

the rights of women in Texas. Finally, this Note will discuss how the outcome of *Abbott* underscores the malleability of *Casey*'s standards as well as the urgent need for the Supreme Court to reinforce the constitutional right to abortion, which continues to suffer both the mischief of legislatures and the apathy of deferential courts.

In view of the peculiar nature of the law in question and the rights burdened thereunder, the Court in *Abbott* not only abdicated its responsibility to thoroughly scrutinize legislative encroachment on constitutionally protected rights (encroachments, which in this case, likely have the purpose or effect of placing a substantial obstacle in the path of women seeking abortions), but likely left many of the women most affected with no adequate remedy. Correctly construed, however, *Casey*'s undue burden standard may yet provide a reasonably powerful check on the power of legislatures bent on limiting women's right to seek an abortion.

I. THE *ABBOTT* COURT ABDICATED ITS RESPONSIBILITY TO SCRUTINIZE THE LEGISLATIVE PURPOSE, DESPITE JUDICIAL AUTHORITY EMPOWERING THE COURT TO DO SO:

Few courts have earnestly attempted to clarify *Casey*'s notion of an "invalid legislative" purpose, and those which have attempted some sort of clarification remain divided with respect to how much deference the courts should accord legislatures that make laws burdening women's right to an abortion.[19] *Casey* appears to invite courts to conduct a more searching review of legislative purpose;[20] however, subsequent opinions emanating from the Supreme Court sometimes seem to temper such judicial authority.[21] In view of the conflict, the circuit courts have produced wildly disparate

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19 Hill, *supra* note 6, at 369.

20 The Court in *Casey* states, without qualification, that "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," suggesting such regulations must do more than serve some speculatively rational purpose. *See Casey*, 505 U.S. at 878.

21 *See* Gonzales v. Carhart, 550 U.S. 124, 158 (2007); Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam).

interpretations of *Casey*'s purpose prong. Lucy Hill neatly summarizes the circuit court split as follows:

> The lower courts have struggled with (1) what constitutes a permissible legislative purpose; (2) how compelling that purpose must be to justify limiting the right to seek an abortion; and (3) the appropriate level of deference to the state's proffered purposes. The Supreme Court perpetuated this confusion by suggesting, in dicta, that an unconstitutional purpose alone may not be enough to invalidate an abortion law . . . .
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> . . . As a result of this uncertainty, various circuits have adopted different analyses of the purpose prong. The Tenth, Fifth, and Eighth Circuits have struck down laws based on impermissible purpose, though only the Eighth Circuit has done so on the basis of purpose alone, with no finding of an unconstitutional effect. These circuits apply a more searching review of the stated legislative purpose, and apply heightened scrutiny to the laws. Relying upon the *Mazurek* dicta, the Seventh and Fourth Circuits have taken a different approach to evaluating legislative purpose, and have invalidated laws on the basis of improper purpose only if they fail rational basis review (i.e., the law is not rationally related to a legitimate government interest). Therefore, there is a conflict among the circuits regarding how to evaluate legislative purpose and how significant that purpose must be to uphold the abortion law in question.[22]

The text of the Court's opinion in *Casey*, and subsequent decisions concerning abortion regulations, strongly suggest that the Court's reference to an "invalid purpose" is not an idle reference to rational basis review. However, the totality of the Supreme Court's abortion jurisprudence also suggests that the undue burden test does not evaluate legislative purpose along the ordinary spectrum of balancing tests used by courts to weigh legislative purpose (e.g., evaluation under "strict scrutiny").

In *Mazurek v. Armstrong*, physicians in Montana challenged the constitutionality of a Montana statutory provision restricting performance of abortions to licensed physicians.[23] The Ninth Circuit Court found: "A determination of purpose in the present case . . .

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22 Hill, *supra* note 6, at 369–92 (emphasis added) (footnotes omitted).

23 *Mazurek*, 520 U.S. at 968.

properly require[s] an assessment of the totality of circumstances surrounding the enactment of [the physician-only law], and whether that statute in fact can be regarded as serving a legitimate health function."[24]

However, "[t]he Supreme Court remanded the Ninth Circuit's decision, and called into question whether an invalid purpose alone can constitute a justification for declaring a law unconstitutional."[25] According to the Supreme Court, "[E]ven assuming the correctness of the Court of Appeals' implicit premise—that a legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right . . . could render the Montana law invalid—there is no basis for finding a vitiating legislative purpose here."[26]

In *Gonzales v. Carhart*, "the Court upheld the constitutionality of the Partial Birth Abortion Ban Act of 2003 (Act). The Act banned a particular form of abortion known as intact dilation and extraction, which is performed late in pregnancy."[27] Ultimately, the Court concluded that state legislatures may ban the procedure in the face of "medical uncertainty" as to the necessity of the procedure, as long as the ban rationally advances the state's legitimate interest in expressing its profound respect for human life.[28]

Despite the Supreme Court's long-standing use of rational basis review, a standard it has refined over centuries of jurisprudence, the Court in *Casey* repeatedly declined to refer to "rational basis" review or even employ the language of rational basis review in describing the "purpose" prong of the undue burden test.[29] Had the Court simply intended to subject abortion regulations to rational basis review, then it could have clearly indicated its purpose by referring to the analysis utilizing rational basis terms.

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24 Hill, *supra* note 6, at 386 (quoting Armstrong v. Mazurek, 94 F.3d 566, 567 (9th Cir. 1996), *rev'd*, 520 U.S. 968 (1997)).

25 *Id.* (referencing *Mazurek*, 520 U.S. at 972).

26 *Id*. (quoting *Mazurek*, 520 U.S. at 972).

27 *Id.* at 388 (footnotes omitted) (discussing Gonzales v. Carhart, 550 U.S. 124, 132–37 (2007)).

28 *See id*. at 389.

29 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992).

Additionally, and perhaps more importantly, the Supreme Court in *Gonzales* distinguishes between "rational basis review" and the "purpose prong" of the undue burden test, suggesting not only that courts must subject abortion regulations to rational basis review *first*, but also that such a review *precedes rather than supplants* further analysis under the purpose prong of the undue burden test.[30] Furthermore, the *Casey* plurality rejects the dissenting opinion of Chief Justice Rehnquist, which primarily distinguishes itself in offering to assess abortion regulations under some form of rational basis review.[31] Since the *Casey* plurality did not join in the Chief Justice's opinion, the Court's notion of an "invalid purpose" almost certainly contemplates a more stringent constitutional test than the low bar set by rational basis review.[32]

Surprisingly, the Fifth Circuit Court itself attempted a rather robust and searching review of legislative purpose behind abortion regulation in a prior abortion case, *Okpalobi v. Foster*.[33] Although the court in *Okpalobi* acknowledged that Supreme Court precedent "has instructed that we should typically afford a government's articulation of legislative purpose significant deference."[34] The court also concluded:

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30 *See* Gonzales v. Carhart, 550 U.S. 124, 158 (2007) ("Where it has a rational basis to act, *and* it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.") (emphasis added).

31 *See Casey*, 505 U.S. at 944–79 (Rehnquist, C.J., dissenting).

32 Interestingly, rational basis review and the purpose prong of the undue burden test may ultimately evaluate the same thing—legislative purpose—but they are not mutually inclusive and therefore not redundant. Logically, a piece of legislation may fail rational basis review despite not having the impermissible purpose or effect of placing a substantial obstacle in the path of woman. Likewise, a piece of legislation may have a rational basis while having a purpose that is nevertheless invalid. Thus, although the two tests evaluate essentially the same thing, i.e., legislative purpose, the undue burden test does not itself transform rational basis review into a redundancy. On the contrary, the undue burden test only becomes a redundancy if courts begin to apply the test in a manner that renders it indistinguishable from rational basis review.

33 190 F.3d 337 (5th Cir. 1999).

34 *Id.* at 354 (referencing Shaw v. Hunt, 517 U.S. 899 (1996)).

> [W]e are not to accept the government's proffered purpose if it is a mere "sham." More specifically, in conducting its impermissible purposes inquiries, the Court has looked to various types of evidence, including the language of the challenged act, its legislative history, the social and historical context of the legislation, or other legislation concerning the same subject matter as the challenged measure.[35]

Despite the Fifth Circuit's previous assertion of expansive judicial authority in the assessment of legislative purpose in *Okpalobi* (a case that was later reversed on other grounds), the Fifth Circuit Court in *Abbott* proceeds, without reference to its earlier assertions in *Okpalobi,* to apply a highly deferential form of rational basis review, sometimes referred to as "rational speculation," before effectively side-stepping the issue of legislative purpose altogether.[36] According to the Fifth Circuit Court in *Abbott*, the law does not permit the court to discern an invalid purpose behind the abortion regulations in question because plaintiffs failed to explicitly attack the state's purpose in their brief and failed to supply sufficient evidence that the State acted with improper purpose.[37] Here, the court effectively combines an inaccurate and uncharitable reading of plaintiffs' brief with an overstated procedural obstacle to effectively treat the regulations in question with the same extreme deference exhibited by the Fourth and Seventh Circuit Courts in previous abortion cases, the same radical deference never before authorized or accepted by the Supreme Court's abortion jurisprudence.

Contrary to the court's uncharitable reading of plaintiffs' brief, plaintiffs nowhere concede the validity of the State's alleged purpose in enacting H.B. 2. On the contrary, plaintiffs expressly regard the State's position as one that relies upon a standard of review even less stringent than traditional rational basis review. According to plaintiffs' reply brief, "[i]t cannot be the case, as [d]efendants suggest, that this Court's review of [p]laintiffs' patients' privacy rights amounts to

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35 *Id.* (citing Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987) (citation omitted)).

36 *See* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 594 (5th Cir. 2014).

37 *Id.* at 597 ("Moreover, the plaintiffs offered no evidence implying that the State enacted the admitting privileges provision in order to limit abortions . . . There is thus no basis for a finding of impermissible purpose under *Casey*.").

something less than even rational basis review."[38] While plaintiffs proceed to attack the State's alleged rational basis on grounds that the law does not rationally relate to its purported purpose, plaintiffs do not thereby stipulate to the validity of the State's purported purpose as the Fifth Circuit suggests.

On the contrary, the plaintiffs' explicit attack on the law's purported rational basis impliedly undermines the validity of the State's alleged purpose, because statutes are much less likely to have a valid purpose if such statutes are not even rationally related to such purpose. The dysfunction of so many legislatures notwithstanding, legislatures acting with valid legislative purposes regularly demonstrate their ability to craft legislation rationally related to these ends (How strange then to find a piece of legislation with a valid legislative purpose that would altogether fail to advance such purpose but very successfully burden the constitutional rights of women seeking an abortion!). Thus, where Plaintiffs' Reply Brief primarily challenges the State's alleged rational basis, it also calls into question the validity and authenticity of the legislature's purpose.[39]

Additionally, while the Fifth Circuit acted within its discretionary authority in deciding to ignore an issue not explicitly raised by the plaintiffs on appeal, the law does not so clearly require it to make such a concession to the State. On the contrary, "whether or not to consider untimely raised issues is left to the court's discretion" and "this discretion [is exercised] on a case-by-case basis, [in which courts] determine whether it is appropriate to consider new issues 'under all the circumstances.'"[40] Evidently, the court did not find that the circumstances in *Abbott* necessitated review of the issues not explicitly raised by the parties on appeal. However, perhaps it should have, given the important constitutional rights at stake and the evident impropriety of applying only one-half of one constitutional test to a law which burdens the rights of women across the state of Texas.

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38 Plaintiffs' Reply Brief in Further Support of their Motion for Preliminary & Permanent Injunction at 13, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583 (5th Cir. 2014) (No. 1:13-CV-00862), 2013 WL 5780785, at *7.

39 *Id.* at 13–17.

40 Melissa M. Devine, *When the Courts Save Parties from Themselves: A Practitioner's Guide to the Federal Circuit and the Court of International Trade*, 21 TUL. J. INT'L & COMP. L. 329, 331 (2013) (citing Forshey v. Principi, 284 F.3d 1335, 1358 (Fed. Cir. 2002)).

In contrast to the Fifth Circuit's majority opinion, the lone dissenting opinion on the motion for rehearing *en banc* argues strenuously for a more stringent form of rational basis review than the Supreme Court typically uses to review abortion legislation.[41] Additionally, the dissent claims *Casey* requires the court to weigh the state's purported interest against the woman's liberty interest in order to correctly evaluate abortion regulations, pointing to the ballot access cases cited in *Casey*.[42] According to Judge Dennis,

> [t]he ballot access cases apply a flexible, balancing test that provides the State with leeway to regulate for a valid purpose, where such regulation does not unnecessarily infringe upon individuals' voting rights. The [*Casey*] Court explained that the 'abortion right is similar' in that courts must weigh the individual woman's right against the State's legitimate interests.[43]

Contrary to Judge Dennis' account, the *Casey* Court actually references the ballot access cases and the voting rights at issue in those cases to support the Court's conclusion that "not every law which makes a right more difficult to exercise is, *ipso facto,* an infringement of that right."[44] However, invalidating H.B. 2's admitting privileges requirement by reason of an invalid legislative purpose does not clearly demand such judicial bootstrapping, which, admittedly, may stretch *Casey*'s precedent far beyond any reasonable interpretation of the text.

Although proving an invalid purpose remains difficult, a reasonable person might conclude, based on all of the relevant

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41 *See* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 769 F.3d 330, 356–58 n.10 (5th Cir. 2014) (Dennis, J., dissenting) (instructing courts to do more than reject the majority's "rational speculation" test and look behind the legislature's purported rationale to determine whether, as an empirical matter, the law is rationally related to some valid state purpose).

42 "*Casey* thus adopted a compromise position, between the strict-scrutiny review endorsed by Justice Blackmun and the rational-basis review urged by Chief Justice Rehnquist. However, the *Casey* plurality did not adopt ordinary, intermediate scrutiny. Rather than apply one of the recognized tiers of scrutiny, the Court adopted the undue burden test, and in so doing, pointed to two ballot-access cases—namely *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Norman v. Reed*, 502 U.S. 279 (1992)—that similarly applied a standard of review that does not squarely fit into the established tiers of scrutiny. *Casey*, 505 U.S. at 873–74." *Id.* at 336.

43 *Id.* (citation omitted).

44 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. at 833, 873 (1992).

circumstances, that the Texas legislature acted with an impermissible purpose in enacting both regulations at issue in *Abbott* because the legislation is not reasonably well-tailored to further any legal purpose. Nevertheless, the court in *Abbott* summarily declined to subject legislative purpose to serious scrutiny.[45]

As previously indicated, *Okpalobi* would have granted the Fifth Circuit broad authority to review "various types of evidence, including the language of the challenged act, its legislative history, the social and historical context of the legislation, or other legislation concerning the same subject matter as the challenged measure."[46] Using this test, the language of the act, as well as "the social and historical context," encompass any existing incongruity between the statutory regulations and the empirical evidence (or lack thereof) supporting the regulation's alleged purpose. And such incongruity may very well suggest the legislature acted with an ulterior motive in enacting these inappropriate regulations. Still, the *Abbott* Court declined to seriously examine the validity of the State's legislative purpose in this case.[47]

Even in light of the Fifth Circuit's mischaracterization of the plaintiff's argument and its failure to correctly apply the purpose prong conceived under *Casey*, the court nevertheless may have reached a sound conclusion with respect to *Casey*'s purpose prong—as the undue burden test articulated in *Casey* does not strike down laws for mere suspicion of an invalid purpose.[48] However, the court's weak treatment of *Casey's* purpose prong represents a failure of judicial review and a mistake that neither the Fifth Circuit Court nor the Supreme Court should repeat when reviewing laws that burden women's right to an abortion.

In any case, the Plaintiff's appeal to the Supreme Court in *Whole Woman's Health v. Hellerstedt*[49] retains petitioner's facial challenge to

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45 *See* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 590 (5th Cir. 2014).

46 Okpalobi v. Foster, 190 F.3d 337, 354 (5th Cir. 1999) (referencing Shaw v. Hunt, 517 U.S. 899 (1996), *and* Edwards v. Aguillard, 482 U.S. 578 (U.S. 1987)).

47 *Abbott*, 748 F.3d at 590.

48 *Casey*, 505 U.S. at 873–74.

49 Whole Woman's Health v. Hellerstedt, No. 15-274, slip op. 1 (U.S. June 27, 2016) (Certiorari

H.B. 2's ASC requirement and revives *Abbott*'s facial challenge of H.B 2's admitting privileges requirement on the basis of newly developed facts.[50] Issues of *Res Judicata* notwithstanding, the appeal provides the Supreme Court with an opportunity to both strengthen the purpose prong of *Casey's* "undue burden" test and thoroughly scrutinize the purpose of H.B. 2 where the 5th circuit did not.

II. THE EFFECT PRONG: PLACING A SUBSTANTIAL OBSTACLE IN THE PATH OF A WOMAN SEEKING AN ABORTION:

According to *Casey*, regulations burdening women's right to abortion "must be judged by reference to those for whom it is an actual rather than an irrelevant restriction."[51] In *Casey,* the Court held that the spousal notification requirement placed a substantial obstacle in the way of a large fraction of women, "because *within the one percent of women* [burdened by the regulation], there was a 'significant number of women . . . [who feared] for their safety and the safety of their children [and] are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.'"[52] According to the Court:

> 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. For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.[53]

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was granted under the name Whole Woman's Health v. Cole, 136 S. Ct. 499 (2015) (mem.), but was re-captioned as Whole Women's Health v. Hellerstedt).

50 Brief for Petitioners at 2–3, Whole Woman's Health v. Cole, 2015 WL 9653047 at *2–3.

51 *Casey*, 505 U.S. at 895.

52 Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 769 F.3d 330, 338 (5th Cir. 2014) (Dennis, J., dissenting).

53 *Casey*, 505 U.S. at 894 (citation omitted).

Conceptually, undue burdens, i.e., substantial obstacles, may exist along multiple axes, which is to say that a law regulating abortion may affect different groups of women differently. Here, the *admitting privileges* requirement in Texas has the effect of imposing a burden on women's right to abortion in Texas in at least two distinct ways: (1) by drastically decreasing the overall supply of abortion services (resulting in higher costs of actual abortion services and a potential inability of abortion services providers to meet overall demand); and (2) by reducing the geographic density of abortion clinics, thereby increasing the travel expenses and heightening the inconvenience associated with obtaining a legal abortion.[54]

With respect to both of these distinct burdens, the *Abbott* Court failed to properly limit the scope of its "large fraction" inquiry to the limited group of women for whom the admitting privileges regulation functioned as a restriction. Instead, the Court construed the law as imposing a burden on *all* women seeking an abortion in Texas. According to the Court, "the question in a 'large fraction' analysis would be whether the requirement imposes an undue burden on a large fraction of women in Texas seeking an abortion."[55] When the scope of the "relevance" inquiry is applied properly to the regulation in this case, the burden on women in Texas (those women for whom the regulation constitutes a restriction) becomes undue "in a large fraction of the cases in which [the regulation] is relevant."[56]

With respect to the first dimension of the burden, one might take the position, as *Abbott* does, that the burden falls squarely upon all women in Texas generally, because all women are confronted with the problem of a diminished supply of abortion services.[57] Insofar as the

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54 *See* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 600 (5th Cir. 2014).

55 *Id.* at 588.

56 *Casey*, 505 U.S. at 895. The Fifth Circuit reiterated this view in *Whole Woman's Health v. Lakey* (a subsequent case challenging H.B. 2's ambulatory surgical center provision), stating "[e]very woman in Texas who seeks an abortion will be affected to some degree by this requirement because it effectively narrows her options for where to obtain an abortion." Whole Woman's Health v. Lakey, 769 F.3d 285, 296 (5th Cir.), *vacated in part,* 135 S. Ct. 399 (2014).

57 *See Abbott*, 748 F.3d at 600. "The evidence presented to the district court demonstrates that if the admitting-privileges regulation burdens abortion access by diminishing the number of

closing of abortion clinics and the resulting scarcity of abortion services may result in the increased cost of abortion services, the burden undoubtedly falls upon all women who would seek an abortion in Texas.[58] However, where the diminished supply of abortion services fails to meet the demand for abortion services, this particular burden on a woman's right to choose abortion is not relevant for those women who nevertheless manage to obtain an abortion in a timely manner. Only those women turned away by abortion service providers as a result of providers' inability to care for all patients suffer the burden produced by an absolute inadequacy in the supply of abortion services.

The *Abbott* trial court's findings of fact failed to specifically indicate that women would lose access to abortion services due to the absolute inadequacy of supply;[59] however, the record now before the Supreme Court in *Hellerstedt* strongly supports the conclusion that the artificial scarcity imposed by H.B. 2 will function as an absolute bar to the right of certain women to obtain an abortion in Texas, irrespective of ability to travel to one of the remaining clinics and pay the additional cost of the services.[60]

For example, the *Hellerstedt* trial court found that the evident cost of opening a new abortion facility under the new regulatory regime "[c]ombined with evidence of operational costs and profit margins associated with operating an abortion facility, the court concludes that few, if any, new compliant abortion facilities will open to meet the demand resulting from existing clinics' closure."[61] Moreover, the *Hellerstedt* trial court noted that the "eight [remaining] providers [of the forty providers that existed prior to the law taking effect] would have to handle the abortion demand of the entire state" and thus "it is

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doctors who will perform abortions and requiring women to travel farther, the burden does not fall on the vast majority of Texas women seeking abortions. Put otherwise, the regulation will not affect a significant (much less 'large') fraction of such women, and it imposes on other women in Texas less of a burden than the waiting-period provision upheld in *Casey*. This suffices to sustain the admitting-privileges requirement." *Id.* (citation omitted).

58 *Contra id.*

59 *See* Planned Parenthood of Greater Tex. Surgical Servs. v. Abbott, 951 F. Supp. 2d 891 (W.D. Tex. 2013).

60 *See* Whole Woman's Health v. Hellerstedt, No. 15-274, slip op. 2 (U.S. June 27, 2016).

61 Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 682 (W.D. Tex. 2014).

foreseeable that over 1,200 women per month could be vying for counseling, appointments, and follow-up visits at some of these facilities."[62] According to the *Hellerstedt* court, the notion "that these seven or eight providers could meet the demand of the entire state stretches credulity."[63]

The upshot of the *Hellerstedt* court's discussion is clear: for some women in Texas, the absolute inability to obtain an abortion in the foreseeable future will stem from the failure of the supply of abortion services to meet the demand for abortion services, rather than any collateral burden, such as the increased cost of said services.[64] *These* are the women for whom this particular burden truly exists and they are, each and every one of them, effectively barred from obtaining an abortion when the state's massive disruption of a previously existing supply of abortion services.

Some may worry that this highly circumscribed application of *Casey*'s relevance inquiry in some sense stacks the deck against constitutionality by limiting the inquiry to those women who are completely barred from obtaining an abortion and who thus clearly face a "substantial obstacle." However, the failure of supply to meet demand in itself realistically generates this all-or-nothing proposition with respect to the availability of abortion services—if a state regulation causes a failure of supply to meet demand, then those women who nevertheless succeed in obtaining abortion services will also find their right to an abortion intact, while those who cannot find services will find that the state has effectively barred them from obtaining such services. Thus, the large fraction of women burdened here approaches 100% of those who cannot get an abortion as a result of state regulations that prevent the supply of abortion services from meeting the demand.

Others may reject the foregoing analysis because other women in the state *are* in some sense burdened by the increased cost of abortion services resulting from the state-imposed scarcity. Concededly, the regulation may impose certain lesser burdens on all women in the state, namely an increased burden in the form of increased costs.

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62 *Id.* at 682.

63 *Id.*

64 *See id.*

However, the regulation does not impose the same burden on all women either in kind or in magnitude, and *Casey* contemplates such distinctions when it derives the relevant group burdened by the State's spousal notification requirement, i.e., "married women seeking abortions who do not wish to notify their husbands of their intentions."[65]

Here, as in *Casey,* the relevant burden is defined and constituted, in part, by the peculiar circumstances of the women in question and not just by the statutory requirement in isolation of those circumstances. Suppose the Pennsylvania statute under review in *Casey* specifically required women to notify their spouses of an abortion by paying a small fee to a certain third party provider to deliver the news to said husbands. As written, the spousal notification requirement would thus impose a burden on all women seeking an abortion who do not wish to use a third party provider to deliver the information to their spouse—a group of women presumably much larger than the group of women who would have no desire whatsoever to notify their husbands.

If courts must broadly construe the scope of a legislative burden to include all women minimally affected by a statute, then legislatures may successfully target and seriously burden the rights of smaller classes of women by imposing less significant collateral burdens on the entire population of women in the state. Thus, if *Casey*'s undue burden test is to have any teeth, it must enable courts to distinguish between the various types of burdens a legislature may impose as well as the many classes of women affected by those burdens. That is, the Supreme Court must acknowledge that married women who do not wish to inform their husbands of their plans to obtain an abortion do not face the same burden as other married women who do not mind telling their husbands, despite the fact that both classes of women must meet the same statutory requirement. Similarly it must recognize that different classes of women, coming from different areas of Texas and from different socioeconomic backgrounds, who bear their own unique burdens when the state effectively shuts down a number of abortion clinics across the state.

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65 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894–95 (1992).

Thanks to the new record now before it *Hellerstedt*,[66] the Supreme Court has an important opportunity, not only to correct Abbott's misapplication of the law for all posterity, but also to avert the devastating effects that H.B. 2 would have on the rights of millions of women in Texas.

With respect to the second dimension of burden identified above[67]—the increased travel time and heightened inconvenience resulting from the increased geographic scarcity of abortion clinics—the women in close proximity to those abortion clinics which can afford to stay in business are women largely unaffected and unburdened by the additional costs of "travel" and the additional inconvenience resulting from regulations forcing the closure of clinics. Under the foregoing analysis, the proper scope of the "relevance" inquiry here captures only those women forced to travel greater distances at greater expense in order to obtain a legal abortion due to the legislative closing of nearer abortion clinics. This encompasses only those women who will lose the abortion clinics previously nearest to them. The admitting privileges requirement simply will not burden the rest of Texas women in this fashion.

Although the trial court specifically found that the two abortion clinics in the Texas Rio Grande Valley would have to close as a result of H.B. 2's admitting privilege requirement, significantly increasing travel time and distance for women in the area seeking abortion, the Fifth Circuit in *Abbott* dismissed the significance of these findings as follows:

> To put this "finding" [that both clinics in the Rio Grande Valley would close as a result of H.B. 2] into perspective, of the 254 counties in Texas only thirteen had abortion facilities *before* H.B. 2 was to take effect. The Rio Grande Valley, moreover, has four counties, not twenty-four, and travel between those four counties and Corpus Christi, where abortion services are still provided, takes less than three hours on Texas highways (distances up to 150 miles maximum and most far less). In addition, Texas exempts from its 24-hour waiting period after informed consent those women who must travel more than 100 miles to an abortion facility.

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66 Whole Woman's Health v. Hellerstedt, No. 15-274, slip op. 2 (U.S. June 27, 2016).

67 *See supra* text at note 54.

> As the motions panel correctly concluded, based on the trial court record, an increase of travel of less than 150 miles for some women is not an undue burden under *Casey*. Indeed, the district court in *Casey* made a finding that, under the Pennsylvania law, women in 62 of Pennsylvania's 67 counties were required to 'travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the *nearest* provider.' Upholding the law, the Supreme Court recognized that the 24-hour waiting period would require some women to make two trips over these distances.[68]

At first blush, the Fifth Circuit's comparison to the facts in *Casey* may sound convincing—the abortion law under review in *Casey* did increase the travel distance for women in Pennsylvania on a scale similar to that shown in *Abbott*.[69] However, the Fifth Circuit's analysis ignores the significant difference in the particular legislative mechanisms used to effectively increase the travel distances in these cases, and the court completely fails to assess the *unique* burden generated in Texas under *Casey*'s large fraction test.

Casey's 24-hour waiting period effectively doubled the travel distance for some women in Pennsylvania, i.e., those who would travel at length and not spend the night in the area where they would obtain an abortion.[70] In contrast, the admitting privileges requirement in *Abbott* created an absolute increase in the travel time and distance for *all* women who would lose the nearest abortion clinic as a result of the admitting privileges requirement, resulting in a burden that is not easily subsumed by or converted into a mere financial burden, i.e., it cannot be overcome by renting a hotel room near the abortion clinic.[71] Rather, because the regulation in *Abbott* caused an absolute increase in travel distance, strictly by virtue of a newly created geographic scarcity in abortion clinics, the Texas regulation in *Abbott* effectively burdens a

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68 Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 597–98 (5th Cir. 2014) (citations omitted).

69 *See id*.

70 *Id.* at 598 ("Indeed, the district court in *Casey* made a finding that, under the Pennsylvania law, women in 62 of Pennsylvania's 67 counties were required to 'travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the *nearest* provider.'"(quoting 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. 883(1992)).

71 *See id*. at 597–98.

different subset of women in a different way than the Pennsylvania regulation did in *Casey*. Therefore, the Fifth Circuit Court cannot dismiss such a distinct burden by simple analogy to the facts in *Casey*.

Additionally, the Supreme Court in *Casey* actually upheld the constitutionality of the waiting period because it found that the lower court, the finder of fact, did not establish a constitutionally impermissible "effect" in simply describing the waiting period as "particularly burdensome."[72] According to the Supreme Court, "a particular burden is not of necessity a substantial obstacle."[73] On the contrary, "[w]hether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group."[74] Because "the District Court did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it," the *Casey* Court concluded "*on the record before [it]* . . . the 24-hour waiting period [does not] constitut[e] an undue burden."[75]

In short, the lower court's findings were inadequate for the Supreme Court to find a "substantial obstacle."[76] However, the Supreme Court did *not* conclude, as the *Abbott* court seems to suggest, that increased travel distances of such magnitude simply do not and cannot constitute an undue burden under any set of circumstances or any finding of fact handed down by the trial court. In other words, such travel distances are not *per se* constitutional under *Casey* (though the *Abbott* court erroneously treats them as such).[77]

Since *Casey* upheld a distinct law, with a distinct operative burden, on separate and inapplicable grounds, *Abbott*'s assessment of the burden imposed by H.B. 2 partly relies on an inapposite comparison to the facts and holding in *Casey*. Simple analogies aside, the legality of the burden created by the Texas admitting privileges requirement does not follow directly from the facts or holding in *Casey*. Thus, the

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72 *Casey*, 505 U.S. at 886–87.

73 *Id.* at 887.

74 *Id*.

75 *Id.* (emphasis added).

76 *See id*.

77 Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 597–98 (5th Cir. 2014).

Abbott court cannot dismiss, out of hand, the substantiality of the obstacle or the resultant closure of abortion clinics.

Compounding its error, the *Abbott* majority further dismisses the statistical evidence adduced at trial as insignificant. According to the court:

> Evidence offered by Planned Parenthood showed that more than ninety percent of the women seeking an abortion in Texas would be able to obtain the procedure within 100 miles of their respective residences even if H.B. 2 went into effect. As the motions panel ruled, "[t]his does not constitute an undue burden in a large fraction of the relevant cases."[78]

The 90% figure trumpeted by the *Abbott* court represents the same sort of fallacious statistical analysis repudiated by the Court in *Casey*, which began its analysis with the 1% of women actually affected by the law in question.[79] As previously noted, the *Abbott* court misapplied *Casey*'s "large fraction" test by misidentifying the groups of women actually affected by the burdens at issue and also by "declining to consider the particular circumstances of the women affected by the law, and disregarding evidence of relevant contextual facts."[80] Considering all the relevant facts under a correctly applied large fraction test, one must conclude that H.B. 2's admitting privileges requirement does create a substantial obstacle for women seeking an abortion in Texas. As Judge Dennis argues in his dissenting opinion on the motion for rehearing *en banc*:

> Applying the *Casey* undue burden standard to the factual findings by the district court that are supported by the record evidence, it is clear that a large fraction of women affected by the admitting-privileges restriction will face substantial obstacles in seeking abortions. Properly considered, the Plaintiffs' evidence established the real-world effect of H.B. 2—that many clinics will close because Texas abortion providers will be unable to comply with the admitting-privileges provision; that the Rio Grande Valley, for example, will be without an abortion provider; and that the few remaining clinics throughout Texas will be

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78 *Id.* at 598 (citing Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 415 (5th Cir. 2013)) (citations omitted).

79 *Casey*, 505 U.S. at 893–95.

80 Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 769 F.3d 330, 356 (5th Cir. 2014) (Dennis, J., dissenting) (explicating potential arguments against the majority opinion in *Abbott*).

> unable to meet the significantly increased demand for abortion services, thereby precluding approximately one in three women seeking abortions in Texas, or 22,000 women, from accessing abortion services as a result of the decrease in available clinic providers alone. Further, the evidence established that women in the Rio Grande Valley and West Texas will be required to travel vast distances to secure access to abortion, and that forty percent of women seeking abortions in Texas are at or below the federal poverty line, and thus are unable to travel the distances that will be necessary as a result of various clinic closures.[81]

III. DESPITE *CASEY*'S USE OF THE "LARGE FRACTION" TEST, *ABBOTT* AND *CARHART* INTERPOLATE *SALERNO*'S "NO SET OF CIRCUMSTANCES" STANDARD, THEREBY BANISHING THE PROTECTION OF ABORTION RIGHTS TO THE IMPRACTICAL REALM OF THE "AS-APPLIED CHALLENGE":

According to the Supreme Court in *Gonzales v. Carhart*: "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. For this reason '[a]s-applied challenges are the basic building blocks of constitutional adjudication.'"[82] Despite the difficulties associated with mounting an as-applied challenge in the context of abortion regulations, the *Abbott* court declined to consider the plaintiffs' facial challenge to the medication abortion regulation, relying heavily on the above-cited *Gonzales* opinion to justify punting the issue.[83]

According to *Abbott*, "[t]he *Gonzales* court noted in closing that the respondents' facial attack on the Act should not have been entertained in the first place because 'the proper means to consider exceptions is by as-applied challenge.'"[84] The court notes that "[f]acial challenges

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81 *Abbott*, 769 F.3d at 362 (footnote omitted).

82 Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (citations omitted) (quoting Richard H. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1328 (2000)) (internal quotation marks omitted in original).

83 Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 603–05 (5th Cir. 2014).

84 *Id.* at 604 (citing *Gonzales*, 550 U.S. at 167.).

impose a 'heavy burden upon the parties maintaining the suit' because there is often too little evidence to show that a particular condition has in fact occurred or is very likely to occur," and that, "[t]hat is the case here."[85] The court concludes that through the "as-applied challenge, which is the proper means of challenging the lack of an exception to the regulations at issue, 'the nature of the medical risk can be better quantified and balanced than in a facial attack[,]'" and thus, "[a]s this case currently stands, H.B. 2 on its face does not impose an undue burden on the life and health of a woman, and the district court erred in finding to the contrary."[86]

Though the *Gonzales* Court considered the as-applied challenge, "the proper means of challenging the lack of an exception to the regulations at issue,"[87] the *Casey* Court ostensibly rejected this view when it instituted the "large fraction" test and struck down Pennsylvania's spousal notification requirement. The claimants in *Casey* did not suggest they had experienced or would soon experience violence as a result of Pennsylvania's spousal notification requirement, but the Supreme Court nevertheless struck the regulation based on research indicating that a small percentage of women *would* experience domestic violence as a result of the requirement.[88] Although the Fifth Circuit in *Abbott* plausibly invoked *Gonzales* to deny the plaintiff's facial challenge, the court's turnabout underscores how readily courts can manipulate facts to reach different conclusions. As David L. Faigman, the John F. Digardi Distinguished Professor of Law at UC Hastings College of the Law and a Professor in the School of Medicine at the University of California, San Francisco (UCSF), writes:

> [T]he Court's abortion jurisprudence provides a good example of the freedom inherent in classifying constitutional facts and the policy ramifications that follow from such classifications. In Casey, the Court ruled that regulations that impose an undue burden on the exercise of the right to a pre-viability abortion are unconstitutional. The undue burden standard was operationally defined to include any regulation

85 *Id.*

86 *Abbott*, 748 F.3d at 604–05 (citation omitted).

87 *Id.* at 604.

88 David L. Faigman, *Defining Empirical Frames of Reference in Constitutional Cases: Unraveling the As-Applied Versus Facial Distinction in Constitutional Law*, 36 HASTINGS CONST. L.Q. 631, 645 (2009).

> that created a "substantial obstacle" to the exercise of the right. In Casey, the Court used this standard to invalidate a spousal notification provision. The opinion for the Court, written jointly by Justices O'Connor, Kennedy, and Souter, treated the issue as a reviewable fact, finding that research indicated that domestic violence might occur in a small percentage of cases as a result of this notification requirement. There was no suggestion that the claimants before the Court had experienced, or were in danger of suffering, violence due to the spousal notification requirement. Yet the prospect of such violence in the class of possible complainants, even if it constituted only a small percentage of cases, was enough to invalidate the law in all cases.[89]

Though the claimants in *Casey* did not attack the Pennsylvania law on grounds it had or necessarily would subject said claimants to the sort of conditions constituting an undue burden, the Court nevertheless found the law facially invalid due to evidence suggesting it would expose women to violence (and therefore create an undue burden) in a large fraction of cases for which the law was relevant.[90] Even accepting both *Casey* and *Gonzales* as good law, one must conclude that the Supreme Court does not require the *Gonzales* approach in every case. Regardless, the peculiar nature of the right to abortion presents a strong basis for an exception to the general rule in *Salerno*. As-applied challenges are particularly difficult for petitioners in the context of abortion cases because the nature of pregnancy renders enforcement of a woman's right to an abortion especially time-sensitive. It is important to recall that a woman's right to an abortion, encompassed by her right to privacy, is manifest at all times.[91] It is *not* a right to opt out of birthing a child and it is not only infringed when abortion is prevented altogether.[92]

A woman's right to an abortion is thus burdened and impaired before and during the proceedings of an as-applied challenge, and remains burdened until she obtains a judgment in her favor. Because every consequence of a legislative burden on a woman's right to

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89 *Id.* at 644–45 (footnotes omitted).

90 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 893 (1992).

91 *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing privacy as a penumbra right under the Constitution); Roe v. Wade, 410 U.S. 113 (1973) (finding that the right to privacy was broad enough to extend to a woman's decision to terminate her pregnancy), *modified by Casey*, 505 U.S. 833.

92 *See Griswold*, 381 U.S. at 479.

abortion must play out within a period of nine months or less, the as-applied challenge may not provide pregnant women in Texas with an adequate legal remedy.

Moreover, with respect to the admitting privileges and ASC requirement, which has the effect of closing numerous abortion clinics, the courts may not very well deregulate an abortion clinic into existence through the legal process of an as-applied challenge. Consequently, a court cannot guarantee that later striking down the law, as it applies to particular plaintiffs or abortion clinics, will actually make abortion services accessible to plaintiffs during the relevant time period. While some businesses may have the ability to reopen upon the resolution of pending legal challenges, many may not necessarily have the ability to reopen following as-applied suits instituted at some indefinite point in the future, when the law's burdens become fully realized.[93] Thus, even if plaintiffs successfully challenge the law in time for the affected women to seek an abortion, the remedy proposed by the Fifth Circuit may not actually provide an adequate remedy where the legislature has unduly burdened the abortion rights of Texas women by forcing the closure of abortion clinics in the state.

CONCLUSION

Abbott's misapplication of *Casey*'s undue burden test, especially its incorrect "large fraction" analysis, underscores *Casey*'s unfortunate and deleterious effects on abortion law in the United States. Although it purported to leave the "central holding" of *Roe v. Wade* undisturbed,[94] the Court's weak holding in *Casey* effectively undermined the spirit of *Roe* by ineffectively limiting the power of legislatures to restrict women's access to abortion.

In *Casey*, the Supreme Court did not intend to fashion the undue burden test as a rubber stamp for abortion regulation. On the contrary, the Court intended to develop a flexible test that could *strengthen* judicial authority to review such legislation.[95] To fulfill the promise of

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93 *See* Brief of Plaintiffs-Appellees at 4–6, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583 (5th Cir. 2014) (No. 13-51008).

94 *See Casey*, 505 U.S. at 833–34.

95 *See id.* at 878.

Roe and *Casey* and rehabilitate abortion jurisprudence across the country, the Supreme Court should clarify *Casey*'s undue burden standard to the extent that it considers all of the circumstances relevant to a determination of the legislative purpose and effect of abortion regulations. Further, the Court should clearly indicate that the undue burden test not only allows courts to look behind the legislature's post-hoc rationalization, at the law's true purposes, but also allows them to look at the particular classes of women most affected by abortion regulations, as well as the entire set of circumstances that construct the burden placed on these classes of women.