

The Undue Burden Standard

Abortion Jurisprudence after *Casey*

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Introduction

The right of an individual to control her reproductive present and future is one of the most debated topics in U.S. law. Perhaps most controversial is the right of a woman to terminate an unwanted pregnancy. The constitutional right of a woman to obtain an abortion was recognized by the Supreme Court in *Roe v. Wade*, holding that an implied right to privacy, which encompasses a woman's ability to make reproductive choices, was a fundamental right protected by the Constitution. Later in *Planned Parenthood v. Casey*, the Supreme Court held that a person's right to privacy is part of the guarantee of "liberty" found in the Fourteenth Amendment's Due Process Clause, holding that decisions "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."

While *Casey* upheld the right to abortion recognized in *Roe* and expanded the constitutional basis for the abortion right, *Casey* and its progeny also permitted restrictions on the right to abortion that had been held unconstitutional under *Roe*. The three Justice plurality articulated the "undue burden" test, which established that a restriction on abortion rights violates the Due Process Clause if it has the purpose or effect of imposing an undue burden on women seeking abortion. The *Casey* Court held that, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." The Court explained that to meet the undue burden standard, a "substantial obstacle" must be present within "a large fraction of cases in which [it] is relevant."

In *Casey*, the Court defined the "relevant group" very narrowly when evaluating the challenge to spousal notification; the "relevant group" constituted just those women who would feel the effects of the restriction, namely, married women who would choose not to notify their spouses about their abortion decision. Even though the group of women affected by the spousal notification requirement constituted less than 1% of women obtaining abortions, the Court found that a large fraction of those women forced to notify their spouses would face a substantial obstacle in attaining abortion, in the form of potential violence from abusive husbands, which constituted an undue burden. The Court defined the relevant group more broadly, however, when analyzing and upholding the 24-hour waiting period requirement and other restrictions.

The *Casey* Court failed to define these terms with any precision, and lower courts have not reached consensus as to how to frame the relevant group of women, determine the requisite size of the large fraction, or measure impact. In *Cincinnati Women's Services v. Taft*, the Sixth Circuit struck down one restriction because it was a substantial obstacle for "practically all" of the relevant group, but upheld another because it only impacted 12.5% of the relevant group, all of whom would be thus unable to obtain an abortion. The district court in *Planned Parenthood of Minnesota v. Daugaard* found that a "large fraction" need not constitute a majority of the

relevant group, merely something more than a “small” fraction of the relevant group. In *MKB Management v. Burdick*, a state district court in North Dakota struck down a ban on medication abortions on state constitutional grounds; the court applied strict scrutiny, but also applied the undue burden standard by analyzing how the law would affect different categories of women who were among the 20% of abortion patients who choose medication abortions.

What kind of evidence, then, is strong enough to demonstrate the existence of an undue burden? In *A Woman’s Choice v. Newman*, the Seventh Circuit overruled the District Court’s finding that statistics from neighboring states on how similar laws have affected women seeking abortions could be probative of how a law may operate in Indiana. Consider what kind of evidence would be necessary for a pre-enforcement challenge of abortion restrictions to be successful.

Because *Casey* stated that a law may not have the purpose *or* effect of creating an undue burden, some laws are challenged not only on impact, but on a claim that a law was passed with the purpose to prevent abortions or make it very difficult to access or provide abortions. The *Casey* Court, however, did not provide any analysis for this “purpose prong” argument. In *Mazurek v. Amrstrong*, the Supreme Court rejected the assertion that improper purpose was shown by evidence that a statute was designed to prevent a particular medical professional from providing abortions or that anti-choice groups drafted the challenged legislation. The Tenth Circuit in *Jane L. v. Bangerter* held that if a state acts to show its intent to challenge *Roe* alongside passing a law limiting abortion, that action demonstrates an improper purpose behind the law itself. In *Jane L.*, the Utah legislature had passed a law equating viability with twenty weeks of pregnancy; it also separately established an abortion litigation trust fund. The Tenth Circuit viewed the litigation trust fund as a demonstration of the state’s improper intent to challenge *Roe* through legislation. . The District Court of Nebraska in *Planned Parenthood of the Heartland v. Heineman* and the Fifth Circuit in *Okpalobi v. Foster* explicitly analyzed both the framework of the challenged legislation as well as its “social and historical context.”

A number of recent abortion restrictions have prompted challenges under the First Amendment’s right to free speech – in particular, the right of medical personnel to refrain from speech. These claims have come up in the context of ultrasound laws and laws regulating so-called crisis pregnancy centers, among others. So far, courts have not been consistent in their approach to those First Amendment claims. Some courts have been wary of finding First Amendment free speech violations in “informed consent” laws – such as with the Eighth Circuit’s affirmation of a law in *Planned Parenthood of Minnesota v. Rounds* requiring doctors to tell women that abortion increases the risk of suicide. The *Rounds* court held the law constitutional, despite finding that there is no causal medical link between abortion and suicide has been found.

In *Texas Medical Providers Performing Abortion Services v. Lakey*, the Fifth Circuit rejected the First Amendment claim made by plaintiffs challenging a law that required doctors to

verbally describe sonograms to patients seeking abortion. Although plaintiffs did not raise an Due Process undue burden claim, the Fifth Circuit held that free speech was an inappropriate challenge to such laws, instead using a *Casey* undue burden analysis. In essence, the Court conflated First Amendment and Due Process analysis. The court held, “[i]f the disclosures are truthful and non-misleading, and if they would not violate the woman’s privacy under the *Casey* plurality opinion, then Appellees would, by means of their First Amendment claim, essentially trump the balance *Casey* struck between women’s rights and the state’s prerogatives.”

Over the last several years, courts have also addressed a wave of anti-abortion laws that regulate not doctors or women, but clinics themselves. These targeted regulations of abortion providers, known as “TRAP” laws, can result in the closure of abortion clinics that are unable to meet the new regulatory standards. The Mississippi state legislature, for example, passed a law that required abortion facilities to be licensed as ambulatory surgical facilities, which meant they must receive a certificate of need from the Department of Health. However, such certificates were not available to “single-specialty” facilities, such as an abortion clinic, and so the clinic could not possibly meet the state’s new licensure requirement. The District Court for the Southern District of Mississippi in *Jackson Women’s Health Org. v. Amy* struck down the law, finding that it would impose an undue burden because it would serve to shut down the state’s only abortion facility.

However, not all TRAP laws that result in the closing of abortion facilities have been found unconstitutional under the undue burden standard. The evidentiary hurdles to demonstrate an undue burden are often quite high. Consider the Sixth Circuit’s decision in *Women’s Medical Professional Corp v. Baird*, in which the court upheld a law that resulted in a clinic closure, because plaintiffs could not prove that a large fraction of women affected by the law would be unable to travel to other clinics to obtain abortions. What exactly are the evidentiary hurdles that courts uniquely face with laws that target abortion facilities rather than women or doctors themselves?

These cases are just a few examples that illustrate how *Casey* has operated in the lower courts. Since *Casey*, many laws passed in the states and advocated for by anti-choice groups work to qualify abortion rights and limit access rather than to challenge the constitutionality of abortion itself. On average, more than five hundred bills that relate to abortion are proposed annually in state legislatures, and dozens are passed.

This supplement serves to break down *Casey*’s undue burden standard to analyze its separate components, and to introduce students to a variety of judicial interpretations. As you read through these materials, ask yourself, what kinds of evidence and what kinds of impact are likely to sway a court to conclude that a law creates an undue burden on women seeking abortion? Ask yourself whether the undue burden standard in practice maintains *Roe*’s central holding that women have a fundamental right to obtain pre-viability abortions. Consider also the multiple restrictions one woman may face, and the impact that restrictions targeting women, their

doctors, and their abortion clinics are likely to have on a woman with limited financial means, limited access to means of travel, and/or obligations to her family and work.

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Article

*317 PRESERVING THE CORE OF ROE: REFLECTIONS ON PLANNED PARENTHOOD V. CASEY

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ABSTRACT. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court backed away from affording women the highest level of constitutional protection for the abortion choice, but nonetheless promised to preserve *Roe v. Wade*'s core objectives by instituting the undue burden standard for measuring the constitutionality of restrictions on abortion. In the years following the *Casey* decision, states and the federal government have added more and more restrictions on women's access to abortion. This Article asks whether *Casey*'s undue burden standard has meaningfully protected a woman's right to an abortion.

The Article begins by describing the undue burden standard's development and application, from pre-*Casey* decisions to the *Casey* joint opinion. Part III describes the Supreme Court's clarification and application of the standard in its subsequent abortion decisions. Part IV reviews the ways in which lower courts have implemented the undue burden standard, concluding that, if correctly and fairly applied, the *Casey* standard can provide meaningful *318 protection for the abortion right. The Article ends with recommendations for solidifying and clarifying the undue burden standard, which will ensure that *Roe*'s core is preserved as promised in *Casey*.

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*319 I. Introduction

Nearly fifteen years have passed since the United States Supreme Court's historic decision in *Planned Parenthood v. Casey*. [FN1] As litigators for Planned Parenthood of Southeastern Pennsylvania and other Pennsylvania reproductive health care providers in the *Casey* litigation, we had awaited the day of the decision with foreboding. Fully prepared for a wholesale overruling of *Roe v. Wade* that would sanction the recriminalization of abortion, instead we greeted the *Casey* decision with a mixture of surprise, relief, and uncertainty.

While the Supreme Court discarded the highly protective strict scrutiny standard of *Roe*, [FN2] the *Casey* joint opinion nevertheless preserved the core of *Roe* by adopting the undue burden test to measure the constitutionality of restrictions on abortion. [FN3] This new standard was arduous enough to sustain a facial challenge to two of the restrictive provisions challenged in *Casey*--the Pennsylvania law's husband-notification requirement [FN4] and its related reporting provision [FN5]--and to raise concerns about the constitutionality of others, despite the limited record before the Court. [FN6] That this new standard was meant to offer meaningful protection for women is further supported by the joint opinion's passionate discussion of the benefits that reproductive liberty had bestowed upon generations of women and their prospects for full equality. [FN7]

As with any new test, however, the undue burden standard would have to be applied in subsequent cases before its full contours became clear. In the years following the *Casey* decision, state legislatures, as well as the federal government, have added more restrictions on women's access to abortion. [FN8] These laws, now subject to review under the *Casey* standard, include mandatory waiting periods, [FN9] informed consent scripts that force doctors to give *320 their patients information biased against abortion, [FN10] onerous licensing and regulatory schemes for abortion providers, [FN11] detailed reporting requirements, [FN12] consent and notification requirements for minors, [FN13] abortion procedure bans, [FN14] and laws making abortion providers strictly liable for any and all damage to their clients. [FN15] In the first four months of 2006 alone, legislators in fourteen *321 states proposed measures to ban virtually all abortion procedures, [FN16] and the South Dakota legislature passed, but voters rejected, the nation's first post-*Casey* abortion ban. [FN17] As governmental restrictions have mounted, the number of abortion providers in the United States has continued to decline. [FN18] Three states--North Dakota, Mississippi, and South Dakota--now have only one abortion provider in the entire state. [FN19] In these and many other states, women must travel long distances to reach a provider. [FN20]

With the highly visible confirmation hearings of Chief Justice Roberts and Justice Alito still fresh in the nation's memory and the federal Abortion Procedure Ban [FN21] undergoing Supreme Court review, [FN22] much media attention is fixated on whether the newly constituted Court will overrule *Roe*. [FN23] Some *322 commentators suggest an alternative scenario, in which the Court will instead "incremental[ly] eviscerat[e]" *Roe* by applying the *Casey* undue burden standard to permit so many restrictions on the abortion right that soon only a privileged few will be able to exercise it. [FN24] Yet the *Casey* plurality's broad articulation of the standard, its application of the standard to the challenged provisions, and the expansive rhetoric of women's equality in which it couched the joint opinion all support the notion that the *Casey* Court indeed intended to preserve the core of *Roe* and not merely an empty shell.

Has the undue burden standard meaningfully protected a woman's right to an abortion? This Article analyzes the application of the *Casey* standard nationwide over the past decade-and-a-half to assess the current status of the constitutional protection it offers. Part II describes the development and application of the undue burden standard in the *Casey* litigation.

tion, focusing on the evolution of the standard from its narrow articulation in pre-Casey decisions and the court of appeals' opinion in Casey to its broader definition in the Casey plurality opinion. Part III describes the Supreme Court's clarification and application of the standard in its subsequent abortion decisions: *Mazurek v. Armstrong*, [FN25] *Stenberg v. Carhart*, [FN26] and *Ayotte v. Planned Parenthood*. [FN27] Part IV reviews the ways in which lower courts have implemented the undue burden standard in a variety of contexts, including challenges to mandatory waiting periods, state-scripted counseling provisions, licensing and regulatory schemes for abortion facilities, and bans on certain types of abortion procedures. This Part examines lower courts' contrasting approaches to applying the Casey standard to assess whether a given restriction has "the effect of placing a substantial obstacle in the path of a woman's choice . . . ." [FN28] The Article ends with recommendations for solidifying and clarifying the undue burden standard so as to ensure Roe's core is preserved as promised in Casey. Application of Casey by some lower courts demonstrates that, if correctly and fairly applied, the undue burden standard can provide meaningful protection for the abortion right. While the Roberts Court could discard Casey altogether, if it keeps the undue burden test in place, the Article concludes that the Court must provide *323 the guidance that lower courts and litigants need to ensure that the standard offers meaningful protection to women.

II. The Meaning of the Undue Burden Standard: Its Evolution in Casey

Prior to the Casey decision in 1992, "undue burden" terminology had appeared in some of the Supreme Court's abortion opinions, [FN29] and Justice O'Connor had championed the use of an undue burden analysis in several of her dissenting opinions. [FN30] The Casey joint opinion, however, crafted an entirely new undue burden analysis and, for the first time, made it the controlling standard for evaluating all abortion restrictions. The meaning of this new standard can only fully be understood first by contrasting it with Justice O'Connor's initial formulations of undue burden, and second by analyzing how the Casey joint opinion defined, developed, and actually applied the standard. This Part undertakes that analysis and concludes that, although the Casey plurality backed away from affording women the highest level of constitutional protection for the abortion choice and stumbled in its efforts to adequately clarify the contours of the undue burden standard, the plurality nonetheless intended to provide a level of protection for the abortion right that was fully consistent with Roe's core objective of "ensur[ing] that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact." [FN31]

*324 A. The Journey to the Supreme Court in the Casey Litigation

The Pennsylvania legislature enacted the restrictions on abortion that were challenged in Casey in direct response to signals that an emerging conservative Supreme Court majority was poised to overrule *Roe v. Wade*. After years of applying Roe's strict scrutiny standard to strike down most abortion restrictions, [FN32] "the constitutional tide turned" [FN33] in 1989 with the Supreme Court's decision in *Webster v. Reproductive Health Services*. [FN34] In declaring three Missouri abortion restrictions to be constitutional, a plurality of the Court called for a "reconsideration" [FN35] of Roe's trimester framework [FN36] and reviewed *325 the Missouri law only to determine whether it was "reasonably designed" to advance a "legitimate" state interest. [FN37] In an impassioned dissenting opinion, Justice Blackmun lamented that the plurality had effectively "invite[d] every state legislature to enact more and more restrictive abortion regulations . . . [that] will return the law of procreative freedom to the severe limitations that generally prevailed in this country before January 22, 1973." [FN38]

State legislatures agreed with Justice Blackmun's reading of the Webster opinion and accepted the plurality's invitation to enact new restrictions on abortion. In the months after Webster, two states and the territory of Guam re-enacted pre-Roe criminal bans on virtually all abortions. [FN39] In 1988 and again in the fall of 1989, the Pennsylvania legis-

lature chose a different strategy, amending its comprehensive Abortion Control Act to add a series of highly intrusive and burdensome restrictions on abortion that fell short of outright bans. The new provisions required that: (1) physicians recite a prescribed litany of information discouraging abortion and describe the availability of state-sponsored, printed materials offering alternatives, and then delay their patient's procedure for at least twenty-four hours; [FN40] (2) married women notify their husbands of their abortion decision; [FN41] (3) young women under the age of *326 eighteen have either the consent of one parent or a court order prior to an abortion, and that both the young woman and her parent obtain the state mandated information discouraging the abortion; [FN42] and (4) clinics report detailed, particularized information about every abortion patient to the state. [FN43] The amendments also severely narrowed the Act's existing definition of the "medical emergency" situations that would exempt women from complying with the forced waiting period, biased counseling, parental consent, and husband-notification requirements. [FN44] Significantly, the amendments explicitly reenacted many of the very statutory provisions of Pennsylvania's 1982 Act, which the Supreme Court had held unconstitutional in *Thornburgh v. American College of Obstetricians & Gynecologists* just a few years earlier. [FN45] As their chief legislative architect and sponsor admitted, the new amendments were explicitly and unabashedly designed to trigger a challenge to *Roe v. Wade* that would lead to its overturning and a return to criminal bans on abortion. [FN46]

*327 In the ensuing facial challenge [FN47] to the Pennsylvania restrictions, the Commonwealth of Pennsylvania defended the constitutionality of the new law by arguing that the courts should apply the undue burden concept developed by Justice O'Connor in her dissenting opinions in *City of Akron v. Akron Center for Reproductive Health* and *Thornburgh* or, alternatively, overturn *Roe v. Wade* wholesale. [FN48] Relying principally on *Roe*, *Thornburgh*, and *Akron*, and following a three-day bench trial, the district court enjoined virtually all of the challenged restrictions, explicitly rejecting the Commonwealth's effort to avoid the *Roe* strict scrutiny standard. [FN49] In stark contrast, the United States Court of Appeals for the Third Circuit found that *Webster v. Reproductive Health Services* [FN50] and subsequent opinions had eliminated *Roe*'s strict scrutiny standard. [FN51] Applying *Marks v. United States*, [FN52] the court of appeals took the unusual step of construing *Webster* and *Hodgson* as establishing a new standard of review under which to judge the constitutionality of all abortion restrictions--Justice O'Connor's undue burden standard. [FN53] Applying that standard as then formulated by Justice O'Connor in her dissenting opinions, [FN54] the court of appeals held that all challenged provisions of the Pennsylvania law *328 were constitutional except the husband-notification requirement. [FN55] Justice Samuel Alito, then a member of the United States Court of Appeals for the Third Circuit, dissented, arguing that the majority had erred in striking down the husband-notification provision because it did not unduly burden women's access to abortion [FN56] and was rationally related to the "state's interest in furthering the husband's interest in the fetus." [FN57]

The court of appeals' maverick opinion led both sides to file petitions for certiorari, [FN58] setting the stage for Supreme Court review. At the time that the Supreme Court granted review, on January 21, 1992, two new Justices-- David Souter and Clarence Thomas--had joined the court, [FN59] increasing speculation that the newly-composed Supreme Court would now explicitly overturn *Roe v. Wade*. [FN60]

*329 B. The Casey Joint Opinion: Preserving Protection for the Right to Abortion via a Newly Minted Undue Burden Standard

Confounding pundits and advocates on both sides, Justices O'Connor, Kennedy and Souter coauthored [FN61] an opinion, joined in relevant part by Justices Blackmun and Stevens, that reaffirmed what they deemed the three central tenets of *Roe*. First, the joint opinion recognized "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." [FN62] Second, the joint opinion reaffirmed "the State's

power to restrict abortion after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health." [FN63] Third, the joint opinion confirmed "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." [FN64]

In reaffirming rather than rejecting Roe's core principles, the joint opinion relied heavily on the doctrine of stare decisis. The plurality found that the factual underpinnings of Roe's central holding had not been weakened and that, in its nearly two decades of application, Roe had proven workable. [FN65] The joint opinion authors expressed deep concern that overruling Roe v. Wade would substantially undermine the Court's integrity, given the likely public perception that reversal was due solely to the changing composition of the Court: "[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question." [FN66] The Casey plurality also emphasized Roe's important role in the lives of countless American women who had come to rely on its protections; and recognized the link between reproductive autonomy and women's autonomy and equality:

[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their *330 views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives . . . . The Constitution serves human values, and while the effect of reliance on Roe cannot be exactly measured, neither can the certain cost of overruling Roe for people who have ordered their thinking and living around that case be dismissed. [FN67]

Despite its strong language, however, the joint opinion also altered key aspects of Roe v. Wade, rejecting Roe's strict scrutiny standard as well as its trimester framework and adopting a more permissive "undue burden" standard. [FN68] In doing so, the joint opinion authors rebalanced the relative interests of the state and the pregnant woman, emphasizing the state's interest in protecting maternal health and potential fetal life "from the outset" of the pregnancy. [FN69] Roe and its progeny permitted restrictions on pre-viability abortions only if the government could prove that they served to protect women's health. [FN70] In contrast, the Casey joint opinion allows states to regulate all pre-viability abortions to promote the state's interest in potential life or in protecting the woman's health, as long as the regulations rationally further these state interests and do not unduly burden women's access to abortion. [FN71] After Casey, challenges to pre-viability restrictions on abortion can no longer *331 focus exclusively on the absence of a health justification. Rather, challengers must prove that the restrictions pose undue burdens. [FN72] The Casey joint opinion thus charted a new path for abortion regulation that undoubtedly represents less constitutional protection than that afforded by Roe. Yet, as discussed below, a close analysis of the Casey standard demonstrates that the authors of the joint opinion intended to replace the Roe framework with a rigorous standard that carefully examines both the actual impact of restrictions on the women they affect and the governmental purpose underlying them.

The plurality carefully articulated a new standard, which, on its face, provided stronger protection for the abortion right than Justice O'Connor's earlier iterations. In doing so, the joint opinion explicitly disavowed prior discussions of the undue burden standard, [FN73] and noted its agreement with the ultimate objective of Roe's trimester framework--i.e., "ensur[ing] that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact." [FN74] In "refin[ing] the undue burden analysis," [FN75] the plurality rejected its narrow formulation in Justice O'Connor's prior opinions, which had defined undue burden as an "absolute obstacle[] or severe limitation [] on the abortion decision." [FN76] In its place, the joint opinion clarified that an undue burden exists where a regulation places "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." [FN77] Thus, under the newly-minted *332 formulation, regulations pose an undue burden even where they do not amount to "absolute obstacles" or "severe limitations." [FN78] Moreover, the joint opinion further buttressed the un-

due burden test by adding a second prong relating to governmental purpose. The test now encompasses not just regulations that unduly impinge upon women seeking abortion (i.e., an effects prong), but also those that are created by government with that purpose in mind:

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. 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. [FN79] Finally, in defining undue burden, the Court clarified that even laws designed to further permissible state interests are unconstitutional if they place an undue burden on women seeking abortions. [FN80] In contrast, in prior dissenting opinions, Justice O'Connor had suggested that the undue burden analysis was merely a "threshold inquiry" and that regulations found to be unduly burdensome could be justified by compelling state interests. [FN81] The Casey joint opinion explicitly rejects this formulation, emphasizing, "[i]n our considered judgment, an undue burden is an unconstitutional burden." [FN82]

C. The Joint Opinion's Application of the Undue Burden Standard

While the joint opinion's abstract invocation of its refined undue burden analysis clearly suggests that its authors intended a relatively protective standard, deducing the meaning of the undue burden standard from the joint *333 opinion's application of it to the Pennsylvania law is more difficult. On the one hand, the undue burden standard was strong enough to invalidate the husband-notification provision and its related reporting requirement. On the other hand, several provisions of the Pennsylvania law, including the mandatory waiting period, survived the joint authors' application of the undue burden standard. Yet, even while upholding some of the Pennsylvania restrictions, the joint authors signaled that the new standard was meant to provide reasonable protection and that those very provisions might not survive under a different factual record.

The joint opinion's analysis of the husband-notification and reporting provisions, sections 3209 and 3214(a)(12) of the Pennsylvania Act respectively, contains much that protects a woman's right to choose abortion. The joint opinion explicitly rejected the Commonwealth of Pennsylvania's argument that the husband-notification requirement imposed no undue burden because the vast majority of married women voluntarily tell their husbands of the abortion decision and thus "only one percent of the women who obtain abortions" are actually affected by the requirement. [FN83] The joint opinion emphasized:

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. . . . 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. [FN84] In focusing on those women who are the "real target" of the husband-notification requirement, [FN85] the joint opinion authors rejected the Commonwealth's rights-by-numbers approach that would deny constitutional protection to the very women affected by the law because this group consisted of only a small number of women. [FN86] Moreover, in invalidating the husband-notification provision on its face even though the plaintiff-providers had not shown that it would be invalid in all circumstances, the Justices implicitly rejected the Solicitor General's claim that, under *United States v. Salerno*, [FN87] *334 facial challengers must prove that there is "no set of circumstances . . . under which [the challenged regulation] would be valid." [FN88] Instead, the joint opinion found that the providers had met their burden of proof under the new standard because "in a large fraction of the cases in which [the legislation] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." [FN89]

In applying the undue burden standard to the husband-notification provision, the joint opinion authors were strikingly sensitive to the specific social context in which forced husband-notification would operate, connecting and understanding the interrelationship between domestic violence and women's reproductive autonomy. The Justices gave great deference to the detailed factual findings of the district court that documented the severity and pervasiveness of domestic violence, the inadequacy of the statutory exceptions to the notification requirement, and the grave dangers posed by forcing victims of domestic battering and marital rape to notify their husbands of their abortion. These findings, together with numerous other independent social science studies, [FN90] led the joint opinion authors, with Justices Blackmun and Stevens, to conclude that the spousal notification requirement amounted to an undue burden. [FN91]

A requirement that all women be affected by an abortion restriction would have considerably diluted the degree of constitutional protection:

It would be difficult to justify a constitutional test that permitted states to enact restrictions that wholly precluded choice for some women merely because those restrictions would not constitute an "undue burden" for other, more fortunate women. Such an approach would simply draw a social and economic line across society, above which *335 women would be able to have safe and legal abortions, and below which women would be returned to illegal and dangerous alternatives. [FN92] The joint opinion's insistence on both an empirical, quantitative inquiry and one that focuses on the particular women affected by an abortion law strengthened the undue burden standard significantly. Moreover, the focus on a fact-bound measure of the burdens imposed on women avoids non-empirical subjective judgments by judges about whether a burden is too heavy. Rather, the inquiry properly focuses on whether the empirical record shows that the restrictions are likely to pose substantial obstacles for certain women.

The joint opinion's analysis of the spousal notification provision is also noteworthy because it explicitly recognized and condemned the outmoded conception of married women's autonomy that underlay this requirement. The joint opinion deemed the notification requirement an impermissible "dominion" of husbands over wives reminiscent of long-abandoned views of married women's subordinate status:

Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power; even where that power is employed for the supposed benefit of a member of the individual's family. [FN93]

In contrast, the joint opinion's well-reasoned, highly contextualized analysis of the spousal notification provision is difficult to reconcile with its application of the undue burden standard to uphold other provisions of the Pennsylvania law. Indeed, the joint opinion has been widely criticized by commentators who have correctly noted the perplexing inconsistency between its treatment of the spousal notification provision and most of the other challenged provisions. [FN94]

In upholding Pennsylvania's mandatory twenty-four-hour waiting period, the joint opinion authors took note of extensive findings by the district court that documented the serious burdens posed by this requirement:

[B]ecause of the distances many women must travel to reach an abortion provider, the practical effect will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion must make at least two visits to the doctor . . . . [T]he District Court found that for those women who have the fewest *336 financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers or others, the 24-hour waiting period will be "particularly burdensome."

[FN95] While noting that “[t]hese findings are troubling in some respects” and that the constitutionality of the waiting period posed a “closer question” than that of other challenged provisions, the joint opinion refused, with no satisfactory explanation, to find a constitutional violation. [FN96] The joint authors reasoned that

We do not doubt that, as the District Court held, the waiting period has the effect of ‘increasing the cost and risk of delay of abortions,’ but the district court did not conclude that the increased costs and potential delays amount to substantial obstacles . . . . We also disagree with the District Court’s conclusion that the ‘particularly burdensome’ effects of the waiting period on some women require its invalidation. A particular burden is not of necessity a substantial obstacle. [FN97] Thus, as Professor Laurence Tribe has argued, “[i]n large part, the plurality based its decision—somewhat hypertechnically—on the district court’s own characterization of the waiting period as ‘particularly burdensome’ rather than a ‘substantial obstacle.’” [FN98] The plurality’s reasoning on this point is especially illogical and troubling given that at the time the district court made its factual findings the *Roe v. Wade* strict scrutiny standard remained in place, and the undue burden standard as then formulated by Justice O’Connor used significantly different terminology and required different proof. To expect the district court to have intuited the new standard—and to have foretold its specific requirement that restrictions have the “purpose or effect of placing a substantial obstacle” on the right to choose abortion—was unreasonable and created uncertainty about the meaning of the new standard. Moreover, while the joint opinion authors easily recognized that forcing married women to notify their husbands was grounded in archaic sex-role stereotypes, in upholding the state-mandated counseling scripts as a “reasonable measure designed to ensure an informed choice,” [FN99] they turned a blind eye to the reality that both this requirement and the mandatory waiting period likewise “rest[ed] on outmoded and unacceptable assumptions about the decisionmaking capacity of women.” [FN100]

*337 Also troubling was the plurality’s unwillingness either to examine the district court’s factual findings of the burdens posed by the informed parental consent provision or to consider the extensive social science data documenting the harmful effects of parental consent requirements. [FN101] In contrast to its willingness to ground its analysis of the husband-notification requirement in the context of the realities of women’s lives, the joint opinion summarily rejected the providers’ arguments against parental consent as a “reprise of their arguments” on other provisions, engaging in no analysis whatsoever of the factual record that documented the experiences of young women and the unique difficulties they face in accessing abortion. [FN102]

Although these shortcomings in the joint opinion’s analysis raise serious concerns, the plurality’s application of the undue burden standard to uphold some of the challenged provisions also had positive aspects. The validation of Pennsylvania’s narrow definition of “medical emergency,” for example, was conditioned on an insistence that it be construed broadly to encompass three life-threatening medical conditions that the district court found were not covered by the statute. [FN103] In doing so, the plurality emphasized that if the narrow definition of medical emergency foreclosed the possibility of an immediate abortion in the face of “significant” health risks, “we would be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State to interfere with a woman’s choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health.” [FN104] In its analysis of this provision, the joint opinion authors thus underscored their continuing commitment that the lives and health of women remain paramount over the State’s interest in restricting abortion.

Additionally, in upholding the challenged recordkeeping and reporting requirements of the Pennsylvania statute, the joint opinion first carefully scrutinized these requirements to determine if they were “‘reasonably directed to the preservation of maternal health and . . . properly respect a patient’s confidentiality and privacy.’” [FN105] The plurality also made clear that even though these provisions were, in its view, reasonably related to the State’s interest in preserving women’s health, they would nonetheless be invalid if they had the *338 purpose or effect of placing substantial obstacles in the path of women seeking abortions. [FN106] In finding that the recordkeeping and reporting provisions did not impose

a substantial obstacle, the joint authors interpreted the record as establishing only that these provisions might increase the cost of abortions by "a slight amount," but conceded that "at some point increased cost could become a substantial obstacle." [FN107] This concession again demonstrates that the joint authors intended the newly formulated undue burden standard to provide substantially broader protection for the abortion right than that envisioned by Justice O'Connor in her prior formulations of undue burden. As Professors Estrich and Sullivan highlighted in their excellent pre-Casey critique of Justice O'Connor's undue burden concept, she "ha[d] never acknowledged that significant cost increases constitute 'burdens' on abortion." [FN108] And, perhaps even more troubling, even if those cost increases posed burdens, her dissenting opinions in *Akron I* and other cases demonstrated a willingness to uphold health regulations regardless of the substantial burdens posed by them. [FN109] The Casey joint opinion responds to these concerns, strengthening the undue burden analysis by protecting women against health regulations that either are not designed to protect women's health or cause price increases and other burdens that become substantial obstacles for women seeking abortions.

Finally, the authors of the joint opinion carefully limited their conclusions about the provisions that they upheld to the facts before them in the existing record. In upholding the mandatory waiting period, the plurality emphasized that it was doing so based "on the record before [the Court], and in the context of this facial challenge." [FN110] Likewise, the plurality carefully limited its validation of the state-scripted counseling provision, stressing that "there is no *339 evidence on this record that [the provision] would amount in practical terms to a substantial obstacle." [FN111] And, as noted above, the Justices acknowledged that the increased costs of recordkeeping and reporting provisions could become a substantial obstacle, upholding them only because "there is no such showing on the record before us." [FN112] Accordingly, as other individual members of the Court agreed, [FN113] the joint opinion did not finally resolve the fate of either the Pennsylvania restrictions or similar laws in other states. Rather, its findings of constitutionality were preliminary and based on a specific factual record. Indeed, in post-Supreme Court proceedings, the district court, recognizing this limitation of the joint opinion, granted the providers' request to continue their facial challenge by putting on factual proof to meet the new undue burden standard. [FN114] While the district court's decision was ultimately reversed on appeal, the Casey joint opinion nonetheless explicitly left the door open to subsequent as-applied challenges to the Pennsylvania provisions and facial challenges to similar laws in other states. The Third Circuit noted, for example, that by limiting its findings to the record before it, the Casey plurality "signalled that it was not announcing a per se rule." [FN115] Rather, "the Court meant that other state abortion laws require individualized application of the undue burden standard" and "a future 'as applied' challenge to the Pennsylvania Act would be possible." [FN116] In denying the providers' motion to stay the court of appeals' mandate, Justice Souter agreed that "litigants are free to challenge similar restrictions in other jurisdictions, as well as these very provisions as applied." [FN117]

*340 D. The Casey Concurring and Dissenting Opinions

The separate opinions of individual members also provide insight into the meaning of Casey's undue burden standard. Chief Justice Rehnquist and Justice Scalia, joined by Justices White and Thomas, wrote separate concurring and dissenting opinions in which they explicitly called for the overruling of *Roe v. Wade* [FN118] --a goal we now know they had come perilously close to achieving. [FN119] However, while sharply criticizing the undue burden standard as both "rootless" [FN120] and "inherently standardless," [FN121] Justice Scalia acknowledged that the joint opinion expressly "repudiate[d] the more narrow formulations" used in past opinions and that the "strong adjectives [of past opinions] are conspicuously missing from the joint opinion, whose authors have . . . now determined that a burden is 'undue' if it merely poses a 'substantial' obstacle to abortion decisions." [FN122] Justice Scalia criticized the joint opinion authors for "stealthily downgrad[ing]" the State's interest in "unborn human life . . . [from a 'compelling interest'] to a merely 'substantial' or 'profound' interest." [FN123] He also recognized that "the 'undue burden' standard may ultimately require the *341 invalidation of each provision upheld today if it can be shown, on a better record, that the State is too ef-

fectively 'express[ing] a preference for childbirth over abortion.'" [FN124]

Justices Stevens and Blackmun each wrote separately to voice their disagreement with the joint opinion's dismantling of the trimester framework and abandonment of strict scrutiny. [FN125] Yet, in doing so, both Justices expressed confidence that the new standard would ultimately ensure meaningful protection for a woman's right to choose abortion. In arguing that the challenged provisions were unconstitutional under either Roe's strict scrutiny standard or the new undue burden test, Justice Stevens noted his belief that the undue burden standard represented more than just rhetorical preservation of abortion rights:

The future may also demonstrate that a standard that analyzes both the severity of a regulatory burden and the legitimacy of its justifications will provide a fully adequate framework for the review of abortion legislation even if the contours of the standard are not authoritatively articulated in any single opinion. [FN126] Roe's author, Justice Blackmun, made an impassioned case for retaining the Roe trimester framework, yet openly expressed his relief that Roe's central holding had been reaffirmed: "But now, just when so many expected the darkness to fall, the flame has grown bright . . . . Make no mistake, the joint opinion of Justices O'Connor, Kennedy, and Souter is an act of personal courage and constitutional principle." [FN127] Justice Blackmun praised the authors of the joint opinion for striking down the husband-notification provision, and noted that, in doing so, "the Court has established a framework for evaluating abortion regulations that responds to the social context of women facing issues of reproductive choice . . . . [a]nd in applying its test, the Court remains sensitive to the unique role of women in the decisionmaking process." [FN128] While disagreeing with Justice Scalia on everything else, Justice Blackmun agreed that the new standard had been used to uphold the Pennsylvania provisions only based on the record before the Court, and that it might ultimately be applied to invalidate those very provisions:

[W]hile I believe that the joint opinion errs in failing to invalidate the other regulations, I am pleased that the joint opinion has not ruled out the possibility that these regulations may be shown to impose an unconstitutional burden. The joint opinion makes clear that its specific holdings are based on the insufficiency of the record before it . . . . I am confident that in the future evidence will be produced to show that *342 "in a large fraction of the cases in which [these regulations are] relevant, [they] will operate as a substantial obstacle to a woman's choice to undergo an abortion." [FN129]

Justice Blackmun's personal papers from the Casey litigation, now housed at the Library of Congress, also reveal his optimism that the new undue burden standard would adequately protect Roe's core principles. Upon learning from Justice Kennedy that he had decided to join forces with Justices O'Connor and Souter in the joint opinion, [FN130] Justice Blackmun wrote: "Roe sound, th[rough] not trimester sys[tem]." [FN131] As Linda Greenhouse recently argued, "The choice of this slightly old-fashioned word was significant. To a lawyer, 'sound' conveys not just survival but correctness and legitimacy." [FN132] Following his retirement from the Court, Justice Blackmun expressed admiration for the joint opinion authors' "robust view of individual liberty and the equal protection undertone of their opinion and their respect for stare decisis" and remained steadfast in his optimism that Roe would remain sound: "I am optimistic that the joint opinion of Justices O'Connor, Kennedy, and Souter in the Casey case will generally stand, and that those three Justices will continue to reaffirm Roe's holding." [FN133]

III. Post-Casey Supreme Court Undue Burden Jurisprudence

The Supreme Court has elaborated the undue burden standard's precise contours in only three cases that produced full opinions from the Court: [FN134] *343 *Mazurek v. Armstrong*, [FN135] *Stenberg v. Carhart*, [FN136] and *Ayotte v. Planned Parenthood of Northern New England*. [FN137] While these opinions taken together stopped short of providing the clear guidance some lower courts sought, [FN138] the Court reaffirmed and in some ways strengthened the protection

announced in Casey, albeit by a slim margin. [FN139]

A. Mazurek v. Armstrong

Mazurek v. Armstrong, [FN140] handed down in 1997, represents the Court's most thorough treatment of the purpose prong of the undue burden test since Casey. A group of Montana physicians and a physician-assistant, Susan Cahill, challenged a Montana statute restricting the performance of abortions to licensed physicians. Cahill was the only physician-assistant in the state who performed abortions. The plaintiffs claimed that the statute prohibiting Cahill from continuing to provide abortion services constituted an undue burden on abortion rights and amounted to a bill of attainder directed against her. The district court denied the plaintiffs' motion for a preliminary injunction, determining that the plaintiffs had not proven that they had a "fair chance of success" on the merits of either their undue burden or bill of attainder claim, despite clear evidence that the legislature's purpose in enacting the statute had been to eliminate Susan Cahill as a source of abortion care in Montana. [FN141] Rejecting this evidence, the district court embraced an almost impossibly high threshold for making out a purpose prong claim, concluding that plaintiffs would have had to prove that "none of the individual legislators approving the *344 passage of [the restriction] was motivated by a desire to foster the health of a woman seeking an abortion." [FN142]

On appeal from the denial of preliminary injunctive relief, the Court of Appeals for the Ninth Circuit reversed and attempted to provide some guidance on purpose prong proof by looking both at Casey and at legislative purpose in other constitutional settings. The Casey test, the court of appeals noted, inquires whether an abortion restriction "serve[s] no purpose other than to make abortions more difficult." [FN143] Commenting that "the Supreme Court has not elaborated on the means of determining legislative purpose under the Casey standard," [FN144] the appeals court turned to Miller v. Johnson [FN145] and Shaw v. Hunt, [FN146] a pair of legislative redistricting cases, to flesh out the standard: "Legislative purpose to accomplish a constitutionally forbidden result may be found when that purpose was 'the predominant factor motivating the legislature's decision.'" [FN147] Furthermore, the proof of such an impermissible purpose "may be gleaned both from the structure of the legislation and from examination of the process that led to its enactment." [FN148] The appeals court refrained from ruling on the merits of the preliminary injunction motion, but held that the plaintiffs had met their burden of demonstrating a "fair chance of success" on their purpose prong claim, and remanded the case to the district court for a determination of the balance of the equities. [FN149] Proceedings on remand never occurred. In the same per curiam order in which it granted certiorari, the Supreme Court issued a summary ruling reaching the merits of the plaintiffs' claims, despite the preliminary procedural posture of the case and the narrowness of the ruling below.

Far from solidifying the undue burden standard, Mazurek injected it with an element of uncertainty. Starting with the observation that the plaintiffs had produced insufficient evidence to establish that the physician-only law would have the unconstitutional effect of posing a substantial obstacle to abortion, the Court flirted with the suggestion that an unconstitutional purpose standing alone would not suffice to invalidate an abortion restriction:

But even assuming the correctness of the Court of Appeals' implicit premise--that a legislative purpose to interfere with the *345 constitutionally protected right to abortion without the effect of interfering with that right (here it is uncontested that there was insufficient evidence of a "substantial obstacle" to abortion) could render the Montana law invalid--there is no basis for finding a vitiating legislative purpose here. [FN150]

With the waters thus muddied, [FN151] the Court refused to discuss whether the court of appeals had identified the correct method for determining improper legislative purpose in this context--Miller's and Shaw's close scrutiny of the totality of the circumstances, the inquiry into whether the improper purpose was the "predominant factor" motivating the

legislature, and the inferences drawn from the statute's structure and legislative history. [FN152] Significantly, the Court did not repudiate that mode of analysis for abortion cases. Rather, the Court focused upon the absence of evidence establishing an adverse impact on women's access to abortion [FN153] and the absence of direct evidence of evil motive on the part of Montana legislators. [FN154]

Justice Stevens, joined by Justices Ginsburg and Breyer, dissented, arguing that, "[w]hen one looks at the totality of circumstances surrounding the legislation, there is evidence from which one could conclude that the legislature's predominant motive . . . was to make abortions more difficult." [FN155] As Justice Stevens noted recently, the determination of an improper legislative purpose is a "manageable judicial task." [FN156] In not looking more searchingly into the motives of the Montana legislature, the Mazurek Court imparted an element of confusion to an inquiry that it has undertaken in numerous other *346 constitutional contexts. [FN157] Still, Mazurek cannot fairly be read to foreclose a finding of undue burden based on improper purpose alone, nor does it derogate from the Miller and Shaw methodology for determining legislative purpose. As discussed in Part IV below, however, lower courts have misread Mazurek in precisely this manner, misconstruing it as the death of the purpose prong. [FN158]

B. Stenberg v. Carhart

In eight separate opinions producing a 5-4 majority, the Supreme Court in 2000 struck down Nebraska's criminal ban on certain abortion procedures. [FN159] Stenberg v. Carhart was the first challenge to abortion restrictions to be fully briefed and argued to the Supreme Court since Casey. Eight years after Casey, the margin of majority support for abortion rights had thinned, but far from eroding Casey, Stenberg strengthened it.

Justice Breyer's majority opinion invalidating the Nebraska abortion procedure ban [FN160] began with the announcement that the Court would not "revisit those legal principles" determined by Roe and redetermined by Casey. [FN161] Applying those principles, the Court held that Nebraska's abortion procedure ban violated the Constitution for "at least two independent reasons." [FN162] First, the statute lacked any exception for procedures needed to preserve the patient's health. The Court relied on Casey and revived a host of pre-Casey holdings to support its conclusion that "the governing standard requires an exception where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother, for this Court has made clear that a State may promote but not endanger a woman's health when it *347 regulates the methods of abortion." [FN163] The primacy of women's health has been deeply embedded in abortion decisions since Roe; Stenberg confirmed Casey's holding that the absence of a health exception in an abortion restriction constitutes an independent ground for a holding of unconstitutionality.

In identifying an explicit statutory health exception as a sine qua non of abortion restrictions whenever substantial medical authority deemed one necessary, the Stenberg Court headed off a key strategy of abortion rights opponents, who have long sought to narrow the application of the health rationale [FN164] and downplay the importance of access to abortion for women's health. In the view of the Stenberg dissenters, the health exception essentially strips states of their authority to regulate physicians' abortion practice. [FN165] The recognition of a right to any abortion procedure required to preserve a woman's health or prevent damage to her health, according to the dissenters, opened an ever-expanding loophole in abortion jurisprudence, investing the doctor with unfettered and unreviewable discretion to perform whatever procedure he or she deemed necessary for the health of the patient. [FN166] Instead, they argued, any exception for women's health—an exception which the dissenters thought unnecessary to begin with [FN167]—should be limited to the harm caused by continuing the pregnancy, as opposed to the greater risk posed by alternative abortion methods. [FN168]

The second independent ground for the holding of unconstitutionality was a finding that the procedure ban imposed an undue burden on women's ability to choose D & E abortions, [FN169] the most common second-trimester abortion

method, thus unduly burdening the right itself. Relying on *Danforth*, [FN170] in which an abortion procedure ban was held invalid under *Roe*'s strict scrutiny test, Justice Breyer found that Nebraska's prohibition of a range of abortion *348 methods constituted an undue burden, refusing to credit Nebraska's contention that the statute would not have prevented a single abortion--it merely would have sharply restricted the doctor's choice of method. Reasoning that a criminal ban on the most common method of second-trimester abortion would foreclose access to abortion altogether for some women, Justice Breyer determined that the statute had the impermissible effect of "placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." [FN171]

It is difficult to read *Stenberg* without concluding that it significantly strengthened *Casey*. Notably, Justice Breyer wrote for five members of the Court, and while all but one of the concurring Justices wrote separate opinions, none of them quarreled with the proposition that the *Casey* standard was the controlling standard. Even Justice Kennedy, who disagreed with the majority's application of the standard, agreed on this point. [FN172] Thus, for the first time, a clear majority of the Court embraced a standard introduced by a three-Justice plurality less than a decade earlier. Furthermore, in this facial challenge, the Court did not require plaintiffs to prove that a large number of women would be harmed by the procedure ban before enjoining the statute as a whole, again implicitly rejecting the *Salerno* standard. [FN173] Perhaps most importantly, in holding that the absence of a health exception constituted an independent ground for invalidating an abortion restriction, the *Stenberg* Court placed paramount value on the protection of women's health, and refused to define that health interest narrowly.

A concurring opinion from Justice O'Connor illustrates the fragility of Justice Breyer's majority. Justice O'Connor, the majority's fifth vote, made clear that, had the Nebraska law contained an adequate health exception and had it been limited to D & X abortions only, she would have sustained its constitutionality. [FN174] Although six years have passed, neither Nebraska nor most *349 other states have accepted Justice O'Connor's advice. [FN175] Even the Federal Abortion Procedure Ban Act, enacted years after *Stenberg*, lacks the health exception that *Stenberg* requires, a fatal flaw in the eyes of the six federal courts that have reviewed it to date. [FN176]

C. *Ayotte v. Planned Parenthood of Northern New England*

The *Stenberg* Court did not agonize over the question of remedy, striking down the statute in its entirety in the context of that facial challenge. Six years later, with the composition of the Court ready to tip on a conservative fulcrum, Justice O'Connor's opinion for an eerily unanimous Court in *Ayotte v. Planned Parenthood of Northern New England* [FN177] left for another day any revisiting of the undue burden standard.

Ayotte was a facial challenge to a New Hampshire parental notification statute [FN178] prohibiting doctors from providing abortion services to minors until 48 hours had elapsed following the delivery of written notice of the abortion to the patient's parent or guardian. Relying upon *Stenberg*, *Casey*, and *Roe*, the Court of Appeals for the First Circuit held that this statute unduly burdened those minors for whom parental notification was not possible. In addition, the court of appeals looked to *Stenberg*'s holding that an explicit health exception was "a specific and independent constitutional requirement" for statutes restricting abortion. [FN179] The appeals court also determined that the statute's judicial bypass procedure could not be deemed an adequate substitute for a health exception. [FN180]

The Supreme Court ruled on *Ayotte* in the brief window of time between Justice O'Connor's announcement of her retirement and Justice Alito's confirmation hearings. This narrow opinion had the cautious and placating tone of a temporary truce. Like *Stenberg*, *Ayotte* led off with a reaffirmation of *Casey*: "We do not revisit our abortion precedents today, but rather address a *350 question of remedy. . . ." [FN181] Here, for the first time, a unanimous Court acknowledged that *Casey* was the controlling standard, and conceded that, "under our cases, it would be unconstitutional to apply the

Act in a manner that subjects minors to significant health risks.” [FN182] Thus embracing--or at least acquiescing to--both the Casey undue burden standard and Stenberg's health exception mandate, [FN183] and, for a third time, implicitly rejecting the Salerno standard, [FN184] the Ayotte Court unanimously held that, as written, the New Hampshire Act would violate the Constitution. [FN185]

This ruling, however, cast into confusion the question of what remedies would be available to plaintiffs in successful challenges to abortion restrictions. The Court noted that in Stenberg, the parties did not ask for any remedy narrower than the invalidation of the entire statute, guaranteeing through this comment that such an omission is unlikely to happen again. In this case, however, where New Hampshire had sought a narrower remedy that would give at least partial effect to the statute, and where the constitutionality of properly circumscribed parental notification provisions was not in doubt, the Ayotte Court was willing to invalidate the defective statute in only some of its applications: “If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, what is the appropriate judicial response? We hold that invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief.” [FN186] Apparently answering Justice Kennedy's concerns about judicial overreaching that he voiced in his Stenberg dissent, [FN187] Justice O'Connor reasoned:

Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while elevating other applications in force, or to sever its problematic portions while leaving the remainder intact. . . . Only a few applications of New Hampshire's parental notification statute would present a constitutional problem. So long as they are faithful to legislative intent, then, in this case the lower courts can issue a *351 declaratory judgment and an injunction prohibiting the statute's unconstitutional application. [FN188]

Justice O'Connor was careful to insist that the limited injunction she was directing the lower courts to impose on the New Hampshire statute could not “entail quintessentially legislative work” and must be faithful to legislative intent, cautioning lower courts not to “rewrit[e] state law to conform it to constitutional requirements.” [FN189] With these cautions, the Court vacated and remanded the First Circuit's judgment with instructions to determine whether a limited injunction could save the statute's constitutionality or whether the statute must, to remain consistent with legislative intent, be invalidated in toto.

Justice O'Connor avoided conflict within the Court by not ruling definitively on the merits of the plaintiffs' claims, thereby passing the question of the law's ultimate constitutionality to the lower federal courts--many of which, even before Ayotte, had been seeking greater guidance from the Supreme Court on abortion questions. Such an approach arguably requires lower courts to leave in place as much of an unconstitutional statute as possible and even to “strive to salvage it” [FN190] by repairing the constitutional defect through judicial decree. The Ayotte compromise cannot be read in isolation from the unique historical circumstances under which it arose, however, and thus should not be interpreted as a general rule that courts must err on the side of rescuing fragments of a constitutionally suspect statute. Rather, Ayotte can be viewed as establishing a holding pattern in the area of parental involvement regulations, a type of abortion restriction that the Court has repeatedly deemed constitutionally permissible. Indeed, Ayotte is most notable for what it did not do: adopt Salerno, retrench Casey, or retreat from Casey's and Stenberg's emphasis on the paramount mandate to protect women's health.

D. Post-Casey Insights from Individual Justices

Individual opinions by the Casey joint opinion authors have signaled a desire to ensure that the new standard offers meaningful protection to women's abortion right. Although the Supreme Court has not explicitly resolved the split in au-

thority over whether to apply Salerno's "no set of circumstances" test [FN191] to facial challenges of abortion statutes, individual Justices have repeatedly addressed it. In a concurring opinion in *Fargo Women's Health Organization v. Schafer*, [FN192] Justices O'Connor and Souter, denying a motion for a stay and an *352 injunction pending appeal, clarified that facial challenges could be sustained against abortion restrictions even if those restrictions could be constitutionally applied to some women but not to others. [FN193] Using the language of *Casey*, [FN194] these Justices clearly repudiated the Salerno "no set of circumstances" standard for facial challenges of abortion regulations. Instead, they reiterated *Casey*'s holding that "a law restricting abortions constitutes an undue burden, and hence is invalid, if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'" [FN195] In addition, they clarified that the lower courts must "specifically examine[] the record developed in the district court" through a fact-intensive analysis of the particular restrictions at issue, rather than mechanically applying the Supreme Court's *Casey* findings regarding the Pennsylvania statute. [FN196]

Dissenting from a denial of certiorari in *Ada v. Guam Society of Obstetricians and Gynecologists*, [FN197] Justice Scalia, in an opinion joined by Chief Justice Rehnquist and Justice White, would have granted review of the Ninth Circuit judgment striking down a Guam statute that prohibited abortions unless two physicians certified that the woman's life or health necessitated the procedure. Justice Scalia opined that, because the Guam restriction could have been applied constitutionally to post-viability abortions, under Salerno's "no set of circumstances" test, the facial challenge to the Guam statute had to fail. [FN198] The discussion continued in *Janklow v. Planned Parenthood, Sioux Falls Clinic*. [FN199] Dissenting from the denial of certiorari, Justice Scalia reiterated that the undue burden standard adopted in *Casey* did not displace Salerno, while noting that the denial of certiorari relegated courts of appeals to "reading the tea leaves of concurring opinions" to resolve the uncertainty over the correct standard to apply in these cases. [FN200] Justice Stevens concurred in the denial of certiorari, and took the opportunity to blast the Salerno standard as unduly onerous even outside the context of facial challenges to abortion restrictions, dismissing Salerno's "no set of circumstances" language as merely a "rhetorical flourish" that had resulted in a "rigid and unwise dictum" unsupported by case law and unnecessary to Salerno's holding. [FN201]

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*353 IV. Lower Courts' Application of the Undue Burden Standard

In the years following the *Casey* decision, lower courts have had ample opportunities to apply the undue burden standard to assess the constitutionality of a wide range of restrictions on abortion. This Part analyzes the application of the undue burden test in a sampling of district court and appellate opinions. With several significant exceptions that reflect the potential vigor and strength of the *Casey* standard, many lower federal courts have not been faithful to *Casey*'s promise. To be sure, the undue burden standard has provided airtight protection against the efforts of states either to implement comprehensive criminal bans on abortion [FN202] or to force women to notify husbands or boyfriends before having an abortion. [FN203] With respect to other types of abortion restrictions, however, challenges in the lower courts have had mixed results. Some lower courts, especially those at the trial court level, have effectively implemented the mandate of *Casey* and post-*Casey* decisions, applying the undue burden standard in ways that afford meaningful protection to women seeking abortion. These courts apply a contextualized, fact-intensive analysis that acknowledges the current real-life challenges women face in accessing reproductive health care services and gives careful consideration to the ways in which the challenged restrictions exploit and exacerbate those realities and thereby unduly burden access to abortion.

In contrast, in a significant number of cases, federal courts have repudiated or misapplied the protections of *Casey*, manipulating the undue burden standard in an incremental undermining of *Roe*. These courts demand unattainably high levels of proof of undue burden, often requiring litigants to establish their case to a statistical certainty. Many of these

courts disregard testimony illuminating how restrictions will affect disadvantaged women; filter *354 evidence of extreme hardship through the lens of privilege; fail to consider how challenged restrictions will operate when compounded by other restrictions; or mechanically apply the purpose or effects prong to restrictions similar to those at issue in *Casey* without any analysis of the record before them. This approach represents a trend that is inconsistent with *Casey* and post-*Casey* decisions and poses a serious threat to meaningful protection for reproductive autonomy.

A. Implementation of the Effects Prong

Most post-*Casey* legal challenges have been facial challenges that seek to demonstrate that the challenged restrictions will have an actual improper effect on women's access to abortion. This section contrasts the varying approaches of the lower courts in assessing these claims in facial challenges to waiting periods, state-prescribed counseling provisions, abortion procedure bans, and laws that impose civil liability and a variety of licensing and other requirements on abortion providers. [FN204]

1. Inconsistency in the Standard for Facial Challenges

The vast majority of circuits that have addressed the issue have rejected the Salerno "no set of circumstances" standard [FN205] for facial challenges and, consistent with *Casey* and other Supreme Court abortion precedents, have not required a showing that the challenged restrictions are unduly burdensome in all circumstances. [FN206] However, the Supreme Court's failure to explicitly repudiate the Salerno standard has been interpreted by courts in both the Fifth and Fourth Circuits as leaving the door open to its use in facial challenges to abortion restrictions.

*355 The Fifth Circuit Court of Appeals has applied the Salerno standard in post-*Casey* abortion challenges. [FN207] In *Barnes v. Moore*, for example, the court, shortly after *Casey*, upheld Mississippi's mandatory waiting period and biased counseling provision. [FN208] Acknowledging, but disregarding, the *Casey* analysis, [FN209] the court insisted that the Salerno standard controlled and therefore denied the plaintiff-providers the opportunity to put on factual evidence of the specific burdens imposed on Mississippi women by these provisions. Instead, the Court reasoned that the *Casey* outcome controlled because the Mississippi provisions were substantially the same as Pennsylvania's, and therefore plaintiffs could not satisfy the "heavy burden" of the Salerno standard. [FN210] Although a panel of the Court of Appeals for the Fourth Circuit recently rejected the Salerno standard, [FN211] other opinions of that court have embraced the Salerno standard in assessing challenges to laws requiring parental consent [FN212] and imposing licensing and other requirements on abortion providers. [FN213]

*356 These decisions are directly at odds with the application of the undue burden standard in both *Casey* and *Stenberg*, in which the Supreme Court assessed the challenged provisions to determine whether they operated as a substantial obstacle in those cases in which they were relevant. [FN214] Thus, under *Casey* and *Stenberg*, the mere existence of some valid application of the challenged abortion restrictions does not preclude a pre-enforcement facial challenge if the restrictions pose an undue burden for some women. This analysis, which some commentators have called the functional equivalent of First Amendment substantial overbreadth review, [FN215] serves the vital function of protecting women against the deterrent effect of laws that by their very existence imperil women's ability to exercise the constitutional right to abortion. In voiding Pennsylvania's husband-notification provision on its face, for example, the *Casey* joint opinion emphasized that the very existence of the notification requirement chilled women in the exercise of their rights: "Whether the prospect of notification itself deters . . . women from seeking abortions, or whether the husband . . . prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth*." [FN216] Allowing pre-enforcement facial challenges to such restrictions is essential given the practical reality that the very women most heavily burdened by them would likely not come forward to vindic-

ate their rights. [FN217] In precluding facial challenges, decisions such as the Fifth Circuit's in *Barnes v. Moore* force these women to choose between sacrificing their right to abortion and enduring restrictions that threaten their health and safety.

*357 2. The Special Difficulties of Challenging Provisions Similar to Those Upheld in *Casey*: Mandatory Waiting Periods and Counseling Provisions

In the years following *Casey*, numerous legal challenges have been mounted to an ever-increasing number of mandatory waiting periods and counseling provisions [FN218] modeled on those upheld in *Casey*. As the district court properly recognized in *A Woman's Choice-East Side Women's Clinic v. Newman*, [FN219] the proper analysis in assessing challenges to these provisions is whether, based on the specific evidentiary record, they are likely to unduly burden those women affected by them. Most other courts, however, have made the mistake of mechanically imposing *Casey*'s result, rather than applying its undue burden analysis to assess these provisions. [FN220] For this reason, these challenges have met with very limited success in the lower courts even where the challengers have supported their claims with compelling evidence of the burdensome effects of these laws that was not available at the time of *Casey*. [FN221]

Some lower courts--though ostensibly rejecting the use of the Salerno formulation adopted by the Fifth Circuit in *Barnes* [FN222]--have misconstrued *Casey*'s application of the undue burden standard to Pennsylvania's mandatory *358 waiting period and counseling provisions as establishing, if not a per se rule, at least a strong presumption that these provisions are valid in the context of facial challenges. In an especially egregious example of this approach, the district court in *Utah Women's Clinic, Inc. v. Leavitt* [FN223] failed to undertake an individualized analysis of the unique burdens posed to Utah women by that state's mandatory waiting period, reasoning that "[b]ecause the two visit requirement is constitutional in Pennsylvania, it must also be constitutional in Utah--especially in the context of a facial challenge." [FN224] While conceding that "*Casey* did not purport to create a per se rule as to the constitutionality of future abortion legislation," the court summarily concluded that *Casey* controlled the outcome because plaintiffs' complaint contained "no factual allegations materially different from those already considered" in *Casey*. [FN225] Remarkably, without looking beyond the four corners of the complaint, the court summarily dismissed the possibility that the number and location of abortion services in Utah, and other specific circumstances, might render the forced waiting period more burdensome for Utah women than Pennsylvania women due to substantially longer travel distances and consequent increases in cost and delay. [FN226] The court also sharply criticized plaintiffs for bringing the case [FN227] and went so far as to sanction the plaintiffs' attorneys for challenging the Utah law, ordering them to pay attorney's fees and costs [FN228]--an order reversed on appeal. [FN229] Likewise, in *Fargo Women's Health Organization v. Sinner*, [FN230] a challenge to North Dakota's waiting period and counseling *359 provision, the district court employed a similarly cursory analysis. It granted summary judgment without any factual findings or analysis of the specific burdens posed by the law on North Dakota women, based entirely on the surface similarities between the Pennsylvania provision upheld in *Casey* and the Mississippi provision upheld in *Barnes*. [FN231]

The refusal of these courts to undertake a fact-intensive analysis in applying the undue burden standard is a betrayal of *Casey*. Indeed, as noted above, Justice O'Connor took pains to reject this approach in her separate concurrence in *Fargo*. [FN232] In carefully limiting its findings on the Pennsylvania waiting period and counseling provisions to the record before it, [FN233] and specifically acknowledging the "closer question" posed by these provisions, [FN234] the *Casey* joint opinion makes clear that its analysis is not a template for similar provisions in other states. *Casey*'s fact-intensive analysis protects women's access to abortion by ensuring that regulations not deemed burdensome based on the limited record before the Court in *Casey* may still be invalidated if they prove burdensome in states with fewer abortion providers; longer travel distances between clinics; more costly abortion procedures; poorer populations; and other unique social, economic, and geographic circumstances. [FN235]

While other courts have undertaken a somewhat more searching, fact-intensive review than the *Leavitt* and *Fargo* courts, they nonetheless misapply the *Casey* standard, imposing unreasonably heavy burdens of proof on plaintiffs. In *Eubanks v. Schmidt*, [FN236] for example, the district court found that Kentucky's mandatory twenty-four-hour waiting period and counseling provision, which it assumed would require two visits for some women, did not constitute an undue burden. While recognizing that *Casey* "[did] not preordain *360 [the] result" [FN237] in the case, the court nevertheless insisted that *Casey* established "a presumption of constitutionality" with regard to those provisions it upheld. [FN238] In failing to find significant differences in the burdens imposed by the Pennsylvania and Kentucky laws, the court seriously misapplied the *Casey* undue burden analysis by forcing the plaintiff-providers to prove that the statute would operate as a substantial obstacle for those women who "could have obtained an abortion under the old [law], but who cannot under the new [law]." [FN239] The court entirely eliminated from consideration those Kentucky women most disadvantaged by poverty and other circumstances because "[f]or those women already so affected that they cannot obtain an abortion, the Statute changes little." [FN240] Having eliminated this group of women, the court found that the plaintiffs had not shown that the Kentucky waiting period unduly burdened a sufficient number of women to meet the *Casey* standard [FN241] because it "does not fundamentally alter any of the significant preexisting burdens facing poor women who are distant from abortion providers." [FN242]

This approach is deeply flawed. The *Casey* joint opinion made clear that in measuring the constitutionality of restrictive abortion laws, the proper focus is "its impact on those whose conduct it affects." [FN243] The joint opinion nowhere counsels that in assessing this impact courts should ignore preexisting conditions in women's lives that already make it difficult to obtain abortions. Indeed, in invalidating the husband-notification provision, the joint opinion recognized that it is these very conditions--poverty, violence, underlying health problems--that may turn certain abortion restrictions into substantial obstacles for some, and not other, women. The *Eubanks* analysis, in contrast, uses a woman's difficult life circumstances against her. A far fairer and more meaningful constitutional inquiry "is whether the obstacle or burden is, considered from [the woman's] perspective, significant or substantial. To demand more is to turn logic on its head, effectively holding that the most desperate among us can, because of that, be burdened the most." [FN244]

While *Eubanks* analyzed the weight of the burden placed on women by forcing them to hear state-mandated information in person, other courts have rejected challenges to mandatory waiting periods based on a finding that the physician-patient counseling can be done over the telephone, thereby *361 eliminating the requirement of two trips to the provider. [FN245] This outcome might be justified on some factual records. Here again, however, some courts woodenly apply the result in *Casey*, concluding that because the restriction is less burdensome on its face than the two-visit provision upheld in *Casey*, it must therefore pose no undue burden. In *Planned Parenthood v. Miller*, for example, the district court relied heavily on *Casey* in dismissing a challenge to a physician-only counseling requirement, summarily rejecting plaintiffs' proof of an undue burden on the women of South Dakota. [FN246] Plaintiffs' evidence, however, established that South Dakota had only one abortion provider in the entire state and that requiring that doctor to make the required telephone calls would take him seven hours per week, thereby increasing the cost of each abortion by sixty dollars. [FN247] The court made factual findings that South Dakota's poverty rate exceeded the national average and that seventeen percent of patients traveled 300 miles or more each way to reach an abortion provider. [FN248] However, the court did not evaluate the impact that this cost increase would have on teenagers, poor women, or those who lived long distances from South Dakota's sole abortion provider. Instead, the court seemed to assume that the cost increase--which it apparently viewed as modest or capable of being reduced [FN249]--would affect all women equally, ignoring the real differences in the lives and vulnerability of middle- and upper-class women as compared to low-income women, teenagers, domestic violence survivors, and others disparately affected by the cost increase. [FN250]

In *Cincinnati Women's Services v. Taft*, [FN251] the court considered evidence of an even larger projected increase in the cost of an abortion, which resulted from Ohio's mandatory waiting period; it found that implementation of Ohio's

law "would increase the cost of an abortion by about \$100," which would represent *362 a twenty-five percent increase over the current cost of the procedure. [FN252] In concluding that this substantial cost increase did not amount to an undue burden, as in *Miller*, the court engaged in no analysis of the actual impact of this substantial increase on teenagers, poor women, and other vulnerable Ohio women. Rather, citing *Casey*, Justice O'Connor's dissenting opinion in *Akron*, and lower court decisions including *Miller*, the court summarily concluded that the hundred dollar cost increase "does not create an undue burden on the right to obtain an abortion." [FN253]

The Taft and Miller courts both misapplied *Casey* in their treatment of cost increases. In its analysis of both the Pennsylvania waiting period and recordkeeping provisions, the *Casey* joint opinion acknowledges that increases in the cost of abortion services that result from abortion laws can amount to an undue burden if they impose substantial obstacles on women's access to abortion. [FN254] Although *Casey* found that the Pennsylvania provisions did not amount to an undue burden, it did so based on a record that did not contain specific fact-findings documenting the kind of cost increases found in either Taft or Miller. [FN255] Moreover, under *Casey*, cost increases must be carefully assessed based on the empirical record before the court to determine if they amount to a substantial obstacle from the perspective of the women and girls actually affected and taking into account the context of poverty and other real life circumstances in which the increases occur. Indeed, lower courts' failure to assess the burdens posed by abortion restrictions from this contextualized perspective inevitably leads many of them to minimize the effect of cost increases. As Professors Estrich and Sullivan argued with respect to Justice O'Connor's initial formulation of the undue burden test:

Because Justice O'Connor's test is based on the obstacle to the woman making the abortion decision, the only appropriate perspective for assessing the burden is that woman's . . . . [T]he question here is not whether a judge or a legislator or the law's perennial "reasonable man" would judge an increase in cost or requirement of notification to be a *363 "drastic limit." The question is whether a pregnant woman, or girl, would.

It is not simply a matter of a man's perspective versus a woman's or, all too often, a girl's. Unwanted pregnancies strike harder at the poor and the young than at comfortable adults. Inadequate health care, incomplete birth control information, and violence and abuse, are far more common realities for poor and young women than for middle class adults. Moreover, while a \$50 difference in cost may appear modest to most members of the Supreme Court, whose families are insured in any event, it is a lifetime's savings for a teenage girl. To forget her perspective could, quite literally, cost her life. [FN256] Moreover, the lower courts' tendency to examine each restriction individually has minimized their impression of the actual impact of the restrictions on real women. As commentators have recognized, "restrictions that, considered one by one by a court, may not appear undue are not experienced that way by a woman seeking an abortion." [FN257] Rather, women often experience the cost increases and delays caused by mandatory waiting periods and counseling provisions in conjunction with a raft of other restrictions that limit access to abortion. Thus, as Walter Dellinger and Gene Sperling have argued, it is essential that courts develop a mechanism for assessing "how a given regulation incrementally adds to the cumulative burden" on the right to abortion. [FN258] Ignoring these cumulative burdens effectively "allow[s] a state to pile on 'reasonable regulation' after 'reasonable regulation' until a woman seeking an abortion first [has] to conquer a multi-faceted obstacle course." [FN259]

Finally, in one especially noteworthy instance, a challenge to a waiting period was successful at the trial level and then reversed on appeal. The case, *A Woman's Choice-East Side Women's Clinic v. Newman*, [FN260] stands out because of both the district court's thorough evaluation of the factual record and the heavy burden of proof that the Court of Appeals for the Seventh Circuit placed on plaintiffs, while giving no deference to the factual inferences drawn by the district court. In *Newman*, the plaintiffs challenged an Indiana law that required women to obtain state-mandated information in person eighteen hours in advance of their abortions. The trial record contained evidence, unavailable in *Casey*, of what had actually occurred in two other states—Mississippi and *364 Utah—when women were forced as a result of this

requirement to make two trips to the clinic. [FN261] Because the Indiana law had been permitted to take effect subject to a preliminary injunction enjoining the requirement that the information be delivered to the woman in person, [FN262] the record also contained evidence of the mandated information's lack of persuasive effect as well as similar evidence from other states. [FN263]

In vivid contrast to the cursory analysis undertaken by other trial courts, the Newman district court engaged in a careful evaluation of the factual record to determine whether the in-person requirement unduly burdened those Indiana women affected by it. The court emphasized at the outset that Casey and lower court rulings from other states did not "control the validity of Indiana's law" because "different results may occur either because new evidence is presented regarding the actual effects of such laws, or perhaps because of demographic or geographic factors unique to a particular state." [FN264] After a thorough analysis of the record evidence and careful consideration of the objections to the validity of this evidence, the court concluded that Indiana's in-person requirement posed an undue burden because it would likely reduce by ten to thirteen percent the number of abortions performed in Indiana and significantly increase both the number of second-trimester abortions and the number of Indiana women traveling to other states to have abortions. [FN265] This effect would result not from the persuasive effects of the information provided but from "the substantial obstacles the law creates for a substantial fraction of [Indiana] women." [FN266] Specifically, the court found that, after the implementation of similar laws, the number of abortions in Mississippi dropped by approximately ten to thirteen percent and Utah showed similar decreases. [FN267] Based on the expert testimony in the case, the court found that the "results in Mississippi provide[d] a reasonable *365 basis for predicting estimated results in Indiana." [FN268] According to the court, the evidence showed that implementation of Indiana's law without its in-person requirement demonstrated that the information provided to women had no persuasive effect at all. [FN269]

In a split decision reversing the district court, the Court of Appeals for the Seventh Circuit emphasized throughout its opinion that "the pre-enforcement nature of this suit" placed a heavy burden on plaintiffs to show why it should "depart from the holding of Casey that an informed consent law is valid even when compliance entails two visits to the medical provider." [FN270] The court of appeals found that the district court had improperly relied on evidence from states other than Indiana in finding that the undue burden standard had been met.

Although Salerno does not foreclose all pre-enforcement challenges to abortion laws, it is an abuse of discretion for a district judge to issue a pre-enforcement injunction while the effects of the law (and reasons for those effects) are open to debate. What happened in Mississippi and Utah does not imply that the effects in Indiana are bound to be unconstitutional, so Indiana (like Pennsylvania and Wisconsin) is entitled to put its law into effect and have that law judged by its own consequences. [FN271] "Indiana," the court of appeals insisted, "is entitled to an opportunity to have its law evaluated in light of experience in Indiana." [FN272]

While admitting that it had found no clear error in any of the district court's fact-findings, [FN273] the court of appeals repeatedly questioned the *366 inferences drawn from the facts by the district court and substituted its own inferences. [FN274] The appeals court, for example, rejected the district court's inference that the effects observed in Mississippi and Utah were likely to occur in Indiana and offered its own alternative explanation drawn not from record evidence but from pure speculation:

Maybe . . . Indiana differs from Mississippi and Utah and will not experience a substantial decline [in the number of abortions], with or without multiple visits. Or maybe what it shows is that presenting the information in person is critical to its persuasive effect . . . . [T]he fact that Indiana has been blocked from enforcing its laws as written means that the record does not contain evidence needed for accurate assessment of that statute's effects. [FN275]

The court of appeals' opinion in Newman is troubling in several respects. The court misapplied Casey by placing a

virtually insurmountable burden of proof on plaintiffs in a pre-enforcement facial challenge. While ostensibly rejecting Salerno, [FN276] the court demanded airtight proof--or certainly proof not "open to debate"--that the Indiana law was "bound to" affect Indiana women in an unconstitutional manner. [FN277] But, in striking down the Pennsylvania spousal notification provision, the Casey plurality did not require a finding that the unconstitutional effects of that statute were inevitable and indisputable; rather the joint opinion found, based on inferences drawn from the factual findings of the district court and published empirical studies of domestic violence, that forced notification was "likely to prevent a significant number of women from obtaining an abortion." [FN278] Moreover, in requiring proof that is not "open to debate" the court of appeals rejected the very evidence that would best prove the likely unconstitutional effects of Indiana's law in a pre-enforcement challenge--i.e., evidence from other states that have already implemented an in-person counseling requirement. Predictions about how women of Indiana *367 will respond to the two-visit requirement will, of course, inevitably be "open to debate," but it is the job of the trial court to assess the evidence in the record and draw reasonable inferences about how Indiana women are likely to respond. [FN279] As Judge Wood emphasized in her dissent, the court of appeals overstepped its bounds by riding roughshod over the reasonable inferences drawn by the district court and "substitut[ing] its own factual assumptions for evidence that is in the record." [FN280]

3. Challenges to Laws Regulating the Medical Practice of Abortion Providers

Other post-Casey undue burden challenges have focused on state laws that regulate the medical practices of abortion providers by laying down a variety of requirements not imposed on comparable medical providers. [FN281] These challenges have met with success--especially in the trial courts--more often than challenges to waiting periods and other provisions similar to those upheld in Casey. [FN282] Some courts have found that these regulations do not reasonably relate to the state's purported health interests; [FN283] others have found that they *368 unduly burden women's access to abortion by decreasing the availability of abortion services or increasing the costs of abortion. [FN284]

As in the Newman litigation discussed above, however, some appellate courts have shown a disturbing tendency to disregard trial courts' factual findings and to impose unreasonably heavy burdens of proof on challengers. *Greenville Women's Clinic v. Bryant*, [FN285] for example, involved a challenge to a South Carolina law that required physicians and abortion facilities that performed more than an occasional first-trimester abortion to obtain a license to operate their office or clinic. [FN286] South Carolina did not generally require licensing of medical facilities. [FN287] For abortion providers, however, licensure was mandatory, and it was conditioned on compliance with twenty-seven pages of detailed requirements concerning the physical layout of the facility, staff qualifications, cleaning and maintenance of the clinic, requisite equipment, training of staff, and the type of medical care and tests that had to be offered to patients. [FN288] Following a six-day bench trial and "after spending months reviewing all aspects of this case" [FN289] the district court made 100 factual findings and ultimately concluded that the regulations were invalid under Casey. [FN290] First, the district court found that they did not further the state's interest in maternal health because they were "at best medically unnecessary and at worst contrary to accepted medical practice." [FN291] Second, the court found that the regulations were likely to have the effect of imposing an undue burden on women's access to abortion in South Carolina. In assessing the burdens posed by the regulation, the court gave great weight to evidence that the regulation would result in a substantial rise in the cost of abortion services, "at *369 a minimum, between \$30.00 and \$75.00," and, in one area of the state, would "result in an increase of between \$100 and \$300, or result in the elimination of services altogether." [FN292] The court also made specific factual findings as to how price increases and elimination of services would likely affect women seeking abortions in South Carolina, concluding:

By causing delays in the woman's financial ability to obtain an abortion, the regulation will cause the woman to undergo abortion later in the pregnancy, or forego the procedure altogether, both of which result in a higher cost and higher medical risk for the woman. The decreased availability of abortions due to closure of an abortion clinic

also constitutes a substantial obstacle to women seeking abortions. And increasing the distance a woman has to travel to obtain an abortion increases the costs for the woman, again resulting in delay or the inability to obtain an abortion. [FN293]

In a split decision reminiscent of the Seventh Circuit's analysis in *Newman* discussed above, [FN294] the Court of Appeals for the Fourth Circuit reversed the district court's entry of a permanent injunction, finding that the district court had erred in its conclusions that the regulations unduly burdened women seeking abortions and that they did not rationally further the state's purported health interests. The court of appeals began its analysis by noting its deep skepticism about the validity of facial challenges to abortion laws and its reluctance to invalidate the regulation without precise evidence of its actual impact on South Carolina women:

Because of the nature of facial challenges, [the plaintiff-providers] could not present the district court with a concrete factual circumstance . . . to which to apply the Regulation. The clinics therefore must argue about the Regulation's impact generally and prospectively, the type of action typically undertaken by legislatures, not courts. Because a trial on a facial challenge can focus only on arbitrarily selected hypotheticals to which the Regulation might apply, a court is required to speculate about the Regulation's overall effect.

In this case, for example, the district court was not given--and could not be given--any data from South Carolina patients about the impact that particular costs had on their decision to seek an abortion. It was given only estimates by "experts." Accordingly, the impact of the Regulation in any given situation could only have been anticipated. [FN295] *370 In rejecting the district court's findings regarding the substantial obstacles posed by the regulation, the court of appeals emphasized that the record contained no evidence of how the regulation "would actually affect any South Carolina woman's decision to seek an abortion," noting that this was "not due to a failure of proof but a problem inherent in conducting a facial challenge." [FN296] The court referred to the record testimony regarding cost increases as "speculative" and, in any event, under *Casey* not sufficient to meet the undue burden standard because the projected increases of twenty-three to seventy-five dollars per abortion at two clinics, while making it more "difficult" and "expensive" to obtain an abortion, did not impose an "undue burden on 'a woman's ability to make the decision to have an abortion.'" [FN297] As to the larger projected cost increases that would cause the clinic in Beaufort, South Carolina to shut down entirely, the court of appeals opined "no evidence suggests that women in Beaufort could not go to the clinic in Charleston, some 70 miles away." [FN298] Finally, the court of appeals balanced the degree of burden posed by the regulation against its value in advancing the state's asserted interest, concluding that "the increased costs claimed by the three abortion providers are particularly modest when one considers their purpose is to protect the health of women seeking abortions." [FN299]

The Fourth Circuit's analysis contains several serious flaws. First, in requiring that facial challengers support their claims with proof of a regulation's actual impact on women in the very state that has enacted but not implemented the regulation, the court of appeals imposed a burden that is both insurmountable and inconsistent with *Casey* and *Stenberg*. All facial challenges to abortion restrictions must necessarily be mounted on the basis of evidence of an abortion restriction's likely impact, because evidence of its actual impact is not available in a facial challenge. As discussed above, [FN300] *Casey* makes clear that the proper focus of the undue burden analysis is whether a significant *371 number of women are "likely to be deterred from procuring an abortion" [FN301] and that cost increases may constitute an undue burden if they have this effect on women. [FN302] In contrast, by requiring evidence of the actual impact of restrictions, the Fourth Circuit's approach effectively dooms all pre-enforcement facial challenges--a result that is plainly at odds with the *Casey* joint opinion. Second, the court of appeals erred in weighing the effects of the regulation against the state's interest in advancing maternal health and intimating that the benefits asserted by the state justified the burdens posed by the regulation. The *Casey* joint opinion holds that even where a statute furthers a legitimate interest of the state, it is unconstitutional if it imposes an undue burden on women seeking abortions. [FN303] Thus, a valid state interest cannot justify abortion laws that unduly burden women's ability to obtain an abortion. [FN304] Finally, as in *Newman*, [FN305]

without declaring any of the district court's factual findings clearly erroneous, the court of appeals disregarded them and improperly substituted its own inferences about the likely impact of the price increases on South Carolina women. For example, it acknowledged the district court's finding that the cost increases caused by the South Carolina regulation would cause the closure of the only abortion provider in one area of the state, but discounted the finding based on pure speculation that women could easily travel seventy miles to another clinic. As Judge Hamilton noted in his dissenting opinion, this conclusion--drawn not from the evidentiary record but apparently from the personal life experience of the judges in the majority-- ignores the real life challenges many South Carolina women face in accessing abortion services:

While traveling seventy miles on secondary roads may be inconsequential to my brethren in the majority who live in the urban sprawl of Baltimore . . . such is not to be so casually addressed and treated with cavalier when considering the plight and effect on a woman residing in rural Beaufort County, South Carolina. [FN306] *372 In contrast, the district court's findings--supported by the empirical evidence in the record and consistent with Casey [FN307]--recognized that these substantial price increases and longer travel distances would amount to a substantial obstacle by "prevent [ing] a significant number of women from obtaining an abortion or, at minimum, delay[ing] them from obtaining the abortion." [FN308]

The decision of the Court of Appeals for the Sixth Circuit in *Women's Medical Professional Corporation v. Baird* [FN309] provides another example of an appellate court reversing a trial court's findings of undue burden based on improper speculation about the impact of a regulation on women seeking abortion. Baird, unlike Greenville, involved an as-applied challenge to an Ohio licensing provision that required the plaintiff-abortion provider to have a written transfer agreement with a local hospital for transfer of patients in the event of medical complications and emergencies. [FN310] The abortion provider, located in Dayton, Ohio, had tried unsuccessfully to obtain such an agreement with local hospitals. [FN311] The district court held that applying the transfer agreement requirement to the plaintiff-provider unduly burdened women seeking abortions in the Dayton area because it would cause the provider, which served 3000 women each year, to shut down completely. [FN312]

In reversing the district court, the court of appeals reasoned that "while closing the Dayton clinic may be burdensome for some of its potential patients, the fact that these women may have to travel farther to obtain an abortion does not constitute a substantial obstacle." [FN313] The court supported its conclusion by noting that there was evidence in the record that other clinics existed in large cities in Ohio, and that the plaintiff operated a clinic "approximately forty-five to fifty-five miles from the Dayton clinic." [FN314] Therefore, the court concluded, "potential patients of the Dayton clinic could still obtain an abortion in Ohio and . . . within a reasonable distance from the Dayton clinic." [FN315]

As to the trial court's finding that 3000 women per year were served by the clinic, the court found that this fact alone "was insufficient in and of itself" to *373 establish an undue burden. [FN316] Rather than remanding the case to the trial court for additional fact-findings on the impact of the closure on this large number of women, however, the court of appeals made its own findings. The court pointed out that "[n]inety percent of [the 3000] women come from within fifty to sixty miles of Dayton," and "there is no evidence suggesting that a large fraction of these women would be unable to travel to other Ohio cities for an abortion." [FN317] As for the other ten percent of patients that came to the Dayton clinic "from across Ohio and from other states," the court of appeals summarily concluded: "Presumably, the closing of the Dayton clinic would not impose an undue burden on this population because they are already traveling to seek abortion services." [FN318]

The court used a similar analysis to reject the provider's argument, unaddressed by the trial court, that its closure unduly burdened women seeking late second-trimester abortion because it was "the only clinic in southern Ohio offering abortions after the eighteenth or nineteenth week of pregnancy." [FN319] In rejecting this argument, the court of appeals again resorted to speculation, finding that no undue burden existed because women seeking later abortions "could travel

to Cleveland to obtain such an abortion, as clinics in that city provide similar services to the Dayton clinic." [FN320]

Given the critical role of fact-findings in the determination of whether a regulation constitutes an undue burden, the Sixth Circuit's approach of essentially making its own findings--based not on empirical evidence, but on pure speculation--undermines the Casey standard. If the district court had not adequately supported with factual findings its conclusion that an undue burden existed, a fairer approach, and one more consistent with the traditional role of an appellate court, would have been for the court of appeals to remand the case to the district court. As the trier of fact, the district court could then assess such factors as the availability of public transportation from Dayton to other cities in Ohio, the cost of increased travel, the ability of other clinics in Ohio to absorb the Dayton clinic's patients, and the ability of low-income and young women to bear these cost increases. [FN321] It is essential to remove these considerations from the realm of speculation and ground them, instead, in the empirical record if the *374 undue burden analysis is to meaningfully assess whether such obstacles, considered from the woman's perspective, are substantial ones.

4. Challenges to Abortion Procedure Bans

Even prior to the Supreme Court's ruling in *Stenberg v. Carhart*, [FN322] most state abortion procedure bans were held unconstitutional under Casey. [FN323] Typically, these rulings have turned on the determination that the procedure ban unduly burdens the abortion right by prohibiting common methods of pre-viability abortion, is unconstitutionally vague, and/or makes no exception for women whose health necessitates the banned procedure. [FN324]

An interesting deviation from this general pattern is the ruling by the Court of Appeals for the Seventh Circuit in *Hope Clinic v. Ryan*. [FN325] In *Hope Clinic*, *375 the Seventh Circuit reviewed a district court opinion granting a permanent injunction under Casey. [FN326] The district court had held that the law had the impermissibly burdensome effect of banning common and safe pre-viability abortion procedures. [FN327] In addition to finding that the law would chill physicians' willingness to provide abortion care by criminalizing "virtually every abortion procedure, except hysterotomy and hysterectomy," [FN328] the court also determined that it violated the effects prong of Casey by increasing the cost and health risk to women. [FN329] While the district court did not provide a detailed purpose prong analysis, it suggested that the legislature may have acted with an improper purpose in that it intentionally excluded a health exception, valuing fetal survival over women's health. [FN330]

In a consolidated appeal, the Court of Appeals for the Seventh Circuit, sitting en banc, undertook to construe the Illinois statute and a similar Wisconsin statute [FN331] to avoid a holding of unconstitutionality. [FN332] The appeals court acknowledged unapologetically that it was proposing a substantial alteration in the text of the challenged provision: "if this approach would nonetheless be an example of brute force used to save a statute--well, courts do it all the time." [FN333] In another startling example of the super-proof that some courts have demanded of plaintiffs in undue burden challenges, the appeals court noted that plaintiffs could not point to one woman who had been injured or denied an abortion because of a partial-birth abortion law in any state [FN334]--proof that would have been challenging to produce in any event, and particularly so when nearly every procedure ban had been enjoined prior to implementation. Reasoning that, "[s]o long as the law does not harm women's legitimate interests, the fact that the law's effects are small and justified by moral rather than utilitarian considerations does not spell unconstitutionality," [FN335] the Seventh Circuit upheld the statutes' constitutionality *376 in some applications. However, it left in place the injunctions preventing the implementation of the ban against any procedure other than the D & X method until statutory construction questions could be resolved by the state courts.

In a stinging dissent on behalf of four judges, Judge Posner argued that the evidence indicated that the statute banned a wide range of common procedures and would constitute an undue burden even if it could be construed to apply only to

the D & X procedure. [FN336] Furthermore, even if expert medical opinion were divided on the question of whether the banned procedures are preferable for some women, such evidence could still support a finding of undue burden: "[T]he Wisconsin and Illinois legislatures are not entitled to ban an abortion procedure that the medical community believes may be preferable from a medical standpoint for some women, simply because a marginally respectable expert . . . thinks that the set of women for whom the procedure is preferable is actually zero." [FN337] Judge Posner detected an improper purpose both in the statute's language, which used emotionally laden terminology designed to discourage abortion, and in the statute's supporters, who failed to articulate a credible purpose of the restriction other than to stigmatize abortion generally: "[I]f a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue." [FN338]

Despite these outlier cases, however, since Stenberg clarified that procedure bans that sweep too broadly or lack an explicit health exception are unconstitutional under *Casey*, [FN339] courts have almost uniformly struck down state abortion procedure bans. [FN340] Interestingly, these cases do not generally turn on or even undertake a purpose analysis, [FN341] even when the challenged statute was enacted post-Stenberg seemingly in outright defiance of the holding of that case. [FN342] These decisions, often per curiam, respond to the clear guidance provided by Stenberg's per se rule that the lack of an explicit health exception renders an abortion procedure ban unconstitutional, and sometimes also *377 undertake an undue burden analysis that focuses on the unconstitutional effect that a ban on most second-trimester abortion methods would have on women's access to abortion. [FN343]

The consistency achieved in this body of case law is due to the clarity of the Stenberg majority opinion. With three ongoing challenges to the federal Abortion Procedure Ban [FN344] likely to produce additional guidance from the Supreme Court on the constitutionality of procedure bans, it is essential that the Court reaffirm the primacy of women's health central to the Court's Stenberg ruling and to those earlier cases from which Stenberg proceeded: *Casey*, *Danforth*, and *Roe*.

B. Implementation of the Purpose Prong

Given the heavy burden of proving in a facial challenge that abortion restrictions will have an actual impermissible effect on women's access to abortion, the purpose prong of *Casey*'s undue burden test becomes especially useful, because evidence of improper purpose is likely to be available pre-implementation, whereas proof of impermissible effect might not be. Yet, just as lower federal courts have often failed to conduct a contextualized, fact-sensitive analysis of the specific effects of an abortion regulation on the affected classes of women, so too have they often failed to look searchingly at the legislative purpose motivating the enactment of challenged restrictions. Similarly, some appellate courts have disregarded district courts' fact-finding as regards legislative purpose, substituting their own presumptions and drawing their own inferences in the absence of any finding of clear error, thus repeating the methodological mistake of imposing *Casey*'s result instead of applying *Casey*'s standard.

Since the Court's perplexing suggestion in *Mazurek* that an impermissible legislative purpose to pose a substantial obstacle to abortion might only be inferred if the intended obstruction has actually been created, [FN345] the Supreme Court has offered little additional guidance as to how to approach *Casey*'s purpose prong. [FN346] Lower courts have tended to omit discussion of the purpose *378 prong or to conflate it with the effects prong. [FN347] The lower court cases that have addressed the purpose prong as an independent constitutional basis for invalidating abortion restrictions have tended to define the test negatively, describing the type of evidence that is insufficient to establish improper purpose but never indicating what evidence, short of a defendant's outright admission on the record, might suffice. [FN348] Absent such an admission, lower courts have been extremely reluctant to apply the purpose prong to invalidate abortion

restrictions. [FN349] In the words of one district court, “[a]fter [Mazurek], the impermissible purpose prong of the undue burden test appears almost impossible to prove . . .” [FN350]

The lower courts' reluctance to engage in meaningful purpose prong analysis is at least partly traceable to the Casey Court's reticence on the subject. For example, in *Karlin v. Foust*, where plaintiffs produced detailed evidence of improper purpose focusing on the statute's legislative history, the district court reluctantly rejected the purpose prong challenge, relying principally not on the recently decided *Mazurek*, but on *Casey*. [FN351] In *Karlin*, a group of women's health care providers challenged Wisconsin's restrictive abortion statute which was based loosely on the Pennsylvania Abortion Control Act. [FN352] It contained a twenty-four-hour waiting period and biased counseling provisions even more extensive than those in *Casey*, [FN353] though certain provisions also contained *379 narrow exceptions of questionable utility that were not present in the Pennsylvania law. [FN354] Notably, the statute did not contain Pennsylvania's health exception permitting doctors to omit informed consent information that would “result in a severely adverse effect on the physical or mental health of the patient.” [FN355]

The *Karlin* court undertook an extensive discussion of the *Casey* standard, including its purpose prong. [FN356] Starting with the observation that “[t]he Court's application of the test to the Pennsylvania statute at issue sheds some light on the meaning of the test,” [FN357] the district court noted that the *Casey* joint opinion “did not subject the Pennsylvania law to a searching purpose inquiry.” [FN358] The *Karlin* court drew a lesson from this silence: “The absence of any detailed discussion of the purpose prong of the undue burden test in *Casey* signals the considerable difficulty of mounting a credible challenge to an abortion law on the premise that the law harbors an impermissible purpose, even if the law's provisions are medically unnecessary.” [FN359]

The district court is somewhat critical of the Supreme Court's inadequate guidance on this point, and gamely attempts to fill in the blanks. Ultimately, however, the district court imputes the Supreme Court's silence to a tacit conclusion that the plaintiffs had failed to make their purpose case, noting that “[n]one of the Pennsylvania regulations was invalidated because of an invalid purpose.” [FN360] The district court makes the further logical error of concluding that, because the Pennsylvania statute did not have an impermissible purpose, therefore the Wisconsin statute also did not: “Moreover, the Supreme Court *380 reviewed similar provisions in the Pennsylvania law and did not find that they revealed an impermissible legislative purpose.” [FN361]

Were *Casey* not binding, I might be inclined to hold that AB 441 was passed with an impermissible purpose, given the absence of any apparent medical benefits in the new legislation, the acknowledgment of Dr. Gianopoulos that the previous law adequately informed women about the risks of abortion, the imposition of a two-trip requirement that will greatly increase the cost and difficulty of obtaining an abortion and make women far more vulnerable to harassment by anti-abortion protesters, and the evident effort of the legislature to impose requirements on physicians that will reduce the number of abortions they can perform, increase their risk of being sued or losing their licenses and add to the expenses of their practices. However, lower courts are bound by Supreme Court precedent. I do not see how *Casey* does not control this question. [FN362] With the same uncritical reflex that characterizes many lower courts' effects analysis, the *Karlin* court dismissed the plaintiffs' evidence that anti-abortion groups were heavily involved in the development and passage of the abortion restrictions, transforming *Mazurek*'s particularized holding that the evidence in that case was insufficient to prove improper legislative purpose [FN363] into a hard-and-fast rule that “the involvement of anti-abortion groups in drafting legislation has no relevance to the legislature's purpose.” [FN364]

On appeal, the Court of Appeals for the Seventh Circuit upheld the district court's purpose prong analysis, [FN365] noting that, “[a]bsent some evidence demonstrating that the stated purpose is pretextual, our inquiry into the legislative purpose is necessarily deferential and limited.” [FN366] Like the district court, the appeals court read *Casey* and

Mazurek to suggest that “such a challenge will rarely be successful, absent some sort of explicit indication from the state that it was acting in furtherance of an improper purpose.” [FN367] Because Casey “accepted at face value” the state’s proffered legislative purposes and did not “scrutinize too closely” the intent underlying the challenged Pennsylvania provisions, [FN368] the Seventh Circuit simply accepted Wisconsin’s asserted purposes. In doing so, the appeals court dismissed the proof of *381 improper purpose adduced at trial, [FN369] including the trial court’s finding of an “evident effort of the legislature to impose requirements on physicians that will reduce the number of abortions they can perform, increase their risk of being sued or losing their licenses and add to the expenses of their practices.” [FN370] Ignoring the trial court’s finding of the legislature’s “evident effort” to impede abortion services, the appeals court chastised the plaintiffs for failing to “come forward with some evidence of unconstitutional intent or purpose especially when the legislature has otherwise identified permissible purposes in enacting the legislation being challenged.” [FN371]

Similar analytical errors can be found in appeals courts’ reversals of lower courts’ application of the purpose prong. In *Greenville Women’s Clinic v. Bryant*, discussed above, [FN372] the district court found an improper purpose based upon the rushed legislative process that provided “no meaningful inquiry” into appropriate regulations for an abortion clinic, leading to many unnecessary and burdensome requirements. [FN373] The finding of improper purpose was based in part on Casey’s admonition that improper purpose may be inferred where “a requirement[] serves no purpose other than to make abortions more difficult.” [FN374] Here, the district court found no evidence that the onerous regulation was needed or that the restrictions advanced their asserted purpose. [FN375] Credible testimony had established that the state was not experiencing a public health crisis, and that there was no indication that abortion providers were dispensing unsanitary or inadequate care. [FN376] On appeal, however, the Court of Appeals for the Fourth Circuit reversed this ruling and upheld the statute, reasoning that “there is no requirement that a state refrain from regulating abortion facilities until a public-health problem manifests itself.” [FN377]

*382 Not every court, however, has given the purpose prong such short shrift. Other courts have read *Mazurek* and *Casey* to require an individualized assessment of the totality of circumstances revealing legislative purpose. In *Okpalobi v. Foster*, [FN378] a challenge to Act 825, a Louisiana statute broadly creating tort liability for medical professionals providing abortion care, [FN379] the district court expressed suspicion of the state’s asserted purpose of ensuring that abortion providers obtain informed consent. The court questioned why the state would not simply strengthen the preexisting informed consent statute. [FN380] Determining that the statute’s purpose and effect were to impose a substantial obstacle to abortion, the trial court granted the preliminary injunction. [FN381]

On appeal, a panel of the Fifth Circuit looked carefully at *Mazurek* and *Casey* and concluded that the Louisiana law was unconstitutional based in part on its improper purpose. [FN382] The court noted that, under *Casey* and Fifth Circuit precedent applying *Casey*, the purpose prong inquiry should not be conflated with the inquiry into the effects prong, but should be independently analyzed. [FN383] Looking closely at the discussion of legislative purpose evidence in *Jane L.* [FN384] and *Mazurek*, [FN385] the appeals court understood these cases to “reconfirm that the established methods for assaying a legislature’s purpose are valid in the abortion context.” [FN386] *Mazurek* merely rejected two types of evidence as insufficient proof that the legislature acted with a forbidden motive—medical data showing that nonphysicians could safely perform abortions and evidence that anti-abortion groups lobbied for the challenged statute. [FN387] Similarly, *Jane L.* relied not only on the state’s admission of improper purpose, but also on the evidently improper purpose revealed on the face of the statute. [FN388] Declining to read either decision as support for the sweeping proposition that an improper purpose cannot be established absent a party’s admission, or that the statutory language, legislative history and context, and related legislation are irrelevant, the appeals court turned to the task of determining what evidence of improper purpose to consider. [FN389]

*383 Like other courts, the *Okpalobi* appeals court commented that *Casey* gave “little, if any” guidance on how to

conduct a purpose prong inquiry. [FN390] However, the appeals court found ample guidance in constitutional case law from other contexts, specifically, voting rights and Establishment Clause cases. [FN391] In these cases, which included *Edwards v. Aguillard*, [FN392] *Stone v. Graham*, [FN393] and *Shaw v. Hunt*, [FN394] it was proper for courts to give significant deference to “a government’s articulation of legislative purpose.” [FN395] However, as *Edwards* and *Stone* emphasized, that purpose had to be more than a “mere ‘sham.’” [FN396] Following this body of precedent, the court determined that “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” all constituted relevant evidence of legislative purpose. [FN397]

In applying this analytical method to Act 825, the court found evidence of improper purpose in the language of the challenged provision. The state’s asserted purpose was to inform the woman’s choice and to ensure that physicians shared information about the risks of abortion with their patients. [FN398] However, the “plain language” and the structure of the Act refuted these assertions, because the statute created a tort cause of action, and informed consent was only included in the statute as a way of reducing damages, not avoiding liability. [FN399] Reading the Act in conjunction with the state’s informed consent law, the court concluded, “it is undeniable that the provision is designed not to supplement the Woman’s Right to Know Act, but to ensure that a physician cannot insulate himself from liability by advising a woman of the risks . . . associated with abortion.” [FN400] Acknowledging that the deference that courts owe to state legislation might have presented a close question had the statute’s only constitutional infirmity been its improper purpose, the appeals court determined that the statute’s effect would also have been to impose an undue burden, and accordingly enjoined the Act. [FN401] The ruling was short-lived, as the court of appeals sitting en banc subsequently vacated the judgment on *384 other grounds. [FN402] Still, the Okpalobi appellate decision stands as a model for purpose prong analysis, and a clear example of the vitality that this test retains.

The opinion of the Court of Appeals for the Eighth Circuit in *Planned Parenthood of Greater Iowa v. Atchison* [FN403] provides a final example of the careful application of the purpose prong. In *Atchison*, the district court had closely scrutinized the motives of the Iowa Department of Health in applying its certificate-of-need law [FN404] to abortion providers but not to other outpatient medical providers. [FN405] The evidence in the record revealed that an anti-abortion lobbying campaign had targeted the clinic at issue in the case, [FN406] and that, “in the ten years preceding this case, no similarly structured outpatient clinic had been required to obtain a certificate of need before opening for business.” [FN407] Unlike the *Karlin* [FN408] and *Baird* [FN409] courts, the Eighth Circuit did not conclude that evidence of anti-abortion lobbying groups’ involvement in the formulation of a challenged policy can never have any probative value in evaluating impermissible intent. The appeals court clarified that, although the anti-abortion lobby’s advocacy for a review of the proposed clinic did not constitute evidence of improper purpose, the state’s response to that lobbying campaign did. [FN410] The court of appeals refused to disturb the district court’s finding of improper purpose based on the Department’s apparent motive-- to prevent a particular provider from operating--and on the social and historical context of the applied restriction. [FN411] In enjoining the application of the certificate of need requirement to Planned Parenthood, the court of appeals quoted *Casey*’s admonition that, “where a requirement serves no purpose other than to make abortions more difficult, it strikes at the heart of a protected right, and is an unconstitutional burden on that right.” [FN412]

Perhaps the Okpalobi and *Atchison* plaintiffs succeeded in establishing improper purpose in part because the provisions at issue--a tort liability statute *385 and a certificate of need requirement--had no counterparts in the legislation challenged in *Casey*, thus facilitating a fresh look at the challenged provisions. Regardless of whether or not abortion restrictions mirror the Pennsylvania restrictions in *Casey*, however, the individualized assessment of the totality of circumstances revealing legislative purpose undertaken by the Okpalobi and *Atchison* appellate courts indicates that the purpose prong can indeed provide the basis of a viable undue burden challenge.

V. Conclusion

In the coming terms, the Roberts Court will undoubtedly have ample occasion to consider the scope of constitutional protection for abortion and to clarify the contours of the undue burden standard. The Casey Court retreated from Roe's high level of protection. However, its broad articulation of the undue burden standard, the joint opinion's application of that standard to strike down Pennsylvania's spousal notification requirement, and its emphasis on women's equality promised meaningful protection for women's abortion rights. Some post-Casey lower court decisions demonstrate that, if fairly and correctly applied, the undue burden standard can provide a reasonable measure of protection for women's right to choose abortion. Other lower federal courts, however, have misconstrued and misapplied the undue burden standard, thereby seriously weakening it. As discussed in Part IV, the analytical errors committed in some of these cases have included: (1) imposing unattainable evidentiary burdens on plaintiffs; (2) reflexively sustaining the constitutionality of restrictions similar to those upheld in Casey, despite a different and stronger factual record of burdensome effect; (3) scrutinizing the effect of an abortion regulation in isolation from other restrictions that compound its burdensome impact; (4) evaluating the impact of restrictions from the point of view of the privileged, rather than contextualizing the burden within the realities of affected women's lives; (5) at the appellate level, discounting trial courts' factual findings in favor of the appeals court's own assumptions and inferences; and (6) requiring an admission by defendants of improper purpose, or requiring proof that not a single legislator acted with a permissible purpose, or excising the purpose prong from the undue burden test altogether. These decisions illustrate the clear danger that, if not corrected by the Court, the undue burden standard can be manipulated so as to substantially undermine Roe's core protections, whether or not Casey is explicitly overruled.

If the undue burden standard is to remain in place and if it is to fulfill Casey's promise that "the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but *386 not in fact," [FN413] then the Court should provide the guidance for which this body of case law cries out. Pre-enforcement facial challenges to restrictive abortion laws must be permitted to proceed without being doomed from the outset by evidentiary hurdles that are virtually impossible to meet. In this regard, the Supreme Court must make explicit what is implicit in Casey, Stenberg, and Ayotte: Facial challengers need not meet Salerno's tough evidentiary burden of showing that there exists "no set of circumstances" under which the law can validly be applied. [FN414] Rather, as Casey instructs, challengers must establish that, "in a large fraction of the cases in which [it] is relevant, [the law] will operate as a substantial obstacle to a woman's choice to undergo an abortion." [FN415] Furthermore, in applying Casey's undue burden standard, the Court must clarify that the proper focus is whether a given restriction is likely to pose a substantial obstacle to those women for whom the restriction is relevant, and that litigants need not meet the heightened standard of perfection--requiring proof not "open to debate" of how the law is bound to affect women--imposed by the Seventh Circuit in Newman [FN416] and suggested by the Fourth Circuit in Greenville. [FN417]

Moreover, in assessing the evidentiary record to determine an abortion law's potential impact, lower courts have too often failed to conduct a contextualized, fact-sensitive analysis of its likely impact on women, resulting in shallow, even dismissive treatment of the realities of women's lives. Such cursory treatment is not how the Casey Court applied the undue burden standard to the husband-notification provision, the only provision with a truly well-developed factual record, and it is not how the Stenberg Court analyzed restrictions on abortion methods that had the potential to harm women. The Court must clarify that lower courts must conduct a full review of the evidentiary record to measure the impact of all abortion restrictions--including those similar to ones upheld in Casey--to determine whether they pose a substantial obstacle to women. This assessment must incorporate the perspective of the women and girls actually affected by these laws. If the undue burden standard is to provide meaningful protection, courts must acknowledge the current real life challenges of poverty, violence, youth, and geography that make access to abortion very difficult for some women, and give careful consideration to the ways in which an abortion restriction, operating with others, can exploit and exacerbate

those difficulties to the point that access to abortion is effectively denied. These assessments must be grounded in the *387 evidentiary records before courts. As the decisions discussed in Part IV illustrate, when courts base conclusions on pure speculation disconnected from the record evidence of the realities of women's lives, they inevitably minimize and discount the impact of challenged restrictions, viewing them as mere inconveniences rather than the insurmountable obstacles they are for those women for whom the restriction is relevant. [FN418]

The Supreme Court must also dispel the confusion it created in *Mazurek* by clarifying the types of evidence that would support a determination of improper purpose. Specifically, the Court should confirm that "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" all constitute relevant evidence of legislative purpose. [FN419] In addition, the Court should reaffirm that, consistent with *Casey*, a finding that a legislature enacted an abortion restriction for the purpose of imposing a substantial obstacle in the path of a woman seeking abortion is, in and of itself, sufficient to render that restriction unconstitutional.

Our research reveals a troubling tendency of appellate courts to disregard the factual findings of district courts and to substitute their own presumptions in the absence of any finding of clear error. In doing so, these courts undermine the undue burden standard by divesting the trial courts of their authority, as triers of fact, to assess whether a challenged regulation will impose a substantial obstacle. The Supreme Court must admonish appellate courts to give appropriate deference to the factual findings and inferences of improper purpose or effect drawn by trial courts.

Finally, the Supreme Court's upcoming review of lower court decisions striking down the federal abortion procedure ban provides it with an opportunity to reaffirm its steadfast insistence--clarified and strengthened in post-*Casey* decisions over a decade and a half--that abortion restrictions must never damage women's health. To vindicate this principle, unquestionably at the core of the right recognized in *Roe*, the undue burden standard must be clarified and reinvigorated so that the promise of *Casey* is realized in meaningful protection for women.

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[FN1]. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

[FN2]. *Roe v. Wade*, 410 U.S. 113 (1973).

[FN3]. See, e.g., *Casey*, 505 U.S. at 879 ("Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade* and we reaffirm that holding."). The lead opinion in *Casey* was a rare joint opinion coauthored by Justices O'Connor, Kennedy, and Souter. Justices Blackmun and Stevens joined in those parts of the opinion that reaffirmed *Roe's* essential tenets and invalidated the husband-notification provision of the Pennsylvania law and its related reporting requirement. See generally *infra* Part II.B (discussing the *Casey* joint opinion's reaffirmation of *Roe*).

[FN4]. *Casey*, 505 U.S. at 887-98.

[FN5]. *Id.* at 901.

[FN6]. See generally *infra* Part II.C (discussing the *Casey* joint opinion's application of the undue burden standard to the challenged provisions of the Pennsylvania law).

[FN7]. See *infra* note 67 and accompanying text.

[FN8]. According to the Alan Guttmacher Institute, between 1992 and 2005, states enacted 299 laws restricting abortion. Memorandum from Elizabeth Nash, Pub. Policy Assoc., Alan Guttmacher Inst. (Apr. 26, 2006) (on file with the authors). In contrast, between 1985 and 1991, states enacted only sixty-eight abortion restrictions. *Id.*

[FN9]. Mandatory waiting periods have proliferated across the United States in the years following *Casey*. Although these laws were on the books in approximately thirteen states prior to *Casey*, they were not being enforced because they had been ruled constitutionally invalid in 1983. See Terry Sollow, *State Legislation on Reproductive Health in 1992: What Was Proposed and Enacted*, 25 *Fam. Plan. Persp.*, Mar.-Apr. 1993, at 87, 88. At the end of 1992, only two states enforced mandatory waiting periods, but forty-one counseling or waiting period bills were introduced in twenty-four states. *Id.* By August 1994, fifteen states had laws imposing waiting periods and seven states were enforcing them. See Frances A. Althaus & Stanley K. Henshaw, *The Effects of Mandatory Delay Laws on Abortion Patients and Providers*, 26 *Fam. Plan. Persp.*, Sept.-Oct. 1993, at 228, 228. Twenty-four states now require women to listen to state-prescribed information and then wait for a specified period of time, usually twenty-four hours, before the abortion procedure is performed. Guttmacher Inst., *State Policies in Brief: An Overview of Abortion Laws 1* (2006), available at http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf. In six of these states, the laws require that the state-mandated information always be provided to women in person, thereby necessitating two visits to the abortion provider. *Id.*

[FN10]. Twenty-eight states require women to receive state-prescribed counseling biased against abortion before an abortion procedure. *Id.* As part of the counseling, three of these states force providers to tell women about the purported link between abortion and breast cancer; four states require information on the fetus's purported ability to feel pain; and three states require that women be warned about the possible long-term mental health consequences of having an abortion. *Id.* These laws are consistent with a concerted strategy on the part of abortion opponents to cast abortion as harmful to women, and to cast abortion restrictions as "pro-woman" legislation necessary to protect women's health. See generally David C. Reardon, *Making Abortion Rare* (1996) (arguing for a comprehensive "pro-woman/pro-life" initiative, including legislation, public education, and research, that focuses on the purported harmful effects of abortion on women).

[FN11]. Thirty-three states have laws burdening abortion providers with restrictions not applied to other comparable medical providers. NARAL Pro-Choice America, *Who Decides? The Status of Women's Reproductive Rights in the United States: Targeted Regulation of Abortion Providers (TRAP)*, http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/nationwide-trends/issues-trap.html (last visited Oct. 16, 2006). These laws, referred to by opponents as TRAP (Targeted Regulation of Abortion Providers) laws, commonly require doctors to acquire licenses and restrict abortion services to hospitals or specialized facilities. *Id.*

[FN12]. Forty-six states require abortion providers to submit regular and confidential reports to the state. Guttmacher Inst., *State Abortion Policies in Brief: Abortion Reporting Requirements 1* (2006), http://www.guttmacher.org/statecenter/spibs/spib_ARR.pdf. Three states and the District of Columbia collect this information on a voluntary basis. *Id.*

[FN13]. Forty-three states have enacted laws that require parental involvement if a minor decides to have an abortion; in nine of those states, enforcement is enjoined because of constitutional defects in the laws. See Guttmacher Inst., *State Abortion Policies in Brief: Parental Involvement in Minors' Abortions 2* (2006), http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf.

[FN14]. Thirty-one states have enacted criminal prohibitions against an array of abortion procedures commonly used in the second-trimester of pregnancy, often mislabeled by the bills' proponents as "partial-birth" abortions. See Ctr. for Reprod. Rights, *Briefing Paper: So-Called "Partial-Birth Abortion" Ban Legislation, By State* (Feb. 2004), available at http://www.reproductiverights.org/pdf/pub_bp_pba_bystate.pdf [hereinafter Ctr. for Reprod. Rights, *Briefing Paper*].

[FN15]. See, e.g., La. Rev. Stat. Ann. § 9:2800.12 (2006) (imposing civil liability on abortion providers for any injury to the woman or fetus, and making certain laws governing medical malpractice, including limitations of liability, inapplicable). See generally Jennifer L. Achilles, Comment, *Using Tort Law to Circumvent Roe v. Wade and Other Pesky Due Process Decisions: An Examination of Louisiana's Act 825*, 78 Tul. L. Rev. 853 (2004) (analyzing the Louisiana law imposing tort liability on abortion providers); A.J. Stone III, Comment, *Constitution: Tort Law as an End-Run Around Abortion Rights After Planned Parenthood v. Casey*, 8 Am. U. J. Gender Soc. Pol'y & L. 471, 474 (2000) (examining the impact of abortion tort liability laws on women's right to abortion).

[FN16]. E-mail from Elizabeth Nash to authors (Oct. 3, 2006) (on file with the authors); see Guttmacher Inst., *Monthly State Update: Major Developments in 2006*, <http://www.guttmacher.org/statecenter/updates/index.html#bans> (last visited Oct. 17, 2006).

[FN17]. 2006 S.D. Sess. Laws ch.119, H.B. 1215, 81st Leg. Assem., Reg. Sess. (S.D. 2006) (imposing criminal ban on abortions except when necessary to preserve the woman's life). The South Dakota bill was signed into law by Governor Mike Rounds in March 2006 and was scheduled to take effect on July 1, 2006, but a successful petition drive halted its implementation and secured a statewide vote on its validity. Gretchen Ruethling, *South Dakota: Certification for Abortion Plan Vote*, N.Y. Times, June 20, 2006, at A15. On November 7, 2006, a majority of voters in South Dakota rejected the ban. Monica Davey, *South Dakotans Reject Sweeping Abortion Ban*, N.Y. Times, Nov. 8, 2006, at P1. On June 17, 2006, Louisiana Governor Kathleen Blanco signed into law a criminal ban on all abortions except those necessary to save the pregnant woman's life. 2006 La. Acts 467. Unlike South Dakota's abortion ban, the Louisiana law becomes effective upon the reversal of *Roe v. Wade* by the United States Supreme Court or the adoption of a federal constitutional amendment allowing bans on abortion. *Id.*

[FN18]. The number of abortion providers in the United States declined from 2380 providers in 1992 to 1819 providers in 2000, a twenty-four percent decrease. Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in*

the United States in 2000, 35 Persp. on Sexual & Reprod. Health 6, 10 (2003). During the same period, the number of abortions reported in the United States also declined, but at a substantially lower rate than the decline in the number of providers. *Id.* at 9 (noting that the number of reported abortions in the United States declined fifteen percent between 1992 and 2000, from 1,528,930 to 1,312,990).

[FN19]. Evelyn Nieves, S.D. Makes Abortion Rare Through Laws and Stigma, *Wash. Post*, Dec. 27, 2005, at A01.

[FN20]. See *Finer & Henshaw*, *supra* note 18, at 10-11 (noting that in 2000, 87% of the counties in the United States had no abortion provider; "94% of all providers and 99% of those who performed 400 or more abortions" are located in metropolitan areas); see also Nieves, *supra* note 19 (noting that some women in South Dakota must travel 350 miles each way to the sole provider in the state: "For some women, the only way to do it--and not pay for a hotel room--is to make the 700-mile trip in one day").

[FN21]. See Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006).

[FN22]. *Planned Parenthood Fed'n of Am. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), cert. granted, 126 S. Ct. 2901 (2006) (No. 05-1382) (invalidating the federal Abortion Procedure Ban on grounds that it lacks a health exception, imposes an undue burden, and is unconstitutionally vague); *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005) (striking down the same statute because it does not provide an exception for circumstances in which the procedure is necessary to protect the health of women seeking abortions), cert. granted, 126 S. Ct. 1314 (2006) (No. 05-380); see also *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278 (2d Cir. 2006) (holding that the statute violates due process rights of physicians and patients because it lacks a health exception).

[FN23]. See, e.g., Stephen Henderson & James Kuhnenn, Alito Holds His Ground on 'Roe,' *Phila. Inquirer*, Jan. 12, 2006, at A1 (describing the efforts of Democratic senators to press Samuel A. Alito to clarify his position on whether *Roe v. Wade* is settled law); Charles Lane, Nominee's Reasoning Points to a Likely Vote Against *Roe v. Wade*, *Wash. Post*, Nov. 2, 2005, at A6 (concluding that supporters and skeptics believe that Samuel A. Alito "would probably vote to strike down *Roe*"); Shannon McCaffrey, Roberts Faces Test on Abortion, *Phila. Inquirer*, July 22, 2005, at A1 ("Abortion was emerging as the pivotal issue of Supreme Court nominee John G. Roberts Jr.'s confirmation battle as lawmakers and advocates on both sides of the aisle tried to read between the lines yesterday to determine whether he would work to overturn *Roe v. Wade*.").

[FN24]. Dawn Johnsen, The Outer Shell: The Hollowing Out of *Roe v. Wade*, *Slate*, Jan. 25, 2006, <http://www.slate.com/id/2134849>; see, e.g., Larry Eichel, The Staying Power of 'Roe v. Wade,' *Phila. Inquirer*, July 31, 2005, at C3 ("I can't imagine *Roe* ever being explicitly overruled, although I can see it being narrowed to the point that it has no teeth in it.") (quoting Professor Marci A. Hamilton), available at http://www.philly.com/mld/inquirer/news/special_packages/sunday_review/12264941.htm; Robin Toner & Adam Liptak, In New Court, *Roe* May Stand, So Foes Look to Limit Its Scope, *N.Y. Times*, July 10, 2005, at A1 ("[E]ven without overturning *Roe*, the new court could seriously limit the decision's reach and change the way abortions are regulated around the country, experts say.").

[FN25]. 520 U.S. 968 (1997).

[FN26]. 530 U.S. 914 (2000).

[FN27]. 126 S. Ct. 961 (2006).

[FN28]. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

[FN29]. The Court had used an “undue burden” analysis in cases involving restrictions on minors’ access to abortion. See, e.g., *Bellotti v. Baird* (Bellotti I), 428 U.S. 132, 147 (1976) (“A requirement of written consent... is not unconstitutional unless it unduly burdens the right to seek an abortion.”); *Bellotti v. Baird* (Bellotti II), 443 U.S. 622, 647 (1979) (holding that a state court’s construction of Massachusetts’s parental consent law “would impose an undue burden upon the exercise by minors of the right to seek an abortion”). The phrase “undue burden” had also appeared in cases involving restrictions on access to public funding. See, e.g., *Harris v. McRae*, 448 U.S. 297, 314 (1980) (citing *Maier v. Roe*, 432 U.S. 464, 473-74 (1977)); *Maier*, 432 U.S. at 474 (stating that a woman is protected from “unduly burdensome interference with her freedom to decide whether to terminate her pregnancy”); see also Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 *Colum. L. Rev.* 2025, 2036-37 (1994) (arguing that the term “undue burden” was not developed as a formal standard and was not used in these cases as a substitute for the *Roe* standard).

[FN30]. Justice O’Connor first argued for an undue burden standard in her dissenting opinions in *City of Akron v. Akron Center for Reproductive Health, Inc.* (Akron I), 462 U.S. 416, 461-64 (1983) (O’Connor, J., dissenting), and *Planned Parenthood Ass’n of Kansas City v. Ashcroft*, 462 U.S. 476, 505 (1983) (O’Connor, J., dissenting), decided the same day as Akron I. She continued her advocacy for such a standard three years later in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 828-29 (1986) (O’Connor, J., dissenting), *Webster v. Reproductive Health Services*, 492 U.S. 490, 529-30 (1989) (O’Connor, J., concurring in part), and *Hodgson v. Minnesota*, 497 U.S. 417, 459 (1990) (O’Connor, J., concurring in part). For detailed analyses of the development of the undue burden standard in Justice O’Connor’s opinions, see Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 *U. Pa. L. Rev.* 119 (1989), and Metzger, *supra* note 29, at 2036-37.

[FN31]. *Casey*, 505 U.S. at 872.

[FN32]. See Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 572-73 (15th ed. 2004) (describing abortion cases decided between *Roe* and *Casey* and noting that, other than denials of public funding, the Supreme Court struck down most abortion restrictions). As the composition of the Supreme Court began changing in the early 1980s, skepticism about the *Roe* trimester framework increased. See, e.g., Akron I, 462 U.S. at 461-64 (O’Connor, J., dissenting) (urging that the *Roe* trimester framework be replaced by an undue burden standard); *Thornburgh*, 476 U.S. at 828-29 (O’Connor, J., dissenting) (restating her undue burden analysis).

[FN33]. Laurence H. Tribe, *Abortion: The Clash of Absolutes* 24 (2d ed. 1992). For detailed discussions of the changes in the composition of the Supreme Court during the 1980s, the political strategies that led to those changes, and how the Court’s new composition affected its support for *Roe v. Wade*, see David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* 637-80 (1998), and Tribe, *supra*, at 17-20.

[FN34]. 492 U.S. 490. The Missouri law declared that life begins at conception, required testing for viability at twenty weeks’ gestational age, and banned the use of public employees and facilities for performing abortions. *Id.* at 501. *Webster* marked the first occasion on which Justice Antonin Scalia, appointed by President Reagan in 1986, and Justice Anthony Kennedy, appointed by President Reagan in 1988, participated in the Supreme Court’s review of abortion restrictions. Tribe, *supra* note 33, at 20. These two new Justices joined Chief Justice Rehnquist and Justices O’Connor and White in voting to uphold all of the challenged provisions of the Missouri law. Justices Blackmun, Brennan, Marshall, and Stevens concurred in part and dissented in part.

[FN35]. See, e.g., *Webster*, 492 U.S. at 517-18 (Rehnquist, C.J.) (arguing that “the rigid trimester analysis of the course

of a pregnancy enunciated in *Roe* has... [made] constitutional law in this area a virtual Procrustean bed” and urging “reconsideration” of the trimester framework because it had proven “unsound in principle and unworkable in practice” (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985)); *id.* at 521 (concluding that the case before the Court offered “no occasion to revisit the holding of *Roe*,” thus leaving it “undisturbed,” but acknowledging that, “[t]o the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases”). In contrast, Justice Scalia urged that *Roe* be overruled “explicitly.” *Id.* at 532 (Scalia, J., concurring in part). Justice O’Connor, the critical fifth vote to uphold the Missouri provisions, declined to reconsider *Roe v. Wade*, arguing that the statute could be upheld under the standards of *Roe* and its progeny and that any reconsideration of *Roe* was inappropriate. *Id.* at 525 (O’Connor, J., concurring in part) (“Unlike the plurality, I do not understand these viability testing requirements to conflict with any of the Court’s past decisions concerning state regulation of abortion. Therefore, there is no necessity to accept the State’s invitation to reexamine the constitutional validity of *Roe v. Wade*.... Where there is no need to decide a constitutional question, it is a venerable principle of this Court’s adjudicatory processes not to do so....”). For an excellent critique of the Webster decision, see Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. Pa. L. Rev. 83 (1989).

[FN36]. *Roe* developed the trimester framework as a means of accommodating competing interests of the woman and the state. Under the trimester framework, almost no restrictions were permitted during the first-trimester. *Roe v. Wade*, 410 U.S. 113, 163 (1973). During the second-trimester, the government could “regulate the abortion procedure in ways that are reasonably related to maternal health,” but not to further the State’s interest in potential life. See *id.* at 164. During the third-trimester, subsequent to fetal viability, the government could prohibit abortions entirely except if necessary to save the life or health of the pregnant woman. *Id.* at 164-65.

[FN37]. *Webster*, 492 U.S. at 520 (Rehnquist, C.J.).

[FN38]. *Id.* at 538 (Blackmun, J., dissenting); *id.* at 560 (“For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.”).

[FN39]. In 1990, Guam passed a law banning nearly all abortions, as well as counseling, encouraging, or advising a woman to obtain an abortion. Guam Code Ann. tit. 9, §§ 31.20-22, 31.33 (1990). In 1990, Louisiana attempted to revive its pre-*Roe* law subjecting physicians to ten years of hard labor for performing abortions. *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990) (invalidating the Louisiana abortion ban because it was in conflict with abortion regulations enacted subsequent to the ban). In 1991, after that attempt failed, the Louisiana legislature passed a law banning abortion except where the procedure was necessary to preserve the woman’s life, the pregnancy was the result of reported rape or incest, or to preserve the life or health of the fetus or to remove “a dead unborn child.” La. Rev. Stat. Ann. § 14:87 (1991 & Supp. 1992). In January 1991, Utah amended and re-enacted its pre-*Roe* felony criminal abortion ban. Utah Code Ann. § 76-7-302 (2006) (stating that abortions prior to twenty weeks’ gestational age can only be performed to save a woman’s life, in cases of rape or incest if reported to law enforcement, to avert grave damage to the woman’s medical health or to prevent the “birth of a child” with “grave defects”; abortions after twenty weeks’ gestational age can only be performed to save the woman’s life, to avert grave damage to the woman’s medical health or to prevent the “birth of a child” with “grave defects”). Following the Supreme Court’s ruling in *Casey*, these bans were invalidated and never went into effect. See *infra* note 202 and accompanying text.

[FN40]. 18 Pa. Cons. Stat. Ann. §§ 3205, 3208 (West 2000). Consent is “informed” only when a physician provides the woman with information about the nature of the abortion procedure, its risks and alternative treatments, the probable gestational age of the fetus, and the medical risks of carrying the pregnancy to term. *Id.* § 3205. Additionally, these pro-

visions mandate that physicians or counselors offer the pregnant woman materials that give detailed descriptions and pictures of the fetus at two-week gestational increments from fertilization until full-term, as well as the names of agencies offering alternatives to abortion; and inform the woman of the availability of medical assistance benefits for prenatal care and childbirth and of the father's liability for child support if she carried the pregnancy to term. *Id.* §§ 3205, 3208.

[FN41]. *Id.* §3209. Section 3209 exempted those women who could provide an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she had reported to law enforcement; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her. *Id.*

[FN42]. *Id.* §§ 3205, 3206 (West 2000).

[FN43]. *Id.* §§3207(b), 3214(a) & (f) (West 2000). Section 3214(a)(12) required the reporting of a married woman's "reason for failure to provide notice" to her husband. *Id.* § 3214(a)(12).

[FN44]. *Id.* § 3203 (West 2000) (narrowly defining medical emergency as a condition so dangerous "as to necessitate the immediate abortion of [the] pregnancy to avert [the woman's] death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function").

[FN45]. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (striking down, *inter alia*, Pennsylvania's "informed consent" requirements and regulations mandating the filing of detailed reports that were made available to the public); see also *City of Akron v. Akron Ctr. for Reprod. Health (Akron I)*, 462 U.S. 416 (1983) (striking down, *inter alia*, Ohio's "informed consent" and mandatory 24-hour waiting period provisions). Following *Akron I*, the Commonwealth of Pennsylvania conceded the invalidity of certain provisions of the Act, including the 24-hour mandatory delay and physician-only counseling provisions. *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 293 (3d Cir. 1984). Thus, the constitutionality of those provisions was not before the Supreme Court in *Thornburgh*. For a thorough summary of the history of abortion regulation in Pennsylvania, see *Planned Parenthood of South-eastern Pennsylvania v. Casey*, 744 F. Supp. 1323, 1326-28 (E.D. Pa. 1990).

[FN46]. See, e.g., Stephen Freind, *Pennsylvania's Response to Webster: A Strategy for Further Challenging Roe v. Wade*, in *Abortion and the States: Political Change and Future Regulation* 309, 310-11 (Jane B. Wishner, ABA ed., ABA 1993) ("We... see these bills as opportunities to go to the U.S. Supreme Court and give the Court an opportunity to challenge *Roe v. Wade* and now *Webster*.... We interpreted the Court's ruling in *Webster* as saying that the states can have additional regulation of abortion, and even in some cases outlaw abortions, if there is a rational basis for doing so. We looked at *Webster* as a window of opportunity, and we were determined to crawl through that window as quickly as possible.") (footnotes omitted); Memorandum from Stephen F. Freind to Members of Pennsylvania House of Representatives (Sept. 27, 1989) (on file with the authors) (identifying one of the purposes of 1989 Abortion Control Act as being to trigger judicial overruling of *Roe v. Wade*); see also *Casey*, 744 F. Supp. at 1372-73 ("The hostility of Pennsylvania's legislature to the protection of a woman's right of privacy to choose abortion is apparent from the history of the legislation purporting to regulate abortion in Pennsylvania.... This hostility is equally apparent in the 1988 and 1989 amendments.... Clearly, the Commonwealth of Pennsylvania seeks to challenge the very foundation of *Thornburgh* and those cases that preceded it, including *Roe v. Wade*.").

[FN47]. Throughout this Article, the phrase "facial challenge" refers to legal challenges in which a court is asked to declare an abortion law invalid on its face. In contrast, an "as-applied challenge" seeks to invalidate a statute as applied to a particular set of circumstances. The legal challenge to the Pennsylvania restrictions was brought as a facial challenge prior to their implementation. As Professor Michael Dorf has noted, the distinction between these kinds of challenges is sig-

nificant: "If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application; in contrast, when a court holds a statute unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances." Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 *Stan. L. Rev.* 235, 236 (1994). For a discussion of the controversy over the legal standard applicable in facial challenges to abortion restrictions, see *infra* Part IV.A.1.

[FN48]. See Brief for Respondents at 42-53, 105-17, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744 and 91-902), 1992 WL 551421 at *42-53, *105-17; Defendants Casey, Richards and Preate's Memorandum of Law at 4-11, *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323 (C.A. No. 88-3228); see also *Casey*, 744 F. Supp. at 1373 ("Defendants seem to argue that the constitutional standard applicable to judicial review of abortion regulations has somehow been modified by recent Supreme Court decisions."). The Commonwealth argued that in *Webster*, 492 U.S. 490 (1989), *Hodgson v. Minnesota*, 497 U.S. 417 (1990), and *Ohio v. Akron Center for Reproductive Health* (*Akron II*), 497 U.S. 502 (1990), the Supreme Court modified the strict scrutiny standard of *Roe*. See, e.g., Defendants Casey, Richards and Preate's Memorandum of Law, *supra*, at 4-6.

[FN49]. *Id.* (rejecting arguments that *Webster*, *Hodgson*, and *Akron II* modified the strict scrutiny standard of *Roe*). Applying *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 640 (1979), the district court assessed Pennsylvania's informed parental consent requirement to determine whether it unduly burdened minors' access to abortion. *Casey*, 744 F. Supp. at 1382; see *infra* notes 97-98 and accompanying text.

[FN50]. 492 U.S. 490; see *supra* notes 34-38 and accompanying text.

[FN51]. *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 694-97 (3d Cir. 1991).

[FN52]. 430 U.S. 188 (1977).

[FN53]. *Casey*, 947 F.2d at 694-98.

[FN54]. *Id.* at 698 ("[N]o undue burden is caused by abortion regulations that do not have a 'severe' or 'drastic' impact upon time, cost, or the number of legal providers of abortions."); *id.* at 698 n.14 ("The definition of [the undue burden] standard--'absolute obstacle or severe limitation'--used by Justice O'Connor in those cases is binding....").

[FN55]. *Id.* at 699-719.

[FN56]. *Id.* at 720-25. In arguing that the husband-notification requirement did not amount to "a severe limitation" or "absolute obstacle," then-Judge Alito focused primarily on the group of women who were not affected by the requirement, because they would voluntarily tell their husbands. *Id.* at 722. With respect to victims of spousal abuse--the very women who were likely to be affected by the requirement--then-Judge Alito discounted the record evidence of the serious dangers posed to them by the husband-notification requirement. See *id.* at 723 n.6. He also deferred to the legislature's judgment that the statutory exceptions for these women were adequate, ignoring the trial court's findings that these exceptions were, in fact, woefully inadequate: "It is apparent that the Pennsylvania legislature considered this problem and attempted to prevent Section 3209 from causing adverse effects by adopting the four exceptions noted above. Whether the legislature's approach represents sound public policy is not a question for us to decide." *Id.* at 724. For a critique of then-Judge Alito's dissenting opinion in *Casey*, see Laurence H. Tribe, *Alito's World ... and His Miscalculations*, *Boston Globe*, Nov. 7, 2005, at A13 ("I do wonder... about the window through which Alito was gazing at the social world in which the controversy arose. Was he perhaps viewing the 'burden' on married women in this situation as simply their due, as something that goes with the territory when a woman weds and thus, almost by definition, as no 'undue'").

burden?").

[FN57]. Casey, 947 F.2d at 725-27. Then-Judge Alito's opinion reflects a disturbing willingness to defer to legislative judgments about the impact of abortion restrictions on women regardless of the record evidence of serious harms that they pose. He reasoned, for example, that the court must defer to the legislature's judgments about the reasons for and the effects of the husband-notification requirement, emphasizing that legislation is not irrational "simply because it produces some adverse effects." *Id.* at 726. He concluded that the Pennsylvania legislature "presumably decided that the law on balance would be beneficial" and "[w]e have no authority to overrule that legislative judgment even if we deem it 'unwise' or worse." *Id.*

[FN58]. The plaintiffs asked the Court to reaffirm Roe's strict scrutiny standard and to invalidate all of the challenged provisions under that standard. Brief for Petitioners and Cross-Respondents at 15-17, Casey, 505 U.S. 833 (Nos. 91-744 and 91-902). The Commonwealth of Pennsylvania asked the Court to adopt Justice O'Connor's undue burden standard and to uphold all of the challenged provisions under that standard or, alternatively, to explicitly overrule *Roe v. Wade*. Brief for Respondents at 42-53; 105-17, Casey, 505 U.S. 833 (Nos. 91-744 and 91-902). The first Bush administration, supporting the Commonwealth of Pennsylvania, asked the Court to overrule *Roe* by replacing its strict scrutiny standard with one that asks whether an abortion restriction "is reasonably designed to advance a legitimate state interest." Brief for the United States as Amicus Curiae Supporting Respondents at 15, Casey, 505 U.S. 833 (Nos. 91-744 and 91-902).

[FN59]. Following the Webster decision, Justices William J. Brennan, Jr. and Thurgood Marshall, strong supporters of *Roe v. Wade*, resigned from the Court. President George H. W. Bush appointed David Souter to the Court in 1990 and Clarence Thomas in 1991. Casey marked the first opportunity for these new Justices to consider the constitutionality of restrictions on abortion. See Tribe, *supra* note 33, at 243.

[FN60]. See, e.g., Henry J. Reske, *Is This the End of Roe?: The Court Revisits Abortion*, A.B.A. J., May 1992, at 64 ("As the 1980s slipped into the 1990s, the once unthinkable has become the probable. The Supreme Court begins its review of this year's abortion cases... with the realization by many that the days of the landmark *Roe v. Wade* ... are numbered."); see also Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 795-96 (2d ed. 2002) (noting that at the time of Casey, "[i]t was thought that either [Souter or Thomas], and particularly Justice Clarence Thomas, might cast the fifth vote to overrule *Roe v. Wade*"); Linda Greenhouse, *The Evolution of a Justice*, N.Y. Times Mag., Apr. 10, 2005, at 28 ("As the country waited for an answer from the court [in Casey] and with a presidential campaign well under way, advocates on both sides gave *Roe* little prospect of surviving.").

[FN61]. See *supra* note 3.

[FN62]. Casey, 505 U.S. at 846. As a result, the joint opinion confirmed that prior to viability "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.*

[FN63]. *Id.*

[FN64]. *Id.*

[FN65]. *Id.* at 860.

[FN66]. *Id.* at 867; see also *id.* at 869 ("A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy,

and to the Nation's commitment to the rule of law.”).

[FN67]. *Id.* at 856 (citation omitted); see also *id.* at 851-52 (“At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.... Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law.”); Tribe, *supra* note 33, at 255-56 (arguing that, through an “emphasis on equality, the [Casey] plurality sketched out a new jurisprudential foundation of the right to choose that is in many ways constitutionally firmer than the approach in *Roe*, which had somewhat paternalistically focused on the role of the attending physician in the woman's decision.”). In his concurring and dissenting opinion, Justice Blackmun argued that “restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality.” *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part and dissenting in part). See generally Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1013-28 (1984) (arguing that women's equality requires that they can control their reproduction); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *Stan. L. Rev.* 261, 351-80 (1992) (arguing that abortion restrictions can violate the antidiscrimination and antistatutory principles underlying the guarantee of equal protection). For suggestions on alternatives to the legal analysis of the Court in *Roe v. Wade*, see *What Roe v. Wade Should Have Said: The Nation's Top Experts Rewrite America's Most Controversial Decision* (Jack M. Balkin ed., 2005).

[FN68]. *Casey*, 505 U.S. at 872-79; see *supra* note 36 and accompanying text.

[FN69]. *Id.* at 869; see also *id.* at 872 (“Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.”). Our analysis here of the *Casey* joint opinion was first presented in our Memorandum in Support of Plaintiffs' Motion to Reopen Record or, Alternatively, to Stay Proceedings, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 822 F. Supp. 227 (E.D. Pa. 1993) (Civ. No. 88-3228).

[FN70]. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

[FN71]. *Casey*, 505 U.S. at 872. Nevertheless, the joint opinion declined to designate the state's interest in protecting potential life as “compelling.” See *infra* note 123 and accompanying text.

[FN72]. *Casey* thus also increased the quantum of proof required to successfully challenge restrictions on abortion. Under *Roe*, once plaintiffs proved that a statute created more than a de minimis impact upon a woman's right to choose abortion, the burden shifted to the state to demonstrate that the provisions were narrowly drawn to serve a compelling purpose. See *Roe*, 410 U.S. at 155; *Casey*, 505 U.S. at 929 & n.5 (Blackmun, J., concurring in part and dissenting in part). In contrast, *Casey* requires challengers of abortion regulations to show in the first instance that the statute “unduly burdens” the abortion right. See *Casey*, 505 U.S. at 877-79.

[FN73]. *Id.* at 876 (“The concept of undue burden has been utilized by the Court as well as individual Members of the Court, including two of us, in ways that could be considered inconsistent.... Because we set forth a standard of general application to which we intend to adhere, it is important to clarify what is meant by an undue burden.”) (citations omitted); *id.* at 877 (“To the extent that the opinions of the Court or of individual Justices use the undue burden standard in a manner that is inconsistent with this analysis, we set out what in our view should be the controlling standard.”).

[FN74]. *Id.* at 872. While reaffirming this objective, the joint opinion emphasized that it did not agree “that the trimester

approach is necessary to accomplish [it]." *Id.*

[FN75]. *Id.* at 879.

[FN76]. *City of Akron v. Akron Ctr. for Reprod. Health (Akron I)*, 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting); see *supra* note 30.

[FN77]. *Casey*, 505 U.S. at 877 (emphasis added). The papers of Justice Harry A. Blackmun, now contained in the Library of Congress, contain five drafts of the joint opinion. See Drafts of Joint Opinion (available in The Harry A. Blackmun Papers, Library of Congress, Madison Building, Manuscript Division [hereinafter The Blackmun Papers]; on file with the authors). An analysis of these drafts shows that the definition of the undue burden standard did evolve slightly. The first two drafts of the joint opinion, for example, defined undue burden as "a shorthand for the conclusion that a state regulation has the purpose or effect of placing serious obstacles in the path of a woman seeking an abortion of a non-viable fetus." 1st draft of joint op. at 32-33 (June 3, 1993), in The Blackmun Papers, *supra*; 2d draft of joint op. at 34 (June 22, 1992), in The Blackmun Papers, *supra*. In the third draft, the word "serious" was changed to "substantial." 3d draft of joint op. at 35-37 (June 25, 1992), in The Blackmun Papers, *supra*. References to improper legislative purpose appeared in the first draft, although subsequent drafts added the word "purpose" to individual sentences where it had presumably inadvertently been omitted. Compare 1st draft of joint op. at 34-35 (June 3, 1993), in The Blackmun Papers, *supra* ("Unnecessary health regulations that have the effect of presenting a serious obstacle to a woman seeking an abortion may amount to an undue burden on the right."), with 3d draft of joint op. at 37 (June 25, 1992), in The Blackmun Papers, *supra* ("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.") (emphasis added).

[FN78]. *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting).

[FN79]. *Casey*, 505 U.S. at 877 (emphasis added). The joint opinion also makes clear that regulations "designed to persuade [women] to choose childbirth over abortion" must be "reasonably related to that goal." *Id.* at 878.

[FN80]. *Id.* at 877 ("Understood another way, we answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional.... The answer is no.") (citation omitted); see *infra* note 106 and accompanying text. The mere fact, for example, that a legislature concluded that the burdens posed by the spousal-notification provisions were justified, as then-Judge Alito argued in voting to uphold the Pennsylvania spousal-notification provision, see *supra* note 56, is not determinative.

[FN81]. *Akron I*, 462 U.S. at 463 (O'Connor, J., dissenting) ("The 'undue burden' required in the abortion cases represents the threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest' standard.").

[FN82]. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. at 877.

[FN83]. *Id.* at 894.

[FN84]. *Id.*

[FN85]. *Id.* at 895.

[FN86]. Indeed, the Commonwealth alleged that the effects of the spousal-notification requirement would be "felt by

only one percent of the women who obtain abortions.... [Moreover] some of these women will be able to notify their husbands without adverse consequences or will qualify for one of the exceptions." *Id.* at 894.

[FN87]. 481 U.S. 739, 745 (1987). In holding that the Bail Reform Act of 1984 was not facially invalid, the Court stated in *Salerno* that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.*

Casey was not the first occasion on which the Supreme Court decided facial challenges to abortion restrictions without applying the "no set of circumstances" standard. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 450-51 (1990) (invalidating on its face two-parent notification statute, in part, because in "dysfunctional families" the statute proved "positively harmful to the minor and her family"); *City of Akron v. Akron Ctr. for Reprod. Health (Akron I)*, 462 U.S. 416, 434-39 (1983) (invalidating a law requiring that all second-trimester abortions be performed in a hospital even though the requirement might be valid as applied to abortions later in the pregnancy). See generally *Dorf*, *supra* note 47, at 272 (noting that the Supreme Court has often decided facial challenges in the abortion context without applying the *Salerno* standard).

[FN88]. *Salerno*, 481 U.S. at 745; see Brief for the United States as Amicus Curiae Supporting Respondents at 19, *Casey*, 505 U.S. 833 (Nos. 91-744 and 91-902), 1992 WL 12006421. The *Casey* joint opinion did not explicitly address *Salerno* and did not elaborate on the reasons for its inapplicability in the abortion context. However, in declaring the husband-notice provision facially invalid, the joint opinion emphasized that "the significant number of women who fear for their safety... are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." *Casey*, 505 U.S. at 894. Pre-enforcement facial invalidation, thus, was essential because Pennsylvania's mandatory spousal-notification effectively forced these women to choose between putting their lives in jeopardy and foregoing their constitutional right to abortion entirely. See *infra* notes 214-217 and accompanying text.

[FN89]. *Casey*, 505 U.S. at 895 (emphasis added).

[FN90]. In addition to crediting eighteen fact findings by the trial court, the joint opinion took judicial notice of studies by the American Medical Association, the Federal Bureau of Investigation, and many individual social scientists. *Id.* at 891-92.

[FN91]. *Id.* at 897 ("The women most affected by this law--those who most reasonably fear the consequences of notifying their husbands that they are pregnant--are in the gravest danger.").

[FN92]. *Dellinger & Sperling*, *supra* note 35, at 103.

[FN93]. *Casey*, 505 U.S. at 898.

[FN94]. See, e.g., *Metzger*, *supra* note 29, at 2036-38; Martha A. Field, *Abortion Law Today*, 14 J. Legal Med. 3, 13-16 (1993); [Supreme Court] Note, *Leading Cases*, 106 Harv. L. Rev. 162, 206 (1993).

[FN95]. *Casey*, 505 U.S. at 885-86 (citations omitted) (emphasis added).

[FN96]. *Id.*

[FN97]. *Id.* at 886-87 (emphasis added). The plurality invoked its expansive reading of the Act's medical emergency definition, see *infra* notes 103-104 and accompanying text, in refusing to conclude that "the waiting period imposes a real health risk." *Id.* at 886.

[FN98]. *Tribe*, supra note 33, at 249; see also *Field*, supra note 94, at 16 (noting that the district court “had not found a ‘substantial burden’ largely because that was not yet required and therefore the court was not looking for one”).

[FN99]. *Casey*, 505 U.S. at 883.

[FN100]. *Id.* at 918 (Stevens, J., concurring in part and dissenting in part); see David H. Gans, *Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law*, 104 Yale L.J. 1875, 1895 (1995) (criticizing the joint opinion for failing to “perceive the interest in discouraging abortion as an interest in forcing women to bear children” and not “recogniz[ing] in such regulations stereotypical assumptions about women's obligations as mothers”).

[FN101]. *Casey*, 505 U.S. at 899-90 (joint opinion). The joint opinion ignored the district court's ample findings that the Pennsylvania provision created obstacles far harsher than any prior parental consent statute because it forced both the parent and the young woman to come to the abortion provider for mandatory counseling. See *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1382-84 (E.D. Pa. 1990). For an in-depth critique of the *Casey* joint opinion's analysis of the informed parent consent requirement, see [Supreme Court] Note, supra note 94, at 206-10.

[FN102]. *Casey*, 505 U.S. at 899-90.

[FN103]. *Id.* at 879-80 (agreeing with the court of appeals that the statutory definition of medical emergency includes pre-eclampsia, inevitable abortion, and prematurely ruptured membranes).

[FN104]. *Id.* at 880.

[FN105]. *Id.* at 900 (quoting *Planned Parenthood of Cent. Miss. v. Danforth*, 428 U.S. 52, 80 (1976)).

[FN106]. See *id.* at 900-01; *id.* at 878 (“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.”).

[FN107]. *Id.* at 901. The district court found that the mandatory disclosure of certain information would negatively affect the providers because “referring physicians and, to a lesser extent, performing physicians will terminate their relationship with the clinics.” *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1371 (E.D. Pa. 1990). The district court rejected the argument that the reporting requirements posed a significant financial burden on the clinics based on the evidentiary record before it:

The evidence of record suggests that plaintiff-clinics have, in fact, incurred additional administrative costs as a result of the reporting requirements. However, there was no testimony which suggests that any of the plaintiff-clinics have raised the fees for an abortion because of these added expenses. Further, I find that the additional cost to plaintiff-clinics is not so great that, in and of itself, it imposes a legally significant burden on the right to obtain an abortion.

Id. at 1391.

[FN108]. *Estrich & Sullivan*, supra note 30, at 138-39.

[FN109]. *Id.* at 140; see, e.g., *City of Akron v. Akron Cent. for Reprod. Health (Akron I)*, 462 U.S. 416, 467 (1983) (O'Connor, J., dissenting) (“A health regulation simply does not rise to the level of ‘official interference’ with the abortion decision.”); *Planned Parenthood Ass'n of Kan. City v. Ashcroft*, 462 U.S. 476, 504 (1982) (O'Connor, J., concurring in part and dissenting in part) (stating that medical regulation that poses an undue burden can be upheld if it “‘reasonably relate[s] to the preservation and protection of maternal health’”) (quoting *Roe v. Wade*, 410 U.S. 113, 163 (1973)).

[FN110]. *Casey*, 505 U.S. at 887.

[FN111]. *Id.* at 884.

[FN112]. *Id.* at 901.

[FN113]. See *infra* notes 124, 129 and accompanying text.

[FN114]. *Planned Parenthood of Se. Pa. v. Casey*, 822 F. Supp. 227, 235-36 (E.D. Pa. 1993). The district court found:

Consideration of fairness and the possibility of undue prejudice compels a decision to reopen the record in this case. Plaintiffs litigated this case in accordance with the law of the land at the time of the trial, which was the strict scrutiny framework of *Roe v. Wade*. ... [T]he Supreme Court carefully limited its conclusions to the record before it, acknowledging that on a different record different conclusions could be reached. Plaintiffs claim that they will present evidence that shows that the amended Act has the purpose and effect of putting a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus, proof that was not necessary under prior law. To deny them this opportunity would be fundamentally unfair, as plaintiffs have essentially had the rules of the game changed while in the midst of play.

Id. at 235-36 (citations omitted).

[FN115]. *Casey v. Planned Parenthood of Se. Pa.*, 14 F.3d 848, 861 (3d Cir. 1994).

[FN116]. *Id.* at 861-62. The court of appeals conceded that "[t]he fact-bound nature of the new standard... suggests that a challenge after enforcement of the Pennsylvania Act might yield a different result on its constitutionality." *Id.* at 863. The court of appeals also agreed that the Supreme Court rejected the facial challenge standard of *United States v. Salerno*. *Id.* at 863 n.21; see *supra* notes 87-88 and accompanying text.

[FN117]. *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309, 1313 (1994) (citing *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (1993) (O'Connor, J., concurring in denial of stay)). Justice Souter noted, however, that "there is no occasion to consider here the Court of Appeals' broader assertion that, even in cases where a statute's facial validity depends on an empirical record... a decision rejecting one such challenge must be dispositive as against all other possible litigants." *Id.* at 1311 n.3.

[FN118]. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases."); *id.* at 980 (Scalia, J., concurring in part and dissenting in part) ("The issue is whether [the right to choose abortion] is a liberty protected by the Constitution of the United States. I am sure it is not.").

[FN119]. Significantly, the papers of Justice Blackmun reveal that Chief Justice Rehnquist and Justices White, Scalia, and Thomas, along with Justice Kennedy, voted in conference to uphold all of the challenged provisions of the Pennsylvania law. The Blackmun papers contain a first draft of this five-member majority opinion, dated May 27, 1992, authored by Chief Justice Rehnquist. The draft opinion concludes that "the Court was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a 'fundamental right' that could be abridged only in a manner which withstood 'strict scrutiny.'" First Draft of Chief Justice Rehnquist at 11 (May 27, 1992) (available in *The Blackmun Papers*, *supra* note 77; on file with the authors). Effectively overruling *Roe v. Wade*, the opinion would have substituted a minimum rationality standard for the *Roe* strict scrutiny standard: "[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." *Id.* at 12. At oral argument before the Supreme Court, Solicitor General Kenneth Starr, ar-

guing on behalf of the United States, would only acknowledge one specific instance in which an abortion ban could not survive such rational basis review: “a complete prohibition that had no exception for the life of [the] mother.” Transcript of Oral Argument at 48, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902).

[FN120]. *Casey*, 505 U.S. at 988 (Scalia, J., concurring in part and dissenting in part).

[FN121]. *Id.* at 992 (arguing that the “standardless nature” of the undue burden standard “invites the district judge to give effect to his personal preferences about abortion”).

[FN122]. *Id.* at 988-89. But see *id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part) (“The joint opinion, following its newly minted variation on *stare decisis*, retains the outer shell of *Roe v. Wade*... but beats a wholesale retreat from the substance of that case.”) (citation omitted); *id.* at 954 (“*Roe* continues to exist, but only in the way a storefront on a western movie exists: a mere façade to give the illusion of reality.”).

[FN123]. *Id.* at 505 (Scalia, J., concurring in part and dissenting in part). Justice Scalia sarcastically noted that “[t]hat had to be done, of course, since designating the interest as ‘compelling’ throughout pregnancy would have been, shall we say, a ‘substantial obstacle’ to the joint opinion’s determined effort to reaffirm what it views as the ‘central holding’ of *Roe*.” *Id.*

[FN124]. *Id.* at 992-93.

[FN125]. *Id.* at 914-20 (Stevens, J., concurring in part and dissenting in part); *id.* at 926-40 (Blackmun, J., concurring in part and dissenting in part).

[FN126]. *Id.* at 920 n.6 (Stevens, J., concurring in part and dissenting in part).

[FN127]. *Id.* at 922-23 (Blackmun, J., concurring in part and dissenting in part).

[FN128]. *Id.* at 924-25.

[FN129]. *Id.* at 926.

[FN130]. On May 29, 1992, Justice Kennedy, who had initially voted to uphold the Pennsylvania law under rational basis review, see *supra* note 119, sent Justice Blackmun a handwritten note in which he asked to see Blackmun: “I want to tell you about some developments in *Planned Parenthood v. Casey*, and at least part of what I say should come as welcome news.” Note from Justice Anthony M. Kennedy to Justice Harry A. Blackmun (May 29, 1992) (available in *The Blackmun Papers*, *supra* note 77; on file with the authors). The next day when the two met, Kennedy revealed that he was joining forces with Justices O’Connor and Souter to reaffirm the central holding of *Roe v. Wade*. See Linda Greenhouse, *Becoming Justice Blackmun* 203-04 (2005).

[FN131]. Handwritten notes by Justice Harry A. Blackmun (undated) (available in *The Blackmun Papers*, *supra* note 77; on file with the authors).

[FN132]. Greenhouse, *supra* note 130, at 204.

[FN133]. The Harry A. Blackmun Oral History Project, Interview by Harold Hongju Koh, Professor, Yale Law School, with Justice Harry Blackmun in New Haven, Conn., at 504 (June 20, 1995) (available in *The Blackmun Papers*, *supra* note 77; on file with the authors). Indeed, Justice Blackmun held out hope that the Court would ultimately readopt the

strict scrutiny standard. *Id.*

[FN134]. Although the Court has only applied the undue burden standard on three occasions, Casey's precedent has solidified and expanded constitutional protection for personal autonomy in other contexts. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003). In overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and striking down Texas's criminal sodomy statute, Justice Kennedy relied heavily upon Casey's concepts of liberty, dignity, and autonomy. As one commentator has noted: "By reaffirming and validating this expansive notion of personal autonomy, *Lawrence* helps to rehabilitate its long-criticized lineage of reproductive rights cases, placing them on firmer legal footing than ever before." Cynthia Dailard, *What Lawrence v. Texas Says About the History and Future of Reproductive Rights*, in 6 *Guttmacher Rep. on Pub. Pol'y* 4, 6 (Oct. 2003); see also Kathryn D. Katz, *Lawrence v. Texas: A Case for Cautious Optimism Regarding Procreative Liberty*, 25 *Women's Rts. L. Rep.* 249 (2004) (arguing that *Lawrence* revitalized substantive due process in gaining majority support on the Court for an expansive notion of individual liberty); Jane S. Schachter, *Lawrence v. Texas and the Fourteenth Amendment's Democratic Aspirations*, 13 *Temp. Pol. & Civ. Rts. L. Rev.* 733 (2004) (contending that *Lawrence* "delivered a doctrinal punch by virtue of its surprisingly expansive language about liberty-based rights" (emphasis removed)); Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 *Ohio St. L.J.* 1341 (2004) (identifying the right recognized in *Lawrence* as an individual right to sexual self-determination). But see Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 *Colum. L. Rev.* 1399 (2004) (arguing that *Lawrence* recognizes a narrower view of liberty than the reproductive rights cases preceding it).

[FN135]. 520 U.S. 968 (1997).

[FN136]. 530 U.S. 914 (2000).

[FN137]. 126 S. Ct. 961 (2006).

[FN138]. See discussion *infra* Part IV.

[FN139]. While the Court also addressed an abortion restriction in *Lambert v. Wicklund*, 520 U.S. 292, 297 (1997), this decision was a narrow one, in which the Court upheld a Montana parental notification law on the ground that the statute was "indistinguishable" from the one upheld in *Ohio v. Akron Center for Reproductive Health (Akron-II)*, 497 U.S. 502 (1990).

[FN140]. *Mazurek*, 520 U.S. 968.

[FN141]. *Id.* at 970 (citing *Armstrong v. Mazurek*, 94 F.3d 566, 567-68 (1996)). Plaintiffs had presented evidence that the proponents of the physician-only restriction had engaged in a concerted campaign to drive Cahill out of practice in order to restrict the availability of abortion care, and had enacted the physician-only law as a part of that campaign. See *id.* at 979-80 (Stevens, J., dissenting).

[FN142]. *Armstrong v. Mazurek*, 906 F. Supp. 561, 567 (D. Mont. 1995).

[FN143]. *Armstrong*, 94 F.3d 566, 567 (1996) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992)).

[FN144]. *Id.* at 567.

[FN145]. 515 U.S. 900 (1995).

[FN146]. 517 U.S. 899 (1996).

[FN147]. *Armstrong*, 94 F.3d at 567 (citing *Miller*, 515 U.S. at 916); see also *Miller*, 515 U.S. at 920 (holding that Georgia's redistricting legislation violated the Equal Protection Clause after determining that race was the "predominant, overriding factor" motivating the legislature).

[FN148]. *Armstrong*, 94 F.3d at 567 (citing *Shaw*, 517 U.S. at 899-906); see also *Shaw*, 517 U.S. at 905 (permitting plaintiffs to prove impermissible motive through circumstantial evidence of the district's shape or demographics, or through direct evidence of legislative purpose).

[FN149]. *Armstrong*, 94 F.3d at 567-68 (citing *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994)).

[FN150]. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

[FN151]. Caitlin Borgmann, for example, notes that "Mazurek calls into question whether an improper purpose alone could ever suffice to invalidate an abortion restriction." Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After Casey and Carhart*, 31 *Fordham Urb. L.J.* 675, 691 n.10 (2004).

[FN152]. *Mazurek*, 520 U.S. at 974 n.2. The Court reasoned that it was unnecessary to address the court of appeals' reading of *Miller* and *Shaw* because the record did not support a determination that the legislature's predominant motive was to create a substantial obstacle to abortion. *Id.*

[FN153]. See *id.* at 974.

[FN154]. The Court reasoned that the fact that the purported health justification for the Montana law was contradicted by available studies did not support a finding of improper purpose because "states have broad latitude to decide that particular functions may be performed only by licensed physicians, even if an objective assessment might suggest that those same tasks could be performed by others." *Id.* at 973 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885 (1992)). The Court also summarily rejected evidence that an anti-abortion group had drafted the Montana law because it "[said] nothing significant about the legislature's purpose in passing it." *Id.* The Court also found that the fact that the law affected only a single practitioner contradicted a finding of improper legislative motive, especially since "no woman seeking an abortion would be required by the new law to travel to a different facility than was previously available." *Id.* at 974.

[FN155]. *Id.* at 980 (internal citation omitted). Justice Stevens further complained that the case did not have "sufficient importance to justify review of the merits at this preliminary stage of the proceeding," *id.* at 977, but that, since review had been granted, the Court "should provide some enlightenment as to whether the Court of Appeals misread this Court's opinions in *Miller* and *Shaw v. Hunt*," *id.* at 981.

[FN156]. *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594, 2632 (2006) (Stevens, J., concurring in part and dissenting in part) (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) and *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 276-80 (1979)).

[FN157]. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (finding an impermissible legislative purpose underlying Louisiana Creationism Act in violation of the Establishment Clause); *Stone v. Graham*, 449 U.S. 39 (1980) (holding a Kentucky statute requiring the posting of Ten Commandments in classrooms unconstitutional because of the statute's religious purpose).

[FN158]. Indeed, Justice Thomas warned that, after *Mazurek*, the Court would require “persuasive proof” that a legislature had acted with an unconstitutional intent. See *Stenberg v. Carhart*, 530 U.S. 914, 1008 n.19 (2000) (Thomas, J., dissenting). However, not all of the Justices appear to read *Mazurek* so broadly. See *id.* at 951-52 (Ginsburg, J., concurring) (quoting with approval Judge Posner’s dissenting opinion in *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (7th Cir. 1999) (Posner, J., dissenting), in which he concludes that the only possible legislative purpose of state abortion procedure ban was to express hostility to abortion rights and therein finds an undue burden).

[FN159]. *Stenberg v. Carhart*, 530 U.S. 914. The majority opinion, authored by Justice Breyer, was joined by Justices Stevens, O’Connor, Souter, and Ginsburg. Justices Stevens and Ginsburg each filed a concurring opinion in which the other joined. Justice O’Connor filed a separate concurrence. Chief Justice Rehnquist and Justice Scalia each filed his own dissenting opinion. Justice Kennedy filed a dissenting opinion in which Chief Justice Rehnquist joined. Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined.

[FN160]. Neb. Rev. Stat. Ann. § 28-328 (Supp. 1999). This ban applied to both pre-and post-viability abortions “in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.” *Stenberg*, 530 U.S. at 922 (quoting Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999)).

[FN161]. *Id.* at 921.

[FN162]. *Id.* at 930.

[FN163]. *Id.* at 931 (citing *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 768-69 (1986); *Colautti v. Franklin*, 439 U.S. 379, 400 (1979); *Planned Parenthood of Cent. Miss. v. Danforth*, 428 U.S. 52, 76-79 (1976); and *Doe v. Bolton*, 410 U.S. 179, 197 (1973), and noting that “[o]ur holding does not go beyond those cases, as ratified in *Casey*”) (internal quotation marks and citation to *Casey* omitted).

[FN164]. See, e.g., *Stenberg*, 530 U.S. at 1010 (Thomas, J., dissenting) (arguing that, under *Casey*, states must make exceptions only for cases in which the life or health of the woman is threatened by continuing the pregnancy).

[FN165]. See *id.* at 964-65, 972 (Kennedy, J., dissenting); *id.* at 1012-13 (Thomas, J., dissenting); *id.* at 953 (Scalia, J., dissenting).

[FN166]. *Id.* at 954 (Scalia, J., dissenting); *id.* at 964-65 (Kennedy, J., dissenting).

[FN167]. *Id.* at 965-66 (Kennedy, J., dissenting) (crediting Nebraska’s contention that there is never a circumstance in which the banned procedure is the only procedure able to save a woman’s life or health).

[FN168]. *Id.* at 1009-10 (Thomas, J., dissenting).

[FN169]. “D & E” or “dilation and evacuation” “refers generically to transcervical procedures performed at 13 weeks gestation or later.” *Id.* at 924 (quoting Am. Med. Ass’n, Report of Board of Trustees on Late-Term Abortion app. 490 (1997)). The breech extraction version of an intact dilation and evacuation or “intact D & E” procedure is known as a “D & X” or dilation and extraction procedure. *Id.* at 927. Intact D & E abortions are variants of dilation and evacuation abortions. *Id.*

[FN170]. *Planned Parenthood of Cent. Miss. v. Danforth*, 428 U.S. 52 (1976) (striking down a criminal ban on saline induction abortions).

[FN171]. *Id.* at 938 (quoting *Casey*, 505 U.S. 833, 877 (1992)); see also *id.* at 945-46 (“In sum, using this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D & E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision. We must consequently find the statute unconstitutional.”)

[FN172]. Justice Kennedy's dissent focused in large part on what he regarded as the majority's failure to give effect to *Casey*'s promise of increased deference to state legislative regulation of abortion. See *id.* at 956-57 (Kennedy, J., dissenting) (“[A] central premise [of *Casey*] was that the States retain a critical and legitimate role in legislating on the subject of abortion....”). The deference Justice Kennedy believes is warranted is deference to “critical state interests” in regulating abortion procedures, *id.* at 957, particularly abortion procedures performed late in pregnancy-- not blind deference to legislators' judgments about what may constitute an undue burden as a matter of law. Nowhere does Justice Kennedy indicate that those judgments are not the proper province of the judiciary, nor does he suggest that the courts should abandon their role in closely scrutinizing the purpose and effect of abortion restrictions.

[FN173]. See *supra* notes 87-88 and accompanying text.

[FN174]. *Id.* at 950 (O'Connor, J., concurring).

[FN175]. See *infra* notes 339-344 and accompanying text for discussion of state abortion procedure bans post-Stenberg.

[FN176]. See *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004), *aff'd sub nom. Gonzales v. Carhart*, 413 F.3d 791 (8th Cir. 2005), cert. granted, 126 S. Ct. 1314 (2006) (No. 05-380); *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004), *aff'd in part sub nom. Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278 (2d Cir. 2006); *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004), *aff'd sub nom. Planned Parenthood Fed'n of Am. v. Gonzales*, 435 F.3d 1163 (9th Cir.), cert. granted, 126 S. Ct. 2901 (2006) (No. 05-1382); see *infra* Part IV.A.4 (discussing lower courts' application of Stenberg).

[FN177]. 126 S. Ct. 961 (2006).

[FN178]. Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. §§ 132.24-28 (2006).

[FN179]. *Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 58 (1st Cir. 2004); see *supra* Part III.B.

[FN180]. As an additional basis for its holding of unconstitutionality, the appeals court found that the statute's exception for an abortion needed to save a pregnant woman's life was so vague that it would have forced doctors to “gamble with their patients' lives” by prohibiting a life-saving abortion until death was sufficiently certain or imminent. *Heed*, 390 F.3d at 63.

[FN181]. *Ayotte*, 126 S. Ct. at 964.

[FN182]. The *Ayotte* Court did not reach New Hampshire's defense that the judicial bypass alternative created by the statute would suffice to protect the patient. Nor did it reach the lower court's alternative holding that the statute's life exception was too narrow.

[FN183]. See *supra* Part III.B.

[FN184]. See *supra* notes 87-88 and accompanying text.

[FN185]. Compare this acceptance of the Casey standard to Justice Thomas's vitriolic dissent in *Stenberg v. Carhart*, 530 U.S. 914, 982 (2000) (Thomas, J., dissenting), where he rejected the undue burden standard as "illegitimate," "without historical or doctrinal pedigree," and not meriting adherence. See also *id.* at 956 (Scalia, J., dissenting) ("Casey must be overruled.").

[FN186]. Ayotte, 126 S. Ct. at 964.

[FN187]. *Stenberg*, 530 U.S. at 978 (Kennedy, J., dissenting) ("The majority and, even more so, the concurring opinion by Justice O'Connor, ignore the settled rule against deciding unnecessary constitutional questions.").

[FN188]. Ayotte, 126 S. Ct. at 967-69 (citations omitted).

[FN189]. *Id.* at 968. Of course, if the lower federal courts were to misread Ayotte as a blanket authorization for the judicial rewriting of unconstitutional abortion statutes, then the result would be a federal judiciary that is highly disrespectful of the legislative sphere--quite the contrary to the deference that Justice Kennedy had been seeking in *Stenberg*.

[FN190]. *Id.*

[FN191]. See *supra* notes 87-88 and accompanying text.

[FN192]. 507 U.S. 1013 (1993) (mem.) (O'Connor, J., concurring).

[FN193]. *Id.* at 1014.

[FN194]. See also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992) ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom it is irrelevant.").

[FN195]. Schafer, 507 U.S. at 1013 (quoting *Casey*, 505 U.S. at 895).

[FN196]. *Id.* at 1014.

[FN197]. 506 U.S. 1011 (1992) (mem.) (Scalia, J., dissenting).

[FN198]. *Id.* at 1011.

[FN199]. 517 U.S. 1174 (1996) (mem.).

[FN200]. *Id.* at 1177-79 (Scalia, J., dissenting).

[FN201]. *Id.* at 1175 (Stevens, J., concurring).

[FN202]. See, e.g., *Sojourner T. v. Edwards*, 974 F.2d 27 (5th Cir. 1992), cert. denied, 507 U.S. 972 (1993) (holding Louisiana's criminal abortion ban unconstitutional); *Jane L. v. Bangerter*, 809 F. Supp. 865 (D. Utah 1992), aff'd, 102 F.3d 1112 (10th Cir. 1996), cert. denied, *Leavitt v. Jane L.*, 520 U.S. 1274 (1997) (holding Utah's felony criminal abortion ban unconstitutional); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam App. Div. 1990), aff'd, 962 F.2d 1366 (9th Cir. 1992) (holding Guam's criminal abortion ban unconstitutional); see also *supra* note 39 (discussing post-Webster reenactment of pre-Roe criminal abortion bans). In 2006, both Louisiana and South Dakota reenacted criminal bans on abortion. See *supra* note 17.

[FN203]. See, e.g., *Coe v. County of Cook*, No. 96 C 2636, 1997 WL 797662 (N.D. Ill. Dec. 24, 1997), *aff'd*, 162 F.3d 491 (7th Cir. 1998) (dismissing a claim against a county hospital that performed an abortion on the plaintiff's girlfriend without notifying him); *Jane L.*, 809 F. Supp. 865 (holding Utah's husband-notification requirement unconstitutional); see also *Stachokus v. Meyers*, No. 67E-2002 (Pa. Ct. Com. Pl., Aug. 5, 2002) (citing *Casey* as authority for vacating an injunction obtained by a man preventing his girlfriend from obtaining abortion care and prohibiting providers from serving her) (unreported decision on file with the authors). Prior to the *Casey* decision, there were more reported decisions of legal challenges by boyfriends, but none proved successful. See, e.g., *Doe v. Smith*, 486 U.S. 1308 (1988) (Stevens, Circuit Justice); *Jones v. Smith*, 278 So. 2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974); *Doe v. Smith*, 527 N.E.2d 177 (Ind. 1988); *Doe v. Doe*, 314 N.E.2d 128 (Mass. 1974); *Rothenberger v. Doe*, 374 A.2d 57 (N.J. Super. Ct. Ch. Div. 1977); *Steinhoff v. Steinhoff*, 531 N.Y.S.2d 78 (Sup. Ct. 1988); *Larrimore v. Doe*, 4 Pa. D. & C.4th 186 (Pa. Ct. Com. Pl. 1989).

[FN204]. For a thorough analysis of post-*Casey* lower court rulings on parental involvement laws, see Amanda M. Latham, *Parental Notification Under the Undue Burden Standard: Is a Bypass Mechanism Required?*, 37 Rutgers L.J. 551 (2006); see also Jennifer Blasdell, *Symposium, Mother, May I?: Ramifications for Parental Involvement Laws for Minors Seeking Abortion Services*, 10 Am. U. J. Gender Soc. Pol'y & L. 287 (2002) (criticizing the Supreme Court's standards for evaluating parental involvement laws because they fail to adequately protect the rights of minors); Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 Hofstra L. Rev. 589 (2002) (same).

[FN205]. See *supra* notes 87-88 and accompanying text.

[FN206]. See, e.g., *Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 58-60 (1st Cir. 2004) (rejecting a Salerno facial challenge standard in the abortion context), *vacated on other grounds sub nom. Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961 (2006); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 142-43 (3d Cir. 2000) (same); *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1025-26 (9th Cir. 1999) (same); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193-96 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998) (same); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996), *cert. denied sub nom. Leavitt v. Jane L.*, 520 U.S. 1274 (1997) (same); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995) (same), *cert. denied sub nom. Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174 (1996); see also *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002), *cert. denied*, *A Woman's Choice-E. Side Women's Clinic v. Brizzi*, 537 U.S. 1192 (2003) (reconciling the conflict between Salerno and Stenberg/*Casey* by holding that Salerno applies).

[FN207]. See, e.g., *Barnes v. Mississippi*, 992 F.2d 1335, 1341-42 (5th Cir. 1993) (applying the Salerno standard and upholding a mandatory waiting period and biased counseling provision); *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir.) (per curiam) (same), *cert. denied*, 506 U.S. 1021 (1992).

[FN208]. *Barnes*, 970 F.2d at 14. In recent years, however, some Fifth Circuit panels have expressed doubts about the applicability of Salerno. See *Okpalobi v. Foster*, 190 F.3d 337, 353-54 (5th Cir. 1999) (declining to decide applicability of Salerno facial challenge standard in striking down Louisiana's civil liability statute because statute was unconstitutional under both Salerno and *Casey*), *rev'd on other grounds*, 244 F.3d 405 (5th Cir. 2001); *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1104 (5th Cir. 1997), *cert. denied*, 522 U.S. 943 (1997), *overruled on other grounds by Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (declining to decide the applicability of Salerno in striking down parental consent law because statute was unconstitutional under both Salerno and *Casey*, but noting it would be "ill-advised" to assume that the Supreme Court would abandon Salerno); see also *Janklow*, 517 U.S. at 1176 n.2 (Stevens, J., on denial of certiorari) ("[I]t is not at all clear to me... that subsequent Fifth Circuit panels would follow *Barnes*' application of the 'no cir-

cumstance' test ....") (citation omitted).

[FN209]. See *Barnes*, 970 F.2d at 14 n.2 ("The Casey joint opinion may have applied a somewhat different standard in striking down the spousal notification provision.... Nevertheless, we do not interpret Casey as having overruled, sub silentio, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes.") (citations omitted).

[FN210]. *Id.* at 14 ("In light of Casey's holding substantially identical provisions of the Pennsylvania Act facially constitutional, the plaintiffs cannot satisfy this 'heavy burden.'").

[FN211]. *Richmond Medical Ctr. for Women v. Hicks*, 409 F.3d 619, 627 (4th Cir. 2005) (concluding, in striking down abortion procedure ban, "that Salerno does not govern facial challenges to abortion regulations").

[FN212]. See *Manning v. Hunt*, 119 F.3d 254, 268 n.4 (4th Cir. 1997) (stating that, until the Supreme Court overrules Salerno in the abortion context, "this Court is bound to apply the Salerno standard"); see also *Greenville Women's Clinic v. Bryant* (*Greenville I*), 222 F.3d 157, 165 (4th Cir.) (noting that Manning's discussion of Salerno was not dictum "because application of Salerno was necessary to the ruling in that case"), cert. denied, 531 U.S. 1191 (2000); *Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 358-59 n.1 (4th Cir. 1998) (en banc) ("Because we conclude... that [Virginia's parental notification law] is facially constitutional under either the Salerno or the Casey standard, we need not, and do not, decide which of these two standards applies in facial challenges to abortion statutes."), cert. denied, 525 U.S. 1140 (1999).

[FN213]. See, e.g., *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health and Envtl. Control*, 317 F.3d 357, 361-63 (4th Cir. 2002) (*Greenville II*) (applying Salerno in the context of a claim that South Carolina abortion clinic licensing standards allowed for the standardless delegation of medical licensing to third parties); *Greenville I*, 222 F.3d at 164-65 (reviewing South Carolina abortion clinic licensing standards under both Salerno and Casey and finding them constitutional).

[FN214]. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992); see also *Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000) ("All those who perform abortion procedures using [the D & E] method must fear prosecution, conviction, and imprisonment. The result is an undue burden.").

[FN215]. See, e.g., *Dorf*, supra note 47, at 271-76 (arguing that the chilling effect that justifies First Amendment overbreadth doctrine also justifies its application in abortion and other privacy jurisprudence).

[FN216]. *Casey*, 505 U.S. at 897; see also *id.* at 894 ("[T]he significant number of women who fear for their safety... are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.").

[FN217]. As one court recognized, the alternative of waiting until a mandatory waiting period takes effect and then mounting an as-applied challenge is unsatisfactory: "[f]or women for whom making two trips would pose a substantial obstacle to obtaining an abortion, the same factors (plus the later birth of a child) make it unlikely that they would step forward to testify about those burdens." *A Woman's Choice-E. Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1448 (S.D. Ind. 1995); see also Brief for Respondents, *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961 (No. 04-1144) at 32 (arguing that "many women with meritorious constitutional claims would not or could not come forward to seek vindication of their rights" and that precluding a facial challenge "would unconscionably force women to choose between risking their safety and foregoing their right to an abortion.").

[FN218]. See *supra* notes 9-10 and accompanying text.

[FN219]. 132 F. Supp. 2d 1150, 1151 (S.D. Ind. 2001), *rev'd*, 305 F.3d 684 (7th Cir. 2002), *cert. denied sub nom. A Woman's Choice-E. Side Women's Clinic v. Brizzi*, 537 U.S. 1192 (2003); see discussion *infra* notes 260-280 and accompanying text.

[FN220]. These decisions are significant both because they have foreclosed most challenges to waiting periods and because the methodological errors in them have been transported to courts' analyses of other kinds of abortion restrictions.

[FN221]. Indeed, our research found only three cases with reported decisions not subsequently reversed on appeal that have invalidated these provisions on federal constitutional privacy grounds. See *Summit Med. Ctr. of Ala., Inc. v. Riley*, 318 F. Supp. 2d 1109, 1113 (M.D. Ala. 2003) (issuing a permanent injunction against the application of biased counseling provision to women diagnosed with ectopic pregnancies and women carrying fetuses with fatal anomalies because "the state interests identified in *Casey* are not served" by providing these women with information about the father's liability for child support and alternatives to abortion); *Planned Parenthood of Del. v. Brady*, 250 F. Supp. 2d 405, 409-10 (D. Del. 2003) (issuing a preliminary injunction against a mandatory twenty-four-hour waiting period because the narrow health exception unduly burdened women seeking abortions in violation of *Casey*); *Planned Parenthood of Del. v. Brady*, No. 03-153-SLR, 2003 U.S. Dist. LEXIS 10099 (D. Del. June 9, 2003) (same, but issuing a permanent injunction); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 22-24 (Tenn. 2000) (invalidating a two-day waiting period on both state constitutional grounds and *Casey*'s undue burden standard). In other cases, challenges against these provisions have been successful on state constitutional grounds or non-privacy federal constitutional grounds such as vagueness. See, e.g., *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Nixon*, 428 F.3d 1139 (8th Cir. 2005) (partially affirming order preliminarily enjoining Missouri's biased counseling requirement on vagueness grounds under the Federal Constitution); *Planned Parenthood Minn. v. Rounds*, 375 F. Supp. 2d 881, 887 (D.S.D. 2005) (issuing preliminary injunction against South Dakota's biased counseling provision because it violated the Federal Constitution's First Amendment); *Planned Parenthood of Missoula v. Montana*, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117 (Mont. Dist. Mar. 12, 1999) (enjoining enforcement of Montana's twenty-four-hour waiting period on state constitutional privacy grounds).

[FN222]. See *supra* notes 208-217 and accompanying text.

[FN223]. 844 F. Supp. 1482 (D. Utah 1994), *rev'd in part*, 75 F.3d 564 (10th Cir. 1995), *cert. denied*, 518 U.S. 1019 (1996).

[FN224]. *Id.* at 1487. Although the court noted that the statute could be interpreted "to allow for telephonic communication," which would eliminate the burdens posed by forcing women to make two trips to the abortion provider, it concluded that this interpretation "is not necessary to uphold the constitutionality of the law under *Casey*." *Id.*; see also *id.* at 1489 ("[P]laintiffs could not... have argued in good faith that the Utah law had to allow for telephone communication in order to be constitutional in light of *Casey*'s constitutional validation of two face-to-face visits.").

[FN225]. *Id.* at 1490. But see *id.* (acknowledging that a state law with similar restrictions to *Casey* could be held unconstitutional if circumstances in the forum state were materially different from those in Pennsylvania).

[FN226]. *Id.* at 1491 n.11. The Court reasoned that "the most severe burden imposed by the waiting period is the same for women in both Utah and Pennsylvania--an overnight stay at a location near the clinic." *Id.*

[FN227]. *Id.* ("Plaintiffs had no case from the beginning" because "[u]nder the broad scope of *Casey*, it would be ex-

tremely difficult, if not impossible, to bring a good faith facial challenge...."); *id.* at 1488 ("An informed consent requirement which requires two visits is simply not a substantial obstacle, as stated by the Supreme Court in *Casey*."). While deciding that it would apply the analysis of *Casey*, rather than *Salerno*, *id.* at 1489, the court nevertheless criticized plaintiffs for arguing that the relevant class of women should be limited "to those women who are particularly burdened by the law," *id.* at 1489 n.9. The court insisted that "[s]uch a construction... turns the facial challenge analysis on its head. It is no test at all. If the class is drawn too narrowly, a finding of undue burden in one aberrational [sic] circumstance would be enough to strike down the law." *Id.*

[FN228]. *Id.* at 1495.

[FN229]. See *Utah Women's Clinic, Inc. v. Leavitt*, 136 F.3d 707 (10th Cir. 1998) (*per curiam*).

[FN230]. 819 F. Supp. 862 (D.N.D. 1993), *aff'd sub nom. Fargo Women's Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994). In affirming the district court's entry of summary judgment, the Court of Appeals for the Eighth Circuit interpreted the North Dakota statute as not requiring that the state-mandated information be given in person, thus eliminating the burden on women of making two trips to the abortion provider. *Schafer*, 18 F.3d at 533. On this basis, the court found that the statute did not pose an undue burden within the meaning of *Casey*. *Id.* A dissenting opinion criticized the panel for failing to require the district court to "hold an evidentiary hearing and make factual findings as to whether the North Dakota provisions in question create such an undue burden." *Id.* at 536 (McMillan, J., dissenting).

[FN231]. *Fargo Women's Health Org. v. Sinner*, 819 F. Supp. at 865 ("Though it may be true that 'North Dakota ain't Pennsylvania,' and while the court is not unsympathetic to the burdens a woman may face when seeking to have an abortion in North Dakota, 'differences between the [North Dakota] and Pennsylvania Acts are not sufficient to render the former unconstitutional on its face.'" (quoting *Barnes v. Moore*, 970 F.2d 12, 15 (5th Cir. 1992))). Unlike the *Leavitt* court, the Eighth Circuit in *Sinner* applied the *Salerno* standard for facial challenges, see *id.* at 864-65.

[FN232]. *Schafer*, 507 U.S. at 1014; see *supra* notes 192-196 and accompanying text.

[FN233]. See *supra* notes 110-117 and accompanying text.

[FN234]. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885 (1992); see *supra* note 96 and accompanying text.

[FN235]. The shortage of reproductive health care providers in Pennsylvania, for example, is significantly less severe than the shortages in either Utah or North Dakota. In 2000, Pennsylvania had 73 abortion providers; in contrast, Utah had 4 and North Dakota had 2 providers. *Finer & Henshaw*, *supra* note 18, at 10. In 2000, 75 percent of Pennsylvania counties did not have an abortion provider; 93 percent of Utah counties and 98 percent of North Dakota counties were without abortion providers in the same year. *Id.*

[FN236]. 126 F. Supp. 2d 451 (W.D. Ky. 2000).

[FN237]. *Id.* at 453.

[FN238]. *Id.* at 457.

[FN239]. *Id.* at 456.

[FN240]. *Id.*

[FN241]. *Id.*

[FN242]. *Id.* (emphasis added). The Court also rejected plaintiffs' reliance on a Mississippi study showing a decline in the number of women having abortions after the implementation of that state's mandatory waiting period. *Id.* at 456-57; see *infra* note 261.

[FN243]. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992); see *supra* notes 83-92 and accompanying text.

[FN244]. *Estrich & Sullivan*, *supra* note 30, at 137.

[FN245]. See, e.g., *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533 (8th Cir. 1994); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 860 F. Supp. 1409, 1420-21 (D.S.D. 1994), *aff'd*, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174 (1996). Six states require that state-mandated information be delivered in person to the woman, while others allow the required information to be provided by other means, including telephone, mail or fax, rather than in person. See *Guttmacher Inst., State Policies in Brief: Mandatory Counseling and Waiting Periods for Abortion 1-2* (2006), http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf.

[FN246]. *Miller*, 860 F. Supp. at 1420-21.

[FN247]. *Id.* at 1414, 1420.

[FN248]. *Id.* at 1414.

[FN249]. The court seemed to discount the likelihood of an increase in the cost of abortion services, conjecturing that the doctor "personally would not necessarily have to contact all of his patients" because South Dakota allows for the referring physician to give the woman this information. *Id.* at 1420. However, the court made no findings as to how many women are actually referred by another doctor to South Dakota's abortion provider or how much the involvement of referring physicians would affect the projected cost increase.

[FN250]. In affirming the district court, as in *Fargo v. Schafer*, the Court of Appeals for the Eighth Circuit again relied heavily on the similarities between the South Dakota provision and both the Pennsylvania provisions at issue in *Casey* and the North Dakota provisions upheld in its *Schafer* opinion. See *Miller*, 63 F.3d at 1467.

[FN251]. No. 1:98-CV-289, 2005 U.S. Dist LEXIS 23015 (S.D. Ohio Sept. 8, 2005).

[FN252]. *Id.* at *23-24.

[FN253]. *Id.* at *33.

[FN254]. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992); *id.* at 886-87; see also *supra* notes 97-98, 107-109 and accompanying text (discussing the *Casey* joint opinion's analysis of the significance of cost increases under the undue burden standard).

[FN255]. With regard to the Pennsylvania recordkeeping and reporting requirements, the district court found that "there was no testimony which suggests that any of the plaintiff-clinics have raised the fees for an abortion because of these added expenses." *Casey*, 744 F. Supp. 1323, 1391 (E.D. Pa. 1990). With regard to Pennsylvania's forced waiting period, the district court found that in some cases, delays caused by the waiting period "will push patients into the second trimester...

substantially increasing the cost of the procedure itself...." *Id.* at 1352. The district court also found that "[i]f the physician-only disclosure requirements become law, the added costs incurred by abortion providers will be imposed upon the women seeking abortions." *Id.* at 1353. The district court made no other specific factual findings regarding price increases in the cost of the abortion procedure resulting from the implementation of the waiting period and counseling provisions.

[FN256]. *Estrich & Sullivan*, *supra* note 30, at 136-37 (citation omitted); see also *Tribe*, *supra* note 33, at 250 ("[U]nless the 'undue burden' test is applied with sensitivity to the circumstances of actual women in the real world, many burdens that from an Olympian judicial perspective might appear to be molehills are in fact massive obstacles to choice."); *Dellinger & Sperling*, *supra* note 35, at 99 (arguing that under undue burden analysis "the Court bears a strong responsibility to avoid purely theoretical judgments and instead to make a practical inquiry about whether abortion regulations operate, alone or together, as a significant burden").

[FN257]. *Estrich & Sullivan*, *supra* note 30, at 137.

[FN258]. *Dellinger & Sperling*, *supra* note 35, at 100.

[FN259]. *Id.*

[FN260]. 132 F. Supp. 2d 1150 (S.D. Ind. 2001), *rev'd*, 305 F.3d 684 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003).

[FN261]. This evidence included a peer-reviewed Mississippi study, published in the *Journal of the American Medical Association*, which studied the effects of Mississippi's 1992 requirement that women receive state-mandated information in person and then wait at least twenty-four hours before the abortion procedure. See Theodore Joyce, Stanley K. Henshaw & Julia D. Skatrud, *The Impact of Mississippi's Mandatory Delay Law on Abortions and Births*, 278 *J. Am. Med. Ass'n* 653 (1997). The study compared abortion rates in the year before and after the Mississippi law went into effect and found that the total rate of abortions for Mississippi residents decreased by approximately 16%; the proportion of Mississippi residents traveling to other states to obtain abortions increased by 37%; and the proportion of second-trimester abortions among all Mississippi women obtaining abortions increased by 40%. *Newman*, 132 F. Supp. 2d at 1161-62. The record also contained extensive evidence of the effects of Utah's in-person counseling and twenty-four-hour delay requirements, which took effect in 1996. *Id.* at 1172. This evidence showed that the rate of abortions per one thousand women declined in Utah by 9.3% from 1995 to 1997. *Id.*

[FN262]. See *A Woman's Choice-E. Side Women's Clinic v. Newman*, 904 F. Supp. 1434 (S.D. Ind. 1995) (granting a preliminary injunction); *A Woman's Choice-E. Side Women's Clinic v. Newman*, 980 F. Supp. 962 (S.D. Ind. 1997) (modifying a preliminary injunction to allow the informed consent provision to take effect and directing that the mandatory information can be provided by telephone).

[FN263]. See *infra* note 269 and accompanying text.

[FN264]. *Newman*, 132 F. Supp. 2d at 1157.

[FN265]. *Id.* at 1175.

[FN266]. *Id.*

[FN267]. *Id.* at 1173.

[FN268]. *Id.* at 1173-74.

[FN269]. *Id.* at 1175. Indeed, the district court noted that the record contained testimony indicating that the state-scripted information encouraged some women to obtain abortions. *Id.* (noting that “a witness from Planned Parenthood showed that giving the information over the telephone caused an increase in the ‘show rate’ for his organization’s clinics, thus indicating the startling result that the state-mandated information tends to persuade women to have more abortions than they otherwise would”). The district court found that the presence of this concrete evidence of the lack of any persuasive effect of the Indiana law distinguished the record in *Newman* from the record in *Karlin v. Foust*, 975 F. Supp. 1177 (W.D. Wisc. 1997), *aff’d in part, rev’d in part*, 188 F.3d 446 (7th Cir. 1999); see *Newman*, 132 F. Supp. 2d at 1177-78. The plaintiffs in *Karlin*, a challenge to Wisconsin’s mandatory waiting period and informed consent law, also relied on the Mississippi study. In *Karlin*, the District Court found that the Mississippi study failed to prove that the drop in abortions in Mississippi was attributable to the unconstitutional, rather than the persuasive, effects of the Mississippi law. See *Karlin*, 975 F. Supp. at 1217-18; see also *Karlin*, 188 F.3d at 487-88 (noting that the “most significant shortcoming” in the Mississippi study was its failure to control for persuasive effect); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 457 (W.D. Ky. 2000) (finding that the Mississippi study did not prove why “some women who are forced to wait twenty-four hours ultimately [do] not have an abortion”).

[FN270]. See *A Woman’s Choice-E. Side Women’s Clinic v. Newman*, 305 F.3d 684, 690-92 (7th Cir. 2002). Judge Easterbrook authored the opinion for the court, *id.* at 684-93, Judge Coffey wrote a lengthy concurring opinion, *id.* at 693-704, and Judge Wood dissented, *id.* at 704-17. The court of appeals subsequently denied rehearing en banc in a 5-5 vote. *A Woman’s Choice-E. Side Women’s Clinic v. Newman*, No. 01-217, 2002 U.S. App. LEXIS 22601 (7th Cir. Oct. 28, 2002).

[FN271]. *Newman*, 305 F.3d at 693 (first emphasis added).

[FN272]. *Id.* at 692.

[FN273]. *Id.* at 689 (“[W]e cannot say that the district court’s findings are clearly erroneous. The studies’ conclusions were hotly debated on both medical and statistical grounds, but the district judge dealt responsibly with these arguments pro and con, and his findings cannot be upset.”).

[FN274]. See *id.* at 689-91. The majority reasoned that the question of “what is likely to happen in Indiana” is an “admixture of fact and law” and therefore could be reviewed “without deference.” *Id.* at 689.

[FN275]. *Id.* at 690 (first and third emphases added).

[FN276]. *Id.* at 687 (“Given the incompatibility between Salerno’s language and Stenberg’s holding, it is the language of Salerno that must give way.”).

[FN277]. *Id.* at 693. Indeed, Judge Wood believed that the standard applied by the majority was, in fact, the Salerno standard or “something very close to it” because “[i]n essence, it holds that a state statute like the one before us now would be unconstitutional only if there was ‘no set of circumstances’ under which it was valid--by which it seems to mean that not a single woman in Indiana would find the law’s burdens tolerable.” *Id.* at 707 (Wood, J., dissenting).

[FN278]. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 893 (1992). As Judge Wood argued, “Casey’s discussion of the spousal notification rule makes it clear that evidence on undue burden does not have to meet some heightened standard of perfection. To the contrary, the Court there relied on ‘limited research that has been conducted... [on notify-

ing one's husband about abortion] although involving samples too small to be representative.” Newman, 305 F.3d at 712 (Wood, J., dissenting) (quoting Casey, 505 U.S. at 892).

[FN279]. Id. at 717. As Judge Wood noted, the Supreme Court has held that reviewing courts owe deference to the district courts' findings of “historical fact” even in constitutional cases. Id. at 705-06 (Wood, J., dissenting) (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (“[A] reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.”)); see also *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 858 (1982) (reversing because “[t]he Court of Appeals erred in setting aside findings of fact that were not clearly erroneous”); id. at 857-58 (“An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction, resolve the ambiguities differently....”) (quotation omitted).

[FN280]. Newman, 305 F.3d at 717 (Wood, J., dissenting).

[FN281]. These laws impose a variety of special requirements on abortion providers, for example: requiring that they be licensed; authorizing state health officials to search their offices and allowing inspection of patients' medical records; imposing requirements as to both training and qualifications of staff and the design and function of the physical facility; and requiring testing of patients and employees. See Ctr. for Reprod. Rights, Briefing Paper: Targeted Regulation of Abortion Providers: Avoiding the “TRAP” 2-4 (Aug. 2003), available at http://www.reproductiverights.org/pdf/pub_bp_avoidingthetrap.pdf. Unlike biased counseling provisions, mandatory waiting periods, parental involvement laws, and other restrictions that seek to advance the state's interest in promoting fetal life by influencing the woman's decision-making process, these laws regulate the medical practices of providers in a purported effort to safeguard the pregnant woman's health. Id. at 2. Challenges to these laws based on the right to privacy have sought to demonstrate that they are, in fact, unnecessary and extremely burdensome, “rais[ing] the cost of providing and obtaining abortions, and thereby caus[ing] some women to delay or even forego desired abortions.” Id. at 1. These laws have also been challenged on a variety of other federal and state constitutional law grounds, including procedural due process, equal protection, informational privacy, and vagueness. Id. at 5-7.

[FN282]. See, e.g., *Tucson Women's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004); *Springfield Healthcare Ctr. v. Nixon*, No. 05-4296-CV-C-NKL (W.D. Mo. Sept. 16, 2005) (granting a temporary restraining order), available at http://www.reproductiverights.org/crt_ab_trap.html; *Jackson Women's Health Org. v. Amy*, 330 F. Supp. 2d 820 (S.D. Miss. 2004); *Reprod. Servs. v. Keating*, 1998 U.S. Dist. LEXIS 23536 (N.D. Okla. Dec. 17, 1998).

[FN283]. See, e.g., *Jackson Women's Health*, 330 F. Supp. 2d at 825 (finding that Mississippi's ban on second-trimester abortions by plaintiff-provider, “without reference to whether it meets the relevant health and safety criteria,” does not advance “the State's professed desire to protect the health and safety of women who choose abortion”); see also *Tucson Women's Clinic*, 379 F.3d at 540 (“[T]he undue burden standard is not triggered at all if a purported health regulation fails to rationally promote an interest in maternal health on its face ....”).

[FN284]. See, e.g., *Springfield Healthcare Ctr.*, No. 05-4296-CV-C-NKL at 2 (granting a temporary restraining order against a requirement that Missouri abortion providers have clinical privileges at a hospital within thirty miles of where an abortion is performed because plaintiff had “demonstrated a substantial likelihood of success on the merits of its argument that the cessation of all abortion services in Southwest Missouri imposes an undue burden on a woman's reproductive rights”); see also *Tucson Women's Clinic*, 379 F.3d at 541 (“A significant increase in the cost of abortion or the supply of abortion providers and clinics can, at some point, constitute a substantial obstacle to a significant number of women choosing an abortion.”).

[FN285]. 66 F. Supp. 2d 691 (D.S.C. 1999), rev'd, 222 F.3d 157 (4th Cir. 2000), cert. denied, 531 U.S. 1191 (2001).

[FN286]. *Id.* at 696. South Carolina had previously required licensing of only those offices and clinics where second-trimester abortions were performed. *Id.*

[FN287]. *Id.* at 697.

[FN288]. See *id.* at 698-704.

[FN289]. *Id.* at 732.

[FN290]. In addition to finding that the regulation violated the Due Process Clause of the Fourteenth Amendment, the district court also found that it violated the Fourteenth Amendment's Equal Protection Clause because it "singles out physicians and clinics where abortions are performed regularly... and imposes upon them requirements which are not imposed upon comparable procedures and not even upon all physicians who perform first trimester abortions." *Id.* at 737-43.

[FN291]. *Id.* at 731.

[FN292]. *Id.* at 735. The district court made seven detailed factual findings on the costs to providers of complying with the regulation. See *id.* at 716-18. With regard to one provider, Dr. Lynn, the district court found that "the substantial alterations that Dr. Lynn must undertake in his practice, and the resulting extraordinary per procedure cost (even by defendants' estimate) will likely force him to cease performing abortions in his Beaufort office and, thereby, eliminate entirely the availability of abortions in this area of the state." *Id.* at 717.

[FN293]. *Id.* at 735.

[FN294]. See *supra* notes 270-280 and accompanying text.

[FN295]. *Greenville Women's Clinic v. Bryant* (Greenville I), 222 F.3d 157, 163-64 (4th Cir. 2000). The court of appeals also indicated its strong preference for the application of the Salerno "no set of circumstances" standard and found that the regulation would be valid under this standard. *Id.* at 165. The court also assessed the regulation under the Casey standard, finding that it was valid under this standard as well. See *id.*

[FN296]. *Id.* at 170. The court of appeals also rejected the district court's conclusions that the regulation departed from accepted medical practice and did not further the state's interest in maternal health because it found that some aspects of the regulation were consistent with the guidelines of national medical organizations. *Id.* at 167-70.

[FN297]. *Id.* at 170 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992)).

[FN298]. *Id.* The court took note of the district court's findings that the regulation would cause delays in women's financial ability to obtain an abortion and increase travel distances, but summarily rejected them, reiterating "again, in the context of a facial challenge and in the absence of any evidence in the record about how the cost would affect women's ability to make a decision," the plaintiffs had not demonstrated "any serious burden on a woman's ability to make an abortion decision." *Id.* at 171.

[FN299]. *Id.* at 170; see *Women's Med. Ctr. of N.W. Houston v. Archer*, 159 F. Supp. 2d 414, 451-52 (S.D. Tex. 1999), *aff'd*, 248 F.3d 411 (5th Cir. 2001) (reasoning that the constitutionality of an abortion regulation under Casey turns on

whether “the benefits sought by the state... justify the increased costs that might be incurred by the physicians”).

[FN300]. See *supra* notes 97, 107-09, 254-256 and accompanying text.

[FN301]. *Casey*, 505 U.S. at 894 (emphasis added).

[FN302]. *Id.* at 901.

[FN303]. See *supra* notes 80, 106 and accompanying text.

[FN304]. In repeatedly insisting that the South Carolina regulation must be shown to unduly burden a “woman’s decision to seek an abortion,” *Greenville Women’s Clinic v. Bryant* (Greenville I), 222 F.3d 157, 170 (4th Cir. 2000), the court of appeals also seemed to narrow the right protected by the Constitution. *Casey* and *Stenberg* both reaffirm that the Constitution protects both the right to decide to choose abortion and the right to be free from substantial obstacles in implementing the abortion decision. *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (invalidating an abortion procedure ban in part because it “‘imposes an undue burden on a woman’s ability’ to choose a D & E abortion, thereby unduly burdening the right to choose abortion itself.”) (quoting *Casey*, 505 U.S. at 874); *Casey*, 505 U.S. at 877 (prohibiting abortion restrictions that “plac[e] a substantial obstacle in the path of a woman’s choice”).

[FN305]. See *supra* notes 260-280 and accompanying text.

[FN306]. *Greenville I*, 222 F.3d at 202 (Hamilton, J., dissenting).

[FN307]. The record contained testimony, credited by the district court, “that an increase of just \$25 can be expected to prevent one or two out of every 100 low-income women seeking an abortion from being able to obtain one.” *Greenville Women’s Clinic v. Bryant*, 66 F. Supp. 2d 691, 714 (D.S.C. 1999).

[FN308]. *Id.* at 718.

[FN309]. 438 F.3d 595 (6th Cir. 2006).

[FN310]. *Women’s Med. Prof’l Corp. v. Baird*, 277 F. Supp. 2d 862, 873 (S.D. Ohio 2003), *aff’d in part, vac’d in part*, 438 F.3d 595. The district court also found that application of the transfer requirements violated plaintiffs’ procedural due process rights. *Id.* at 877-79. This aspect of the trial court’s holding was affirmed on appeal. 438 F.3d at 611 (holding that the failure to offer the provider a pre-deprivation hearing before closing the clinic was a violation of its procedural due process rights).

[FN311]. *Baird*, 277 F. Supp. 2d at 873.

[FN312]. *Id.* at 877.

[FN313]. *Baird*, 438 F.3d at 605.

[FN314]. *Id.*

[FN315]. *Id.*

[FN316]. *Id.*

[FN317]. *Id.*

[FN318]. *Id.* at 605 n.6.

[FN319]. *Id.* at 606.

[FN320]. *Id.* But see *The Women's Ctr. v. Tenn. Dep't of Health*, No. 3:99-0465, 2000 U.S. Dist. LEXIS 20198 at *57 n.18 (M.D. Tenn. Apr. 14, 2000) (finding that the plaintiff-providers had not established that the Tennessee certificate of need requirement posed an undue burden on women seeking abortions, but noting that had facts been presented that established that the plaintiffs treated primarily indigent patients, that clinics in surrounding areas could not provide abortions to the women affected, or that plaintiffs were the only clinic in their region of the state, "analysis might have been different as well").

[FN321]. The opinion of the district court does not indicate whether the plaintiffs had, in fact, supported their challenge with this kind of evidence.

[FN322]. See *supra* Part III.B.

[FN323]. Of the thirty-one states that have enacted abortion procedure bans, twenty-two have been the subject of legal challenges. See *Ctr. for Reprod. Rights*, Briefing Paper, *supra* note 14.

[FN324]. See, e.g., *Rhode Island Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288 (D.R.I. 1999) (granting a permanent injunction based on vagueness, lack of health exception, and undue burden), *aff'd*, 239 F.3d 104 (1st Cir. 2001) (affirming *per curiam* based on *Stenberg*); *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604 (E.D. La. 1999) (granting a permanent injunction based on findings of an unduly burdensome purpose and effect, and lack of maternal health exception), *aff'd*, 221 F.3d 811 (5th Cir. 2000) (affirming in light of *Stenberg*); *Little Rock Family Planning Servs. v. Jegley*, No. LR-C-97-581, 1998 U.S. Dist. LEXIS 22325 (E.D. Ark. Nov. 13, 1998) (granting a preliminary injunction and declaring a procedure ban unconstitutional because of undue burden, vagueness, and absence of health exception), *aff'd*, 192 F.3d 794 (8th Cir. 1999) (basing a holding of unconstitutionality on undue burden grounds); *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148 (S.D. Fla. 1998) (issuing a permanent injunction against a Florida abortion procedure ban on grounds of undue burden, vagueness, and lack of health exception); *Planned Parenthood of Cent. N.J. v. Verniero*, 41 F. Supp. 2d 478 (D.N.J. 1998) (holding a procedure ban unconstitutional on grounds that it was void for vagueness, lacked a health exception, and was unduly burdensome), *aff'd sub nom. Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000) (adopting district court's analysis, in a decision drafted but not released prior to *Stenberg* decision); *Planned Parenthood of Greater Iowa v. Miller*, 1 F. Supp. 2d 958 (S.D. Iowa) (granting a preliminary injunction based on vagueness and undue burden), *aff'd*, 30 F. Supp. 2d 1157 (S.D. Iowa 1998) (granting the plaintiffs' motion for summary judgment on the same grounds), *aff'd*, 195 F.3d 386 (8th Cir. 1999) (affirming the judgment based on the Eighth Circuit's *Stenberg* ruling), *cert. denied*, 530 U.S. 1274 (2000); *Planned Parenthood of S. Ariz. v. Woods*, 982 F. Supp. 1369 (D. Ariz. 1997) (holding an Arizona procedure ban unconstitutional on grounds of undue burden, vagueness, and failure to contain a health exception); *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997) (granting a permanent injunction based on findings of undue burden and unconstitutional vagueness); *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051 (S.D. Ohio 1995) (enjoining a statute based on *Casey* and *Danforth*), *aff'd*, 130 F.3d 187 (6th Cir. 1997) (affirming the district court based on *Casey* undue burden standard), *cert. denied*, 523 U.S. 1036 (1998). But see *Hope Clinic v. Ryan*, 195 F.3d 857, 874 (7th Cir. 1999) (holding that a procedure ban could be applied constitutionally but affirming a permanent injunction pending resolution of state court questions), *vacated*, 530 U.S. 1271 (2000) (following *Stenberg*).

[FN325]. 195 F.3d 857, vacated, 530 U.S. 1271 (2000), permanent injunction entered, 249 F.3d 603 (7th Cir. 2001) (per curiam opinion holding statute unconstitutional under Stenberg). *Midtown Hospital v. Miller*, 36 F. Supp. 2d 1360 (N.D. Ga. 1997), was also an exception to the general rule that, even before Stenberg, procedure bans were held unconstitutional. In *Midtown Hospital*, the parties entered into a consent agreement limiting Georgia's enforcement of its abortion procedure ban to intact D & E procedures performed post-viability. In approving the consent agreement and denying the plaintiff's motion for a temporary restraining order, the court noted that no third-trimester abortion procedures had been performed in Georgia in the last two years, and that physicians could avoid liability under the statute by causing fetal demise prior to undertaking the banned procedure. *Id.* at 1362-63.

[FN326]. *Hope Clinic v. Ryan*, 995 F. Supp. 847 (D. Ill. 1998).

[FN327]. *Id.*

[FN328]. *Id.* at 857.

[FN329]. *Id.* at 858-59.

[FN330]. *Id.* at 860-61.

[FN331]. Wis. Stat. Ann. § 940.16 (2006) (providing for life imprisonment upon conviction of offense of performing "partial birth abortion"). The constitutionality of this statute was challenged in *Planned Parenthood of Wisconsin v. Doyle*, 9 F. Supp. 2d 1033 (W.D. Wis.) (denying preliminary injunction), rev'd, 162 F.3d 463 (7th Cir. 1998) (granting a preliminary injunction against the Wisconsin procedure ban because it applied to pre-viability abortions, contained no health exception, and was unconstitutionally vague).

[FN332]. *Hope Clinic v. Ryan*, 195 F.3d 857, 865-68 (7th Cir. 1999) (discussing various scenarios for the constitutional construction of the challenged statutes, including conforming the statutory definition of the banned procedures to the medical definition of D & X, using scienter requirements to limit prosecutions to cases in which the defendant intends to perform all steps of a D & X procedure, and using a common law approach to "fashion [the] outer boundaries" of the offense).

[FN333]. *Id.* at 865.

[FN334]. *Id.* at 874.

[FN335]. *Id.* at 875.

[FN336]. *Id.* at 885 (Posner, J., dissenting).

[FN337]. *Id.*

[FN338]. *Id.* at 881 (Posner, J., dissenting). This suggestion of improper purpose was echoed in Justice Ginsburg's concurrence in *Stenberg*. See *supra* note 158.

[FN339]. See *supra* Part III.B.

[FN340]. See, e.g., *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 325 F. Supp. 2d 991 (W.D. Mo. 2004) (permanently enjoining procedure ban based on *Stenberg*), *aff'd*, 429 F.3d 803 (8th Cir. 2005) (affirming on health exception grounds); *Richmond Med. Ctr. for Women v. Hicks*, 301 F. Supp. 2d 499 (E.D. Va. 2004)

(granting a permanent injunction against a 2003 ban on “partial birth infanticide,” Va. Code Ann. § 18.2-71.1 (2006), on grounds that the statute lacked a health exception, was vague, and imposed an unduly burdensome effect on pre-viability abortions), *aff’d*, 409 F.3d 619 (4th Cir. 2005) (affirming the district court under Stenberg based on absence of health exception), *pet. for cert. filed*, 74 U.S.L.W. 3352 (U.S. Dec. 1, 2005) (No. 05-730).

[FN341]. See discussion *infra* Part IV.B.

[FN342]. See, e.g., Hicks, 301 F. Supp. 2d 499; Nixon, 325 F. Supp. 2d 991 (holding a post-Stenberg procedure ban, Mo. Rev. Stat. § 565.300 (2004), unconstitutional because it lacked a health exception).

[FN343]. In contrast, in *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003), the Court of Appeals for the Sixth Circuit lifted a district court injunction entered post-Stenberg that had enjoined Ohio's abortion procedure ban on the ground that it lacked an adequate health exception. In permitting the ban to take effect, the appeals court distinguished Stenberg by pointing to the Ohio statute's careful description of the restricted procedure, to the statute's specific exclusion of the D & E procedure, and to the presence of a health exception.

[FN344]. See *supra* note 176 and accompanying text.

[FN345]. See *supra* Part III.A.

[FN346]. See Amalia W. Jorns, Note, Challenging Warrantless Inspections of Abortion Providers: A New Constitutional Strategy, 105 Colum. L. Rev. 1563, 1586 (2005) (concluding that the Supreme Court has largely ignored the purpose prong of the undue burden test, and noting Justice Thomas's comment in dissenting in *Stenberg v. Carhart*, 530 U.S. 914, 1008 n.19 (2000) (Thomas, J., dissenting), that the Court would require “persuasive proof” before concluding that a legislature had acted with an unconstitutional intent).

[FN347]. See *supra* notes 341-342 and accompanying text.

[FN348]. Defendant-Appellees in *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), *cert. denied*, *Leavitt v. Jane L.*, 520 U.S. 1274 (1997), made just such an admission. *Jane L.* concerned a Utah statute sharply restricting abortions after twenty weeks' gestation. The court of appeals struck down the statute, concluding that the legislature had acted with an improper motive by drafting a statute in direct conflict with Supreme Court precedent in order to provoke a challenge to *Roe*, as evidenced by the legislature's creation of an abortion litigation trust account. During litigation, the state conceded that its purpose was to restrict abortions, raising no defense that any member of the Utah legislature had acted with a permissible purpose. See also Karlin, 188 F.3d at 493 (purpose prong “challenge will rarely be successful, absent some sort of explicit indication from the state that it was acting in furtherance of an improper purpose.”).

[FN349]. Our research revealed only three cases striking down an abortion restriction on the basis of improper purpose: *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999) (terminating tort liability for abortion providers), *rev'd* on other grounds, 244 F.3d 405 (5th Cir. 2001) (*en banc*); *Planned Parenthood of Greater Iowa v. Atchison*, 126 F.3d 1042 (8th Cir. 1997) (removing a certificate of need requirement); and *Jane L.*, 102 F.3d 1112 (eliminating post-20-week abortion restrictions).

[FN350]. *Karlin v. Foust*, 975 F. Supp. 1177, 1210 (W.D. Wis. 1997), *aff'd*, 188 F.3d 446 (7th Cir. 1999).

[FN351]. *Karlin*, 975 F. Supp. 1177.

[FN352]. *Id.*; Assembly Bill 441, codified at Wis. Stat. P 253.10 (2005).

[FN353]. Among the more onerous aspects of the Wisconsin statute were: a requirement that the mandated counseling be given in person by the physician or any other “qualified physician”; that the woman’s gestational stage be provided to her orally and in writing; that the physician discuss with the woman a specific list of possible risks of abortion including infection, psychological trauma, hemorrhage, endometritis, perforated uterus, incomplete abortion, failed abortion, danger to subsequent pregnancies, and infertility, as well as “any other information that a reasonable patient would consider material and relevant to a decision of whether or not to carry a child to birth or to undergo an abortion”; that the physician inform the woman that fetal ultrasound imaging and auscultation of fetal heart beat services are available and how to obtain them; and that the woman be provided with the name and phone number of a physician to call following the procedure should she experience any complications. See Wis. Stat. § 253.10(3)(c)1 (2005). In addition, like the Pennsylvania statute on which it was modeled, the Wisconsin statute directed the publication of printed materials describing fetal development and listing agencies offering assistance to women continuing their pregnancies; unlike the Pennsylvania law, however, Wisconsin required that the provider “physically give” the woman these printed materials. See *id.* § 253.10(3)(c) 2.d. To add insult to injury, the providers could be charged a fee for them. See *id.* §§ 253.10(3)(d), 46.245.

[FN354]. For example, the twenty-four-hour waiting period could be waived if the woman seeking abortion care alleged that she was the victim of sexual assault which she had reported to law enforcement authorities, and the provider had verified that the report had been made. See *id.* § 253.10(3m)(a). Applying a somewhat tougher rule for incest survivors, the waiting period could be reduced to two hours but not waived if a woman or child alleged that she had survived an act of incest and had reported it to law enforcement authorities, and her provider had verified that the report had been made. See *id.* § 253.10(3m)(b).

[FN355]. See 18 Pa. Cons. Stat. Ann. § 3205(c) (West 2000).

[FN356]. Karlin, 975 F. Supp. 1177.

[FN357]. *Id.* at 1199-1200.

[FN358]. *Id.* at 1208.

[FN359]. *Id.*

[FN360]. *Id.* at 1204. As explained above, the Casey plaintiffs had had no opportunity to produce proof of legislative purpose, as such evidence would have been unnecessary, if not irrelevant, to the governing strict scrutiny standard in effect at the time. See *supra* note 114 and accompanying text.

[FN361]. *Id.* at 1212.

[FN362]. *Id.*

[FN363]. See *supra* Part III.A.

[FN364]. Karlin, 975 F. Supp. at 1211. This error was repeated in other cases. For example, in *Women’s Medical Professional Corp. v. Baird*, 438 F.3d 595 (6th Cir. 2006), the Court of Appeals for the Sixth Circuit held that a licensing statute was facially neutral because it applied to all health care facilities, rejecting evidence of improper purpose in the lobbying campaign conducted by anti-abortion activists trying to deny the providers a license, despite a district court finding that the director had been actually affected by this political pressure. Reasoning that no improper purpose could be found where the department had granted licenses to other abortion providers, the appeals court upheld the statute.

[FN365]. *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999).

[FN366]. *Id.* at 496.

[FN367]. *Id.* at 493.

[FN368]. *Id.*

[FN369]. *Id.* at 496.

[FN370]. *Karlin*, 975 F. Supp. at 1211 (emphasis added).

[FN371]. *Karlin*, 188 F.3d at 496.

[FN372]. *Supra* notes 285-308 and accompanying text.

[FN373]. *Greenville Women's Clinic v. Bryant*, 66 F. Supp. 2d 691, 705-10 (D.S.C. 1999).

[FN374]. *Planned Parenthood of Se. Pa. v. Casèy*, 505 U.S. 833, 901 (1992).

[FN375]. *Greenville Women's Clinic*, 66 F. Supp. 2d at 711.

[FN376]. *Id.*; see also *id.* at 715 (finding testimony credible).

[FN377]. *Greenville Women's Clinic v. Bryant*, 222 F.3d 152, 169 (4th Cir. 2000). Similarly, in *A Woman's Choice-East Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1463-66 (S.D. Ind. 1995), discussed *supra* notes 260-280 and accompanying text, the district court granted plaintiffs' motion for a preliminary injunction after examining the legislative history of the challenged statute, including records of the legislative debate. In light of that debate, the court expressed skepticism that the state's asserted purpose in enacting a requirement that informed consent counseling be provided in the presence of the pregnant woman--to deter telephonic impersonation of health care providers--was genuine. Even so, the court was unwilling to base its ruling on a purpose prong analysis, noting the difficulty in determining the subjective motives of state legislators and ruling instead on the basis of the statute's unduly burdensome effects. Following a ruling from the state courts answering certified questions regarding the "in the presence" requirement, *A Woman's Choice-E. Side Women's Clinic v. Newman*, 671 N.E.2d 104 (Ind. 1996), the Seventh Circuit reversed the grant of preliminary injunctive relief to the plaintiffs based on the effects prong, disregarding the district court's concerns about the apparently improper purpose of the statute. *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002).

[FN378]. 981 F. Supp. 977 (E.D. La. 1998), *aff'd*, 190 F.3d 337 (5th Cir. 1999), *rev'd* on other grounds, 244 F.3d 405 (5th Cir. 2001) (*en banc*).

[FN379]. La. Rev. Stat. Ann. § 9:2800.11 (redesignated as § 9:2800.12) (2006).

[FN380]. *Okpalobi*, 981 F. Supp. at 983.

[FN381]. *Id.* at 986-88.

[FN382]. *Okpalobi*, 190 F.3d at 357.

[FN383]. *Id.* at 354 (“As the... test for undue burden is disjunctive, a determination that either the purpose or the effect of the Act creates such an obstacle is fatal.”) (discussing *Casey* and *Sojourner T. v. Edwards*, 974 F.2d 27 (5th Cir. 1992)).

[FN384]. *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996).

[FN385]. *Mazurek v. Armstrong*, 520 U.S. 968 (1997); see *supra* Part III.A.

[FN386]. *Okpalobi*, 190 F.3d at 356.

[FN387]. *Id.* at 355.

[FN388]. *Id.* at 356.

[FN389]. *Id.* at 355-56.

[FN390]. *Id.* at 354.

[FN391]. See *Metzger*, *supra* note 29, at 2072-77 (discussing the Establishment Clause endorsement test as a useful method for applying the undue burden standard).

[FN392]. 482 U.S. 578 (1987).

[FN393]. 449 U.S. 39 (1980).

[FN394]. 517 U.S. 899 (1996).

[FN395]. *Okpalobi*, 190 F.3d at 354.

[FN396]. *Id.* (quoting *Edwards*, 482 U.S. at 586-87, and citing *Stone*, 449 U.S. at 41).

[FN397]. *Id.*

[FN398]. *Id.* at 356.

[FN399]. *Id.*

[FN400]. *Id.* at 357.

[FN401]. *Id.*

[FN402]. *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc) (holding that the Eleventh Amendment barred federal court jurisdiction over claims against defendants who lacked enforcement authority over challenged statute).

[FN403]. 126 F.3d 1042 (8th Cir. 1997).

[FN404]. Under section 135.63(1) of the Iowa Code, prior to offering any new institutional health service, a provider must obtain a “certificate of need” from the Department of Health following a public hearing process in which the clinic must prove that its services are needed, economical, and not merely duplicative of existing medical facilities’ services. Iowa Code § 135.63(1) (2005). In applying this provision to abortion providers, the Department of Health gave opponents of abortion a mechanism for blocking new clinics. *Atchison*, 126 F.3d at 1044.

[FN405]. Atchison, 126 F.3d at 1046.

[FN406]. Id. at 1044.

[FN407]. Id. at 1046.

[FN408]. Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999); see supra notes 350-371 and accompanying text.

[FN409]. Women's Med. Prof'l Corp. v. Baird, 438 F.3d 595 (6th Cir. 2006); see supra notes 309-321 and accompanying text.

[FN410]. Atchison, 126 F.3d at 1049.

[FN411]. Id.

[FN412]. Id. (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992)).

[FN413]. Id. at 872.

[FN414]. United States v. Salerno, 481 U.S. 739, 745 (1987).

[FN415]. Casey, 505 U. S. at 895.

[FN416]. A Woman's Choice-E. Side Clinic v. Newman, 305 F.3d 684, 693 (7th Cir. 2002); see supra notes 260-280 and accompanying text.

[FN417]. Greenville Women's Clinic v. Bryant (Greenville I), 222 F.3d 157, 170 (4th Cir. 2000); see supra notes 285-308 and accompanying text.

[FN418]. Casey, 505 U.S. at 895.

[FN419]. Okpalobi v. Foster, 190 F.3d 337, 354 (5th Cir. 1999).

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II. Measuring Effects – What Evidence Suffices?

Under *Casey*, a law has the effect of placing an undue burden on a woman seeking abortion if its enforcement would create a substantial obstacle in a large fraction of the relevant cases. In *Casey*, the Supreme Court did not clearly define the terms “substantial obstacle” and “large fraction,” leaving lower courts to determine how many women must be impacted to constitute a “large fraction,” and what evidence is sufficient to establish a substantial obstacle. The Court did say that whether a “large fraction” exists should be determined by looking at the group for whom the law is a restriction, not those for whom it is irrelevant. The Court also left unclear what kind of evidence is needed to prove that a restriction poses a substantial obstacle, leaving interpretation and implementation to the lower courts.

Lower courts have grappled with how to determine whether an affected group constitutes a “large fraction” of those for whom the law is relevant. In *Planned Parenthood Minnesota, North Dakota, South Dakota v. Daugard*, the district court rejected the proposition that a “large fraction” should necessarily be defined as a majority of the relevant group. Instead, the court interpreted *Casey*’s “large fraction” requirement as indicating that “the number of women affected by the requirements must be more than a ‘small fraction’ of the group in question.” Consider what percentage of women must be impacted by such a law for it to constitute a “large fraction” under the holding in *Casey*. Did the Sixth Circuit in *Cincinnati Women’s Services v. Taft* err when it interpreted *Casey*’s large fraction test to require that more than 12.5% of women be precluded from obtaining an abortion?

Further, consider the evidentiary hurdles plaintiffs face to present quantifiable evidence that women have been or are likely to be impacted by restrictive abortion laws. Was the Seventh Circuit correct in *A Woman’s Choice v. Newman* when it held that studies done in neighboring states, indicating that an in-person informed consent and waiting period requirement resulted in a 10-13% reduction in the number of abortions performed, were insufficient to show that a similar reduction would occur in Indiana? Compare Judge Wood’s dissent, arguing that evidence on undue burden “does not have to meet some heightened standard of perfection.”

132 F.Supp.2d 1150
(Cite as: 132 F.Supp.2d 1150)

United States District Court,
S.D. Indiana,
Indianapolis Division.

A WOMAN'S CHOICE-EAST SIDE WOMEN'S CLINIC; Indianapolis Women's Facility; a Clinic for Women, Inc.; Planned Parenthood of Central and Southern Indiana, Inc.; Fort Wayne Women's Health Organization, Inc.; Ulrich G. Klopfer, D.O.; Women's Pavilion, Inc.; and Friendship Family Planning Clinic of Indiana, on behalf of themselves and their patients seeking abortions, Plaintiffs,

v.

Scott C. NEWMAN, in his official capacity as Prosecuting Attorney for Marion County, and as representative of the class of all prosecuting attorneys in the State of Indiana; and Gregory Wilson, M.D., in his official capacity as Commissioner of the Indiana Department of Health, Defendants.

No. IP 95-1148-C H/G.

March 30, 2001.

Reproductive health care facilities and a licensed physician who performed abortions brought action raising facial challenge to constitutionality of Indiana statutory provision requiring that medical personnel provide state-mandated information concerning the abortion and alternatives to abortion "in the presence" of the pregnant woman. The District Court, Hamilton, J., held that "in the presence" requirement imposed an undue burden on a woman's constitutional right to choose to end a pregnancy.

Judgment for plaintiffs.

West Headnotes

[1] Abortion and Birth Control 4 ⚡102

4 Abortion and Birth Control

4k102 k. Right to Abortion in General; Choice. Most Cited Cases
(Formerly 4k1.21)

Abortion and Birth Control 4 ⚡106

4 Abortion and Birth Control

4k106 k. Fetal Age and Viability; Trimester. Most Cited Cases

(Formerly 4k1.21)

Before viability of the fetus, a woman has a right under the United States Constitution to choose to terminate her pregnancy.

[2] Abortion and Birth Control 4 ⚡106

4 Abortion and Birth Control

4k106 k. Fetal Age and Viability; Trimester. Most Cited Cases

(Formerly 4k1.30)

A law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability is unconstitutional; "undue burden" is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.

[3] Abortion and Birth Control 4 ⚡104

4 Abortion and Birth Control

4k104 k. Scope and Standard of Review. Most Cited Cases

(Formerly 4k1.21)

"Undue burden" standard is the controlling test for evaluating state regulations of abortions; standard has two distinct and independent prongs; based on the purpose of the law and the effect of the law, and either may be sufficient to find an undue burden.

[4] Constitutional Law 92 ⚡656

92 Constitutional Law

92V Construction and Operation of Constitutional Provisions

92V(F) Constitutionality of Statutory Provisions

92k656 k. Facial Invalidity. Most Cited Cases

(Formerly 92k44.1)

When a facial challenge to statute is successful, the

law in question is declared to be unenforceable in all its applications, and not just in its particular application to the party in suit.

[5] Abortion and Birth Control 4 127

4 Abortion and Birth Control

4k127 k. Civil Liability and Proceedings. Most Cited Cases

(Formerly 4k1.30)

In a facial challenge, those challenging an abortion regulation do not have to wait for the law to take effect and cause them harm.

[6] Abortion and Birth Control 4 112

4 Abortion and Birth Control

4k112 k. Information and Consent; Counseling. Most Cited Cases

(Formerly 4k1.30)

Indiana statutory provision requiring that medical personnel provide state-mandated information concerning the abortion and alternatives to abortion "in the presence" of the pregnant woman imposed an undue burden on a woman's constitutional right to choose to end a pregnancy; burden imposed by the "in the presence" requirement, which required most women to make two trips to a clinic in order to obtain an abortion, was likely to prevent abortions for approximately 10 to 13 percent of Indiana women who would otherwise choose to have an abortion, roughly 1300 to 1700 per year. West's A.I.C. 16-34-2-1.1.

West Codenotes

Held Unconstitutional West's A.I.C. 16-34-2-1.1 *1151
Colleen Connell, The Roger Baldwin Foundation of American Civil Liberties Union, Chicago, IL.

Janet Crepps, Center For Reproductive Law and Policy, Simpsonville, SC.

Kenneth J. Falk, Indiana Civil Liberties Union, Indianapolis, IN.

Simon Heller, Center For Reproductive Law & Policy, New York City.

Mary J. Hoeller, White & Raub, Indianapolis, IN.

Jon Laramore, Deputy Attorney General, Indianapo-

lis, IN.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HAMILTON, District Judge.

An Indiana law enacted in 1995 requires in almost all cases that at least 18 hours before an abortion can be performed, a woman must be given certain state-mandated information concerning the abortion and alternatives to abortion. See Ind.Code § 16-34-2-1.1. The law specifically requires that medical personnel provide some of this advance information "in the presence" of the pregnant woman. The "in the presence" provision would require most women to make two trips to a clinic in order to obtain an abortion.

Plaintiffs in this case are reproductive health care facilities that provide a range of services related to pregnancy and women's health, including abortions up to 12 weeks of gestation, and a licensed physician who performs abortions. Plaintiffs contend the "in the presence" requirement is unconstitutional because it imposes an undue burden on a woman's constitutional right to choose to end a pregnancy.

The Indiana statute is similar to a Pennsylvania law upheld by the Supreme Court against a facial challenge in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), as well as a Wisconsin law upheld by the Seventh Circuit in Karlin v. Foust, 188 F.3d 446 (7th Cir.1999). Both decisions left open the possibility, however, that additional evidence on the effects of such laws could establish an undue burden. In this case, plaintiffs have presented evidence on the effects of such "in the presence" requirements that was not presented to the courts in *Casey* or *Karlin*. The additional evidence shows that Indiana's "in the presence" requirement is likely to impose an undue burden on the ability of many women to exercise their constitutional right to choose to end a pregnancy.

The evidence shows that the burden imposed by the "in the presence" requirement is likely to prevent abortions for approximately 10 to 13 percent of Indiana women who would otherwise choose to have an abortion-roughly 1300 to 1700 per year. Plaintiffs have also shown it is highly unlikely that the effects of

the law will result from any persuasive effect the state-mandated information might have. There is no evidence from other states or from Indiana showing that requiring such state-mandated information to be provided to a woman in advance of an abortion (whether in person or otherwise) actually persuades women to choose childbirth over abortion.

Accordingly, as explained below, the "in the presence" provision imposes an undue burden on a woman's constitutional right to choose to end a pregnancy. The court is entering a permanent injunction against enforcement of the "in the presence" requirement, which is severable from the other provisions of Public Law 187. This entry sets forth the court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52. The substance rather than the court's label shall determine whether a matter is a finding of fact or a conclusion of law.

*1152 I. The Indiana Statute

Indiana has long required physicians performing abortions to obtain the informed consent of their patients, just as they must obtain informed consent for other medical procedures. Informed consent generally requires that the patient be told the general nature of her condition, the proposed treatment or procedure, the expected outcome, the material risks, and the reasonable alternatives to the treatment or procedure. See Ind.Code § 34-18-12-3 (informed consent for purposes of medical malpractice action).

Indiana's "informed consent" requirements for abortions reach well beyond the more general requirements for medical procedures. Abortions in Indiana are criminal unless a number of conditions are satisfied, one of which is that "the woman submitting to the abortion has filed her consent with her physician." Ind.Code § 16-34-2-1(1)(B). Indiana Public Law 187-1995 (referred to here as "Public Law 187") added special mandatory disclosure and waiting period provisions for informed consent for abortions. The law requires in almost all cases that certain medical information and information about alternatives to abortion be provided to a woman orally at least 18 hours before she may have an abortion. Some of the medical information must be provided "in the presence of the pregnant woman." The law was drafted to have gone into effect on September 1, 1995, but it was enjoined from operation first by this court's temporary

restraining order and then by this court's preliminary injunction. A Woman's Choice-East Side Women's Clinic v. Newman, 904 F.Supp. 1434 (S.D.Ind.1995).

The central provisions of Public Law 187 state:

An abortion shall not be performed except with the voluntary and informed consent of the pregnant woman upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed only if the following conditions are met:

(1) At least eighteen (18) hours before the abortion and in the presence of the pregnant woman, the physician who is to perform the abortion, the referring physician or a physician assistant (as defined in IC 25-27.5-2-10), an advanced practice nurse (as defined in IC 25-23-1-1(b)), or a midwife (as defined in IC 27-12-2-19) to whom the responsibility has been delegated by the physician who is to perform the abortion or the referring physician has orally informed the pregnant woman of the following:

(A) The name of the physician performing the abortion.

(B) The nature of the proposed procedure or treatment.

(C) The risks of and alternatives to the procedure or treatment.

(D) The probable gestational age of the fetus, including an offer to provide:

(i) a picture or drawing of a fetus;

(ii) the dimensions of a fetus; and

(iii) relevant information on the potential survival of an unborn fetus; at this stage of development.

(E) The medical risks associated with carrying the fetus to term.

(2) At least eighteen (18) hours before the abortion, the pregnant woman will be orally informed of the

following:

(A) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care from the county office of family and children.

(B) That the father of the unborn fetus is legally required to assist in the support of the child. In the case of rape, the information required under this clause may be omitted.

(C) That adoption alternatives are available and that adoptive parents may legally pay the costs of prenatal care, childbirth, and neonatal care.

*1153 (3) The pregnant woman certifies in writing, before the abortion is performed, that the information required by subdivisions (1) and (2) has been provided.

Ind.Code § 16-34-2-1.1. Anyone who knowingly or intentionally performs an abortion in violation of these requirements is subject to criminal penalties. Ind.Code §§ 16-34-2-1, 16-34-2-7. The evidence here shows that only a few women are referred to abortion providers by other physicians. See Ex. 25 (approximately four percent of patients in one clinic were referred by outside physician). Thus, the practical effect of the "in the presence" requirement is to require a woman to make two trips to an abortion clinic in order to obtain an abortion.^{FN1}

FN1. Exhibit 25 was considered when the court issued its preliminary injunction. See A Woman's Choice, 904 F.Supp. at 1453. Defendants have not sought to revisit the question of this practical effect. Public Law 187 also contains an exception to the disclosure and waiting period requirements when a woman faces a "medical emergency," which is defined to mean: "a condition that, on the basis of the attending physician's good faith clinical judgment, complicates the medical condition of a pregnant woman so that it necessitates the immediate termination of her pregnancy to avert her death or for which a delay would create serious risk of substantial and irreversible impairment of a major bodily function." Ind.Code § 16-18-2-223.5. The Supreme Court of Indiana has construed this language broadly to include any situation in

which "the attending physician, in the exercise of her clinical judgment in light of all factors relevant to a woman's life or health, concludes in good-faith that medical complications in her patient's pregnancy indicate the necessity of treatment by therapeutic abortion," including "serious and permanent mental health issues." A Woman's Choice-East Side Women's Clinic v. Newman, 671 N.E.2d 104, 111 (Ind.1996) (answering certified questions in this case). Plaintiffs are no longer pursuing their challenge to the medical emergency language of Public Law 187.

II. Procedural Background

Plaintiffs filed their complaint on August 24, 1995, asserting that Public Law 187 would impose undue burdens on a woman's constitutional right to choose to end a pregnancy.^{FN2} Defendants are a class consisting of all prosecuting attorneys in the State of Indiana, with Scott C. Newman of Marion County as representative of the class; and the Commissioner of the Indiana Department of Health.^{FN3}

FN2. In their complaint, plaintiffs also challenged an Indiana statute providing that abortions after the first trimester may be performed only "in a hospital or ambulatory outpatient surgical center." Ind.Code § 16-34-2-1(2)(B). Plaintiffs did not request a preliminary injunction against that provision and have not presented evidence concerning it. That claim is dismissed without prejudice.

FN3. Plaintiffs originally named John C. Bailey as a defendant in his official capacity. Pursuant to Fed.R.Civ.P. 25(d), Gregory Wilson has been substituted as the current Commissioner of the Indiana Department of Health.

On August 25, 1995, plaintiffs filed a verified motion for a preliminary injunction and expedited hearing, asserting that enforcement of Public Law 187 would cause immediate and irreparable harm. After a hearing on August 30, 1995, the court entered a temporary restraining order enjoining enforcement of the challenged law for ten days. The court also issued an order certifying the defendant class.^{FN4} The parties agreed to

a short extension of the temporary restraining order, and the court heard evidence on plaintiffs' motion for a preliminary injunction on October 11-13, 1995. Also on October 13, 1995, defendants filed a motion to certify the interpretation of the medical emergency exception to the Supreme Court of Indiana.

FN4. The court's original order certifying the defendant class invited further consideration of the issue. Neither side has raised the class issue since then.

On November 9, 1995, the court issued a preliminary injunction enjoining enforcement of Public Law 187. See *A Woman's Choice*, 904 F.Supp. 1434. The court also granted defendants' motion to certify the interpretation of the medical emergency exception to the Supreme Court of *1154 Indiana. After the state court answered certified questions about the scope of the medical emergency exception, defendants moved to vacate or modify this court's preliminary injunction. On October 14, 1997, this court modified its preliminary injunction. See *A Woman's Choice-East Side Women's Clinic v. Newman*, 980 F.Supp. 962 (S.D.Ind.1997). The state court's construction of the medical emergency exception persuaded this court that the law's enforcement should not be enjoined entirely. However, the court found that the grounds for the preliminary injunction against enforcement of the "in the presence" requirement in Public Law 187 remained valid and that the requirement was severable from the remaining portions of Public Law 187.

The court therefore modified its preliminary injunction to permit enforcement of the waiting period and mandatory disclosure provisions of Public Law 187, concluding that, on the record before the court, plaintiffs were not likely to succeed in showing that the mandatory disclosure and waiting period requirements would impose burdens that would actually prevent a substantial number of women from having abortions they would otherwise choose to have. The court also concluded that plaintiffs were still likely to succeed on their challenge to the "in the presence" requirement. The court therefore also modified its injunction against enforcement of that requirement by directing that the state-mandated information could be provided by telephone.

Plaintiffs now challenge the constitutionality of only the "in the presence" requirement of Public Law 187.

The record at this point includes evidence from the earlier stages of this case, a court trial on November 1-2, 1999, and later written supplements to the evidence by both sides. After post-trial briefing and further evidentiary submissions in writing, the court heard additional argument. The issues have been fully briefed and are ripe for decision.

III. Legal Framework Governing Abortion Regulations

A. The "Undue Burden" Standard

"The issue of abortion is one of the most contentious and controversial in contemporary American society. It presents extraordinarily difficult questions that, as the Court recognizes, involve 'virtually irreconcilable points of view.'" *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 2617-18, 147 L.Ed.2d 743 (2000) (O'Connor, J., concurring). Notwithstanding the contention and controversy, some broad principles have been established by the Supreme Court.

[1] First, before viability of the fetus, a woman has a right under the United States Constitution to choose to terminate her pregnancy. *Stenberg*, 120 S.Ct. at 2604, citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 870, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (controlling joint opinion of O'Connor, Kennedy, and Souter, JJ.).^{FN5}

FN5. The joint opinion signed by Justices O'Connor, Kennedy, and Souter, and joined in part by Justices Blackmun and Stevens, provided the narrowest grounds for the judgment of the Court on all questions. That opinion therefore states the controlling holdings of the Court. See *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (when 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 the Justices who concurred in the judgment on the narrowest grounds). Accordingly, the Court majority in *Stenberg* and several dissenting justices treated the joint opinion in *Casey* as the controlling statement for the court. See *Stenberg*, 120 S.Ct. at 2604 (majority); *id.* at 2621 (Rehnquist, C.J., dissenting) (citing *Marks*); *id.* at 2625 (Kennedy, J., dissenting);

id. at 2636 (Thomas, J., dissenting).

[2][3] Second, “a law designed to further the State’s interest in fetal life which imposes an undue burden on the woman’s decision before fetal viability” is unconstitutional. Stenberg, 120 S.Ct. at 2604, quoting *1155 Casey, 505 U.S. at 877, 112 S.Ct. 2791. An “undue burden is ... shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” Id. The standard has two distinct and independent prongs, based on the purpose of the law and the effect of the law. Either may be sufficient to find an undue burden.

Casey and Stenberg together establish the “undue burden” standard as the controlling test for evaluating state regulations of abortions. The unadorned language of the undue burden test—determining whether a state law has “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”—does not draw sharp lines on the legal map. This court’s task in this case is to apply the undue burden test to the evidence in this case. For purposes of this case, the best guide to the meaning of the Supreme Court’s language is the Court’s application of the test in Casey itself.^{FN6}

FN6: In Stenberg, the Court addressed a Nebraska law prohibiting particular surgical methods used in late-term abortions. The Court found that the state law imposed an undue burden in two different respects. First, the law lacked the constitutionally required exception “for the preservation of the life or health of the mother.” 120 S.Ct. at 2613. In this case, however, the Supreme Court of Indiana has saved Public Law 187 with respect to protecting the health of the woman by giving an expansive reading to the statutory language of the medical emergency exception. See A Woman’s Choice, 671 N.E.2d at 111. That application of the undue burden standard in Stenberg therefore is not in dispute here. Second, the Nebraska law in Stenberg imposed an undue burden by outlawing both the “dilation and evacuation” procedure used most commonly in second trimester abortions, as well as the rare “dilation and extraction” method. 120 S.Ct. at 2613. In fact, Nebraska agreed that if the

statute were properly construed to bar both methods, it would impose an undue burden. Id. The specific issues in this case are so different from those in Stenberg that the Supreme Court’s applications of the undue burden standard in Casey itself provide more specific guidance.

At issue in Casey were Pennsylvania statutes that required disclosures of state-mandated information to the woman before she could give informed consent; required a woman to wait 24 hours after such disclosures before obtaining an abortion; required a minor to have parental consent prior to obtaining an abortion; and required a married woman to notify her husband before obtaining an abortion.

The controlling joint opinion by Justices O’Connor, Kennedy, and Souter in Casey articulated the undue burden standard and then applied it to those statutory requirements. A majority of the Court held that the requirements of mandatory disclosure, a 24-hour waiting period, and parental consent for minors had not been shown to impose an undue burden on women seeking pre-viability abortions. See 505 U.S. at 885-87, 899-900, 112 S.Ct. 2791 (O’Connor, Kennedy, Souter, JJ.), id. at 967-71, 112 S.Ct. 2791 (Rehnquist, C.J., joined by White, Scalia, Thomas, JJ.). A different majority of the Court struck down the requirement that a married woman notify her spouse before seeking an abortion because the requirement was likely to prevent a significant number of women from obtaining an abortion. See 505 U.S. at 893, 112 S.Ct. 2791 (O’Connor, Kennedy, Souter, JJ., joined by Blackmun and Stevens, JJ.).

Pennsylvania’s spousal notification requirement was the only provision for which the Court found sufficient evidence of an undue burden on a woman’s right to choose to terminate a pregnancy. The portion of the joint opinion striking down that requirement therefore provides the surest guide to the type of showing required to meet the undue burden standard in a facial challenge. See Karlin v. Foust, 188 F.3d at 480 (acknowledging instructive significance of this portion of Casey); see also Casey, 505 U.S. at 920 n. 6, 112 S.Ct. 2791 (Stevens, J.) (“The meaning of any legal standard can only be understood by *1156 reviewing the actual cases in which it is applied.”).

When the Casey Court struck down the spousal noti-

fication law, the record did not include statistical evidence of the effects of any similar spousal notification requirements in other states. The record included substantial evidence and findings of fact on the frequency of domestic violence and the role that pregnancy often plays as a flashpoint for such violence against women and their children. See 505 U.S. at 887-92, 112 S.Ct. 2791. The Court also considered "limited research" on spousal notification requirements that involved "samples too small to be representative." *Id.* at 892, 112 S.Ct. 2791. That research also supported findings of fact indicating that, when married women do not notify their husbands of their decisions to have an abortion, in most cases the pregnancy is the result of an extramarital affair or, if the husband is the father, the husband and wife are experiencing marital difficulties, often accompanied by violence. *Id.* The Court concluded that the research and the district court findings "reinforce what common sense would suggest." *Id.* at 892-93, 112 S.Ct. 2791. Although spouses in healthy marriages discuss such important and intimate decisions, "there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion." *Id.* at 893, 112 S.Ct. 2791.

The fact that a law may make abortions more difficult or expensive to obtain does not, the joint opinion in *Casey* emphasized, necessarily show that the law imposes a substantial obstacle. *Id.* at 893-94, 112 S.Ct. 2791. What made the difference for the Court was the evidence supporting the following conclusion about the spousal notification law: "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." *Id.* at 894, 112 S.Ct. 2791.

The defendants in *Casey* argued that the spousal notice requirement could not be an "undue burden" because it would affect only about one percent of women seeking abortions. (About 20 percent of women seeking abortions were married, the evidence showed, and 95 percent of those women notified their husbands on their own.) The Court rejected the argument: "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." 505 U.S. at 894, 112 S.Ct. 2791. The Court recognized the target of the legislation as married women seeking abortions who did not wish to notify their husbands of their intentions and who did not qualify for one of the exceptions to the requirement. The Court found that the prospect of domestic violence would mean that, "in a large fraction of the cases in which [the requirement] 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." *Id.* at 895, 112 S.Ct. 2791. The Court did not quantify more precisely the "large fraction" or its denominator.

The portion of the joint opinion in *Casey* addressing the mandatory disclosure and waiting period requirements in the Pennsylvania law is also highly instructive here, of course, especially since the Indiana law was modeled on the Pennsylvania law upheld in *Casey*. The joint opinion recognized that the law would impose some burden on women seeking abortions in terms of increased cost and delay, but the Court was not persuaded that those burdens were so great as to be "undue burdens." See *id.* at 886-87. The Court acknowledged the district court's findings that delays would require two trips to a *1157 clinic, thus increasing exposure of women to "the harassment and hostility" of protesters at clinics, and that "for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be 'particularly burdensome.'" 505 U.S. at 886, 112 S.Ct. 2791, quoting 744 F.Supp. 1323, 1352 (E.D.Pa.1990). The Court described these findings as "troubling in some respects," but inadequate to demonstrate that the waiting period imposed an "undue burden." 505 U.S. at 886, 112 S.Ct. 2791. The Court concluded: "Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden." *Id.* at 887, 112 S.Ct. 2791.

That conclusion in *Casey* left the door open for possible future challenges, such as the one here, to similar state laws modeled after the Pennsylvania statute if parties challenging such laws could come forward with evidence that would meet the "undue burden" standard. See *Planned Parenthood of Southeastern*

Pennsylvania v. Casey, 510 U.S. 1309, 1313, 114 S.Ct. 909, 127 L.Ed.2d 352 (1994) (Souter, Circuit Justice) (denying application for a stay of Court of Appeals' refusal on remand to consider additional evidence on the likely effects of Pennsylvania's statute, but noting that "litigants are free to challenge similar restrictions in other jurisdictions, as well as these very provisions as applied"); Karlin v. Foust, 188 F.3d at 484 ("We conclude plaintiffs are not precluded from challenging a waiting period provision nearly identical in all respects to the one upheld in *Casey*.").

The parties here have recognized, as the Supreme Court and the Seventh Circuit have taught, that application of the effects prong of the undue burden standard to similar laws could lead to different results in different states. Such different results may occur either because new evidence is presented regarding the actual effects of such laws, or perhaps because of demographic or geographic factors unique to a particular state. Thus, the Supreme Court's decision in *Casey* did not control the validity of a similar law in Wisconsin where different evidence was presented. See Karlin, 188 F.3d at 485 (recognizing that *Casey*'s decision to uphold Pennsylvania law did not control constitutionality of Wisconsin law). Nor should the Wisconsin case control the validity of Indiana's law in a case where additional and different evidence has been presented.^{FN7}

FN7. In the *Hope Clinic* opinions, the Seventh Circuit's majority and dissent debated the consequences of conflicting factual findings by two district courts on medical issues related to procedures used in late-term abortions. See Hope Clinic v. Ryan, 195 F.3d 857, 873 (7th Cir.1999) (*en banc*) (stating "that none of the Supreme Court's decisions in abortion cases suggests that the same law would be constitutional in one state, and unconstitutional in another, depending on a district court's resolution of factual disputes"), *vacated*, 530 U.S. 1271, 120 S.Ct. 2738, 147 L.Ed.2d 1001 (2000); Hope Clinic, 195 F.3d at 883-85 (Posner, J., dissenting) (addressing problems posed when constitutionality of similar state statutes depends on factual findings of district judges in different cases and arguing that effects of law should be treated as legislative facts rather than ad-

judicative facts). In *Hope Clinic*, the Court of Appeals was dealing with conflicting findings from two district courts made at essentially the same time on essentially the same medical issues. With respect to "in the presence" requirements, however, the available evidence has been growing over time. This court has before it evidence that was not presented to the district court or the Court of Appeals in *Karlin v. Foust*.

B. Burden of Proof for a Facial Challenge

[4][5] Plaintiffs have brought a facial challenge to the "in the presence" requirement before it could take effect. In bringing a facial challenge, "a party seeks to vindicate not only [her] own rights, but those of others who may also be adversely impacted by the statute in question." *1158 Chicago v. Morales, 527 U.S. 41, 55 n. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). "When a facial challenge is successful, the law in question is declared to be unenforceable in *all* its applications, and not just in its particular application to the party in suit." *Id.* at 74, 119 S.Ct. 1849 (Scalia, J. dissenting) (emphasis in original). In a facial challenge, those challenging an abortion regulation do not have to wait for the law to take effect and cause them harm.

Since *Casey* was decided in 1992, the lower federal courts have debated whether facial challenges to laws regulating abortions should be governed by the "undue burden" standard as the Court actually applied it in *Casey* or by the so-called "*Salerno* standard," which requires a demonstration "that no set of circumstances exists under which the [statute] would be valid." See United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (upholding federal Bail Reform Act against facial challenge under Eighth Amendment). The Court in *Casey* did not expressly overrule or reject the *Salerno* standard, but the Court did not apply the standard in evaluating the facial challenge to Pennsylvania's abortion regulation. The joint opinion in *Casey* found that a woman's right to choose to terminate or continue her pregnancy must be protected from "undue burdens" imposed by a state regulation. Casey, 505 U.S. at 876, 112 S.Ct. 2791. The joint opinion further held that a regulation imposes an undue burden if it operates as a substantial obstacle to "a large fraction" of the women "for whom the law is a restriction." *Id.* at 895, 112 S.Ct. 2791. Applying this standard, the Court struck down the

statute's spousal notification requirement, finding that the provision was likely to pose a substantial obstacle to a significant fraction of the women affected by the restriction. *Id.* at 893-97, 112 S.Ct. 2791.

The apparent tension between *Casey* and the *Salerno* standard for facial challenges has resulted in a circuit split regarding the proper standard for facial challenges to abortion regulations. See *Hope Clinic v. Ryan*, 195 F.3d 857, 865 (7th Cir.1999) (*en banc*) ("Courts of appeals are divided on the question whether *Salerno* applies to abortion legislation."), *vacated*, 530 U.S. 1271, 120 S.Ct. 2739, 147 L.Ed.2d 1002 (2000); *Carhart v. Stenberg*, 192 F.3d 1142, 1149 (8th Cir.1999) ("In considering a challenge to the facial validity of an abortion regulation, we follow the standard set out in *Casey*."), *aff'd*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743. ^{FN8}

FN8. See also *Planned Parenthood of Southern Arizona v. Lawall*, 180 F.3d 1022, 1025-27 (9th Cir.1999) (reviewing split among lower courts and concluding that *Casey* is the proper standard in the context of facial challenges to abortion statutes), *as amended by*, 193 F.3d 1042 (9th Cir.1999) (amending prior opinion and denying rehearing) (O'Scannlain, J., dissenting from denial of rehearing and criticizing panel for finding that *Salerno* standard no longer applies to facial challenges to abortion statutes); *Women's Med. Profl Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir.1997) (finding "that *Salerno* is not applicable to facial challenges to abortion regulations" and applying *Casey* standard); *Manning v. Hunt*, 119 F.3d 254, 268 n. 4 (4th Cir.1997) (applying *Salerno* standard of review because the parties did not challenge the district court's application of this standard, and noting that the Supreme Court had not expressly overruled *Salerno*); *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096, 1104 (5th Cir.1997) ("As far as we can tell, the Court appears to be divided 3-3 on the *Salerno-Casey* debate, and it would be ill-advised for us to assume that the Court will abandon *Salerno* because three members of the Court now desire that result."), *vacated on other grounds*, *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir.2001) (*en banc*); *Jane L. v. Banger-*

ter, 102 F.3d 1112, 1116 (10th Cir.1996) (rejecting district court's use of *Salerno* standard and finding "that the proper test after *Casey* is the 'undue burden' standard applied by the Court in that case"); *Barnes v. Moore*, 970 F.2d 12, 14 & n. 2 (5th Cir.1992) (*per curiam*) (noting that the "*Casey* joint opinion may have applied a somewhat different standard" than *Salerno*, but refusing to "interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent" governing facial challenges).

In ruling on plaintiffs' motion for a preliminary injunction, this court concluded that "*Casey* effectively displaced *Salerno*'s *1159 application to abortion laws." *A Woman's Choice*, 904 F.Supp. at 1448, citing *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1458 (8th Cir.1995) ("We choose to follow what the Supreme Court actually did-rather than what it failed to say-and apply the undue-burden test."). This court adheres to that view, follows what the Supreme Court has actually done in *Casey* and *Stenberg*, and applies the undue burden standard as applied in those cases.

IV. The Effects Prong of the Undue Burden Test

[6] In applying the effects prong of the undue burden test, the question is whether the "in the presence" requirement of Public Law 187 is likely to impose an "undue burden" on Indiana women who seek to have abortions. In terms of *Casey*, would the law operate to place a "substantial obstacle" in the path of "a large fraction" of the women for whom the law operates as a restriction? See 505 U.S. at 895, 112 S.Ct. 2791. The best available guide to answer this question in this facial challenge comes from the post-*Casey* experience in other states that have implemented "two-trip" requirements, as well as from the experience in Indiana and other states that have implemented waiting period and mandatory disclosure requirements without requiring two trips. Mississippi has been studied most closely, but evidence in this record also pertains to Utah, Louisiana, North Dakota, and Indiana itself.

In applying the undue burden test, it is important to distinguish between two factual questions. The first is whether "two-trip" laws have a significant effect on abortion rates and practices. That issue is the subject

of extensive statistical evidence and debate. As explained below, the answer is yes. The court finds as a fact that enforcement of the “in the presence” requirement in Indiana, which effectively requires two trips to an abortion clinic, (a) is likely to cause a significant decline of approximately 10 to 13 percent in the rate for Indiana women having abortions, which amounts to approximately 1300 to 1700 per year; (b) is likely to cause significant increases in travel out-of-state to have abortions; and (c) is likely to cause a significant increase in the proportion of second trimester abortions, which are both riskier and more expensive than earlier abortions.

Proof that the law is likely to cause a decrease in the abortion rate is not sufficient by itself, however, to show that the “in the presence” requirement would impose an undue burden on women. Putting aside for the moment the increase in second trimester abortions and the changes in interstate travel for abortions, if the effect of the law, with its combination of state-mandated information and the required waiting period, were to persuade women to change their minds about whether to have an abortion, that effect would be constitutional under *Casey*. *Casey* upheld the Pennsylvania waiting period and mandatory disclosure law precisely because the state was entitled to take some measures to try to persuade women not to have abortions. See 505 U.S. at 883, 112 S.Ct. 2791.

The second factual issue, therefore, is whether the expected reduction in abortion rates would result from any persuasive effect the law might have, or whether the reduction would result instead from the law posing substantial obstacles for women seeking abortions. That question cannot be answered by examining only the abortion rate statistics in states requiring two trips to clinics. However, states that require mandatory disclosures and waiting periods without requiring two trips have not shown any significant reduction in abortion rates resulting from those requirements. That evidence indicates that such laws have no detectable persuasive effects. There is also a complete lack of any other evidence tending to show that mandatory disclosures and waiting periods have any persuasive effect. In addition, the evidence shows that a two-trip law is likely to increase the number of women *1160 leaving the enacting state to obtain abortions in other states and to decrease the number of women from other states coming to the enacting state to have abortions, and to increase the frequency of later abor-

tions. The sum of this evidence, and the absence of evidence of any persuasive effect, shows convincingly that the predicted reduction in abortion rates would result not from persuasion but from restrictions posing a substantial obstacle for some women's ability to obtain abortions.

Accordingly, the court further finds as a fact that the likely effects of the “in the presence” requirement would not be the result of any persuasive effect of the state-mandated information or the required waiting period. The likely effects would instead result from the burdens that the “in the presence” requirement would impose on women. The court explains next the evidence supporting these findings on the reduction in rates and other effects of the law, as well as the reasons for the reduction.

A. Effects of “In the Presence” Requirements on Abortion Rates

1. The Evolution of the Data

The parties have submitted extensive evidence relevant to the effects prong of the undue burden test. In a sense, the litigation process has produced an ongoing dialogue among expert statisticians and judges in this case and in *Karlin v. Foust*. From the outset of this case, plaintiffs have relied primarily on Dr. Stanley Henshaw, a statistician with the Alan Guttmacher Institute. After this court's preliminary injunction decision in 1995, Dr. Henshaw also testified in the case challenging the similar Wisconsin law in *Karlin*. The State of Wisconsin in *Karlin* relied on Dr. Peter Uhlenberg, a professor of sociology at the University of North Carolina, to criticize and rebut Dr. Henshaw's work. Judge Crabb reviewed the work of both experts in her decision. See *Karlin*, 975 F.Supp. at 1215-18.

Judge Crabb relied on Dr. Henshaw's data and analysis to find that the Mississippi two-trip that took effect in 1992 law caused a statistically significant reduction in the rate of abortions for Mississippi residents. *Id.* at 1217. However, Judge Crabb was not convinced by the evidence offered in that case that the reduction was caused by burdens the law imposed rather than by a possible persuasive effect. *Id.* at 1217-18. The Seventh Circuit did not disturb either finding. See 188 F.3d at 487. Thus, one way of looking at the present case is that it turns first on whether Indiana and its experts have undermined the basis for expecting the “in the

presence” requirement to cause a reduction in the abortion rate, and second, if not, it turns on whether plaintiffs have come forward with sufficient evidence in this case to enable this court to reach a reliable conclusion about whether the reduction would result from persuasive effects or from burdens on women seeking abortions.

For the trial of this case, both Dr. Henshaw and Dr. Uhlenberg refined and supplemented their work. At trial the state also offered evidence from Dr. Lee Jen Wei, a professor of biostatistics at Harvard. At each step of the process, the dialogue has gone a step or two further as Dr. Henshaw and Dr. Uhlenberg (with the fresh support from Dr. Wei) have responded to criticisms from one another and from the courts.^{FN9} This process continued even *1161 beyond the trial as the court held the record open for further submissions of written evidence from Dr. Henshaw and Dr. Uhlenberg.^{FN10}

^{FN9}. For example, in *Karlin* Dr. Uhlenberg had criticized Dr. Henshaw's preliminary study for using some data from 1993, after the Mississippi law took effect, to make seasonal adjustments in calculating an expected rate of abortions. See *Karlin*, 975 F.Supp. at 1216; see also *A Woman's Choice*, 904 F.Supp. at 1456 (addressing similar criticism raised by defense witness at preliminary injunction stage of this case). That criticism was mooted by Dr. Henshaw's further work, which avoided use of the 1993 data for any seasonal adjustment. Similarly, Dr. Uhlenberg was criticized in *Karlin* for excluding from his Mississippi calculations data from July and August 1992 on the theory that some women might have accelerated their scheduling of abortions to anticipate the effective date of the law in August 1992. See *Karlin*, 975 F.Supp. at 1216-17 (court found method “suspect for excluding both July and August”). Dr. Uhlenberg's new calculations in this court included the data from both months, mooting that earlier criticism.

^{FN10}. The court invited further evidence from both sides because, at the close of trial, the record in this case was simply silent on one factual matter that had received considerable attention from both the district and

appellate courts in *Karlin*—whether the (reported) closing of one abortion clinic in southern Mississippi in 1992 undermined the reliability of Dr. Henshaw's analysis of the Mississippi data. See *Karlin*, 188 F.3d at 487 (addressing combined effect of clinic closing and missing data from Louisiana); *Karlin*, 975 F.Supp. at 1216. The parties submitted additional evidence after trial in the form of short supplemental depositions from Dr. Uhlenberg and Dr. Henshaw to address this factual issue and its potential effect on Dr. Henshaw's overall analysis. Dr. Uhlenberg's deposition exhibits contained an affidavit from another lawsuit in which the doctor who operated the clinic in Gulfport stated that the clinic was closed for ten months in 1992. Ex. 377 ¶ 10. There is also conflicting evidence about whether that doctor performed more abortions than were reported. See Uhlenberg Supp. Dep. 19. The net result of that additional evidence, as discussed below, shows that Dr. Henshaw's overall analysis remains valid. The same effects were observed in Mississippi when the southern counties were excluded from consideration altogether.

As a result of this ongoing process of analysis, this court cannot assume that the courts' and the experts' earlier adoptions of or criticisms of Dr. Henshaw's and Dr. Uhlenberg's findings are still valid. As shown below, for example, in response to very specific criticisms of his study of Mississippi's experience, Dr. Henshaw has conducted further analyses to test those criticisms. The court now turns to the evidence concerning several states, beginning with Mississippi.

2. Dr. Henshaw's Mississippi Studies

After *Casey* was decided in June 1992, a similar Mississippi law took effect on August 8, 1992. The law requires a woman seeking an abortion to receive certain information in person at least 24 hours before the abortion. Dr. Henshaw and colleagues studied abortion data from Mississippi and other states to evaluate the effects of the law on women seeking abortions. The results of that study were published in the Journal of the American Medical Association in 1997. Ex. 224 (“JAMA article”). That study was more detailed, precise, and reliable than the preliminary study presented to this court in 1995 as part of the preliminary injunc-

tion proceedings. See 904 F.Supp. at 1454-55. (It also appears that the JAMA article may not have been available to the Seventh Circuit in *Karlin v. Foust*. The court's opinion in *Karlin* refers to a study of the number of abortions performed in Mississippi in the seven months before the law took effect and five months after it took effect, see 188 F.3d at 486, which was the preliminary study this court also considered. See Ex. 3.) The analysis in the JAMA article used both a time series model looking at the twelve months before and the twelve months after the law took effect, and regression analyses using data from the three years before the law took effect and the two years after. The JAMA article also introduced comparisons to Georgia and South Carolina for both the time series and the regression analyses.

The Mississippi study in the JAMA article shows that when the twelve months before and after the new Mississippi law took effect are compared: (1) the total rate of abortions for Mississippi residents (regardless of where they were obtained) decreased by approximately 16 percent; (2) the proportion of Mississippi residents traveling to other states to obtain abortions increased by approximately 37 percent; and (3) the proportion of second trimester abortions for Mississippi residents*1162 increased by approximately 40 percent. Ex. 224 at 655. (The state's expert Dr. Uhlenberg replicated these results, but criticized their reliability for reasons discussed below. See Ex. 301 ¶ 9.)

To test the significance of these changes, Dr. Henshaw and his colleagues compared the Mississippi data to data from Georgia and South Carolina, which did not impose similar changes in their abortion laws. All three states are southern states and had comparable abortion laws, apart from the law being evaluated. All three also had relatively reliable abortion data, including data from neighboring states under reciprocal agreements. Thus, the authors could account for women who left their home states to have abortions in neighboring states. See Ex. 224 at 654. The authors also noted that all three states had large non-white populations, which allowed race-specific analysis of data. *Id.*

The time series analysis showed that Mississippi residents obtained 16 percent fewer abortions in the twelve months after the law took effect as compared to the twelve months before. Abortions during that same

period declined by three percent in Georgia and by five percent in South Carolina. Ex. 224 at 655 (Table 1). By comparing the changes in rates, the researchers found that the decrease in Mississippi was 14 percent as compared to Georgia and 12 percent as compared to South Carolina. The confidence intervals for the Mississippi changes as compared to the changes in the other states showed that the changes in Mississippi were statistically significant, meaning they were unlikely to have resulted from random fluctuations. *Id.*

The researchers also broke down the data for all three states by age and race. The declines in Mississippi rates were greatest for white adults and white teenagers, indicating decreases of 24 and 22 percent respectively. Ex. 224 at 656 (Table 2). The decline for non-white adults in Mississippi was smaller, and there was no decline for non-white teenagers.

The increase in second trimester abortions in Mississippi also withstood comparison to the other states. Georgia and South Carolina experienced essentially no change in the rate of second trimester abortions. The rate in Mississippi increased by a very substantial 40 percent. The difference was statistically significant. Ex. 224 at 655 (Table 1), 657.

In addition to the comparison of rates in the twelve months before and after the Mississippi law took effect, Dr. Henshaw and his colleagues also conducted regression analyses for the abortion rates in Mississippi, South Carolina, and Georgia, using data from January 1989 through December 1994. The regression analyses showed that overall abortion rates declined between 10 and 13 percent in Mississippi after the two-trip law took effect, as compared to South Carolina and Georgia. Ex. 224 at 656 & Table 4. The decrease was statistically significant.^{FN11} When results were broken down by age and race, the decrease in Mississippi was greater for *1163 white adults and white teenagers than for all women. Results from the regression analyses for non-whites were consistent with the results of the twelve-month before/twelve-month after comparison but were not statistically significant by themselves. Ex. 224 at 656.

^{FN11} The changes were found to be statistically significant, meaning that the observed changes were highly unlikely (probability of less than 0.05) to have been the result of random fluctuations in the measured va-

riables (i.e., the "null hypothesis"). In the JAMA article, Dr. Henshaw and his colleagues measured "rate ratios" and gauged statistical significance by estimating "95 % confidence intervals" for their results. Ex. 224 at 654 and tables. In essence, if the 95% confidence interval (shown in parentheses in the tables of the JAMA article) does not include the value 1.00, then the likelihood that the null hypothesis could account for the observed results is less than 5%. See generally Federal Judicial Center, Reference Manual on Scientific Evidence 123-29 (2d ed.2000) (discussing statistical significance and confidence intervals). Defendants have not challenged directly the methods by which Dr. Henshaw and his colleagues determined statistical significance, so there is no need for the court to delve into issues concerning the proper tests of statistical significance, such as those mentioned in Mister v. Illinois Central Gulf Railroad Co., 832 F.2d 1427, 1430-31 (7th Cir.1987). Of course, defendants challenge Dr. Henshaw's findings on many other grounds, which are discussed in detail below.

In the JAMA article, Dr. Henshaw and his colleagues reached the conclusion that the Mississippi two-trip law caused a statistically significant reduction in the rate of abortions for women residing in Mississippi. That conclusion is consistent with Judge Crabb's finding in *Karlin* based on the preliminary data. 975 F.Supp. at 1217.

In the JAMA article, Dr. Henshaw and his colleagues tested a number of alternative explanations for the decrease in abortion rates that they observed in Mississippi. They considered whether the decrease was part of a long-term trend of declining abortion rates in Mississippi. In fact, however, there was no such trend. Abortion rates had risen significantly in Mississippi in the years before the law took effect. Dr. Henshaw also examined data showing a two percent nationwide drop in abortion rates, which was not sufficient to account for the much larger decrease in Mississippi. See Ex. 205 ¶ 2(f). Dr. Henshaw also considered whether changes in prices or the number of providers of abortions could explain the decrease. He found no support for those explanations, *id.*, which is important in light of the reported closing of a clinic discussed in the *Karlin* opinions. He also found no significant change

in the number of women of childbearing age in Mississippi. *Id.* Furthermore, by including in the JAMA article the comparison of Mississippi's experience to experience in South Carolina and Georgia, Dr. Henshaw and his colleagues also provided a further means for accounting for other trends and factors that might have affected abortion rates in Mississippi and those other states. See Ex. 224.

3. Criticisms of Dr. Henshaw's Mississippi Studies

Defense experts Dr. Uhlenberg and Dr. Wei both opined that the evidence did not show the Mississippi two-trip law had any statistically significant effect on abortion rates. The court considers first Dr. Uhlenberg's criticisms and then Dr. Wei's. Consideration of the defense experts' numerous criticisms requires delving into some fairly intricate statistical and data quality issues.

Dr. Uhlenberg criticized Dr. Henshaw's Mississippi study because many out-of-state abortions for Mississippi women (especially in Louisiana) were not reported and included in the data. Ex. 301 ¶ 9. In writing the JAMA article, however, Dr. Henshaw and his colleagues made adjustments on the generous assumption that 1,000 abortions per year for Mississippi women in Louisiana were not reported to Mississippi state officials for inclusion in the data. See Ex. 224 at 654 (referencing estimate). They still found a 10 percent decrease in abortion rates for Mississippi residents attributable to the law, which was still statistically significant. Tr. at 52 (Henshaw). In the JAMA article Dr. Henshaw and his colleagues also tested the sensitivity of their conclusions to changes in out-of-state abortions. They assumed for purposes of argument that there was an increase in travel to Louisiana for abortions equal to the sum of increase in travel to Alabama and Tennessee. Under that generous assumption, the overall drop in abortion rate would be 13 percent instead of 16 percent, but still statistically significant. Ex. 224 at 657; see also Ex. 206 ¶ 24 (same).

In response to Dr. Uhlenberg's criticism, Dr. Henshaw also ran additional analyses of the data in which he excluded southern Mississippi counties. Dr. Henshaw took this approach because any missing data from Louisiana and any data problems resulting from inaccurate reports from, or the closing of, a particular clinic in southern Mississippi would have had their

greatest effects on data on abortions obtained by residents of those counties. *1164 When the data Dr. Uhlenberg had criticized were excluded entirely from the analysis, Dr. Henshaw found comparable statistically significant results for the effect of the law in the rest of the state. Henshaw Supp. Dep. 10-13, 26 & Exs. 255 & 256. Thus, the criticisms based on possible data problems from Louisiana or the accuracy of reports from the southern-most counties in Mississippi do not undermine Dr. Henshaw's conclusions.

As a further test of Dr. Henshaw's methods and conclusions, Dr. Uhlenberg tried to determine whether he could show a similar statistical effect attributable to a random month, not tied to enactment of Mississippi's two-trip law. Specifically, Dr. Uhlenberg selected June 1992 for his test, which was two months before the two-trip law took effect and in which there was an unusual one-month decrease in reported abortions in the Mississippi state data. Using Dr. Henshaw's regression calculations, Dr. Uhlenberg found a significant drop as of June 1992. Tr. 123. Dr. Uhlenberg speculated that a change in Mississippi standards for abortion clinics effective in June 1992 might have affected the number of reported abortions. *Id.*

The criticism is not persuasive. Dr. Henshaw noted that if the change of law had a significant effect in August 1992, one would also expect to detect a statistically significant effect with respect to other months close in time to August 1992. The reason is simply that, when data are compared over a significant period of time, a shift of one or two or three months may not be large enough to dilute the measured effect. See Tr. 42-43, 54 (Henshaw); Ex. 206 ¶ 27.

In addition, Dr. Uhlenberg's speculation about the effects of a change in clinic standards affecting the overall rate of reported abortions was based primarily on a legal dispute involving one abortion provider who operated a clinic in Gulfport, along the coast of the Gulf of Mexico in southern-most Mississippi. See Ex. 300 ¶¶ 22-23; Uhlenberg Supp. Dep., *passim*. Dr. Uhlenberg's reliance on that situation is not supported by the evidence.

First, Dr. Uhlenberg's information about that situation consists of conflicting affidavits from two sides in a bitter lawsuit in Mississippi. Neither Dr. Uhlenberg nor this court can make a reliable assessment of the credibility of either side's view of the facts in that case.

See Uhlenberg Supp. Dep. 37 (admitting he could not tell who was telling the truth in the dispute); *id.* at 44-45 (same).

Second, and more compelling for present purposes, Dr. Henshaw analyzed the Mississippi data without taking into account the southern-most counties in Mississippi. For purposes of that analysis, he assumed Dr. Uhlenberg was right in doubting the reliability of the data from those counties. Dr. Henshaw's analysis excluding those counties again showed a substantial statistically significant decline in the rest of the state. Henshaw Supp. Dep. 10-13 and Exs. 255 & 256.

Third, Dr. Henshaw also looked more closely at Dr. Uhlenberg's hypothesis that the clinic standards law might account for a drop in the abortion rate in June 1992. Dr. Henshaw examined county-by-county reports of abortions from Mississippi for the period 1990-1993, which are in the record as Exhibits 250, 251, 252, and 253 to his supplemental deposition. Based on his review of those reports, Dr. Henshaw found two months-April 1991 and June 1992-for which there appeared anomalies best explained as reporting errors, both in DeSoto County (adjacent to Memphis, Tennessee). For the years 1990 to 1993, the reports show that residents of DeSoto County generally obtained 10 to 20 abortions per month with a few months above or below that range. The report for June 1992, however, shows zero abortions that month for residents of DeSoto County and a substantial drop in abortions for women from other states. See Ex. 252 (reporting 10 abortions in May for DeSoto County residents, zero in June, and 17 in July; *1165 reported abortions for out-of-state residents were 180 in May, 42 in June, and 171 in July).

To account for those errors, Dr. Henshaw compared abortion numbers in June 1992 for the entire state, for the northern counties, and for the state without the northern counties, and he compared June 1992 to Junes of 1990, 1991, and 1993. The results, shown in Exhibit 257, reflect a dramatic fluctuation in the northern counties from a high of 141 abortions for residents of those counties in June 1991, down to a low of 45 in June 1992 (a 68 percent drop), and an increase to 83 in June 1993 (an 84 percent increase over 1992).^{FN12} These problems in the data for June 1992 tend to undermine Dr. Uhlenberg's hypothesis that the change in clinic standards actually accounted for any observed reduction in the abortion rate.^{FN13}

FN12. As this example indicates, the data from Mississippi and other states are not perfect. Experts on both sides had to make some judgment calls about anomalous data that may not have been accurate. As another example, the report for April 1991 shows 117 abortions for residents of DeSoto County, up from 23 in March 1991. Ex. 251. The same table also shows, however, a similar one-month drop in the number of out-of-state residents having abortions in Mississippi, from 191 in March 1991 to 116 in April 1991. The most reasonable explanation of that anomaly is that abortions performed in DeSoto County on women from Tennessee were reported inaccurately as abortions on residents of DeSoto County. See Henshaw Supp. Dep. 16-17.

FN13. Also, additional data on changes in the stage of pregnancy when abortions were performed and the number of Mississippi women obtaining abortions out-of-state also coincide with August 1992. Those results tend to undermine Dr. Uhlenberg's hypothesis of a June 1992 effect. Exhibit 209 shows that, before August 1992, the percentage of abortions performed on Mississippi residents past eight weeks gestation was about 44 percent (on an unweighted basis). Beginning in August 1992, that percentage jumped to about 53 percent. Exhibit 210 shows that, before August 1992, the percentage of abortions that Mississippi residents obtained in other states was averaging about 19 percent (on an unweighted basis). Beginning in August 1992, the average jumped to about 25 percent. These changes as of August 1992 are consistent with the other effects of the Mississippi law that Dr. Henshaw and his colleagues observed.

Even more important, however, because the data problems would give pause to any cautious researcher, Dr. Henshaw tested his regression methods and analysis if both the northern-most and the southern-most counties were excluded. He still found a substantial statistically significant drop in abortion rates resulting from the two-trip law in August 1992. He also tried excluding the data from both April 1991 and June

1992 in his calculations, in light of the reasons for doubting the accuracy of the two reports for those months. When those months were excluded entirely, Dr. Henshaw found even larger statistical effects for the two-trip law. Henshaw Supp. Dep. 23-26; Ex. 256 (Regression 2) (coefficient of absolute number of abortions changed from -91.18 to -115.68, and p-value changed from 0.0263 to 0.0046); see also Henshaw Supp. Dep. 12-13 (explaining meaning of coefficients and p-values). Thus, Dr. Henshaw ran to ground those criticisms by Dr. Uhlenberg, and he showed convincingly that they did not affect the overall reliability of his conclusions.

These additional studies are important because they are new. Not only do they address Dr. Uhlenberg's criticisms, but they address the principal problem identified by Judge Crabb and the Seventh Circuit in *Karlin v. Foust* with respect to whether the two-trip law caused abortion rates in Mississippi to decrease. The Seventh Circuit noted in its opinion that Dr. Henshaw's initial study was compromised by the combination of missing data from Louisiana and a problem resulting from either the closure of "the sole abortion facility" in southern Mississippi in early 1992 or that clinic's failure to report abortions for some period. See *Karlin*, 188 F.3d at 487 (closed); *Karlin*, 975 F.Supp. at 1216 (either closed or stopped reporting). Dr. Henshaw's further analysis here *1166 shows that even if one excludes the southern-most counties from the analysis where the effects of missing Louisiana data and the closure of a clinic in Gulfport would obviously be greatest the overall effect of the two-trip law in August 1992 remains substantial and statistically significant.^{FN14}

FN14. Both the Seventh Circuit and Judge Crabb also pointed out that Dr. Henshaw's preliminary study of Mississippi did not take into account a possible persuasive effect of the law. That issue is considered below. The threshold issue at this stage of the analysis is whether the law in fact produced a substantial drop in the abortion rate in Mississippi. Despite the criticism based on missing Louisiana data and the clinic in Gulfport, Judge Crabb found the law had such an effect in Mississippi. *Karlin*, 975 F.Supp. at 1217. The Seventh Circuit did not take issue with that finding. See *Karlin*, 188 F.3d at 487. In this case, however, with the evidence from

Dr. Uhlenberg and Dr. Wei, Indiana has launched an attack on the threshold issue: whether the two-trip law had any effect at all in Mississippi.

Dr. Uhlenberg also tested Dr. Henshaw's conclusions by studying birth rates in Mississippi. If the Mississippi two-trip law had the effect of preventing abortions, one would expect to see an increase in the number of births in the state, all other things being equal. Dr. Uhlenberg found no such increase. Ex. 300, ¶¶ 14-16. Although this criticism of Dr. Henshaw's analysis has some superficial appeal, it is not persuasive. The abortion rate is much lower than the birth rate in Mississippi. See, e.g., Ex. 201 at 6 (in 1992, Mississippi had 177 abortions for every 1000 live births). Thus, a 10 to 13 percent decrease in the abortion rate would be expected to produce a much smaller percentage change in the birth rate. In addition, some proportion of the pregnancies would end in miscarriages in any event, although Dr. Uhlenberg made an adjustment for that fact. Ex. 300, Table 5. Also, Dr. Uhlenberg concentrated his analysis on births to unmarried white women in Mississippi. See Ex. 301, ¶¶ 2-5. (Dr. Henshaw's data indicated the law had stronger effects on white women than on non-white women, and abortions were much more common among unmarried women than among all women. See Ex. 201 at 22 (in 1992, 85 percent of abortions in Mississippi were performed for unmarried women). Thus, any effect on the birth rate should have been most readily observable among unmarried white women.) By looking for changes in births to unmarried white women, however, Dr. Uhlenberg did not account for the proportion of single pregnant women who marry before they give birth. The evidence indicated that the proportion would be about 29 or 30 percent. See Tr. 373. In addition, Dr. Uhlenberg developed his projected number of births from comparisons to birth rates in neighboring states that simply did not correlate well with Mississippi's birth rate at times other than those being examined and was not a reliable basis for the projection. Tr. 45-46. In fact, Exhibit 240 shows a small but noticeable increase in births among unmarried white women between 1992 and 1994.

Dr. Henshaw and his colleagues also looked at birth rates as part of their study reported in the JAMA article. Looking at the relevant time period, they observed that birth rates declined in Mississippi, South

Carolina, and Georgia, but the decline was the smallest in Mississippi. The data on birth rates were inconclusive, but they were not inconsistent with the hypothesis that the Mississippi law caused an increase in the number of unintended pregnancies carried to term. See Ex. 224 at 657-58; see also *id.* at 655 (Figures 1 & 2 and Table 1).

Thus, when adjustments are made for miscarriages and for marriages before the birth of a baby, the predicted change in the birth rate is small compared to the degree of random fluctuations in birth rates. As a result, random fluctuations could easily mask such effects of changes in the abortion rate. See Ex. 206 ¶ 28. The birth data are not inconsistent with *1167 Dr. Henshaw's conclusions. The absence of a detectable effect in the birth rate does not undermine the validity of Dr. Henshaw's finding that the Mississippi two-trip law caused a statistically significant reduction in the rate of abortions.

Dr. Uhlenberg also criticized Dr. Henshaw's conclusions because of the different results found for whites and non-whites in the Mississippi data. As noted above, Dr. Henshaw and his colleagues found greater decreases in abortion rates for whites in Mississippi. The decrease for non-white adults as shown through the regression analyses was smaller and not statistically significant by itself. There was no decrease for non-white teenagers. See Ex. 224. Dr. Uhlenberg used annual data for non-white women in Mississippi and found a slight increase in the number of abortions for that group after the Mississippi law took effect, although that result may well be an artifact of the particular time periods chosen, which used longer time periods and introduced more potentially confounding variables. See Ex. 300 ¶¶ 9-13 & Table 4. Dr. Uhlenberg found no apparent explanation for the different results by race, and he argued that this anomaly undermines Dr. Henshaw's analysis and tends to show the decrease observed by Dr. Henshaw was an artificial phenomenon rather than a true effect of the Mississippi law. See also Tr. 116.

Dr. Henshaw and his colleagues had also considered the issue of race. In the JAMA article, they wrote that the differences by race were "more difficult to interpret." Ex. 224 at 657. They suggested two possible explanations in the article, but neither is especially persuasive. It is clear, however, that there are substantial underlying differences by race with respect to

both birth rates and abortion rates in Mississippi. Figure 2 of Exhibit 224 shows, for example, birth rates of 85 to 90 births per 1000 non-white women, but 58 to 62 births per 1000 white women. Figure 1 shows abortion rates of 14 to 17 abortions per 1000 non-white women, but 8 to 11 abortions per 1000 white women. With differences that large in these underlying rates, the differences in measured effects by race do not undermine the conclusion that the law had significant effects on the overall rate of abortions.

Dr. Wei agreed with Dr. Uhlenberg on some of the criticisms discussed above. He also added some criticisms of his own and carried out some statistical analyses that persuaded him that the Mississippi data do not show a statistically significant decline in the abortion rate attributable to the two-trip law taking effect.

Dr. Wei criticized Dr. Henshaw for failing to take account of "the declining national trend in the number of abortions." Ex. 303 ¶ 5. However, Dr. Henshaw's use of South Carolina and Georgia as comparator states in the JAMA article provided a reasonable means for accounting for such changes. See Ex. 224 at 656-58. In addition, Mississippi had experienced increases in its relatively low abortion rate while the national average rate was declining slightly. The modest downward national trend does not undermine Dr. Henshaw's conclusions.

Dr. Wei also criticized Dr. Henshaw for failing to account for changing beliefs regarding abortion. See Ex. 303 ¶ 5. Again, however, the use of comparator states provided a mechanism for accounting for such changes (if they had actually occurred) on a national or regional level. Moreover, Dr. Wei and the defendants have not come forward with any actual evidence of such changes at any relevant times. It is always possible to imagine other possible confounding factors. Without some reason to believe the factors are real, the mere possibility does not undermine Dr. Henshaw's results.

Dr. Wei also cited an article by Meier and others that he described as providing "scientific evidence that state-level restrictions have no effect on the incidence of abortion." Ex. 303 ¶ 6, citing Meier, *et al.*, *The Impact of State-Level Restrictions on *1168 Abortion*, 1996 *Demography* 307. Dr. Wei seriously overstated the conclusions of that article, which is in the record as

Exhibit 328. The Meier paper studied 23 separate state policy actions in the wake of *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989). The authors found no evidence that the policies they studied had an appreciable impact on abortion rates. Ex. 328 at 311. The authors recognized, however, as Dr. Wei did not, that their findings did "not refute the possibility that state policies can affect the rate of induced abortions." *Id.* They also recognized that state Medicaid policies affect abortion rates. The authors did not purport to have come forward with "scientific evidence that state-level restrictions have no effect on the incidence of abortion," without qualification.

Even more relevant for this case, Meier and his colleagues also recognized the importance of the *Casey* decision. They cited "early anecdotal or case analysis" suggesting that the waiting period and mandatory disclosure laws have an effect. *Id.* The authors also suggested more systematic study of the effects of such laws as later data became available. *Id.* Dr. Henshaw's JAMA article is precisely such an effort, and it provides substantial proof of such effects.

Dr. Wei also identified a number of additional possible confounding and intervening variables, including changes in abortion pricing, levels of anti-abortion activity "perceived as harassment" at clinics, negative publicity, the quality of services, changed service availability, the reputation of providers, the scope and funding of abstinence programs, the scope and availability of services providing alternatives to abortion, differences in geographic proximity of abortion services, misreporting and underreporting of abortion data, changing laws on abortion facilities, changes in Medicaid financing for abortion, and alterations in reimbursement for abortions by private insurance carriers. Ex. 303 ¶ 7. Dr. Wei claimed: "None of these were accounted for by Dr. Henshaw in examining the impact of Mississippi's waiting period and informed consent law."

Plaintiffs have objected to Dr. Wei's testimony on these points, arguing that he is not qualified to offer an admissible expert opinion on the topic of potential confounding factors affecting studies of abortion rates. Dr. Wei had not studied abortion rates or the subject of abortion more generally before he began working on this case. However, he is experienced in statistical analysis in a wide range of areas relating to

human health and medical practice. He testified that when he begins to do statistical work in a new field (independent of litigation work, which is a small part of his work), he immerses himself in the literature of the field to help him get a feel for what sorts of factors are most likely to affect and possibly to obscure the data. The court credits that testimony and overrules plaintiffs' objections to Dr. Wei's testimony on that score. Plaintiffs' criticism goes to the weight of his testimony, not its admissibility. However, Dr. Wei's testimony on potential confounding factors is entitled to little weight.

Dr. Wei's criticism of Dr. Henshaw for failing to account for potential confounding factors simply is not accurate. As noted above, Dr. Henshaw and his colleagues considered many of these factors, and they used methods designed to minimize and control for such effects. For example, they considered changes in prices, changes in the number of providers, and changes in the population of women of child-bearing age. They found no significant changes in these factors. In addition, they used comparisons to Georgia and South Carolina, which share important similarities with Mississippi, as a useful control for other factors, including those that might have affected abortion rates more broadly. As for the other potential confounding factors identified by Dr. Wei, there is simply no evidence that any of these factors changed *1169 in Mississippi during the time period studied by Dr. Henshaw.

Dr. Henshaw and his colleagues made a reasonable and serious effort to account for likely confounding variables. Their effort was easily sufficient to render their analysis relevant and admissible. See generally *Bazemore v. Friday*, 478 U.S. 385, 400, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) ("Normally, failure to include variables will affect the analysis' probativeness, not its admissibility."); *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 422-28 (7th Cir.2000) (reversing district court finding that statistical reports were inadmissible). It is almost always possible for someone disappointed with the results of statistical analysis to hypothesize one more independent variable that might explain the results. Such a bare hypothesis is not sufficient to undermine the analysis. See *Allen v. Seidman*, 881 F.2d 375, 380 (7th Cir.1989) (defendant's "attack on the plaintiffs' statistical case amounts to a contention that unless a plaintiff eliminates all alternative hypotheses he must lose. That would raise

the threshold of proof too high."). Dr. Wei and the defense have had ample time and incentive to find evidence that any other material changes occurred during the relevant time period in Mississippi. They have not come forward with such evidence. Cf. *Mister v. Illinois Central Gulf Railroad Co.*, 832 F.2d 1427, 1431-33 (7th Cir.1987) (noting importance of taking relevant variables into account, but plaintiffs proved discrimination where employer failed to conduct appropriate analysis to support its theory that distance from work sites explained apparent racial bias in hiring data). While the proponent of the analysis must make reasonable efforts to account for relevant explanatory variables, he need not anticipate and refute every hypothesis the opponent might dream up. Unsupported speculation about other possible confounding variables is not a sufficient basis for discounting the significance of Dr. Henshaw's analysis.

Dr. Wei himself wrote that an "examination of the above variables is warranted." Ex. 303 ¶ 8. If such an examination was warranted, Dr. Wei and the defense did not carry out such an examination, beyond those items raised by Dr. Uhlenberg and addressed above. Moreover, Dr. Wei's own statistical analyses were carried out in a way that introduced several genuine confounding factors. He failed to follow his own advice to take them into account.

Dr. Wei criticized Dr. Henshaw for using the twelve months preceding the two-trip law in Mississippi because "the number of abortions in 1991 was extremely high," leading Dr. Wei to describe 1991 as an "outlier year" not appropriate for comparison. The number of abortions in Mississippi in 1991 showed a 10.7 percent increase over 1990. Ex. 303, Table 3. However, there is evidence that a new abortion clinic opened in southern Mississippi in 1991, see Ex. 206 ¶ 20, which is precisely the sort of potential confounding factor that all three experts recognize should be taken into account (and a factor that Dr. Henshaw addressed in detail in his supplemental deposition). In addition, the trend over several years in Mississippi had been a significant increase in abortion rates, which had started out and remained well below the national average. See Ex. 201 at 3, 6 (national abortion rate of 23 to 24 per 1000 women aged 15-44, while Mississippi rate was only 12 per 1000 women aged 15-44 in 1992). Given the combined effect of that long-term trend and the change in provider availability in southern Mississippi in 1991, Dr. Wei's criticism of

Dr. Henshaw for focusing on the twelve months before and after the effective date of the law is not persuasive.

In addition, there are substantial reasons for examining a fairly short period of time for purposes of the comparison. As Dr. Wei acknowledged, there are many potential confounding variables in this analysis, including long-term trends and changes in abortion providers and availability.*1170 The longer the period that is examined, the greater potential there is for such confounding effects, as indicated, for example, by the change in providers in 1991.

Dr. Wei also criticized Dr. Henshaw for failing to attempt a survey of affected women to assess the impact of the law. He said this failure rendered Dr. Henshaw's conclusions "speculative at best." This criticism is naive and completely unfounded. Dr. Henshaw, who is thoroughly acquainted with the challenges of doing research related to abortion and abortion policy, explained for the record the obvious practical and ethical problems involved in doing the type of survey Dr. Wei proposed. These problems include confidentiality issues and the difficulty in even finding women who might have contacted a clinic anonymously, learned of the requirements, and changed their minds, let alone the difficulty in obtaining reliable answers from a woman after the birth of a child about why she might have chosen not to have an abortion early in the pregnancy. See Tr. 362-64 (Henshaw); see also Tr. 282 (Wei acknowledging "logistical problems" and recognizing that such a survey would be "very difficult"); Tr. 309 (Wei acknowledging there are areas of social science research where true experiments with human subjects would be unethical).

Dr. Wei carried out his own analysis of data from Mississippi. In his principal analysis, he compared monthly abortion rates from August 1992 to December 1992 with the same months from 1988, 1989, 1990, and 1991. That is, he compared August 1992 to the Augusts of the four previous years, September 1992 to the Septembers of the four previous years, and so on for October, November, and December. Using these comparisons, he found no statistically significant decrease in abortion rates for 1992 after the two-trip law took effect.

Dr. Wei's use of the Wei-Johnson method for ana-

lyzing time-series data may be useful in many situations, but its use as applied to the Mississippi data is not persuasive. Most important, Dr. Wei's method suffers from the very flaws for which he incorrectly criticized Dr. Henshaw-the failure to account for other confounding variables, especially long-term trends in Mississippi and changes in provider availability. See Tr. 376 (Henshaw criticism of Wei-Johnson method as applied). Also, by comparing only monthly data, which involve quite a bit of random fluctuation at the statewide level, Dr. Wei reduced his sample sizes and introduced more potential for "noise" in the statistical results. See Tr. 376. If the Mississippi two-trip law did have a significant effect on abortion rates when it took effect in August 1992, Dr. Wei's methods were custom-tailored to hide that effect in statistical noise created by both the long-term trends and the greater degree of fluctuation from month to month than is present from year to year.

Although Dr. Wei brought impressive credentials to this case, some of his testimony further diminished his credibility in general and more specifically with respect to his reliance on his Wei-Johnson method in this case. For example, in defending his approach to time-series data, Dr. Wei used a comparison to the stock market. He asserted that it would be easier for him to predict the price of IBM stock next year than to predict the abortion rate in Mississippi next year, supposedly because he had more data points over the years for the IBM stock price. Tr. 287; see also Tr. 356-57. With all due respect to Dr. Wei, the court cannot credit that testimony, and it impaired his credibility overall.^{FN15}

^{FN15} For example, one recent published report of IBM stock price as of February 10, 2001, showed a 52-week high of \$134.94 and a 52-week low of \$80.06. Even if one assumed the Mississippi rate of abortion had purely random swings on an annual basis of 10 to 13 percent (the magnitude of the effect Dr. Henshaw observed), anyone who finds it easier to predict a stock price based on past data than to predict a statewide abortion rate should be very wealthy.

*1171 More directly pertinent, Dr. Wei also impaired his credibility by signing and submitting an affidavit that exaggerated and misstated his conclusions. In Paragraph 2 of his report, Dr. Wei stated under oath:

For the reasons enumerated below, I believe that Senate Bill 311 is unlikely to cause any unusual delay to Indiana women in obtaining abortions resulting in an increase in second trimester terminations, unlikely to prevent women from obtaining the abortions they desire, unlikely to expose them to any unusual adverse health risks, and unlikely to especially harm low-income women.

Ex. 303 ¶ 2. That strong form of his conclusions-not only that Dr. Henshaw had not proven his own conclusions, but that in fact the contrary was true and the law is unlikely to have adverse effects for women-is not supported by Dr. Wei's own testimony or his explanations directed toward the Mississippi data. In Paragraph 8, for example, Dr. Wei said he could "neither verify Dr. Henshaw's conclusions nor rule out changes in Mississippi's abortion rate due to possible other factors identified above." At trial, however, during questioning by the court about the contrast between these two views, Dr. Wei backed away from the strong assertions of Paragraph 2 and conceded that he could not say the law would have no impact. Tr. 353-54.

Dr. Wei also evaluated how the Mississippi and Utah two-trip laws affected the timing of abortions in those states. He found small increases in the annual means for the week of gestation for abortions in those states. See Ex. 303 ¶ 20 & Figure 9 (also including Louisiana, which did not show a change from its already higher level). He found increases that he described as "clinically insignificant." This comment again shows Dr. Wei's lack of familiarity with the relevant considerations in dealing with abortions. The change in the mean week of gestation is not the clinically relevant consideration. What is clinically most significant is the shift of an abortion from late in the first trimester to early in the second trimester, when the procedure becomes more expensive and more complex, and carries higher medical risks. That is what Dr. Henshaw considered, and Dr. Wei did not challenge those results.

Dr. Wei also looked at abortion complication rates, which were available for Mississippi and Utah. He found no significant differences. Ex. 303 ¶ 21 & Table 2. However, the sample sizes were so small as to render the comparison meaningless. An abortion complication rate of 0.0013 in Mississippi in 1990-91

amounts to eight to ten such cases per year in the state. An abortion complication rate of 0.0015 in Utah in 1994 and 1995 amounts to only four or five such cases per year in that state. See Ex. 202; Ex. 300, Table 3 (annual number of abortions in Utah); Ex. 303, Table 3 (annual number of abortions in Mississippi).

In sum, Dr. Uhlenberg's and Dr. Wei's criticisms of Dr. Henshaw's Mississippi studies did not undermine the strength of Dr. Henshaw's conclusions about the effects of the Mississippi two-trip law.

4. *The Utah and Louisiana Experiences*

Dr. Uhlenberg questioned Dr. Henshaw's conclusions about the Mississippi data because Dr. Uhlenberg looked at data from both Utah and Louisiana before and after those states adopted similar mandatory disclosure and waiting period laws that require two trips to a clinic. Dr. Uhlenberg found no significant decline in abortions in either state, let alone declines that could be attributed to enforcement of the new laws. The absence of such effects in those states, Dr. Uhlenberg opined, suggested that Dr. Henshaw's finding of an effect in Mississippi was spurious. The parties presented extensive evidence on Utah and somewhat less on Louisiana.

*1172 The Utah law took effect in 1996 and requires an in-person visit with an abortion provider or a referring physician 24 hours before the abortion takes place. The law thus has essentially the same practical two-trip requirement as the Indiana law's "in the presence" requirement. Dr. Uhlenberg considered data from both before and after the Utah law took effect. The law took effect in mid-1996, and Dr. Uhlenberg had only annual data, not monthly data, so he compared annual totals for 1995 and 1997. He found "no unusual decline in the number of abortions to residents of Utah in the period following the implementation of the law in Utah." Ex. 300 ¶ 6. Dr. Uhlenberg found a decline of 4.9 percent from 1995 to 1997, which amounted to an annual decline that he said was "about the same as the annual percent decline in abortions in the U.S. in recent years." *Id.*, ¶ 7(a). Dr. Uhlenberg also found no significant change in the proportion of abortions occurring in the first trimester. *Id.* ¶ 7(b), and Table 3. Dr. Uhlenberg viewed the Utah data as weighing against Dr. Henshaw's opinions on the likely effects of such "two-trip" laws.

On closer examination, however, the Utah experience tends to support plaintiffs. It certainly does not support the defendants. The principal reason is that Utah's population has been growing rapidly. In evaluating the likely effects of a two-trip requirement, therefore, the absolute number of abortions is not as probative as the *rate* of abortions among women of child-bearing age. Adjusting for the population increase, the rate of abortions per 1000 women aged 15-44 for abortions performed in Utah on Utah residents *declined* by 9.3 percent from 1995 to 1997, the period that Dr. Uhlenberg studied. See Ex. 206 ¶ 13; Tr. 37 (Henshaw). That change was statistically significant. The probability of a chance fluctuation of that magnitude was less than .001. In addition, from 1995 to 1997, there also was a 33 percent decrease in the number of women coming from other states to Utah to obtain abortions. Ex. 206 ¶ 16. That change is also consistent with the experience in Mississippi, where there was a similarly dramatic decrease (approximately 30 percent) in the number of women coming from other states after the two-trip law took effect. Ex. 205 ¶ 2(e).^{FN16}

^{FN16}. Less information was available with respect to Utah residents traveling to other states to obtain abortions, apparently as a result of the lack of effective reciprocal reporting agreements. See Tr. 38 (Henshaw) ("I have no data on Utah residents that went to some of the neighboring states.").

At trial, Dr. Uhlenberg objected to Dr. Henshaw's reliance on abortion rates in Utah because that approach did not take into account the age-distribution of women of child-bearing age. See Tr. 187-91. For example, if the growth in population were skewed more heavily toward older women in the range, who have relatively few abortions, the results would be less meaningful.

Dr. Uhlenberg's attack on Dr. Henshaw's treatment of the Utah data is not persuasive. It was yet another example of the defense raising an objection or criticism without appropriate follow-through. Cf. *Allen v. Seidman*, 881 F.2d 375, 380 (7th Cir.1989) (discounting defense criticism of plaintiffs' statistical evidence when not supported by appropriate test of the criticism); *Mister v. Illinois Central Gulf Railroad Co.*, 832 F.2d 1427, 1432-33 (7th Cir.1987) (discounting defense hypothesis for statistical evidence

where defense did not actually test the hypothesis with available data). First, Dr. Uhlenberg's rebuttal did nothing to justify his own reliance on absolute numbers without taking any account of the change in population. Second, Dr. Uhlenberg did not attempt himself the sort of age-normalization test that he said would provide the best test. Third, in response to Dr. Uhlenberg's criticism, Dr. Henshaw actually did check the age distribution of the growth in Utah population. He found no disproportionate increase among older women, and he found a significant increase in population among *1173 younger women, who tend to have more abortions. Tr. 384-85.

The Utah data are not as detailed as those from Mississippi, but when the proper adjustment is made for the growth of the population, the Utah data are consistent with Dr. Henshaw's findings with respect to Mississippi. The two-trip requirement is associated with a statistically significant and substantial decrease in the abortion rate. It is also associated with a sharp drop in the number of women coming to Utah from other states to have abortions.^{FN17}

^{FN17}. The percentage of abortions performed in the second trimester in Utah increased from 7.5 percent in 1995 to 8.4 percent in 1996. Dr. Henshaw described that change as a 12 percent increase in the incidence of such abortions, but he described the change, which involved quite small numbers, as only "non-trivial," not as statistically significant. See Ex. 206 ¶ 15; Tr. 37 (Henshaw); Ex. 300 ¶ 7(b).

Dr. Uhlenberg also studied data from Louisiana, which imposed a two-trip requirement that took effect September 25, 1995. Dr. Uhlenberg found no discernible effect on the abortion rate in Louisiana. Using data from the Louisiana state government, Dr. Uhlenberg found slight declines in the numbers of abortions performed when comparing the twelve months before the law took effect to the twelve months afterwards (1.3 percent decline), and when comparing 1994 to 1996 (2.3 percent decline). Ex. 300 ¶ 3. Dr. Uhlenberg did similar comparisons using data from the Alan Guttmacher Institute (AGI). Those data showed an increase of 8.4 percent in the number of abortions in 1996, after the law took effect, as compared to 1992. Ex. 300 ¶ 4. At first glance, those data support defendants' view.

Dr. Henshaw testified that Louisiana data on abortions are not reliable enough to measure accurately a law that would have the effect of reducing abortion rates by 10 percent. Tr. 36. The unreliability is shown by substantial differences between the results of AGI surveys of abortion providers in Louisiana and the state's own data, which generally reflect a lower number of abortions. See Ex. 206 ¶ 4 & Table 1 (AGI survey of providers found abortion numbers 22 and 20 percent higher than official state data in 1995 and 1996); see also Ex. 300, Tables 1 & 2 (data used by Dr. Uhlenberg). Those large differences are strong indications that the statewide totals for Louisiana simply are not reliable enough to detect changes on the order of 10 or 15 percent. Also, the AGI data were not available for Louisiana for 1993 and 1994, the last two full years before the law took effect. The evidence from Louisiana does not undermine Dr. Henshaw's conclusions.

5. The Statistical Evidence Shows Significant Effects on Abortion Rates, Interstate Travel for Abortions, and Delays of Abortions

After considering the statistical evidence submitted by both sides, the court finds that the Mississippi two-trip law: (a) caused a decrease in the abortion rate for Mississippi residents of approximately 10 to 13 percent, (b) caused a significant increase in the number of Mississippi residents who traveled to other states to obtain abortions, (c) caused a significant decrease in the number of residents of other states who traveled to Mississippi to obtain abortions, and (d) caused women to delay having abortions, resulting in a significant increase in the number and rate of second trimester abortions for Mississippi residents, which are more dangerous and more expensive. Those findings are generally consistent with the preliminary data from Utah, when properly focused on abortion rates, although the Utah data on travel are less complete and reliable. The different results from Louisiana do not undermine those conclusions, in the court's view, because the statewide data from Louisiana are not reliably precise enough to support conclusions either way.

The next question is whether those results in Mississippi provide a reasonable *1174 basis for predicting estimated results in Indiana. The court finds that they do provide such a reasonable basis. There is no reason

on this record to expect the experience to be significantly different. In the JAMA article, Dr. Henshaw and his colleagues suggested that the large decline in abortion rates they observed in Mississippi might not occur in states with greater availability of abortion providers both within the state and among neighboring states. Ex. 224 at 658. Indiana has a larger population and a larger number of abortion clinics, so that overall, clinics are more conveniently available to women in Indiana than to women in Mississippi. See Exs. 305-316. However, the Mississippi results did not correlate at all with distance or geography, see Tr. 64-65, which indicates that something other than a change in mere convenience is at work here.

Dr. Henshaw found the effects of the two-trip law were greater for white women in Mississippi than for non-white women. The available data for Indiana, from 1995, show that 71.7 percent of abortions performed in Indiana were for women identified as white and 23.7 percent for women identified as black. Ex. 203 at 56. In Mississippi, by comparison, 36.1 percent of abortions were for women identified as white and 62.8 percent for women identified as black. Perhaps that difference could weigh in favor of a greater impact in Indiana, but one cannot say with any reasonable certainty that such a greater effect is likely. See Tr. 34 (Henshaw noting possibility but not opining as to likelihood). The higher proportion of white population in Indiana might or might not tend to produce a greater effect, but there is no reason to expect a smaller effect.

Dr. Henshaw found, contrary to his expectations, that the observed decrease in the abortion rate could not be correlated to distance or economic status. The defendants have argued that that evidence undermines his theory of causation. The court does not view the evidence that way. First, when dealing with expert witnesses in litigation, credible testimony that the expert did not find what he expected to find is a breath of fresh air. In addition, plaintiffs in this case need to show an undue burden. They do not need to show definitively the precise mechanism by which such an undue burden would result from the law. ^{FN18}

FN18. The absence of correlation with distance or economic status suggests that the effects of the two trip law may be more closely tied to the same considerations and types of relationships the Supreme Court considered when it struck down Pennsylv-

nia's spousal notice law in *Casey*. Plaintiffs in this case provided substantial evidence about behavior of men and women in abusive relationships. Dr. Connie L. Best is a psychologist with expertise in domestic violence. She provided an affidavit at the preliminary injunction phase of the case in which she testified that men who subject women to violence and abuse often subject them to surveillance and use other tactics to keep them under control. Best Aff. ¶¶ 10-19, 36-49 (Ex. 3 to Pls. Motion for Prelim. Inj.). She also testified that men who abuse their wives or partners often escalate the abuse when the woman becomes pregnant. Such behavior makes it very difficult for some abused women to make even one trip to an abortion clinic, let alone two. The result of the two-trip requirement may be that the man learns of the woman's plan to have an abortion. Best. Aff. ¶¶ 37-45.

Dr. Best's affidavit does not show by itself that the two-trip requirement in Indiana will in fact impose an undue burden on a significant number of women, but it provides a reasonable explanation for how a two-trip requirement could prevent a significant number of women from exercising their right to choose to have an abortion. Moreover, that real possibility in many cases is one of the principal foundations for the Supreme Court's decision in *Casey* to strike down the spousal notification law. See 505 U.S. at 888-95, 112 S.Ct. 2791 (detailing evidence of domestic violence and effects on women's practical ability to choose to have abortions). As the Supreme Court explained:

For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an

abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in [*Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976)]. The women most affected by this law-those who most reasonably fear the consequences of notifying their husbands that they are pregnant-are in the gravest danger.

Id. at 897, 112 S.Ct. 2791. The practical effect of a two-trip law for some women is likely to be the same as the effect of a spousal notice law-disclosure to a spouse or partner that the woman seeks to have an abortion, followed by additional abuse or other efforts to prevent the abortion.

*1175 For the reasons set forth above, the court finds that the effects of Indiana's "in the presence" requirement are likely to be equivalent to the effects of the similar law in Mississippi-an abortion rate reduced by 10 to 13 percent, a significant increase in the proportion of second trimester abortions, a significant increase in the number of Indiana residents traveling to other states to have abortions, and a significant decrease in the number of residents of other states traveling to Indiana to have abortions.

B. "Persuasive Effect" v. Burdens

The finding that the Indiana law is likely to cause a significant decrease in the abortion rate does not show, by itself, that the law will impose an undue burden. From that starting point, the critical issue is whether such a decrease is likely to be caused by burdens the law imposes on women seeking an abortion or by persuasive effects that the state-mandated information and the waiting period might have in causing women to choose not to have abortions. That was the pivotal issue in *Karlin* on which plaintiffs' case failed. See 188 F.3d at 487-88 ("most significant shortcoming" in Mississippi study was failure to control for persuasive effect); 975 F.Supp. at 1217-18 (plaintiffs failed to show absence of persuasive effect). Such a law was upheld in *Casey* because a legislature may require that information that is truthful and not misleading be provided to better inform a woman's choice, and possibly to persuade her not to have an abortion she would otherwise choose to have. See 505 U.S. at 885,

112 S.Ct. 2791.

Based on the evidence in this case, the court finds that the likely effects of the Indiana "in the presence" requirement will not result from any such persuasive (and thus constitutional) effect. The effects will instead result from the substantial obstacles the law creates for a substantial fraction of women who seek to have abortions.

At the closing argument in this case, the court asked counsel for defendants to direct the court's attention to any evidence tending to show that a mandatory disclosure/informed consent law with a waiting period has a persuasive effect-*i.e.*, that the information and the time to consider it persuade women to change their minds about whether to have an abortion. The state's response was that testimony from a witness from Planned Parenthood showed that giving the information over the telephone caused an *increase* in the "show rate" for his organization's clinics, thus indicating the startling result that the state-mandated information tends to persuade women to have *more* abortions than they otherwise would. See Tr. 50-52 (May 19, 2000), citing Tr. 12-14. Counsel observed: "That's the only persuasive effect that we've seen demonstrated by either side in the record." Tr. 50 (May 19, 2000).

The court agrees with that candid observation. After years of litigation, with ample opportunity and incentive for defendants to come forward with such evidence, there is simply no evidence in this record tending to demonstrate that mandatory disclosure/informed consent and waiting period laws can accomplish the persuasive purpose deemed constitutional in *Casey*.

The court does not mean to suggest that the burden of proof on this issue is on defendants. Plaintiffs have come forward with evidence from several sources tending to show the absence of any persuasive *1176 effect from the information that is provided. That evidence has not been rebutted.

In roughly chronological order, plaintiffs offered evidence at the preliminary injunction stage about the experience in North Dakota, where a mandatory disclosure/waiting period law took effect in 1994. The North Dakota law allowed the information to be provided by telephone, so only one trip was required. The

director of the only clinic in North Dakota testified that only one or two percent of women who are given the mandated information over the telephone ask for copies of written materials that must be offered. Pr. Inj. Tr. 268. She testified that no patient had ever told her she was cancelling an appointment because of the information. *Id.* at 269. In addition, she saw no decrease in the number of abortions provided. *Id.* at 269-70; see also Ex. 29 (summary statistics). If the state-mandated information and waiting period had any persuasive effect, then one might reasonably expect data from North Dakota to show a sign of it. There is no such sign.^{FN19}

^{FN19} At the preliminary injunction phase of the case, defendants criticized the North Dakota data as "crude." The court invited further analysis, see *A Woman's Choice*, 904 F.Supp. at 1458 n. 17, but none was provided.

In Indiana itself, the mandatory disclosure and waiting period law took effect in November 1997, subject to the proviso that the information could be provided by telephone. See *A Woman's Choice*, 980 F.Supp. at 974-75. Plaintiffs in this case then established procedures and mechanisms for that information to be provided to a woman who has scheduled an appointment for an abortion. The evidence at trial in this case indicates no change in the so-called "show rate," the proportion of women who schedule appointments who actually come to the clinics as scheduled. See Ex. 226. Overall abortion numbers for Planned Parenthood of Central and Southern Indiana increased after the law became effective, notwithstanding a \$25 price increase. Ex. 227; see also Tr. 13-14. Again, if the state-mandated information and waiting period were having any persuasive effect on those women who receive it, one might reasonably expect the Indiana data to show a sign of it. And again, there is no such sign.

In addition, the evidence that a two-trip law is likely to increase the number of women from such a state who travel across state lines to obtain an abortion tends to weigh against any persuasive effect. Dr. Henshaw found that the proportion of Mississippi residents who traveled to other states to obtain abortions increased by about 37 percent. Ex. 224 at 655. (For purposes of comparison, the same proportion for South Carolina women dropped slightly. See *id.* The change in Mis-

Mississippi was statistically significant.) For a significant proportion of women, a two-trip law makes one trip to a clinic in another state a better choice than two trips to a clinic in their home state. That phenomenon cannot be attributed to any persuasive effect. There is no indication that mandatory disclosure and waiting period laws that require only one trip to a clinic produce similar increases in out-of-state abortions.

Other evidence on changes in interstate travel for abortions also tends to show the absence of a persuasive effect. After the two-trip law took effect, the number of women from other states traveling to Mississippi for abortions decreased by about 30 percent. The data from Utah showed a similar decrease of 33 percent in travel from other states to Utah for abortions. Those changes are statistically significant, they are attributable to the laws taking effect, and they have not been explained by any hypothesis other than the burdens of the two-trip requirements. That evidence also tends to show that the effects of the law in reducing overall abortion rates cannot be attributed to persuasion.^{FN20}

^{FN20}. The evidence of changes in interstate travel patterns also suggests that the observed changes in abortion rates in Mississippi and Utah do not fully reflect the burdens that two-trip laws would impose if enacted by several adjacent states. When neighboring states do not require two trips, residents of a state with a two-trip law may choose to avoid some burdens of the law by crossing a state line. In other areas of constitutional law, however, the courts evaluate the effects of a state law based on the assumption that many or all other states may enact similar laws. See, e.g., *Healy v. The Beer Institute*, 491 U.S. 324, 336-37, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989); *Armco Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984).

*1177 It is of course always possible to generate one more hypothesis or to conduct one more study. The court therefore cannot say it would be impossible for the Indiana law to have a persuasive effect. At the time of trial in this case, however, the legal importance of such an effect and the potential value of evidence of such an effect had been part of this case for four years. The state and its experts have had ample opportunity

to look for such evidence in several states where waiting period and mandatory disclosure laws have been in effect. They have not found and offered any such evidence. The absence of such evidence is a powerful indicator that those laws do not have a persuasive effect.^{FN21}

^{FN21}. The court is not relying on Dr. Henshaw's report of conversations with two clinic directors in Mississippi as support for the finding that the law's effects are the result of burdens rather than persuasion. That reliance has been the subject of considerable debate in this case. See 904 F.Supp. at 1458-62. There is ample support for Dr. Henshaw's opinion on this point apart from those conversations.

In *Karlin v. Foust*, the Seventh Circuit observed that "every post-*Casey* facial challenge to a waiting period requirement substantially similar to the one upheld in *Casey* has been found constitutional." 188 F.3d at 486. In support, the court cited two decisions upholding North Dakota and South Dakota laws, but neither law required two trips to a clinic. See *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir.1995); *Fargo Women's Health Org. v. Schaffer*, 18 F.3d 526, 533 (8th Cir.1994). The Seventh Circuit also cited in *Karlin* the Fifth Circuit's decision in *Barnes*, 970 F.2d at 15, which upheld the Mississippi two-trip requirement before the state had experienced its effects (which were studied in this case). The Seventh Circuit also cited a district court decision in Utah that was reversed on other grounds. See *Utah Women's Clinic, Inc. v. Leavitt*, 844 F.Supp. 1482, 1494 (D.Utah 1994), *rev'd in part on other grounds*, 75 F.3d 564 (10th Cir.1995). The Utah district court decision offers little guidance on this issue at this time. The Utah law was actually construed to require only one trip, so that information could be provided by telephone. See 844 F.Supp. at 1487, 1495. The district judge offered the correct observation that the Supreme Court had upheld a two-trip requirement in *Casey*, but there is no indication that the court considered evidence of actual experience under a two-trip law, which provides the type of evidentiary foundation that *Casey* recognized could be used to challenge such a law. See 844 F.Supp. at 1487-88, 1490. Further, the district court decision was not reviewed on the merits.^{FN22}

^{FN22}. On appeal, the Tenth Circuit dis-

missed as untimely the appeal on the merits, but remanded the district court's award of fees against the plaintiffs. 75 F.3d 564. After the district court again imposed fees after that remand, the Tenth Circuit conclusively reversed the fee award. 136 F.3d 707 (10th Cir.1998). After the district court construed the Utah law in 1994 as requiring only one trip to a clinic, the law was amended to require the advance information to be provided "in a face-to-face consultation." The enforcement of that amendment beginning in 1996 was the change studied by Dr. Henshaw and Dr. Uhlenberg in the discussion of Utah data in Part IV-A-4, above.

Thus, *Karlin* remains the only post-*Casey* decision upholding a two-trip requirement where the challenge was based on evidence of women's actual experience under a two-trip law. The evidence in this case and in *Karlin* shows that such laws are likely to cause statistically significant reductions in the rate of abortions, on the order of approximately 10 percent or a little more, allowing for variations among different states. See 975 F.Supp. at 1217 *1178 (finding as a fact that law caused reduction in abortion rate). The additional evidence in this case, not offered in *Karlin*, goes further to show that the reduction in the rate of abortions and the other important effects of the law (delays in abortions and changes in interstate travel) are not at all likely to result from any persuasive effect the mandated information and waiting period might have.

The evidence in this case also goes well beyond what was found sufficient in *Casey* to show that a spousal notification requirement would impose undue burdens on some women's right to choose to end their pregnancies. The reasonable conclusion from this evidence, then, is that Indiana's "in the presence" requirement would impose a substantial obstacle for a sizable number of women who seek abortions. The effect of the requirement would impose an undue burden on their constitutional right to choose to end a pregnancy.

V. The "Purpose" Prong of the Undue Burden Test

The Supreme Court taught in *Casey* that a law imposes an undue burden on a woman's right to choose if it was enacted for the purpose of placing a substantial obstacle in the path of a woman seeking an abortion. 505

U.S. at 877, 112 S.Ct. 2791. Plaintiffs contend that the "in the presence" requirement of Public Law 187 has no legitimate purpose and was enacted to place a substantial burden on a woman's right to choose. Defendants argue that the Indiana legislature reasonably could have concluded that "sound medical practice" required a medical professional to assess fetal age and the risks of the abortion procedure in person. Def. Post-trial Br. at 18-19.

During the legislative session leading to enactment of Public Law 187, the Indiana legislature preserved an unusually detailed history of the legislative process, including audio tapes of the House floor debates, relevant portions of which were transcribed for the record. As introduced and passed by the Indiana Senate, the legislation required only that the mandatory disclosure be made "orally" to the pregnant woman. The language requiring that information be provided "in the presence of the pregnant woman" was added by a floor amendment in the Indiana House of Representatives. Debate on the amendment was brief. Initially, the sponsor of the amendment explained the result of the words he proposed but not his underlying reasons for requiring the information session to be conducted in person:

[A]ll my amendment does is on page 2, line 22, after the word "abortion" it inserts "and in the presence of the pregnant woman" so it's very clear that the information will be given to the pregnant woman in person and not by telephone. That information can be given to her by her family doctor or by the clinic. It just simply requires that it be given in person and I would appreciate your support. I might add, Mr. Speaker, there's some confusion about the language that presently is in the bill whether the information can be given over the telephone or not and this would clear that up and make it very clear that it should be, it will be given in the presence of the woman and not by telephone or some other conveyance.

Ex. 38 at 3. Then a member spoke in opposition to the amendment and raised some of the same objections that plaintiffs have raised here:

Some people have referred to the bill itself as the women-women are stupid bill. This amendment is the women are really stupid amendment and I don't mean that as offensively to [the sponsor of the amendment]. I really feel that very sincerely. Be-

cause now we're saying that not only do we have to have this informed consent as if a woman hasn't thought this through, we're saying that if she calls in and talks to the physician and hears all the options and is given the option of seeing the pictures that people want her to see or the information*1179 that she has to receive, that she's not capable of understanding that over the telephone. This is clearly an effort to make the woman have to go into the clinic, to have to go through all the protesters, and to alert those protesters that she'll be back in 18 hours, we'll know exactly who she is, we'll know exactly why she's back, it gives them the second chance. I mean if we can have informed consent, we can have the bill as it is now with the language in it that requires the informed consent, that requires her to have to call in and get that, all the information and all the graphic descriptions that you want to give, if that's what you so choose, but we don't have to have her go into the facility twice in order to receive that information. I would ask that you reject this amendment.

Id. at 3-4. Another member spoke in opposition:

I've had a test, biopsy if you will, for cancer and if you can get that information on the phone when something is life threatening as cancer, I should think if you choose to, you could get any other information on the phone as far as abortion or not to have an abortion or whatever is concerned.

Id. at 4.

After the opponents asserted that the "in the presence" requirement was intended as an "obstacle," the chief sponsor of the bill in the House defended the proposal:

Thank you, Mr. Speaker, members of the House. Real quickly, the purpose of this amendment is quite simply, somebody that's going to make a decision that is this important, you want to make sure that you're talking to the physician, the advanced practical nurse, the midwife or whomever is spelled out in this bill that that's the person you're talking to. I mean, the first time you may see this doctor, maybe on the operating table while you're already anesthetic and how do you know this is the doctor or the person you're supposed to be talking to. I mean, that is terrible consequence to rely on somebody you've never met before in your life and to take them at face value that this is the person who may be performing

the operation or has the authority from the physician to talk to me over a telephone. That is very dangerous, especially when you're talking about the symptoms and consequences of an abortion. I would think you would want to talk personally to the person who may be performing that and know that they have-know that they are the person indeed that they are.

Id. at 4. The House then voted to adopt the amendment adding the "in the presence" requirement. The Senate eventually concurred with all House amendments, and the bill was enacted by overriding the Governor's veto.

No evidence before this court suggests that Indiana women seeking an abortion face a material risk of telephonic impersonation of health care professionals-the only purpose advanced in support of the "in the presence" requirement during the actual legislative debate.

Defendants suggest another purpose for the "in the presence" requirement-that "sound medical practice" recognizes the possible benefit of providing medical risk and fetal development information in person after an actual physical examination rather than over the telephone. See Def. Post-trial Br. at 18 ("The legislature could reasonably believe a face-to-face meeting would permit the physician to determine the gestational age of the fetus and the likely risks to the mother...."). Courts often indulge the assumption, without clear evidence, that legislators may have actually considered points that could support the constitutionality of a law. After all, what is important in a lawsuit may be different from what seemed immediately important in the thrust and parry of floor debate.

The problem with defendants' argument is that it requires reading into the language*1180 of Public Law 187 a requirement that the person providing the information conduct a visual or physical examination of the woman when the mandated information is provided. No such requirement is stated in the statute. Additionally, the statute does not mandate that the required information be tailored to fit the individual medical needs of each woman. In fact, the evidence shows that plaintiffs use a "script" or a recording made by a physician in which the same information is provided to all women. See *Tr.* 7-9, 210; Ex. 364 at 11-12. There is no evidence tending to show how the "in the

presence" requirement actually furthers the state's legitimate interests in maternal health or in protecting potential life.

In *Karlin v. Foust*, the Seventh Circuit considered the purpose prong of the undue burden test as applied to Wisconsin's informed consent statute, which is similar to Public Law 187. That statute required that a woman give her voluntary and written consent to an abortion, and that certain information be provided orally to a woman in person at least 24 hours prior to the abortion. Although the district court found certain provisions of the statute unconstitutional and therefore severed them from the statute, the court also found that the statute as a whole did not have the effect or purpose of imposing an undue burden on a woman's right to choose. See 188 F.3d at 457.

On appeal, the plaintiffs argued that the district court had erred in concluding that the statute did not have the purpose of imposing an undue burden on a woman's right to an abortion. The Seventh Circuit began its discussion of the purpose prong by reaffirming *Casey*'s holding that "a statute is considered to have an invalid purpose only if the means chosen by the state to further its legitimate interests in protecting potential life and maternal health are calculated to hinder a woman's free choice, rather than to inform it." *Id.* at 493, citing *Casey*, 505 U.S. at 877-78, 112 S.Ct. 2791. The court then noted that the joint opinion in *Casey* and the Supreme Court's later decision in *Mazurek v. Armstrong*, 520 U.S. 968, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997), "suggest that such a challenge will rarely be successful, absent some sort of explicit indication from the state that it was acting in furtherance of an improper purpose." *Karlin*, 188 F.3d at 493. The court explained:

It is reasonable to conclude that the Court's decision [in *Casey*] not to engage in any inquiry into the Pennsylvania statute's purpose indicates that the nature and structure of that statute's provisions coupled with the express indication of the Pennsylvania legislature contained in the Pennsylvania statute's purpose section, were more than sufficient to show that the statute was passed with a proper purpose or purposes in mind. *Casey* would seem to indicate that the Court would not scrutinize too closely the stated purpose or purposes of a regulation given the state's legitimate interest from the outset of a woman's pregnancy in persuading

women to choose childbirth over abortion *as long as the regulation was reasonably designed to further that interest.*

Id. at 493 (internal citations omitted) (emphasis added). The Seventh Circuit noted that *Mazurek* "suggests that plaintiffs challenging abortion statutes will face significant difficulty in showing that an otherwise constitutional abortion regulation was enacted with an improper purpose." *Id.* at 494.

Defendants point out here that there has been no "explicit indication" from the state that it was acting in furtherance of an improper purpose. *Karlin* did not hold, however, and this court does not believe that *Casey* requires, that the legislature must admit to an improper purpose before a court can find that a statute fails the purpose prong of the undue burden standard. See *Okpalobi v. Foster*, 190 F.3d 337, 355 (5th Cir.1999) (rejecting the view that, "for a court to hold that a measure *1181 has the impermissible purpose of placing an undue burden on a woman's right to an abortion, the legislature actually has to admit to such a purpose"), *vacated on other grounds*, 244 F.3d 405 (5th Cir.2001) (*en banc*). Nevertheless, the court need not reach a final conclusion as to whether the evidence in this case shows an improper purpose for the "in the presence" requirement. The evidence of the law's likely effects clearly shows that the law will impose an undue burden on women and their constitutional right to choose to end a pregnancy. The "in the presence" requirement is unconstitutional because of its effects. The court need not try to divine its purpose.

VI. Equal Protection Analysis

Plaintiffs have argued that the "in the presence" requirement of Public Law 187 also violates the Equal Protection Clause of the Fourteenth Amendment by discriminating against women. It is difficult to imagine legislation regulating abortions or access to them that does not affect women more than men. That much has been clear since long before *Roe v. Wade*. In light of all the attention devoted to litigating abortion rights under the Due Process Clause, the court does not see a basis for applying any different standard by invoking the Equal Protection Clause. The court therefore concludes that the Equal Protection theory adds nothing to plaintiffs' case and declines to address it further.

132 F.Supp.2d 1150
(Cite as: 132 F.Supp.2d 1150)

VII. *Severability and Injunctive Relief*

The court concluded in 1997 that the “in the presence” requirement was severable from the rest of Public Law 187. *A Woman's Choice*, 980 F.Supp. at 974. Plaintiffs have indicated they do not seek to revisit that issue. Pl. Post-trial Br. at 6 n. 4. The court remains of the view that the “in the presence” requirement is severable. Accordingly, the court will enter a final judgment with a permanent injunction enjoining the defendant class from enforcing the “in the presence” requirement. The remaining provisions of Public Law 187, in light of their construction by the Supreme Court of Indiana, will remain in effect.

S.D.Ind.,2001.

A Woman's Choice-East Side Women's Clinic v.
Newman

132 F.Supp.2d 1150

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305 F.3d 684
(Cite as: 305 F.3d 684)

H

United States Court of Appeals,
Seventh Circuit.

A WOMAN'S CHOICE-EAST SIDE WOMEN'S
CLINIC, et al., Plaintiffs-Appellees,

v.

Scott C. NEWMAN, Prosecuting Attorney for Marion
County Indiana, on behalf of a class of prosecutors, et
al., Defendants-Appellants.

No. 01-2107.

ARGUED Feb. 19, 2002.

DECIDED Sept. 16, 2002.

Rehearing and Rehearing En Banc Denied Oct. 28,
2002. ^{FN*}

^{FN*} Judge Ripple took no part in the con-
sideration or decision of this case. Judges
Posner, Rovner, Diane P. Wood, Evans and
Williams voted to grant rehearing en banc.
Judge Diane P. Wood voted to grant rehear-
ing.

Prosecutors appealed from an order of the United
States District Court for the Southern District of In-
diana, David F. Hamilton, J., 132 F.Supp.2d 1150,
which permanently enjoined enforcement of in-
formed-consent provision of Indiana abortion statute
requiring a second clinic visit so that information
would be provided in presence of the pregnant wom-
an. The Court of Appeals, Easterbrook, Circuit Judge,
held that it was an abuse of discretion for district judge
to issue pre-enforcement injunction prior to determi-
nation of the effects of that provision and reasons for
those effects.

Reversed.

Coffey, Circuit Judge, filed concurring opinion.

Diane P. Wood, Circuit Judge, filed dissenting opin-
ion.

West Headnotes

Civil Rights 78 ↪ 1456

78 Civil Rights

78III Federal Remedies in General

78k1449 Injunction

78k1456 k. Other Particular Cases and
Contexts. Most Cited Cases
(Formerly 78k262.1)

Injunction 212 ↪ 85(1)

212 Injunction

212II Subjects of Protection and Relief

212II(E) Public Officers and Entities

212k85 Enforcement of Statutes, Ordi-
nances, or Other Regulations

212k85(1) k. In General. Most Cited

Cases

It was an abuse of discretion for district judge to issue
an injunction against enforcement of in-
formed-consent provision of Indiana abortion statute
requiring a second clinic visit so that information
would be provided in presence of the pregnant woman
prior to determination of the effects of that provision
and reasons for those effects; effect of similar provi-
sions in Mississippi and Utah where abortions
dropped could not be extrapolated to Indiana. West's
A.I.C. 16-34-2-1.1(1).

West Codenotes

Negative Treatment Reconsidered West's A.I.C.
16-34-2-1.1. *684 Mary J. Hoeller, White & Raub,
Indianapolis, IN, Simon Heller (argued), Center for
Reproductive Law & Policy, New York, NY, Colleen
K. Connell, Roger Baldwin Foundation of ACLU,
Inc., Chicago, IL, for plaintiff-appellee.

Thomas M. Fisher (argued), Office of the Attorney
General, Indianapolis, IN, for defendant-appellant.

Before COFFEY, EASTERBROOK, and DIANE P.
WOOD, Circuit Judges.

EASTERBROOK, Circuit Judge.

In 1995 Indiana enacted a statute making the woman's
informed consent a condition to an abortion. Ind.Code
§ 16-34-2-1.1. Even though the text of this law is

materially identical to one held constitutional in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881-87, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), a federal district court issued a preliminary injunction preventing the statute from taking effect. *A Woman's Choice-East Side Women's Clinic v. Newman*, 904 F.Supp. 1434 (S.D.Ind.1995). Two years later, the district court modified this injunction to permit the state to enforce most of the law, but it blocked enforcement of the requirement that information be provided "in the presence of the pregnant woman, [by] the physician who is to perform the abortion, the referring physician or a physician assistant" (§ 16-34-2-1.1(1)). See 980 F.Supp. 962 (1997). After*685 four more years had passed, the judge held a trial and made permanent the injunction as modified in 1997. 132 F.Supp.2d 1150 (2001).

By requiring information to be supplied "in the presence of the pregnant woman"—rather than by printed brochure, telephone, or web site—the statute obliges the woman to make two trips to the clinic or hospital. This raises the cost (both financial and mental) of an abortion. On the basis of studies concerning similar laws in Mississippi and Utah, the district court concluded that the higher cost will reduce by 10% to 13% the number of abortions performed in Indiana. Some of these women will travel to states that do not require two trips; others will forego an abortion; some who do have an abortion in Indiana will delay that procedure until the second trimester. These consequences show that the law creates an "undue burden" on abortion, the district judge held. Although by the time the district judge entered the permanent injunction we had concluded that the Mississippi study does not warrant condemnation of Wisconsin's law (which like Pennsylvania's requires two trips to the medical facility and a 24-hour wait), see *Karlin v. Foust*, 188 F.3d 446, 484-88 (7th Cir.1999), the district judge wrote that data from the Utah study, and a new analysis of the Mississippi data, require a different result. The judge also thought that experience in Indiana showing that the demand for abortion did not decline when information was provided on paper or over the telephone implies that the reduction in the number of abortions is attributable to higher cost (a bad reason) rather than to the statutory information (a valid reason).

Indiana's statute reads as follows:

An abortion shall not be performed except with the

voluntary and informed consent of the pregnant woman upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed only if the following conditions are met:

(1) At least eighteen (18) hours before the abortion and in the presence of the pregnant woman, the physician who is to perform the abortion, the referring physician or a physician assistant (as defined in IC 25-27.5-2-10), an advanced practice nurse (as defined in IC 25-23-1-1(b)), or a midwife (as defined in IC 34-18-2-19) to whom the responsibility has been delegated by the physician who is to perform the abortion or the referring physician has orally informed the pregnant woman of the following:

(A) The name of the physician performing the abortion.

(B) The nature of the proposed procedure or treatment.

(C) The risks of and alternatives to the procedure or treatment.

(D) The probable gestational age of the fetus, including an offer to provide:

(i) a picture or drawing of a fetus;

(ii) the dimensions of a fetus; and

(iii) relevant information on the potential survival of an unborn fetus;

at this stage of development.

(E) The medical risks associated with carrying the fetus to term.

(2) At least eighteen (18) hours before the abortion, the pregnant woman will be orally informed of the following:

(A) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care *686 from the county office of

family and children.

(B) That the father of the unborn fetus is legally required to assist in the support of the child. In the case of rape, the information required under this clause may be omitted.

(C) That adoption alternatives are available and that adoptive parents may legally pay the costs of prenatal care, childbirth, and neonatal care.

(3) The pregnant woman certifies in writing, before the abortion is performed, that the information required by subdivisions (1) and (2) has been provided.

When the litigation began, plaintiffs challenged not only the requirement that advice be delivered in person but also the medical-emergency exception, which they deemed insufficient because it lacks details found in the Pennsylvania statute. The district court certified the medical-emergency issue to the Supreme Court of Indiana, whose interpretation, see *A Woman's Choice-East Side Women's Clinic v. Newman*, 671 N.E.2d 104 (Ind. 1996), satisfied the district judge. See 980 F. Supp. at 966. Plaintiffs then dropped this objection, leaving only the advice requirement as a ground of contention.^{FN†}

FN† For comparison, we reproduce the substantive portions of the statute at issue in *Casey*, 18 Pa. Cons.Stat. § 3205:

(a) No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:

(i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material

to the decision of whether or not to undergo the abortion.

(ii) The probable gestational age of the unborn child at the time the abortion is to be performed.

(iii) The medical risks associated with carrying her child to term.

(2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician or social worker to whom the responsibility has been delegated by either physician, has informed the pregnant woman that:

(i) 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.

(ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.

(iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted.

(3) A copy of the printed materials has been provided to the pregnant woman if she chooses to view these materials.

(4) The pregnant woman certifies in writing, prior to the abortion, that the information required to be provided under paragraphs (1), (2) and (3) has been provided.

(b) Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily function.

(c) ... No physician shall be guilty of violating this section for failure to furnish the information required by subsection (a) if he or she can demonstrate, by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.

Pennsylvania thus requires essentially the same advise as Indiana, provided "orally" by the physician, 24 hours before the abortion. It is more restrictive than Indiana's law in two ways: Pennsylvania requires a 24-hour waiting period versus 18 in Indiana, and it requires the physician to deliver the information while Indiana allows a range of medical personnel. The defense in subsection (c) of the Pennsylvania statute has no direct parallel in Indiana's law, but the Supreme Court of Indiana has read the "medical emergency" proviso in Indiana's law to achieve the same basic effect. See A Woman's Choice-East Side Women's Clinic v. Newman, 671 N.E.2d 104 (Ind. 1996). Neither side contends that any remaining difference between the statutes is material.

*687 Indiana makes much of the fact that its statute has never been allowed to operate as written. It relies on United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), for the proposition that, except in first amendment cases, a law may be held unconstitutional only when "no set of circumstances exists under which the Act would be valid." Yet in Stenberg v. Carhart, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), without so much as a mention of Salerno, the Court held invalid, in a pre-enforcement challenge, an abortion statute that might have been construed by the state courts to have

at least some proper applications. This leaves us with irreconcilable directives from the Supreme Court. The Justices have insisted that courts lower in the hierarchy apply their precedents unless overruled, even if they seem incompatible with more recent decisions. See, e.g., State Oil Co. v. Khan, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). When the Justices themselves disregard rather than overrule a decision-as the majority did in Stenberg, and the plurality did in Casey-they put courts of appeals in a pickle. We cannot follow Salerno without departing from the approach taken in both Stenberg and Casey; yet we cannot disregard Salerno without departing from the principle that only an express overruling relieves an inferior court of the duty to follow decisions on the books. See also, e.g., Scheiber v. Dolby Laboratories, Inc., 293 F.3d 1014 (7th Cir.2002) (following Brulotte v. Thys Co., 379 U.S. 29, 85 S.Ct. 176, 13 L.Ed.2d 99 (1964), even though it is incompatible with the rationale of more recent decisions). Troxel v. Granville, 530 U.S. 57, 85 n. 6, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), offers us a way out by calling the language in Salerno a "suggestion," an approach not essential to Salerno's judgment. Given the incompatibility between Salerno's language and Stenberg's holding, it is the language of Salerno that must give way.

Still, to say that a claim is justiciable does not mean that we must ignore the fact that enforcement has not commenced. Plaintiffs rely on predictions about what is likely to happen if Indiana's law were enforced as written. Because Indiana has been disabled from implementing its law and gathering information about actual effects, any uncertainty about the inferences based on other states' experience and how that experience would carry over to Indiana must be resolved in Indiana's favor. This, coupled with doubts about the role of predictions in constitutional analysis, turns out to be important, for reasons explained presently.

Casey stated, and Karlin reiterated, that an informed-consent statute may have effects that differ from the written terms, and that those effects could in principle demonstrate that an innocuous-appearing *688 law actually imposes an undue burden on abortion. But neither decision explained how such factual arguments are to be evaluated: before implementation or after?, using what standards? Normally a court

asked to say that a statute will have forbidden effects asks only whether a proper outcome is possible; it does not hold a trial-and, if a district judge nonetheless takes evidence and makes findings, the appellate court will reexamine matters with a heavy presumption favoring the law's constitutional application. See, e.g., Vance v. Bradley, 440 U.S. 93, 111, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979); National Paint & Coatings Ass'n v. Chicago, 45 F.3d 1124 (7th Cir.1995). One may say in response that these cases deal with rational-basis review, while abortion implicates fundamental rights. But laws that regulate, not abortion itself, but ancillary issues (such as informed consent), do not affect fundamental rights *unless* the ancillary rule creates an undue burden on the underlying right. How does the court handle factual disputes that bear on *whether* an undue burden has been created? It cannot simply assume that a fundamental right has been burdened; that begs the question.

Stenberg shows that the undue-burden standard must be applied at the level of logic, and to the nation as a whole, rather than one state at a time. Nebraska forbade use of "intact dilation and extraction" (D & X), a method of late-term abortion. *Stenberg* believed that this ban would have unacceptable consequences because it would induce physicians to steer clear of other procedures similar to the D & X. Nebraska's law therefore was held unconstitutional, as an undue burden on abortion, without the need for a trial. Meanwhile a trial *had* been held in Wisconsin, where the district judge found as a fact that the untoward consequences anticipated in *Stenberg* would not occur. Planned Parenthood of Wisconsin v. Doyle, 44 F.Supp.2d 975 (W.D.Wis.1999), affirmed under the name Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir.1999) (en banc), remanded, 530 U.S. 1271 (2000), decision on remand, 249 F.3d 603 (2001) (en banc). The Supreme Court vacated our decision without regard to the district court's findings; it was of the view (as we likewise had concluded, 195 F.3d at 872-73) that constitutionality must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges. Only treating the matter as one of legislative fact produces the nationally uniform approach that *Stenberg* demands. This worked against the partial-birth-abortion laws in *Stenberg* but has worked in favor of other laws: the Court has held it constitutional to prevent non-physicians from performing abortions, see Mazurek v. Armstrong, 520 U.S. 968, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997), without factual inquiries into

whether other medical professionals could do the job as safely, and how much prices may be elevated by a physician-only rule.

Findings based on new evidence could produce a new understanding, and thus a different legal outcome; the plurality implied this in *Casey*, as did we in *Karlin*. But if the issue is one of legislative rather than adjudicative fact, it is unsound to say that, on records very similar in nature, Wisconsin's law could be valid (as we held in *Karlin*) and Indiana's law invalid, just because different district judges reached different conclusions about the inferences to be drawn from the same body of statistical work. Because the Supreme Court has not made this point explicit, however, and because the undue-burden approach does not prescribe a choice between the legislative-fact and adjudicative-fact approaches, we think it appropriate to review the evidence in this record and the inferences*689 that properly may be drawn at the pre-enforcement stage.

The district court found that the two-visit requirement in Mississippi and Utah reduced the number of abortions performed in those states by about 10% compared with neighboring states that do not require multiple visits. The judge also found that the number of abortions performed in Indiana has not declined because of the advice given to women under Ind.Code § 16-34-2-1.1, though not necessarily in person (because that aspect of the statute has been enjoined). Indiana asks us to set aside these findings, but review under Fed.R.Civ.P. 52(a) is highly deferential, see Anderson v. Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), and we cannot say that the district court's findings are clearly erroneous. The studies' conclusions were hotly debated on both medical and statistical grounds, but the district judge dealt responsibly with these arguments pro and con, and his findings cannot be upset. But what happened in Mississippi and Utah, a question of historical fact on which appellate review is deferential, does not necessarily ordain what *will* happen in Indiana-or whether what is likely to happen in Indiana amounts to an "undue burden." That admixture of fact and law, sometimes called an issue of "constitutional fact," is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects. Only the findings of historical fact are sheltered by Rule 52(a). Thus our consideration of the studies' *significance* is not deferential. See Cooper Industries, Inc. v. Leatherman

Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (constitutionality of punitive damages is reviewed *de novo*); Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (probable cause for a search or seizure is reviewed *de novo* in the absence of a warrant); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (factual disputes that determine constitutionality under the first amendment are reviewed *de novo*). Cf. Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (without discussing the standard of review, all nine Justices freely substitute their judgment for that of the district and appellate judges on the significance of an empirical study in a constitutional suit). See also Henry P. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229 (1985).

By concluding that the empirical work had been carried out competently, the district judge established (for purposes of this litigation) that abortions dropped in Mississippi, compared to those in South Carolina, during the year after Mississippi enacted a statute requiring two visits. The authors of this study (and its replication in Utah) did not ask how Mississippi compares with Indiana. The study does not include a regression based on the sorts of variables, such as urbanization, income, average distance to an abortion clinic, average price of abortion, and so on, that might enable conclusions drawn from Mississippi to be extrapolated with confidence to other states. That is one reason why we held in *Karlin* that the Mississippi study was a poor basis for predicting what would happen in Wisconsin, which we thought more similar to Pennsylvania than to Mississippi. 188 F.3d at 485-86.

That shortcoming could have been fixed in one of two ways. First, the authors could have conducted a more comprehensive study, with additional variables and regression coefficients that would reveal their effects. That was not done. Second, the authors (or other scholars) could have gathered data from other states to test *690 whether (and, if so, how) state-specific characteristics affect the results. That was not done either. What *has* happened in Pennsylvania, Wisconsin, and the other states whose informed-consent laws require two visits? Did Mississippi prove to be a better predictor of Wisconsin than *Karlin* anticipated, or was the outcome in Wisconsin dissimilar? This record is

silent on these matters. Mississippi and Utah, two states with a history of hostility to abortion and very few abortion providers (implying long travel times), may be poor models for other states. Indianapolis has multiple abortion clinics; another in Fort Wayne serves the northeastern portion of the state; women in the northwest and southeast can use not only local providers but also those just across the state lines in Chicago and Louisville. So just as in *Karlin* the application of the Mississippi data (and now Utah's data) to a different state would be a leap of faith. Here is where the pre-enforcement nature of this suit matters.

Plaintiffs did try to deal with another problem identified in *Karlin*: that the original Mississippi study did not try to separate the raw costs of a two-visit requirement from the effects of the information that was provided during the first visit. 188 F.3d at 486-88. The Supreme Court's first two encounters with informed-consent statutes treated these laws as meddling in the physician-patient relation with no valid purpose, and no effect other than to heap pointless costs on women. See Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 442-49, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 759-65, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986). *Casey* overruled both of these decisions and held that states may try to persuade women not to abort their pregnancies. Maybe all the Mississippi study reveals is successful persuasion, we observed in *Karlin*. In this case the plaintiffs tried to separate the effect of information from the effect of making two visits. Since 1997 Indiana has been able to enforce the portion of its informed-consent statute requiring the provision of certain information to women who inquire about abortions. Yet the number of abortions has not declined. This shows, the district judge wrote, that the law lacks persuasive effect; and if a decline in abortions cannot be attributed to persuasion, then the cause must lie in some other and impermissible feature of the law.

Yet this assumes what is to be proven: that Indiana is like Mississippi and Utah, so that the number of abortions would decline 10% or more if the law were enforced as written. Maybe what Indiana's experience since 1997 shows is that Indiana *differs* from Mississippi and Utah and will not experience a substantial decline, with or without multiple visits. Or maybe what it shows is that presenting the information in

person is critical to its persuasive effect. Our education system rests on the premise that information delivered orally, with an opportunity for give-and-take, "takes" better than information delivered exclusively in writing. Otherwise a university would simply mail a syllabus to the freshman class and ask the students to appear four years later for exams. So the fact that advice delivered in writing or over the phone is uninfluential need not imply that advice delivered in person will be uninfluential. Once again the fact that Indiana has been blocked from enforcing its law as written means that the record does not contain evidence needed for accurate assessment of that statute's effects.

Then there is an open question what the 10% reduction reflects. Let us suppose that abortions would decline 10% in Indiana if that state's law were fully enforced.*691 What would the decline signify? One possibility is that many women who strongly want an abortion have been blocked by the cost (in money and time) of multiple visits to the clinic, or because the more times the woman must be absent the greater is the likelihood that an abusive parent, spouse, or partner would discover what the woman has planned and intervene notwithstanding the availability of the emergency bypass, which the Supreme Court of Indiana held to encompass *any* kind of threat to the woman's health or safety. See 671 N.E.2d at 108-09. Another possibility is that about 10% of all women who have abortions are on the fence between ending the pregnancy and carrying the pregnancy to term, so that even a modest cost tips the scales. If the former, then a two-visit rule might be deemed an undue burden; if the latter, the two-visit rule would not be an undue burden, for only a law that "has the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus" (*Stenberg*, 530 U.S. at 921, 120 S.Ct. 2597; emphasis added; quoting from the plurality opinion in *Casey*) is an "undue" burden. This record does not permit (and the district judge did not make) an inference either way about the reason for the decline in Mississippi and Utah. Perhaps this shortcoming could be rectified by studying the effects of changes in out-of-pocket outlays or travel time as prices change, or clinics open, close, or move locations, but the studies in this record do not address the question.

Since 1992, when the plurality in *Casey* announced the "undue burden" standard, only two kinds of statute

have flunked the test: a law forbidding the "intact dilation and extraction" (D & X) method of abortion (the subject of *Stenberg*) and a law requiring a woman to notify her husband before obtaining an abortion (discussed in *Casey* itself). Because the language used to describe the D & X also could be understood to prohibit other procedures that were common (and perhaps essential) to late-term abortions, *Stenberg* concluded that the law would forbid abortions altogether for substantial numbers of women. The notification statute did not forbid abortions, but the Court feared that it would come to the same thing for those women whose husbands are likely to respond violently to the notice (if not to any contact from an estranged spouse). The plurality explained:

The spousal notification requirement is thus 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. 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.

505 U.S. at 893-94, 112 S.Ct. 2791. This record does not suggest that *any* woman in Indiana faces an obstacle of that magnitude in visiting a clinic twice. As we have stressed, Indiana's law has an emergency-bypass clause that has been authoritatively interpreted to cover any kind of physical or psychological risk to the woman. 671 N.E.2d at 108-09. Plaintiffs do not contend that this interpretation falls short of what *Stenberg* and *Casey* require for emergency-bypass opportunities. It is accordingly difficult to see how the sort of outcome that doomed the spousal-notification rule could condemn Indiana's statute.

This is not to say that a two-visit requirement *could not* create a burden comparable to a spousal-notice requirement. Quoting the district court, *Casey*'s plurality*692 assumed that "for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be 'particularly burdensome.'" 505 U.S. at 886, 112 S.Ct. 2791. But it held these considerations insufficient to condemn the

Pennsylvania statute. All that the record in the current case shows is that these costs are positive and have *some* effect-something that the plurality in *Casey* assumed. Likewise in *Mazurek* the Court assumed that a statute preventing nurses and other skilled medical personnel whose training falls short of the M.D. from performing abortions would increase the expense (and thus, by the Law of Demand, reduce the number) of abortions; this again was held insufficient to show invalidity even on the assumption that one legislative purpose was to curtail abortion.

The record in this case does not show that a two-visit rule operates similarly to a spousal-notification rule by facilitating domestic violence or even inviting domestic intimidation. It shows nothing except a decline in the number of abortions in Mississippi and Utah-leaving open both the extent to which other states would experience the same effect and the reason *why* the effect occurs. This is not the sort of evidence that permits an inferior federal court to depart from the holding of *Casey* that an informed-consent law is valid even when compliance entails two visits to the medical provider. If Indiana's emergency-bypass procedure fails to protect Indiana's women from risks of physical or mental harm, it will be a failure *in operation*; it is not possible to predict failure before the whole statute goes into force.

Justice Souter reached a similar conclusion when denying a request to set aside a post-*Casey* decision enforcing Pennsylvania's statute. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 510 U.S. 1309, 114 S.Ct. 909, 127 L.Ed.2d 352 (1994) (in chambers). Like the third circuit, whose decision, 14 F.3d 848 (1994), he declined to disturb, Justice Souter concluded that *Casey* itself had resolved the facial challenge to Pennsylvania's law. What remained was a challenge to the law in application, on a record showing how that law actually operated in Pennsylvania, 510 U.S. at 1311 & n. 3, 114 S.Ct. 909. Just so in Indiana. For reasons we have given, what transpired in Mississippi need not portend what will happen in Indiana.

What is more, it would be incongruous to hold Indiana's informed-consent law invalid on the basis of studies covering Mississippi and Utah that (to the district judge's eyes) imply the *un-constitutionality* of the Mississippi and Utah statutes, while the laws continued to be implemented in Mississippi and Utah.

Relying on *Casey*, the fifth circuit has allowed Mississippi to enforce its statute, see *Barnes v. Moore*, 970 F.2d 12 (5th Cir.1992), and Utah's statute likewise has been sustained. See *Utah Women's Clinic, Inc. v. Leavitt*, 844 F.Supp. 1482, 1487, 1494 (D.Utah 1994), appeal dismissed in pertinent part for lack of jurisdiction, 75 F.3d 564 (10th Cir.1995). No one has asked these courts to hold the Mississippi or Utah statute invalid on the basis of the local experience; and if these laws remain enforceable despite the consequences demonstrated in this record, it is difficult to see why Indiana's law should be unenforceable even though it is unclear whether similar effects would occur there. Indiana is entitled to an opportunity to have its law evaluated in light of experience in *Indiana*. And in the event the sort of effects that could make the burden undue-such as women deterred by the threat or actuality of violence at the hands of those tipped off by a preliminary visit-come to light in Indiana, then it will be *693 informed-consent laws nationwide that must be reevaluated.

For seven years Indiana has been prevented from enforcing a statute materially identical to a law held valid by the Supreme Court in *Casey*, by this court in *Karlin*, and by the fifth circuit in *Barnes*. No court anywhere in the country (other than one district judge in Indiana) has held any similar law invalid in the years since *Casey*. Although *Salerno* does not foreclose all pre-enforcement challenges to abortion laws, it is an abuse of discretion for a district judge to issue a pre-enforcement injunction while the effects of the law (and reasons for those effects) are open to debate. What happened in Mississippi and Utah does not imply that the effects in Indiana are *bound to be* unconstitutional, so Indiana (like Pennsylvania and Wisconsin) is entitled to put its law into effect and have that law judged by its own consequences.

REVERSED
COFFEY, Circuit Judge, concurring.

III.

In Indiana, according to the preamble to its abortion control statute, "[c]hild birth is preferred, encouraged, and accepted over abortion." Ind.Code § 16-34-1-1. Furthermore, "in America, we respect the sanctity of human life." *Walsh v. Mellas*, 837 F.2d 789, 798 (7th Cir.1988). Pro-life legislation that fails to pose a substantial obstacle for 87 to 90 percent of a

state's women, and may have the incidental effect of reducing the demand for abortions by merely 10 to 13 percent, is reasonable, sensible, and lawful under the Constitution of the United States and the State of Indiana. Because this is the thrust of Judge Easterbrook's reasoning, I am pleased to join his opinion.

DIANE P. WOOD, Circuit Judge, dissenting.

In today's opinion, the majority disregards the standards that were established by the Supreme Court in *705Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), for evaluating laws that impose burdens on a woman's right to seek an abortion, and it brushes aside the painstakingly careful findings of fact the district court made in support of the limited preliminary injunction it issued against Indiana's so-called informed consent law, Ind.Code § 16-34-2-1.1. The careful reader of the majority's opinion will see that the majority regrets the fact that the Supreme Court held in Stenberg v. Carhart, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), that pre-enforcement challenges of abortion statutes, like the one presently before us, are permissible. Nevertheless, Stenberg is the law of the land and we must follow its direction, including its endorsement of the constitutional standards governing abortion legislation first articulated by the Casey plurality. See Stenberg, 530 U.S. at 921, 120 S.Ct. 2597. That direction is by no means the opaque mess the majority accuses the Supreme Court of creating. In my view, the Court has not left us with "irreconcilable directives" nor has it put courts of appeals "in a pickle." Ante at 687. At the most, if we were reviewing legislation in some field unrelated to abortion (or speech), we might be faced with the problems the majority describes. As for abortion regulation, the Court's guidance is crystal clear. In the end, the majority concedes that Stenberg governs, which ought to be enough for present purposes to lead to an affirmance of the district court's grant of the injunction.

When one follows the analytical path outlined in Casey, it becomes clear that the district court did not abuse its discretion when it concluded that one narrow requirement of Indiana's law had to be enjoined. In support of that conclusion, the court found that in the particular circumstances faced by Indiana women, and on the basis of the expanded factual record that the Supreme Court invited in Casey, the law's requirement that women receive certain advice "in the presence" of

"the physician who is to perform the abortion, the referring physician or a physician assistant" (§ 16-34-2-1.1(1)) amounts to an unconstitutional "undue burden" on the abortion decision. I would affirm the district court's decision.

Before turning to the areas of disagreement that lie between the majority and me, it is important to point out that we also share some areas of agreement. First, it is clear that Indiana's requirement to furnish the statutory information "in the presence of the pregnant woman" (instead of, for example, mailing written materials, having a telephone conversation, or visiting a local doctor who is neither the referring physician nor the physician who will perform the procedure) is one that raises the cost of obtaining an abortion. This is because the "presence" rule normally necessitates two trips to the abortion facility.

Second, the majority notes, and I agree, that there are both unconstitutional ways in which costs may be raised and constitutional ones: an increased cost is unconstitutional if it has the purpose or effect of forcing some women to give up their constitutional right to choose abortion; it is constitutional if it genuinely furthers the state's legitimate interest in persuading women not to select abortion when faced with an unwanted pregnancy.

Third, I agree with the majority that the standard of review for constitutional or legislative facts is more searching than the one we use for historical facts. That does not mean, however, that we may disregard the district court's findings of historical fact. To the contrary, the Supreme Court has emphasized that we owe deference to such findings even in constitutional cases. See *706Ornelas v. United States, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) ("a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers"). Were we to abandon that rule, many constitutional matters would receive far less restrained review than we presently give them: from possible violations of the Fourth Amendment, to the voluntariness of confessions, to the First Amendment protection accorded to public employee speech.

I

Turning now to the way in which we should resolve this appeal, it is useful to begin with some reminders about what *Casey* held. (For ease of exposition, I refer to *Casey* alone rather than to “the *Casey* standard as endorsed in *Stenberg*,” since the latter formulation, while more accurate, is needlessly cumbersome.) First, *Casey* dictates how to draw the line between permissible state regulation and unconstitutional regulation:

Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. 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. 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.

505 U.S. at 874, 112 S.Ct. 2791. The opinion later elaborates on the undue burden standard:

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. 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. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

Id. at 877, 112 S.Ct. 2791.

Applying this standard, the Court struck down the Pennsylvania statute's spousal consent requirement and the record-keeping requirement relating to spousal notice; it upheld the statute's parental consent requirement (which contained the necessary one-parent and judicial bypass provisions), the medical emergency provisions, the rest of the record-keeping requirements, and the “informed consent” requirement. Knowing both what failed the new test and what passed it gives litigants a roadmap of the kind of

claims that are likely to succeed, and the kind of evidence they must present. It also gives us concrete guidance on the critical questions now before us: (1) under the *Casey* test, must the statute create an “undue burden” for every single woman, or is it enough that it create an undue burden for some women; (2) to what extent are we dealing with empirical, fact-specific issues, and to what extent with “legislative” issues; and (3) how must the statute allow for flexible compliance with the state's broader goals?

The first question—how many women must be affected—is really another way of putting the question about facial challenges*707 that the majority addresses. *Ante* at 687. In this connection, despite its disclaimers, one is left with the strong impression that the majority is applying either *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), or something very close to it. In essence, it holds that a state statute like the one before us now would be unconstitutional only if there was “no set of circumstances” under which it was valid—by which it seems to mean that not a single woman in Indiana would find the law's burdens tolerable. This is an impermissible back-door application of *Salerno*. Worse yet, it assumes the answer to the question before us: whether the system Indiana wants to put in place will unduly burden Indiana women. Since the pertinent part of the statute has never gone into force, the majority indulges in the presumption that the law imposes no burden at all. But this presumption is found nowhere in our jurisprudence, at least for laws implicating fundamental constitutional rights. Furthermore, this methodology is inconsistent with *Casey*.

Part V-C of *Casey* addressed the spousal notification requirement of the Pennsylvania law, also under circumstances in which enforcement had not yet begun. The district court had found, and the Supreme Court accepted, that “[t]he vast majority of women consult their husbands prior to deciding to terminate their pregnancy....” 505 U.S. at 888, 112 S.Ct. 2791. We can assume, therefore, that the spousal notification requirement was not an undue burden, or any kind of burden, for that “vast majority” of women; they are already doing what the statute specified. But the Court went on to consider the plight of women who were not already consulting the putative father: the 2,000,000 women a year who are the victims of severe assaults by their male partners. As for *those* women—“the victims of regular physical and psychological abuse at the

hands of their husbands," *id.* at 893, 112 S.Ct. 2791, matters were different. The Court found, based on "[t]he limited research that has been conducted with respect to notifying one's husband about an abortion, although involving samples too small to be representative," *id.* at 892, 112 S.Ct. 2791, that the spousal notification requirement was "likely to prevent a significant number of women from obtaining an abortion." *Id.* at 893, 112 S.Ct. 2791. Later, to underscore the point, it reiterated that "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there." *Id.* at 894, 112 S.Ct. 2791.

That takes us to the second critical question: whether the reduction in abortions performed is the result of the law's persuasive force or the consequence of the impermissible placement of obstacles in the path of a woman's right to choose. One may assume, for the sake of argument, that fewer women in Indiana will forego an abortion than did women in Mississippi, according to the studies in the record. One may further assume that a larger percentage of women in Indiana who forego an abortion will do so because they were persuaded by the law's informational requirements, contrary to their sisters in Mississippi. No matter: under *Casey*, our focus must be on those women who, like those affected by the spousal notification requirement in Pennsylvania, will forego the abortion because of the burden, and not because of persuasion.^{FN1}

^{FN1} In fact, the parallel with the spousal notification requirement in *Casey* runs deeper than the mere finding of an undue burden. Were the Supreme Court to have reasoned along the same lines as the majority of the panel, it would have concluded that the 1% of women who forego abortions because of the notification requirement have in fact merely changed their minds—been "persuaded"—after the consultation with their husbands that would not have occurred but for the notification requirement. The Court focused on those women who were *not* persuaded, but who instead were forced to carry their pregnancy to term because of the risk of violence or abuse from their male partner. Similarly, this court should focus on those who are not persuaded because of the "presence" requirement, but for whom this requirement is close to the equivalent of a flat prohibition on

abortion.

*708 I cannot imagine a more resounding repudiation of the *Salerno* approach than the *Casey* opinion gave. The majority opinion in *Stenberg* makes it clear that this was no accident or oversight. We must therefore look at the effect of the "in the presence" requirements on the Indiana women upon whom the statute operates: the approximately 10% (as the record suggests and as the district court found) who will no longer be able to obtain abortions under the new regime. (Note that the 10% number could be off by an order of magnitude and we would still be required to enjoin this part of the law if it affected "only" 1%, the number presumptively affected by the spousal notification rule in Pennsylvania.)

But, the majority responds, the Supreme Court in *Casey* upheld something almost exactly like the Indiana "in the presence" requirement when it found that Pennsylvania's informed consent rules passed muster. Informed consent at the most general level, of course, was not the issue either in our case or in *Casey*; under the injunction the district court entered, every Indiana woman is furnished with the information the state deems helpful, and when she shows up for the abortion procedure the doctor can once again assure herself that the patient's consent is informed. Our concern is with the specific way in which the state wants the information to be transmitted.^{FN2}

^{FN2} As the majority acknowledges, Indiana's law has been construed to have an emergency by-pass provision that covers any kind of physical or psychological risk to the woman from any of its provisions, including presumably the "presence" requirement. But that does not distinguish it from Pennsylvania's statute, which also relieved a physician of compliance with the informed consent rules "if he or she can demonstrate, by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient." 18 Pa. Cons.Stat. § 3205(c) (1990). The existence of such a statute was not enough to convince the Court that the spousal consent requirement was permissible. By the same token, the existence of a similar safety valve in the Indiana statute

is not enough to save the otherwise burdensome "presence" requirement, for the reasons I explain below.

The majority suggests that *Casey* has already answered this question, insofar as it addressed a regulatory regime with a similar "two visit" rule. But a look at the *Casey* opinion shows that the Court was not writing so broadly; to the contrary, the Court took great pains *not* to rule on informed consent/two-visit rules either in general as a matter of fact or as a matter of law. Instead, it explicitly limited its holding to the record before it. It stated that there was "no evidence *on this record* that requiring a doctor to give the information as provided by the statute would amount *in practical terms* to a substantial obstacle to a woman seeking an abortion." *Id.* (emphasis added). There is no reason to treat the phrases "on this record" and "in practical terms" as casual insertions. The Court thought that the waiting period question was a close one, particularly because it would often translate into a two-visit requirement. The Pennsylvania district court had not made the necessary findings of fact to show that a two-visit requirement would amount to an undue *709 burden (largely because that court had applied the old trimester test from *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and had invalidated the rule for other, less factually sensitive, reasons). If there could be any doubt remaining on the question whether the Court was restricting its ruling to the record before it, the following passage from *Casey* should set it to rest:

And the District Court did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it. Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.

505 U.S. at 887, 112 S.Ct. 2791.

Casey, therefore, establishes the following guidelines for the present case: (1) we must evaluate the Indiana law based on those upon whom it is operating, which is to say the set of women who will be burdened by the "in the presence" requirement; (2) if there were no evidence before the court tending to show that this requirement, like the spousal notification rule considered in *Casey*, is "likely to prevent a significant number of women from obtaining an abortion," 505

U.S. at 893, 112 S.Ct. 2791, then we would be required to uphold Indiana's rule on this facial challenge; but (3) since there is evidence that is at least as reliable-if not much more so-than the evidence on which the *Casey* opinion relied in evaluating the spousal notification rules, we must look at what that evidence shows, deferring to the district court's findings of historical fact, just as the Supreme Court did in *Casey*. Cf. *Ornelas*, 517 U.S. at 699, 116 S.Ct. 1657. I now turn to the evidence before the district court.

II

Initially, it is necessary briefly to consider what we mean by the term "fact" and how a fact may be established. The majority has tried to explain how and why it is reversing the district court, even while it accepts such critical findings of fact as (1) abortions dropped in Mississippi after enactment of a two-visit rule, as compared to those in South Carolina, which did not have a two-visit rule; and (2) the number of abortions performed in Indiana has not declined because of the advice given to women pursuant to the statute. Even though these facts support the district court's finding, the majority argues that the ultimate finding of an "undue burden" cannot be sustained, largely because the Supreme Court did not find such a burden in *Casey* for a similar rule, nor did this court in *Karlin v. Foust*, 188 F.3d 446 (7th Cir.1999), the decision upon which the majority places most of its reliance. With respect, I believe this approach confuses two fundamentally different inquiries: the first concerns the way in which a certain fact must be established, and the second asks whether this fact will logically vary from case to case or if, once properly established, it is "legislative" in nature such that it cannot be questioned over and over again.

Casey, as the preceding discussion makes clear, was focused on the first of those questions. The Court there decided that the existence of an "undue burden" had not been established on the record then before it. It left the door open, however, for later parties to present more evidence that would cure the gaps in the record that existed. This point can be illustrated by an analogy to new drug approval. Suppose a pharmaceutical company approaches the Food and Drug Administration with an application for approval of a new drug, Alpha. Naturally, it submits*710 supporting information to the agency. If, however, the FDA deems that information insufficient, it will reject the application.

This does not mean that the company cannot re-apply later, after it conducts more clinical studies or otherwise cures the deficiencies in the earlier record. Based on a fully supported application, the FDA will decide whether Alpha should be approved as safe and effective for the designated uses. Our situation is exactly the same. We now have in this case the "re-application" for a finding whether a rule that requires two visits to the clinic (here, Indiana's "presence" requirement) constitutes an undue burden. Are there, in other words, women for whom this rule has the "effect of placing a substantial obstacle in the path of ... seeking an abortion of a nonviable fetus"? 505 U.S. at 877, 112 S.Ct. 2791.

In order to answer that question, we must evaluate the evidence presented in this particular case. Before doing so, however, it is also useful to note where the concept of "legislative facts"—on which the majority relies—legitimately applies in this case, and where it does not. Skipping over the crucial question about the way in which facts must be established, the majority treats this case as one in which the factual record is identical to the record in *Karlin* and then assumes that if there was nothing unconstitutional about a two-visit rule in *Karlin* there can be nothing unconstitutional here. Burdens are burdens, no matter what state a court is considering. Furthermore, reasons the majority, that is how the Supreme Court treated efforts to regulate the late-term abortion procedure at issue in *Stenberg*, and thus it must be the way to treat all facts relating to the abortion issue.

With all due respect, the majority has failed to take into account significant differences in the record that was compiled in this case, as compared with the record before the *Karlin* court, and it has made assumptions about inter-state differences that are unsupported in this record (and, I suspect, unsupportable). Once again, I discuss the particular evidence in the present record later. What is important here is to recognize that this evidence is highly pertinent to the case. A central reason why the majority treats this as a "failure of proof" case, to the extent it does, is that it assumes that studies done in Mississippi, or Utah, or North Carolina, have nothing to do with Indiana. This assumption is mysterious. What we are considering, after all, is a simple matter of human reactions to sets of incentives or disincentives: will a particular measure be seen as a disincentive at all; if so, will the obstacle be a mere inconvenience, or will it effectively

ban a particular option? In the field of economics, we assume that people will react in similar and predictable ways to incentives. (And sometimes it takes more than one study to ascertain what the incentive effects of a particular measure are, even if, once understood, those effects are presumed to be universal.) Consistently with that well-accepted proposition, there is every reason here to assume that Indiana women will react to proven incentives and disincentives in the same way women from other states (e.g., Mississippi) have been shown to respond. The Law of Demand is based on generalized assumptions about human behavior and rationality, and there is no reason to waste time trying to prove that people in one area are exceptions to these rules. The Supreme Court relied on the same idea in *Stenberg*: faced with high uncertainty about which procedures were legal and which were not, coupled with draconian penalties for an incorrect guess, it was safe to assume that all doctors, everywhere, would err on the side of caution and refuse altogether to perform certain kinds of late-term abortions.*711 Maybe the Court should have carved out an exception for doctors in places famous for attracting gamblers, like Las Vegas or Atlantic City; but for obvious reasons it did not.

The majority acknowledges that under the Law of Demand, higher prices for abortion will decrease the number demanded, but (as it also appears to recognize) that is not the difficult question here. It is instead whether the observed increase in price caused by the "presence" or two-visit rule is a permissible one under the undue burden analysis. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 1742, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring) (reduction in demand is merely the first step of an analysis on the permissibility of a regulation: the crucial step is whether that decrease was achieved through allowable governmental action). That is precisely the issue that the Court identified in *Casey* as an empirical point, where a different result was possible on a more complete record. It is unclear at best to me why the two judges in the majority on this panel think that they know better than the district court judge, who heard all the testimony and weighed all the evidence, what the answer is to the question whether a critical number of Indiana women would experience the "in the presence" rule as such a significant burden that it would effectively prevent them from exercising their constitutionally protected choice. Instead of respecting the district court's extensive work, the majority finds flaws with the evidence on which the court based

its factual findings. It thinks, for instance, that the evidence in the record should have taken into account factors like degree of urbanization, average distance to abortion clinics, and income levels. *Ante* at 689.

But this simply leads to the majority's second misunderstanding about the legal significance of the differences between Mississippi and Indiana that these factors might reveal. At best, studies incorporating these variables at a greater level of detail will indicate that there are some women in Indiana for whom the "presence" rule is not a problem, just as there were many women in Pennsylvania who did not anticipate any problem with spousal notification. Surely the majority does not think that every woman in Indiana lives close to a clinic; like all states, Indiana has significant rural areas and significant numbers of people living far from a reproductive health services facility. (There are 11 abortion clinics in Indiana, see Indiana Family Institute, Fact Sheet: Abortion in Indiana, at <http://www.hoosierfamily.org/FactSheet13.html>, covering a territory of some 36,000 square miles, see U.S. Census Bureau, State and County QuickFacts, at <http://quickfacts.census.gov/qfd/states/18000.html>. That adds up to one abortion clinic on the average for almost every 3,300 square miles. And, needless to say, it is quite unlikely that these clinics are distributed with perfect geographical regularity; to the extent the clinics are concentrated around major cities like Indianapolis, that means that other women in rural Indiana will live substantial distances away from the nearest facility.) At most, the details the majority demands might suggest that more Indiana women can withstand the burdens of the Indiana statute than their counterparts in Mississippi could. But the question is not, for example, whether Indiana women as a group live closer to abortion clinics. It is whether an Indiana woman living 60 miles away from a clinic in Indiana who cannot afford (either financially, socially, or psychologically) to make two visits, will respond the same way a Mississippi woman living 60 miles away from a clinic in Mississippi with similar constraints did. To repeat, *Casey* made it clear that the set of *712 women we must consider are those who are burdened by the law, and it found 1% enough to justify striking down the spousal notification rule. Maybe 10% of the women in Mississippi have that problem and "only" 3% of women in Indiana do. No matter. The district court was quite reasonable to find that women in Indiana are like all other people and that their responses will be the same as those of women elsewhere.

Or it could be that the majority thinks that women in Indiana are more likely to be persuaded by the "presence" requirement than are women in Mississippi, so that the decrease in abortions due to the requirement could be attributed to the constitutionally permissible persuasive force of the law. Again, however, all the previous criticisms apply: the question is not whether more women in Indiana are persuaded than are women in Mississippi (bearing in mind that there was no evidence before the district court indicating why that should be the case). It is instead whether a sufficient number of Indiana women (something akin to the 1% of *Casey*) are *not* so persuaded, and yet are among those who will be forced to forego their right to choose.

The majority rejects wholesale the relevance of the Mississippi studies (and several other studies) by implying that the district court clearly erred in its decision that Indiana women would react to burdensome two-visit requirements in the same way, and for the same reasons, as Mississippi women did. But even in this context, it offers no reason at all to believe that Indiana women are so idiosyncratic, nor in my view could it. The Supreme Court has consistently endorsed the use of studies from other states or areas—shared experience is exactly how the "laboratories" in the several states ought to work. See, e.g., *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (in the First Amendment context, no requirement that "a city, before enacting such an ordinance, [ ] conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.").

III

Turning now to the evidence demonstrating that the Indiana "presence" rule indeed constitutes an undue burden, we find detailed and meticulous findings from the district court to support that proposition. This evidence was entirely competent to support the district court's decision; *Casey*'s discussion of the spousal notification rule makes it clear that evidence on undue burden does not have to meet some heightened standard of perfection. To the contrary, the Court there relied on "limited research that has been conducted with respect to [the issue at hand, there notifying one's

husband about an abortion], although involving samples too small to be representative,” 505 U.S. at 892, 112 S.Ct. 2791, to support its conclusion about spousal notification.

We have more than zero, and less than perfection, when it comes to information about the burden the Indiana statute places on the women affected by the two-visit rule. The majority, in effect, has not only demanded perfection; it also wants a showing that some number of Indiana women significantly larger than the number the Court accepted in *Casey* are unduly burdened by the law. Every time the plaintiffs come back with more studies and more information (as they have surely done here, in comparison with the record they created in *Karlin*), the majority raises the bar higher and tells them to come back another day—even though this court *713 has specifically held that “the biases of one study in one case may be avoided or reversed in the next.” *Mister v. Illinois Cent. Gulf R.R. Co.*, 832 F.2d 1427, 1437, n. 3 (7th Cir.1987) (Easterbrook, J.).

In this case, we have evidence, and importantly we have significant new evidence that has been developed since *Karlin*, which answers precisely the kinds of questions that *Karlin* directed future plaintiffs to address. The district court relied on this evidence to conclude that the “in the presence” part of the Indiana law would indeed impose an undue burden on enough Indiana women seeking abortions that this part of the statute had to be enjoined. The Supreme Court has consistently endorsed the use of the type of evidence that was presented here, and has analyzed it in the “factual context of each case in light of all the evidence presented by both the plaintiff and the defendant.” *Bazemore v. Friday*, 478 U.S. 385, 400, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986). Key among this evidence before the court was a new (post-*Karlin*) study published in the *Journal of the American Medical Association (JAMA)*, one of the most highly respected journals in the medical field, and one that meets any conceivable standard for peer-review. Cf. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Robinson v. California*, 370 U.S. 660, 667 n. 9, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (relying on findings in *JAMA*); *Budd v. California*, 385 U.S. 909, 912 n. 3, 87 S.Ct. 209, 17 L.Ed.2d 138 (1966) (Fortas, J., dissenting from denial of certiorari) (same).

The *JAMA* study is a time-series and regression analysis designed to assess the effect of the Mississippi law on the abortion and birth rates of Mississippi residents in two ways: first, through a retrospective analysis of those rates before and after the passage of the statute, and second, through a comparison between Mississippi and two similar states, Georgia and South Carolina, neither of which had a “presence” requirement in effect at the relevant time but were otherwise similar in the relevant respects. Regression analyses are an important tool in much of social science research, as well as in law. See *McCleskey v. Kemp*, 481 U.S. 279, 293-94, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (discussing their role in Title VII of the Civil Rights Act of 1964 cases and in sentencing context); see also *Bazemore v. Friday*, 478 U.S. at 398-401, 106 S.Ct. 3000 (additional regression analyses conducted in response to criticisms and suggestions by the district court, all of which confirmed, and some of which even strengthened, the study's original conclusions; further concluding that multiple-regression analysis need not include every conceivable variable to establish a party's case; and chiding the court of appeals because it “failed utterly to examine the regression analyses in light of all the evidence in the record”); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 n. 13, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (discussing jury selection context).^{FN3}

^{FN3}. It is worth reviewing for a moment what this kind of study does. A regression takes a dependent variable (here, the decrease in abortions or abortion rates) and tests it against a number of independent variables. The independent variables are chosen before the regression is run; here, for example, they included factors like the opening of new clinics, changes in marriage rates, changes in the percentage of the population living in metropolitan areas, the increased availability of contraceptives, and changes in per capita income. Once the data is collected, the researcher runs a regression on each variable, which shows the effect of that variable, in isolation, on the dependent variable. If a variable is found to have no meaningful correlation to the dependent variable, it is discarded.

*714 The difficulty here is that there is no single in-

dependent variable that will show “undue burden.” The only way to prove that a particular part of a law is imposing an undue burden on abortion choice is to hypothesize that it *might* constitute an undue burden, and then to show that no other reasonably related variable satisfactorily explains the drop in abortion rates (i.e., the phenomenon that is being tested)-essentially a process of elimination. This is a methodology we have approved before. See *In re Oil Spill by Amoco Cadiz*, 954 F.2d 1279 (7th Cir.1992) (per curiam). In that case, this court endorsed the use of simple linear regressions as a way to draw out all other plausible explanations leaving only the hypothesized one as a reason for what part of a loss in business was attributable to a massive oil spill. *Id.* at 1320. We expressed satisfaction there with this way of getting “a better grip on the relation between dependent and independent variables” and reaching “an inference of causation, and of the size of the effect.” *Id.* Indeed, the latest pronouncement by the Supreme Court in First Amendment matters endorses a study by the city of Los Angeles aimed at demonstrating the connection between its ban on multiple-use adult establishments and its interest in reducing crime—a connection that can only be shown by ruling out some (but clearly not all) of the other potential independent variables that could have contributed to the effect on crime. See *City of Los Angeles v. Alameda Books, Inc.*, *supra*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (plurality opinion). Dealing with the nature of such studies, the plurality concluded that a party “does not bear the burden of providing evidence that rules out every [other] theory.” *Id.* at 1735. The study, however imperfect, was respected for its probative value precisely because of the lack of evidence presented by the other side to rebut its finding. As in this case, once the point was made, the opponent had to produce concrete evidence on the other side; it was not enough merely to point out an alleged imperfection in the study. *Id.* (respondents did “not offer a competing theory, let alone data” to counter the city’s assertions).

That is exactly what the JAMA study did. It was tailored to explore the question (unanswered in the record in *Karlin*) whether the decrease in abortions in Mississippi was an effect not of the persuasive power of the law, but rather of its burdensome qualities. And it showed that the latter explanation was the correct one. The principal outcome measures in the study were birth rates, abortion rates, the percentage of late abortions, and the percentage of abortions performed outside the state. The researchers found that the resi-

dent abortion rates declined 12% more in Mississippi than they did in South Carolina after the passage of the law, and they declined 14% more in Mississippi than they did in Georgia. Limited to Caucasian adults, abortions declined 22% more in Mississippi than in South Carolina and 20% more in Mississippi than in Georgia. Abortions performed after the 12-weeks gestation mark increased 39% more in Mississippi than in either South Carolina or Georgia. The percentage of abortions performed out-of-state increased 42% more among women in Mississippi relative to women in South Carolina.

The JAMA study also showed that in the 12-month period after the law took effect, the total rate of abortions for Mississippi residents decreased by approximately 16%; the proportion of Mississippi residents traveling to other states for an abortion increased by about 37%; and the number of second trimester abortions increased by some 40%. The study concluded that these statistics “suggest that Mississippi’s mandatory delay statute was *715 responsible for a decline in abortion rates and an increase in abortions performed later in pregnancy.” The researchers who conducted the study testified before the district court that the only salient difference among Mississippi, Georgia, and South Carolina for these purposes was that only Mississippi had a two-trip requirement. Otherwise, the laws regulating abortions in the three states were functionally the same—and no other statistically significant events had taken place in the various states.

The district court realized that it needed to address one final, but critical, question of fact: were declines observed in abortions in Mississippi because women in Mississippi had been persuaded to forego abortions, or were the declines because the new law was impermissibly burdening the right to seek an abortion—precisely the inquiry mandated by *Karlin*. The court found that the latter explanation was the correct one, for several reasons, all amply based on the evidence in the record. First, the “persuasive power” hypothesis was severely undercut by the evidence showing that Mississippi women were leaving the state to have their abortions elsewhere and having more second-trimester abortions. Those women quite evidently had not been persuaded to carry their pregnancy to term; they aborted their pregnancies, but they did it outside the state of Mississippi or at a later and riskier time. (And certainly we must assume that the

Mississippi legislature was trying to persuade women to forego abortion, rather than to persuade them to travel out-of-state for the procedure or to postpone it to a riskier time.) Second, the court looked at evidence from Indiana itself that showed no changes in abortion rates from the information standing alone (a part of the statute that the court permitted to take effect, stripped only of the "presence" requirement). The court discussed other evidence as well, and I commend its thorough analysis, particularly its evaluation of similar studies conducted in Utah and Louisiana. In the end, its conclusion was that the "sum of this evidence, and the absence of evidence of any persuasive effect, shows convincingly that the predicted reduction in abortion rates would result not from persuasion but from restrictions posing a substantial obstacle for some women's ability to obtain abortions." As mentioned before, even if the relative numbers of women who were persuaded versus burdened are different in Mississippi and Indiana, the study conclusively reveals that a significant number of Indiana women will be unduly burdened by the "presence" requirement. And those women—not those who are persuaded, or unaffected, or not even contemplating an abortion—are those on whom the majority should have concentrated under *Casey* and *Stenberg*.

Whether this court is looking at the record *de novo*, under an abuse of discretion standard, or merely for clear error, the district court's findings should stand. I find nothing in the majority's speculation that comes close to refuting the evidence upon which the court relied. See *City of Los Angeles*, 535 U.S. at ----, 122 S.Ct. at 1735 (disapproving of fact that the "Court of Appeals simply replaced the city's theory ... with its own" and that its analysis "implicitly requires the city to prove that its theory is the only one that can plausibly explain the data"). Only by disregarding key points such as the number of women who willingly undertook the burden of seeking an abortion out-of-state, where they could have the entire procedure accomplished in one visit, rather than staying in-state and enduring the two-visit burden, can the majority come to the result it does.

IV

Finally, although not necessary to my analysis, it is worth noting that *Casey* said *716 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." 505 U.S. at 877, 112 S.Ct. 2791 (emphasis added). The majority considers only the "effect" part of that disjunctive test, perhaps thinking that this court's dismissal of the "purpose" half in *Karlin* was binding on the Supreme Court. I am under no such illusion. I believe, therefore, that it is appropriate to take a brief look at the purpose Indiana offered for this regulation, to see if it might either help to save the statute or to condemn it.

The district court found that "[t]here is no evidence tending to show how the 'in the presence' requirement actually furthers the state's legitimate interests in maternal health or in protecting potential life." It said this, importantly, after the plaintiffs had made an extensive *prima facie* showing that the statute furthered neither legitimate interest; in the sense of a burden of production, the court was concerned that Indiana had offered nothing to the contrary. (Indiana argues strenuously that the district court imposed an impermissible shift in the ultimate burden of proof, but it is clear from the court's opinion as a whole that it did no such thing; it was simply addressing the evidentiary vacuum on Indiana's side in the face of the plaintiffs' evidence.)

Indeed, my search of the legislative history of the Indiana statute reveals no reason whatsoever for imposing a two-visit requirement for the dissemination of the required information. Acting as if it were conducting rational basis review, the majority speculates that some Indiana legislator might have thought that absorption of information occurs more effectively when it is transmitted in person. Maybe so, but that does not explain why the state could not simply have said that at the point of checking into the clinic, the previously transmitted information must be reiterated in person. The change from an oral communication to an "in the presence" requirement was added by a floor amendment in the House of Representatives that was marked by scant debate. After some members of the House suggested that the "in the presence" requirement was intended as an obstacle to abortion, its chief sponsor stated instead that the concern was that unless the information was given in person, "how do you know this is the doctor or the person you're supposed to be talking to.... I would think you would want to talk personally to the person who may be performing that and know ... that they are the person indeed that they [say they] are." A special concern with impostor

doctors, or generally with practitioners not being who they say they are over the telephone is not a problem that is specific to abortion-or at least there were no such findings other than a statement that this possibility (of talking to an impostor) "is very dangerous, especially when you're talking about the symptoms and consequences of an abortion." Literally the only other scrap of evidence from the legislature seems to reflect a fear that women would receive the information while they were under sedation on an operating table. But that cannot be what the legislature really feared, for the simple reason that this concern is already addressed in Indiana's law of "informed consent," which cannot be given by persons already under anaesthesia. See, e.g., *Culbertson v. Mernitz*, 602 N.E.2d 98, 103 (Ind.1992) (endorsing the American Medical Association's 1992 Code of Medical Ethics with respect to necessary consent, and rejecting as invalid consent given "where the patient is unconscious or otherwise incapable of consenting"). I would be surprised if many Indiana doctors were in the habit of *717 obtaining consent for medical procedures from unconscious or drugged patients; they would risk loss of their medical license if they did, whether they were performing an appendectomy, knee surgery, a vasectomy, a prostate removal, or an abortion. The law of informed consent is consistent across the spectrum of surgeries and procedures: if no reason is given why heightened consent is needed in the abortion context, then this cannot be accepted as the reason for the "in the presence" requirement.

V

For all these reasons, I believe that the majority has seriously mis-applied the *Casey* test. It has substituted its own factual assumptions for evidence that is in the record; it has failed to focus on the women for whom that statute will create problems; and it seems to think that the *Casey* Court was not serious when it emphasized the lack of evidence in the record before it, by implying that the result in *Casey* dictates the result here. I respectfully dissent.

C.A.7 (Ind.),2002.

A Woman's Choice-East Side Women's Clinic v.
Newman
305 F.3d 684

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468 F.3d 361, 2006 Fed.App. 0419P
(Cite as: 468 F.3d 361)

H

United States Court of Appeals,
Sixth Circuit.
CINCINNATI WOMEN'S SERVICES, INC.; Walter
Bowers, Dr., Plaintiffs-Appellants,
v.

Robert TAFT, Governor of Ohio; Betty D. Mont-
gomery, Attorney General; Joseph Deters; Michael K.
Allen; Jim Petro, Defendants-Appellees.
No. 05-4174.

Argued: Feb. 1, 2006.
Decided and Filed: Nov. 13, 2006.

Background: Healthcare provider and its medical director brought action challenging constitutionality of two provisions of Ohio's abortion statute. The United States District Court for the Southern District of Ohio, Sandra S. Beckwith, Chief Judge, 2005 WL 2206219, upheld the provisions, and plaintiffs appealed.

Holdings: The Court of Appeals R. Guy Cole Jr., Circuit Judge, held that:

- (1) provision limiting minors seeking a judicial bypass of statutory parental-consent requirement to one petition per pregnancy was an undue burden on the constitutional right to an abortion;
- (2) provision was severable from the remainder of the statute; and
- (3) provision requiring women seeking an abortion to attend, for informed consent purposes, an in-person meeting with a physician at least 24 hours prior to receiving the abortion, was not an undue burden on the constitutional right to an abortion.

Affirmed in part, reversed in part, and remanded.

Rogers, Circuit Judge, filed opinion concurring in part and concurring in the result.

West Headnotes

[1] Abortion and Birth Control 4 ☞ 104

4 Abortion and Birth Control

4k104 k. Scope and Standard of Review. Most

Cited Cases

In determining whether Ohio's abortion restrictions were constitutional, Court of Appeals would apply the "large-fraction" test and determine whether the restrictions presented a substantial obstacle to obtaining an abortion for a large fraction of the women for whom the restrictions were relevant.

[2] Abortion and Birth Control 4 ☞ 119

4 Abortion and Birth Control

4k116 Substitution and Bypass; Notice

4k119 k. Approval by Court; Bypass in General. Most Cited Cases

If a state requires parental consent before an unemancipated minor woman receives an abortion, it must provide for a judicial or administrative procedure so that a minor woman who satisfies certain conditions may bypass the consent requirement.

[3] Abortion and Birth Control 4 ☞ 120

4 Abortion and Birth Control

4k116 Substitution and Bypass; Notice

4k120 k. Capacity and Maturity. Most Cited Cases

Abortion and Birth Control 4 ☞ 121

4 Abortion and Birth Control

4k116 Substitution and Bypass; Notice

4k121 k. Best Interests of Patient. Most Cited Cases

If a minor woman establishes either that she is mature enough and well enough informed to make the abortion decision independently or that the abortion would be in her best interests, the reviewing court or agency must issue a bypass of a state parental consent requirement; otherwise, the attendant bypass procedure is constitutionally invalid.

4 Abortion and Birth Control

4k112 k. Information and Consent; Counseling. Most Cited Cases

Provision of Ohio's abortion statute requiring women seeking an abortion to attend, for informed consent purposes, an in-person meeting with a physician at least 24 hours prior to receiving the abortion was not an undue burden on the constitutional right to an abortion in a large fraction of the cases in which it was relevant, and thus was not a facially unconstitutional restriction on the right to an abortion; out of every 1000 women seeking an abortion, provision affected only 6 to 12.5 women who, due to domestic abuse, could not meet the in-person informed-consent requirement without grave risk of retaliation. Ohio R.C. § 2317.56(B)(1).

West Codenotes

Held Unconstitutional Ohio R.C. § 2919.121(C)(4)

*363 ARGUED: Alphonse A. Gerhardstein, Gerhardstein & Branch, Cincinnati, Ohio, for Appellants. Diane Richards Brey, Office of the Attorney General of Ohio, Columbus, Ohio, for Appellees. **ON BRIEF:** Alphonse A. Gerhardstein, Jennifer L. Branch, Gerhardstein & Branch, Cincinnati, Ohio, David A. Friedman, Fernandez Friedman Grossman Kohn & Son, Louisville, Kentucky, for Appellants. Diane Richards Brey, Stephen P. Carney, Douglas R. Cole, Office of the Attorney General of Ohio, Columbus, Ohio, Anne Berry Strait, Tracy M. Greuel, Office of the Attorney General, Charitable Law Section, Columbus, Ohio, for Appellees.

Before COLE, GIBBONS, and ROGERS, Circuit Judges.

COLE, J., delivered the opinion of the court, in which GIBBONS, J. joined. ROGERS, J. (pp. 374-78), delivered a separate concurring opinion.

OPINION

R. GUY COLE, JR., Circuit Judge.

In this facial constitutional attack, Plaintiffs-Appellants Cincinnati Women's Services ("CWS") and Dr. Walter Bowers, CWS's medical director, appeal the district court's judgment upholding two provisions of Ohio House Bill 421, a law enacted by the Ohio General Assembly in 1998 concerning the regulation of abortions. The first of these

provisions limits minors seeking a judicial bypass of the statutory parental-consent requirement to one petition per pregnancy ("Single-Petition Rule"). The second challenged provision requires women seeking abortions to attend, for informed-consent purposes, an in-person meeting with a physician at least twenty-four hours prior to receiving the abortion ("In-Person Rule"). Following a bench trial, the district court granted judgment in favor of the Defendants.

*364 For the following reasons we **REVERSE** the district court's judgment that the Single-Petition Rule is constitutionally valid and conclude that the Single-Petition Rule is severable from the remainder of the statute. Further, we **AFFIRM** the district court's judgment that the In-Person Rule is constitutionally valid and **REMAND** for further proceedings consistent with this opinion.

I. Background

A. Factual Background

In 1998, the Ohio General Assembly made various substantive changes to Ohio's law regulating abortion, two of which are at issue in this case: the Single-Petition Rule and the In-Person Rule. See Cincinnati Women's Servs. v. Taft, No. 1:98-CV-289, --- F.Supp.2d ---, ---, 2005 WL 2206219, 2005 U.S. Dist. LEXIS 23015, at *1-*2 (S.D. Ohio Sept. 8, 2005).

Until 1998, Ohio law did not impose any restrictions upon the number of times a minor woman could petition for a judicial bypass of the prior parental-notification rule. The 1998 amendments, however, included the Single-Petition Rule, which limits to once per pregnancy the number of times a minor may seek a judicial bypass in lieu of parental consent. Ohio law makes it a misdemeanor and a tort for any person to perform an abortion on an unemancipated minor unless the attending physician has "secured the written informed consent of the minor and one parent, guardian, or custodian." Ohio Rev. Code § 2919.121(B)(1) (2005).^{FNI} The statutory amendment permits a minor woman to petition a juvenile court for a judicial bypass of parental consent if "the court finds that the minor is sufficiently mature and well enough informed to decide intelligently whether to have an abortion" or that "the abortion is in the best interests of

the minor.” *Id.* § 2919.121(C)(3). The Single-Petition Rule further provides that “[n]o juvenile court shall have jurisdiction to rehear a petition concerning the same pregnancy once a juvenile court has granted or denied the petition.” *Id.* § 2919.121(C)(4).

FN1. The 1998 statutory amendment also changed Ohio law by requiring parental consent instead of parental notice, but this aspect of the law is not before us.

In evaluating the probable impact of the Single-Petition Rule, the district court found that “[m]ost judicial bypasses occur in the first trimester of a minor’s pregnancy.” *Taft*, 466 F.Supp.2d at ----, 2005 U.S. Dist. LEXIS 23015, at *27. The district court also found that “there have been times when it was apparent that a bypass was denied because the minor failed by oversight to adequately discuss facts that the minor knew or could easily learn.” *Id.* at ----, 2005 U.S. Dist. LEXIS 23015, at *28. One witness, a part-time magistrate in the Cuyahoga County Juvenile Court in Cleveland, testified that in such situations he has advised the minor’s attorney to file another bypass petition during the same pregnancy. *Id.* at ----, 2005 U.S. Dist. LEXIS 23015, at *27-*28.

The 1998 statutory amendment also modifies prior law by requiring women seeking abortions to attend an in-person meeting with a physician for informed-consent purposes. See *Ohio Rev.Code* § 2317.56(B)(1) (2005). “The meeting need not occur at the facility where the abortion is to be performed or induced, and the physician involved in the meeting need not be affiliated with that facility or with the physician who is scheduled to perform or induce the abortion.” *Id.* Although Ohio’s prior abortion regulation required informed consent before a woman underwent an abortion, the law did not *365 contain any requirement that the meeting take place in person. See *Ohio Rev.Code* § 2317.56(B)(1) (1997) (“At least twenty-four hours prior to the performance or inducement of the abortion, a physician informs the pregnant woman, verbally or by other nonwritten means of communication....”). Ohio’s Attorney General issued an opinion in 1994 interpreting the older version of *section 2317.56(B)(1)* to permit videotaped or audiotaped physician statements. See 1994 Ohio Op. Att’y Gen. No. 94-094, 1994 WL 725885. The challenged provision thus changed the status quo to require that a woman seeking an abortion receive

informed consent in-person, by any physician, rather than “verbally or by other nonwritten means.” *Id.*

CWS is a healthcare provider that provides contraceptive services and performs pregnancy testing and abortions. See *Taft*, 466 F.Supp.2d at ----, 2005 U.S. Dist. LEXIS 23015, at *19. When a woman inquires about obtaining an abortion from CWS, her first contact is generally by phone. *Id.* at ----, 2005 U.S. Dist. LEXIS 23015, at *20. CWS employees inform her of CWS’s abortion process and invite her to schedule two appointments. *Id.* “The first appointment is for an informed consent visit and the second appointment is for an actual procedure.” *Id.*

In evaluating the impact of the In-Person Rule on CWS, the district court found that the In-Person Rule will have the practical effect of requiring all of CWS’s own clients to come to its premises twice, once for the informed-consent meeting with a physician affiliated with CWS, and a second time for the procedure. See *id.* at ----, ----, ----, 2005 U.S. Dist. LEXIS 23015, at *12, *20, *36, *39. The district court found that CWS currently excuses approximately 5 to 10 percent of its patients from its normal two-visit protocol. *Id.* at ----, 2005 U.S. Dist. LEXIS 23015, at *24. “Some women are excused from coming because of the distance of their residencies from the clinic, their lack of resources, or because of interference from an abusive partner.” *Id.* The district court found that 7 to 18 percent of those excused by CWS are excused because of “partner abuse.” *Id.* Excused patients “receive all the information about the procedure via mail and are given the opportunity to listen to an audio version” of the informed consent video tape, and to speak with CWS’s “patient advocates.” *Id.* Witnesses from two other abortion clinics—Capital Care clinic in Columbus and Center for Choice clinic in Toledo—testified that their clinics excuse 5 to 10 percent of their patients from their own two-visit protocols. *Id.* at ----, 2005 U.S. Dist. LEXIS 23015, at *25. Twenty to 25 percent of this excused group are “abused women.” *Id.*

B. Procedural Background

Several weeks before the Act’s effective date, CWS filed a pre-enforcement facial attack against two of the Act’s provisions, naming the Governor of Ohio and various other government officials as defendants. *Taft*, 466 F.Supp.2d at ----, 2005 U.S. Dist. LEXIS 23015, at *3. CWS sought injunctive and declaratory relief on

the grounds that the statutory provisions are unconstitutionally vague and invalid under Supreme Court precedent. Following a bench trial, the district court upheld both provisions. With respect to the Single-Petition Rule, the district court reasoned that Supreme Court precedent does not “require[ ] the state to afford a minor virtually unlimited opportunities to petition for a bypass.” *Id.* at ----, 2005 U.S. Dist. LEXIS 23015, at *46. Assuming that striking down the Single-Petition Rule would mandate “limitless opportunities to petition for a bypass” during the same pregnancy, the district court determined *366 that “such a requirement would conflict with *Casey* in that the state could completely prohibit minors from even obtaining an abortion except where necessary to preserve the life or health of the minor.” *Id.* at ---- - ----, 2005 U.S. Dist. LEXIS 23015, at *46-*47 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)).

The district court also held that the Single-Petition Rule “does not impose any undue burden even in the pre-viability context.” *Id.* at ----, 2005 U.S. Dist. LEXIS 23015, at *47. To find otherwise, the district court concluded that it would have to engage in speculation and guesswork about the following: (1) what fraction of subsequent petitioners’ bypass petitions had been denied due to a lack of understanding of the abortion procedure; (2) whether a petitioner’s increased understanding in a second proceeding would be enough to tip the balance in favor of granting a bypass; and (3) what proportion of subsequent petitioners would develop fetal anomalies after an unsuccessful petition in the first trimester (the district court concluded that a minor who discovered such a fetal anomaly likely had access to prenatal care, “which leads one to conclude further that she has a parent or guardian involved in her pregnancy to pay the medical bills”). *See id.* at ---- - ----, 2005 U.S. Dist. LEXIS 23015, at *47-*50. The district court also determined that it would be pure speculation to conclude that a large fraction of parents would withhold consent for an abortion from a minor. *See id.* at ----, 2005 U.S. Dist. LEXIS 23015, at *50. Finally, the district court held that the Single-Petition Rule need not contain a mental-health exception, and that the general maternal-health exception was constitutional even though it had been “promulgated in the form of an affirmative defense.” *See id.* at ---- - ----, ----, 2005 U.S. Dist. LEXIS 23015, at *51-*52, *53.

Likewise, the district court upheld the In-Person Rule because it “does not create a substantial obstacle for women seeking abortions.” *Id.* at ----, 2005 U.S. Dist. LEXIS 23015, at *29. While granting that the In-Person Rule could have the effect of delaying abortions up to two weeks, the district court held that a “delay of up to two weeks, however, does not impose an undue burden on women seeking abortions.” *Id.* at ----, 2005 U.S. Dist. LEXIS 23015, at *30. The district court relied on the Supreme Court’s ruling in *Casey*, which upheld Pennsylvania’s similar informed-consent statute.

Addressing the “most difficult question to answer,” the district court rejected CWS’s argument that the In-Person Rule would increase the probability that abusive partners would learn about the pregnancy or the attempt to obtain an abortion, thereby causing an undue burden on the abortion-seeking woman’s constitutional right to an abortion. *See id.* at ----, 2005 U.S. Dist. LEXIS 23015, at *39. After reviewing the testimonial and record evidence received at trial, the district court concluded that the evidence did not establish what proportion of the abused women would be blocked from obtaining abortions. *See id.* at ---- - ----, 2005 U.S. Dist. LEXIS 23015, at *39-*42. The district court thus concluded that it could not strike down the In-Person Rule under *Casey*’s “large fraction” test. *See id.* at ----, 2005 U.S. Dist. LEXIS 23015, at *41.

This timely appeal followed. Enforcement of the Single-Petition Rule, but not the In-Person Rule, has been enjoined pending resolution of this appeal.^{FN2}

^{FN2}. Slightly more than a week after CWS filed its complaint, the parties agreed to an order maintaining the status quo—i.e., the state of the law prior to the 1998 amendments—in the form of a preliminary injunction. When the district court entered its final judgment dismissing the case on September 8, 2005, the preliminary injunction was dissolved. The next day the district court issued another order suspending dissolution of the injunction for two weeks. CWS filed a notice of appeal on September 16, 2005. When the order suspending dissolution of the injunction ran its course, the district court, on September 22, 2005, denied CWS’s motion to stay the judgment pending appeal.

On October 3, 2005, this Court granted in part and denied in part CWS's motion to enjoin enforcement of the Act pending appeal. We enjoined enforcement of the Single-Petition Rule, but in all other respects, we denied the motion.

*367 II. The Large Fraction Test

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), sets the standard that we are bound to apply in facial challenges to abortion restrictions. In Casey, the Supreme Court set forth the test that must be applied in analyzing whether a restriction placed on a woman's constitutional right to an abortion is an "undue burden" on that right, thereby rendering the restriction facially unconstitutional. Id. at 878, 894-95, 112 S.Ct. 2791. The Supreme Court determined that, because "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects," when analyzing abortion restrictions, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." Id. at 894, 112 S.Ct. 2791. Therefore, if, "in a large fraction of the cases in which [the abortion restriction] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion," then reviewing courts should find that the restriction is an "undue burden, and therefore invalid." Id. at 895, 112 S.Ct. 2791. This test has come to be known as the Casey "large fraction" test.

In the intervening decade, the Supreme Court has not abandoned Casey. See, e.g., Planned Parenthood v. Casey, 510 U.S. 1309, 114 S.Ct. 909, 910, 127 L.Ed.2d 352 (1994) (Souter, J., denying application for stay of mandate) (if an abortion restriction interposes a substantial obstacle on a large fraction of the affected population, it is an unconstitutional violation of "the exercise of the right to reproductive freedom guaranteed by the Due Process Clause and affirmed in th[e] Court's Casey opinion" (citations omitted)); Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014, 113 S.Ct. 1668, 123 L.Ed.2d 285 (1993) (O'Connor, J., concurring) ("[W]e made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an

abortion." (internal citation to Casey omitted)).^{FN3}

FN3. Justice Thomas's dissent in Stenberg v. Carhart, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), takes to task the Stenberg majority for not applying Casey's large-fraction test and implicitly argues that the Court has abandoned the large-fraction test. Id. at 1019-20, 120 S.Ct. 2597 (Thomas, J., dissenting). Cf. Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 294 (2d Cir.2006) (Walker, Jr., C.J., concurring) ("[T]he Supreme Court appears to have adopted the 'large fraction' standard (perhaps modified by Stenberg to mean a 'not-so-large fraction' standard) for those who seek to challenge an abortion regulation as facially unconstitutional."). However, Justice Thomas's criticism is misplaced. The holding in Stenberg relating to whether the abortion restriction before the Court was an undue burden hinged entirely on statutory interpretation. Stenberg, 530 U.S. at 938, 120 S.Ct. 2597; see also id. at 938-46, 120 S.Ct. 2597. In Stenberg, the state of Nebraska acknowledged that the statute in question placed an undue burden on a woman's right to an abortion if it was interpreted in a certain way—the way the Supreme Court eventually interpreted it. Id. Because the state conceded that the statute was an undue burden if interpreted a certain way, the Court did not need to undertake the large-fraction analysis. See Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 921 n. 10 (9th Cir.2004) ("The abortion-specific 'large fraction' standard is part and parcel of the undue burden analysis."). Finally, the Stenberg Court affirmed the Eighth Circuit's decision *in toto*, Stenberg, 530 U.S. at 946, 120 S.Ct. 2597, which itself used Casey's large-fraction test, see Carhart v. Stenberg, 192 F.3d 1142, 1149 (8th Cir.1999); see also id. at 1151 (Because "[a]n abortion regulation that inhibits the vast majority of second trimester abortions would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion" and the restriction here "prohibit[s] the most common procedure for second-trimester abortions," it thereby causes "an undue burden on a woman's right to choose to have an abortion."

(quotation omitted)).

*368 In *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), the Supreme Court held that, to succeed in a facial constitutional challenge, “the challenger must establish that no set of circumstances exists under which the [law] would be valid.” However, in considering facial challenges to abortion restrictions, every circuit, with one exception, has applied *Casey’s* test rather than *Salerno’s* more restrictive “no set of circumstances” test. See *Nat’l Abortion Fed’n v. Gonzales*, 437 F.3d at 294 (Walker, Jr., C.J., concurring) (“As it stands now, however, the Supreme Court appears to have adopted the ‘large fraction’ standard ... for those who seek to challenge an abortion regulation as facially unconstitutional.”); *Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619, 628 (4th Cir.2005) (holding that “*Salerno’s* ‘no set of circumstances’ standard does not apply in the context of a facial challenge ... to a statute regulating a woman’s access to abortion”); *Planned Parenthood v. Heed*, 390 F.3d 53, 57 (1st Cir.2004), *vacated on other grounds by Ayotte v. Planned Parenthood*, 546 U.S. 320, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (determining that *Casey’s* large-fraction test is properly applied to facial abortion-restriction challenges); *A Woman’s Choice-E. Side Women’s Clinic v. Newman*, 305 F.3d 684, 687, 698-99 (7th Cir.2002) (an abortion restriction “will be deemed valid unless, in a large fraction of the cases in which the law is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo abortion” (internal citation omitted)); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 142-43 (3d Cir.2000) (“a plaintiff must show that an abortion regulation would be an undue burden in a large fraction of the cases in which that regulation is relevant”); *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1027, *amended on denial of reh’g*, 193 F.3d 1042 (9th Cir.1999) (following the “great weight of circuit authority holding that *Casey* has overruled *Salerno* in the context of facial challenges to abortion statutes”); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir.1996) (noting that the *Casey* Court “did not apply” the *Salerno* test, but rather “evaluated the regulations under the undue burden standard”); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir.1995) (opting to “follow what the Supreme Court actually did-rather than what it failed to say-and apply the undue-burden test” which requires a court to invalidate an abortion restriction if the law “operate[s] as a substantial obstacle to a

woman’s choice to undergo an abortion in a large fraction of the cases in which [it] is relevant” (quotation omitted)). The Fifth Circuit stands alone in its rejection of the large fraction test. See *Barnes v. Moore*, 970 F.2d 12, 14 (5th Cir.1992) (holding that a plaintiff must “establish that no set of circumstances exists under which the Act *369 would be valid” (quoting *Salerno*, 481 U.S. at 745, 107 S.Ct. 2095)).^{FN4}

FN4. Interestingly, even the Fifth Circuit’s cases are inconsistent on this issue. Compare *Sojourner T. v. Edwards*, 974 F.2d 27, 30 (5th Cir.1992) (applying *Casey’s* undue burden test without reference to *Salerno*), with *Barnes*, 970 F.2d at 14 & n. 2 (5th Cir.1992) (per curiam) (applying *Salerno* to a facial attack on an abortion regulation).

Like the majority of other circuits, this Court too has followed *Casey’s* large-fraction test in analyzing facial attacks on abortion regulations. In deciding whether a pre-viability abortion restriction passes facial constitutional muster, we “determine whether ‘in a large fraction of the cases in which [the ban] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.’” *Women’s Med. Profl Corp. v. Voinovich*, 130 F.3d 187, 196 (6th Cir.1997) (quoting *Casey*, 505 U.S. at 895, 112 S.Ct. 2791). This has been our repeated and continuous practice. See, e.g., *Women’s Med. Profl Corp. v. Baird*, 438 F.3d 595, 607 (6th Cir.2006) (following *Casey’s* holding that “a regulation is an undue burden if ‘in a large fraction of the cases in which [the regulation] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion’” (quoting *Casey*, 505 U.S. at 895, 112 S.Ct. 2791)); *Memphis Planned Parenthood v. Sundquist*, 175 F.3d 456, 477 n. 3 (6th Cir.1999) (“When considering [whether a] statute [that regulates abortion] is unconstitutional on its face, we must analyze the factual record to determine whether the challenged regulation in a large fraction of the cases in which it is relevant, will operate as a substantial obstacle to a woman’s choice to undergo an abortion” (citing *Casey*, 505 U.S. at 895, 112 S.Ct. 2791) (emphasis added)); see also *Women’s Med. Profl Corp. v. Taft*, 353 F.3d 436, 443, 446 (6th Cir.2003) (holding that “a state may regulate abortion before viability as long as it does not impose an ‘undue burden’ on a woman’s right to terminate her pregnancy,” and that “an ‘undue burden’ exists when

'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' " (citing Casey, 505 U.S. at 876-77, 112 S.Ct. 2791)).

[1] Thus, our path is clear: We must follow Casey's large-fraction test in analyzing the facial challenge to the two abortion restrictions before us. Accordingly, we assess whether Ohio's abortion restrictions present a substantial obstacle to obtaining an abortion for a large fraction of the women for whom the restrictions are relevant. Casey, 505 U.S. at 895, 112 S.Ct. 2791.

III. The Single-Petition Rule

A. Constitutionality of the Single-Petition Rule

[2][3] If a state requires parental consent before an unemancipated minor woman receives an abortion, it must provide for a judicial or administrative procedure so that a minor woman who satisfies certain conditions may bypass the consent requirement. See Bellotti v. Baird, 443 U.S. 622, 647-51, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (plurality opinion) ("Bellotti II"). If a minor woman establishes either "that she is mature enough and well enough informed to make the abortion decision independently" or "that the abortion would be in her best interests," the reviewing court or agency must issue the bypass. Lambert v. Wicklund, 520 U.S. 292, 295, 117 S.Ct. 1169, 137 L.Ed.2d 464 (1997) (citation omitted). Otherwise, the attendant bypass procedure is constitutionally invalid. See Bellotti II, 443 U.S. at 643-44, 99 S.Ct. 3035.

*370 [4] Ohio provides for a judicial-bypass procedure that apparently encompasses the procedural requirements set forth in Lambert and Bellotti II. Ohio, however, seeks to limit a minor woman to filing one petition for a bypass per pregnancy. The Supreme Court has never determined whether an abortion restriction preventing a minor woman from filing multiple bypass petitions violates the Constitution. We must, therefore, analyze whether Ohio's restriction to the judicial-bypass procedure constitutes an undue burden under Casey's large-fraction test.

In Casey, the Supreme Court analyzed a spousal-notification law that required a married woman who wished to abort her pregnancy to first notify her husband, unless she fit into a statutorily exempted category. Casey, 505 U.S. at 887-88, 112 S.Ct. 2791. The

Supreme Court held that, in determining whether this restriction was an undue burden, 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." Id. at 894, 112 S.Ct. 2791. Therefore, while the restriction ostensibly affected all married women seeking an abortion, the spousal-notification restriction was only relevant to married women seeking an abortion who did not fit into a statutory exception to the notification requirement and did not desire to inform their husbands about the abortion. Id. at 894-95, 112 S.Ct. 2791. Of the women for whom the restriction was actually relevant, many of whom were at risk for spousal abuse, the restriction would "operate as a substantial obstacle" to a "large-fraction." Id. Casey thus requires courts to determine whether a large fraction of the women "for whom the law is a restriction" will be "deterred from procuring an abortion as surely as if the [government] has outlawed abortion in all cases." Id. at 894, 112 S.Ct. 2791. The spousal-notification law in Casey was facially unconstitutional because it satisfied that test. Id. at 895, 112 S.Ct. 2791.

Applying Casey to the Single-Petition Rule before us, we find that the group of women for whom the restriction actually operates are women who are denied a bypass and who have changed circumstances such that if they were able to reapply for a bypass, it would be granted. The group of women who will be deterred from procuring an abortion because of the restriction are women with changed circumstances who would apply for another bypass if allowed. The record shows that second petitioners exist under Ohio's current bypass scheme, and that practically all second petitioners allege changed circumstances such that, if believed, a reviewing court must issue a bypass. The changed circumstances that affect abortion-seeking minors include increased maturity, increased medical knowledge about abortion, and pregnant minors who discover that their fetus has a medical anomaly such as gastroschisis.^{FNS} The record further shows that most women who are denied a bypass but who experience a change in their circumstances will subsequently seek another bypass procedure. Because Ohio's law preventing more than one petition per procedure acts as a substantial obstacle to a woman's right to an abortion in a large fraction of the cases in which the single petition is relevant, we find that the Single-Petition Rule is an undue burden and, therefore, is facially unconstitutional.

FN5. It is likewise clear from the record that most judicial bypass petitions are filed in the first trimester of a minor's pregnancy and that fetal anomalies are usually not discoverable or diagnosed until the second trimester.

In sum, because the Single-Petition Rule fails under *Casey's* large-fraction *371 test, we hold that it is facially unconstitutional.

B. Severability of the Single-Petition Rule

[5] The Single-Petition Rule is severable from the remainder of Ohio's statute regulating abortion. Therefore, our finding that the Single-Petition Rule does not survive constitutional scrutiny is not fatal to the remainder of the regulations.

[6] In *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 126 S.Ct. 961, 964, 163 L.Ed.2d 812 (2006), the Supreme Court held that a reviewing court need not invalidate an entire statute when the court "may be able to render narrower declaratory and injunctive relief." The "normal rule" is that "partial, rather than facial, invalidation is the required course." *Id.* at 968 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985)). "So long as [the reviewing court is] faithful to legislative intent," the court "can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application." *Id.* at 969.

[7][8] Whether a portion of a state's statute is severable is determined by the law of that state. See *Voinovich*, 130 F.3d at 202. In Ohio, "statutory provisions are presumptively severable." *Id.* Ohio law provides that:

If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

Ohio Rev.Code § 1.50 (2006). A provision may be severed only if "severance will not fundamentally disrupt the statutory scheme of which the unconstitu-

tional provision is a part." *Voinovich*, 130 F.3d at 202 (citing *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 644 N.E.2d 369, 377 (1994)).

Ohio has devised a three-factor test that determines whether severance will cause such a disruption:

- (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

Id. (quoting *Geiger v. Geiger*, 117 Ohio St. 451, 160 N.E. 28, 33 (1927)).

Applying this test, we find that the Single-Petition Rule may be severed. As to the first part of the test, the Single-Petition Rule can be read independently. Nothing in the remainder of the bypass scheme inherently requires a limit on the number of petitions. The Single-Petition Rule is therefore "capable of separation." As to the second part of the test, excising the Single-Petition Rule is not so connected to the general scope of the bypass scheme that other provisions would not have their intended effect if the court removed it. Under the final part of the test, we need only eliminate, not add, words to strike down the Single-Petition Rule. The Single-Petition Rule can simply be deleted. The invalidity of the Single-Petition Rule does not affect the remainder of Ohio's parental consent law and, therefore, is severable.

*372 IV. The In-Person Rule

[9] We now turn to the In-Person Rule. Although *Casey* upheld both an in-person informed-consent requirement and a twenty-four-hour notification requirement, the record in *Casey* as to these two issues was sparse. In the *Casey* Court's words, "there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion." *Casey*, 505 U.S. at 884, 112 S.Ct. 2791. Therefore, the Court concluded that

the in-person informed-consent requirement did not constitute an undue burden. *Id.* at 885, 112 S.Ct. 2791; see also *id.* at 887, 112 S.Ct. 2791 ("Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.").

The sum of the evidence before the *Casey* Court concerning the twenty-four-hour notification requirement was as follows:

The findings of fact ... indicate that because of the distances many women must travel to reach an abortion provider, the practical effect will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. [I]n many instances this will increase the exposure of women seeking abortions to "the harassment and hostility of anti-abortion protestors demonstrating outside a clinic." As a result, ... for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be "particularly burdensome."

Id. at 885-86, 112 S.Ct. 2791. On the basis of these facts, and without reference to abused women, the Supreme Court declined to find an undue burden. The record evidence concerning abused women available to the *Casey* Court centered entirely on the impact on such women of the *spousal-notification requirement*. See *Casey*, 505 U.S. at 888-94, 112 S.Ct. 2791. These admittedly extensive facts did not discuss the impact on abused women of the in-person informed-consent requirement. *Id.*

The Appellants in the case at bar were obviously aware of the *Casey* Court's reliance on the paucity of the record concerning how the in-person informed-consent requirement affected abused women in declining to find an undue burden. In an attempt to establish that there are abused women who effectively cannot obtain in-person informed consent with a physician at least twenty-four hours prior to receiving an abortion, the Appellants amassed an impressive amount of data, akin to the data available in *Casey* on the issue of spousal notification.

The record shows that three Ohio abortion providers,

by their own policies, currently require women to come in for an in-person informed-consent meeting prior to obtaining an abortion. This meeting does not have to be with a physician. Some abortion-seeking women request to be excused from the in-person meeting. Some of these requests are denied by the clinics. Attendance is excused for women who "simply live too far away" or have "income or [other] hardship" reasons. Women excused from the in-person informed-consent meeting constitute 5 to 10 percent of abortion-seeking women. According to Appellants, the in-person meeting is all but impossible for women "in abusive situations," who constitute approximately 25 percent of the women excused by the clinics' in-person requirement. Of this 25 percent, 12.5 percent would be precluded altogether *373 from obtaining an abortion as a result of the In-Person Rule. For abused women, appearing in person twice is difficult and, in some cases, life-threatening. Any woman who is excused from the in-person informed-consent meeting receives videos and literature through the mail sent to her or another address of her choice. All other women are required to come in for an in-person meeting prior to obtaining an abortion.

Therefore, of every 1000 women who seek an abortion, 50 to 100 are excused by the clinic from an in-person informed-consent meeting. According to the facts provided by the clinics, 6 to 12.5 of those 50 to 100 excused women will face a substantial obstacle in obtaining an abortion if forced to comply with the In-Person Rule. Therefore, for approximately 6 to 12.5 women out of every 1000 women seeking an abortion, the state's In-Person Rule would likely deter them "from procuring an abortion as surely as if [Ohio] has outlawed abortion in all cases." *Casey*, 505 U.S. at 894, 112 S.Ct. 2791.

Thus, Appellants have improved on the *Casey* record, at least with respect to the issue of informed consent. Nevertheless, we find that the restriction survives constitutional scrutiny. The parties agree that the group of women who will be deterred from obtaining an abortion because of the restriction are the 12.5 women who, due to domestic abuse, cannot meet the in-person informed-consent requirement without grave risk of retaliation. The parties disagree, however, over the definition of the group for whom the law is a restriction. Appellants argue that the 12.5 women who will not obtain an abortion as a result of the restriction should be compared against all women actu-

ally affected by the in-person requirement, defined as all women who are presently excused by the clinic from the clinic's own in-person informed-consent requirement. Ohio argues, on the other hand, that the group for whom the law is actually relevant is all women seeking an abortion.

Unlike the parties, we find that the group for whom the law is a restriction for purposes of applying *Casey's* large fraction test is "all women who seek an exception to the clinic's in-person informed-consent requirement." The record does not reflect this number.

Yet, even accepting the definition urged by Appellants, we do not find a substantial burden under *Casey*. This Court has previously found that a large fraction exists when a statute renders it nearly impossible for the women actually affected by an abortion restriction to obtain an abortion. *Voinovich*, 130 F.3d at 201. Importantly, in *Voinovich*, a large fraction was found because all women upon whom the restriction actually operated—i.e., women seeking second-trimester pre-viability abortions—would effectively be barred from exercising their constitutional right to obtain an abortion. *Id.* Other circuits that have applied the large fraction test to facial challenges to abortion regulations have, likewise, only found a large fraction when practically all of the affected women would face a substantial obstacle in obtaining an abortion. *See, e.g., Heed*, 390 F.3d at 64; *Farmer*, 220 F.3d at 145; *Miller*, 63 F.3d at 1463; *see also Newman*, 305 F.3d at 699 (Coffey, J. concurring) (in applying the large-fraction test "it is clear [from *Casey*] that a law which incidentally prevents 'some' [of the] women [for whom the abortion restriction will actually be a burden] from obtaining abortions passes constitutional muster"). The *Casey* Court itself was not persuaded to invalidate Pennsylvania's parental-consent requirement by record evidence showing that the requirement would altogether prevent some women from obtaining an abortion. *374 *Casey*, 505 U.S. at 899, 112 S.Ct. 2791; *see also Planned Parenthood v. Casey*, 744 F.Supp. 1323, 1356-57 (E.D.Pa.1990) (finding that in "some" of the forty-six percent of cases where a minor can neither obtain parental consent nor obtain a judicial bypass, the law "may act in such a way as to deprive [the minor] of her right to have an abortion").

To date, no circuit has found an abortion restriction to be unconstitutional under *Casey's* large-fraction test simply because some small percentage of the women

actually affected by the restriction were unable to obtain an abortion. Although a challenged restriction need not operate as a *de facto* ban for all or even most of the women actually affected, the term "large fraction," which, in a way, is more conceptual than mathematical, envisions something more than the 12 out of 100 women identified here.

V. Conclusion

For the foregoing reasons, the judgment of the district court upholding the Single-Petition Rule is **REVERSED**, the judgment upholding the In-Person Rule is **AFFIRMED**, and the case is **REMANDED** for further proceedings consistent with this opinion.

ROGERS, Circuit Judge, concurring.

I concur in Parts I, III-B, and IV of the majority opinion, and entirely in the result. I write separately concerning the single petition rule because, as a categorical limitation on whether an abortion is permitted at all, the rule defies application of the "large fraction" test. The Supreme Court has used the "large fraction" test instead to examine state regulation of how an abortion is to be performed or of what information should be given a woman who is legally allowed to get an abortion. It is not necessary in this case to apply the test to the single petition rule, however, because Supreme Court holdings regarding judicial bypass procedures directly compel invalidation of that rule.

Requiring a minor to get parental consent for an abortion, without the possibility of an administrative or judicial bypass procedure that meets defined standards, unduly burdens the minor's right to an abortion. This is the holding of *Bellotti v. Baird*, 443 U.S. 622, 647-51, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (plurality opinion) ("*Bellotti II*"), reaffirmed by the Supreme Court in many subsequent cases. *See, e.g., Lambert v. Wicklund*, 520 U.S. 292, 295, 117 S.Ct. 1169, 137 L.Ed.2d 464 (1997) (per curiam); *Planned Parenthood v. Casey*, 505 U.S. 833, 895, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 510-13, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990). To survive constitutional challenge, a law requiring parental consent for a minor's abortion must contain a procedure that (1) allows the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently, (2) allows the minor to bypass the consent requirement if she establishes that

the abortion would be in her best interests, (3) ensures the minor's anonymity, and (4) provides for expeditious bypass procedures. See Lambert, 520 U.S. at 295, 117 S.Ct. 1169.

The Supreme Court in Bellotti II stated that a minor possesses an absolute right to a proceeding where she may establish her entitlement to a bypass:

A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this *375 decision independently, the desired abortion would be in her best interests.

Bellotti II, 443 U.S. at 643-44, 99 S.Ct. 3035 (emphasis added). The Bellotti II Court explained that every minor must have the opportunity to establish that she should not have to seek parental consent based on her current level of maturity or her current best interests:

We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity-if she so desires-to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.

Id. at 647-48, 99 S.Ct. 3035.

Under a fair reading of Bellotti II, a minor's right not to seek parental consent depends on the current level of her maturity or interest in abortion. See id. at 647-51, 99 S.Ct. 3035. Bellotti II also provides that this right must be protected by judicial proceedings. See id. But if the right is to be adequately protected, such proceedings must account for material changes in the petitioner's state after a first, unsuccessful bypass

proceeding. Accordingly, under Bellotti II, the single petition rule is facially invalid because, after a failed first petition, the rule does not permit a judge to evaluate the petitioner's current maturity or interest in abortion in light of new developments. When a minor alleges that her current state has materially changed, an older and potentially incorrect determination will in identifiable cases nullify Bellotti II's command that a minor's current state be determinative of her request for a bypass. Ohio must in some manner stand ready to evaluate minors' claims of appropriate changed circumstances. Such minors cannot constitutionally be cut off from all recourse in the manner accomplished by the single petition rule. Therefore, the single petition rule violates the right of second petitioners to some judicial or administrative process that evaluates their claims of changed circumstances.

While the question of successive bypass petitions was not before the Bellotti II Court, the Court's rationale directly compels the result in this case. The Bellotti II Court founded its determination of the law concerning parental consent and judicial bypass upon a careful and nuanced balancing of constitutional interests. On the one hand were the need to preserve the constitutional right to an abortion and the unique nature of the abortion decision. See id. at 639-44, 99 S.Ct. 3035. On the other hand were "the particular vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." Id. at 634, 99 S.Ct. 3035. These considerations preclude the single petition rule just as they led to a judicial bypass requirement in the first place in Bellotti II. Indeed, the Bellotti II Court expressly contemplated that a judicial bypass procedure would be available in later stages of pregnancy. See id. at 651 n. 31, 99 S.Ct. 3035. The state has not distinguished Bellotti II by identifying any way in which the single petition rule furthers*376 the interests of protecting vulnerable minors, making up for their inability to make mature decisions, or furthering the parental role, other than simply by curtailing the availability of judicial bypass for minors with late-arising bases for a judicial bypass.

Instead, the single petition rule is said to avoid the possibility of a minor's "re-filing throughout her pregnancy until she finds a judge who will grant her petition." Appellees' Br. at 47.^{FN1} This court does not need to decide whether a state may require minors to direct their second or successive bypass petitions to

the same judge to avoid judge shopping, or require a higher burden of proof for successive petitions to limit refiling. These issues are not before us because the single petition rule does much more than limit judge shopping and unlimited refiling. Instead, it forbids a judicial bypass where one has been sought unsuccessfully before in the same pregnancy, regardless of a change in circumstances. Such a prohibition is inconsistent with the holding and reasoning of *Bellotti II*, and thus constitutes an undue burden on a minor's right to an abortion. *Casey*, which sets the standard that we are bound to apply in abortion cases, explicitly reaffirmed the *Bellotti II* holding. See 505 U.S. at 895, 899, 112 S.Ct. 2791. Under *Bellotti II* a minor is entitled to seek a judicial bypass in the later stages of pregnancy, and none of the constitutional foundations for this decision warrants an exception so distantly related to the constitutional policies furthered by that decision. The conclusion is inescapable that the single petition rule runs afoul of *Bellotti II*, which continues to bind us.

FN1. The state's brief however concedes that "[t]he evidence established that second bypass petitions under the prior law were extremely rare." Appellees' Br. at 18.

The rationale of *Bellotti II* is of sufficiently direct applicability to the single petition rule at issue in this case that it is not necessary for us to become entangled in the meta-mathematical niceties of whether a "large fraction" of a relevant group is denied the right to an abortion. Indeed, the "large fraction" analysis contested by the parties is of questionable assistance in resolving the issue presented in this case. The question in this case is not the constitutionality of some procedural hurdle imposed as part of the bypass procedure, but rather the constitutionality of a categorical limit on the availability of the bypass procedure to certain minors. No matter what the circumstances, a minor who has previously been denied a judicial bypass may not obtain such a bypass during the remainder of the same pregnancy.

In evaluating the constitutionality of such a provision, the inquiry cannot be simply restated as whether "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." Such a standard may provide analytic clarity when the challenge is to a type of abortion procedure, where the

question is whether the right to an abortion is sufficiently preserved by the availability of other methods. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000). The "large fraction" analysis may also make sense where the question is whether the requirements of the judicial bypass procedure are so onerous as to defeat its purposes and thereby unduly burden the minor's right to an abortion. See, e.g., *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456 (6th Cir.1999). But where the issue is a categorical exception to the availability of a bypass procedure, the "large fraction" analysis becomes so manipulable as to lose its logical usefulness. Too much depends *377 on the arbitrary determination of what the denominator is.

Opponents of the categorical exception will simply argue that the denominator is the persons precluded by the exception, leading to a large fraction of one. Thus plaintiffs in this case argue that the denominator consists of "all women who are denied a bypass and who later discover medical and other information causing them to renew their pursuit of an abortion." Appellants' Reply Br. at 2. As the district court noted in its order denying CWS's motion for a stay pending appeal, "[i]mplicit in Plaintiffs' argument is a contention ... that the only relevant group in considering whether a regulation creates an undue burden is those women who are actually foreclosed from obtaining an abortion." Any plaintiff so defining the denominator could automatically show a fraction of one (i.e., one-hundred percent), and thereby invalidate any categorical exception to the availability of a bypass procedure.

Defenders of the exception, on the other hand, must argue a larger denominator, some class of abortion-seeking women that also includes persons not precluded. Thus defendants in this case argue that the denominator should include all women who are initially denied bypasses, regardless of circumstances that might obviate the need for a later bypass. In the absence of evidence that a large portion of minors initially denied a bypass will need one later, defendants argue that the relevant fraction is small. In contrast, but to a similar result, the district court at one point considered the denominator to be minors whose need for a judicial bypass arises at a later point during pregnancy, regardless of whether a bypass has been sought previously. *Cincinnati Women's Servs., Inc. v. Taft*, 466 F.Supp.2d at ----, 2005 U.S. Dist. LEXIS

799 F.Supp.2d 1048
United States District Court,
D. South Dakota,
Southern Division.

PLANNED PARENTHOOD MINNESOTA,
NORTH DAKOTA, SOUTH DAKOTA, and Carol E.
Ball, M.D., Plaintiffs,

v.

Dennis DAUGAARD, Governor, Marty Jackley,
Attorney General, Doneen Hollingsworth,
Secretary of Health, Department of Health, and
Robert Ferrell, President, Board of Medical and
Osteopathic Examiners, in their official capacities,
Defendants.

No. CIV. 11-4071-KES. | June 30, 2011.

Synopsis

Background: Women's health clinics and physician brought action against state officials, challenging amended South Dakota statute imposing voluntary and informed consent requirements upon patients seeking abortions. Plaintiffs moved for preliminary injunction.

Holdings: The District Court, Karen E. Schreier, J., held that:

[1] plaintiffs showed likelihood of success on claims that statute's pregnancy help center requirements were unconstitutional;

[2] plaintiffs showed likelihood of success on claim that statute's 72-hour waiting period requirement was unconstitutional;

[3] plaintiffs showed likelihood of success on claim that statute's purported "anti-coercion" provision was unconstitutionally vague;

[4] plaintiffs showed likelihood of success on claims that statute's requirements compelling disclosure of purported "risk factors" were unconstitutional;

[5] statutory provisions were separable in part;

[6] plaintiffs established threat of irreparable harm in absence of preliminary injunction;

[7] balance of harms favored granting of injunction; and

[8] public interest factors favored granting of injunction.

Motion granted in part.

West Codenotes

Recognized as Unconstitutional

SDCL § 34-23A-10.1

Validity Called into Doubt

SDCL §§ 34-23A-53, 34-23A-54, 34-23A-55,
34-23A-56, 34-23A-57, 34-23A-59, 34-23A-60,
34-23A-61, 34-23A-62.

Attorneys and Law Firms

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Opinion

MEMORANDUM OPINION AND ORDER

KAREN E. SCHREIER, Chief Judge.

Plaintiffs, Planned Parenthood Minnesota, North Dakota, South Dakota and Dr. Carol Ball, move for a preliminary injunction or temporary restraining order that would enjoin defendants, Governor Dennis Daugaard, Attorney General Marty Jackley, Secretary Doneen Hollingsworth, and Board President Robert Ferrell, in their official capacities, from enforcing South Dakota House Bill 1217 (hereinafter "the Act"), which takes effect on July 1, 2011.

BACKGROUND

In 2005, the South Dakota Legislature amended SDCL 34-23A-10.1 to include various requirements to ensure a pregnant woman's voluntary and informed consent before she underwent an abortion. Some of those amendments were challenged by plaintiffs on the grounds that they violated the First and Fourteenth Amendments of the United States Constitution. *See generally Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir.2008) (en banc). That case is currently before the Eighth Circuit Court of Appeals.

In 2011, the South Dakota Legislature passed the Act at issue in this case. Plaintiffs challenge the constitutionality of the Act on the grounds that it violates the First Amendment's Free Speech Clause and the Fourteenth Amendment's Due Process Clause and Equal Protection Clause.¹ A hearing on plaintiffs' motion for preliminary injunction was held on June 27, 2011.

There are essentially four parts to the Act: (1) The Pregnancy Help Center Requirements; (2) The 72-Hour Requirement; (3) the Risk Factors Requirement; and (4) the Coercion Provisions. Generally, the Pregnancy Help Center Requirements require a pregnant woman to consult with a registered "pregnancy help center" before she is able to undergo an abortion. The 72-Hour Requirement establishes at least a three-day waiting period between the pregnant woman's initial consultation with her physician and the abortion. The Coercion Provisions impose a duty on the physician to certify that the pregnant woman has not been "coerced" as defined in the Act. Finally, the Risk Factors Requirement establishes what information the physician must tell a pregnant woman with regard to the "complications associated with abortion."

Defendants acknowledge that no court has upheld a requirement that is similar to the Risk Factors Requirement. Defendants also acknowledge that no other state currently has requirements that are comparable to the Pregnancy Help Center Requirements, the 72-Hour Requirement, or the Coercion Provisions.

2. Undue Burden Analysis

Plaintiffs argue in the alternative that the Pregnancy Help Center Requirements constitute a substantial obstacle that will deter many women from exercising their constitutional right to obtain an abortion.⁶ Defendants argue that plaintiffs have not demonstrated, and cannot demonstrate, that the Pregnancy Help Center Requirements will interfere with the decision to obtain an

abortion for a "large fraction" of the affected women.⁷

*1059 When a statute is challenged on the ground that it violates a woman's constitutional right to obtain an abortion, the burden placed on the challenger "has been a subject of some question." *Gonzales v. Carhart*, 550 U.S. 124, 167, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) (citations omitted). Nonetheless, the Eighth Circuit Court of Appeals has determined that the standard set out in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), applies. *See Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir.1995) ("We will therefore apply the *Casey* standard to determine if South Dakota's Act to Regulate the Performance of Abortion is constitutional on its face.")⁸

[⁷] [⁸] Thus, the court will apply the following standard as set out in *Casey*: "If the law will operate as a substantial obstacle to a woman's choice to undergo an abortion 'in a large fraction of the cases in which [it] is relevant, ... [i]t is an undue burden, and therefore invalid.' " *Id.* at 1458 (alteration in original) (quoting *Casey*, 505 U.S. at 895, 112 S.Ct. 2791). In determining whether plaintiffs have met this burden, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* (alteration in original) (citation omitted).

[⁹] As the applicable test makes clear, whether the Pregnancy Help Center Requirements constitute an "undue burden" depends on whether, in a large fraction of the cases in which they are relevant, the Pregnancy Help Center Requirements create a "substantial obstacle to a woman's choice to undergo an abortion." *See id.* There are three issues that must be resolved in order to determine whether plaintiffs have met their burden: (1) in what cases are the requirements "relevant;" (2) do the requirements create a "substantial obstacle to the woman's choice to undergo an abortion" in those cases in which the requirements are "relevant;" and (3) is the substantial obstacle present in a "large fraction" of the "relevant" cases.

As to the issue of what cases are "relevant," the Pregnancy Help Center Requirements would not apply if the woman has not chosen to undergo an abortion or is uncertain about whether or not she wishes to obtain an abortion.⁹ That is, the requirements are only relevant in those instances where a woman has chosen to undergo an abortion in South Dakota. Similarly, the Pregnancy Help Center Requirements are only relevant in those instances ***1060** where a woman has not chosen to consult with a pregnancy help center on her own. Thus, the relevant

cases are those that involve a woman who has chosen to undergo an abortion and would otherwise not consult with a pregnancy help center. Cf. *Casey*, 505 U.S. at 894, 112 S.Ct. 2791 (limiting the relevant cases to “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”).

With the relevant cases in mind, the next issue is whether the Pregnancy Help Center Requirements create “a substantial obstacle to a woman’s choice to undergo an abortion.” See *Miller*, 63 F.3d at 1458. The plain language of sections 3, 4, 5, and 6 makes it clear that a woman can obtain an abortion if, and only if, she first consults a pregnancy help center when she otherwise would not. Forcing a woman to divulge to a stranger at a pregnancy help center the fact that she has chosen to undergo an abortion humiliates and degrades her as a human being. The woman will feel degraded by the compulsive nature of the Pregnancy Help Center Requirements, which suggest that she has made the “wrong” decision, has not really “thought” about her decision to undergo an abortion, or is “not intelligent enough” to make the decision with the advice of a physician.

Furthermore, these women are forced into a hostile environment. Aside from its compulsive nature, the hostility of the consultation is evidenced by the fact that section 5 of the Act establishes that the only entities that can be listed on the state registry of pregnancy help centers are those that routinely “consult[ ] with women for the purpose of helping them keep their relationship with their unborn children” and that “one of [their] principal missions is to educate, counsel, and otherwise assist women to help them maintain their relationship with their unborn children.” A pregnancy help center cannot have even “referred any pregnant women for an abortion at any time in the three years immediately preceding July 1, 2011.” Requiring these women to “have a consultation,” and a “private interview” with a “pregnancy help center” destroys “[t]he right to avoid unwelcome speech” that is “protected in confrontational settings.” Cf. *Hill v. Colorado*, 530 U.S. 703, 717, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). And it forces an unnecessary confrontation on one of the most volatile subjects in America. See *Stenberg v. Carhart*, 530 U.S. at 920, 120 S.Ct. 2597 (acknowledging that “[m]illions of Americans believe that ... abortion is akin to causing the death of an innocent child”); *Casey*, 505 U.S. at 852, 112 S.Ct. 2791 (recognizing that “some deem [abortions as] nothing short of an act of violence against innocent human life”).

There are clear ideological differences between a woman who has chosen to undergo an abortion and a “pregnancy help center.” When considering these differences, a woman will likely be unwilling to actually consult with a pregnancy help center because she will fear being ridiculed, labeled a murderer, subjected to anti-abortion ideology, and repeatedly contacted by the pregnancy help center. Moreover, a woman may likely believe, rightly or wrongly, that her decision to have an abortion could become public information. And it will not matter to her that in the future she may be able to obtain legal relief from the pregnancy help center worker who disclosed the information. By then it will be too late. Thus, rather than risk having such information being made public or to avoid “consulting” with someone who is not supportive of her decision to have an abortion, she will be forced to remain pregnant.

*1061 The Pregnancy Help Center Requirements establish that those women who choose to undergo an abortion must consult with the pregnancy help center and divulge personal information against their will in order to effectuate their decision to undergo an abortion. The court finds these requirements do “not merely make abortions a little more difficult or expensive to obtain.” *Casey*, 505 U.S. at 893, 112 S.Ct. 2791. Rather, the requirements constitute a substantial obstacle to a woman’s decision to obtain an abortion because they force the woman against her will to disclose her decision to undergo an abortion to a pregnancy help center employee before she can undergo an abortion. Cf. *Casey*, 505 U.S. at 887, 892, 112 S.Ct. 2791 (finding the spousal notification requirement to be unconstitutional partly because there are “many cases in which married women do not notify their husbands [because] the pregnancy is the result of an extramarital affair” even though the spousal notification requirement allowed the woman to “certify[ ] that her husband is not the man who impregnated her”).

Defendants argue that the Pregnancy Help Center Requirements are not a substantial obstacle because no woman “who wants to keep her pregnancy a secret, will forgo her option to have an abortion because she does not want to reveal her pregnancy to a third party [because] she will already have disclosed her pregnancy to staff members at an abortion clinic.” Docket 32 at 68. This argument is without merit. There is an inherent difference between compelling a woman to disclose her decision to undergo an abortion to a “pregnancy help center” and a woman freely disclosing this decision to someone she chose to provide her with the medical services that she seeks. See *Hill*, 530 U.S. at 717, 120 S.Ct. 2480 (recognizing the significance of “confrontational settings” in the context of free speech issues). The former situation

leads to the fear described above. *See Casey*, 505 U.S. at 893, 894, 112 S.Ct. 2791 (“We must not blind ourselves to ... the significant number of women who fear for their safety[.]”); *Miller*, 63 F.3d at 1463 (acknowledging that “non-abusive parents who differ from their daughters on religious or moral grounds over abortion may be prepared to prevent their daughters from obtaining abortions even when those abortions are in the daughters’ best interests”). The latter situation does not. For the reasons expressed above, the court finds that the Pregnancy Help Center Requirements do create a substantial obstacle in the relevant cases.

The next issue is whether this substantial obstacle is present in a “large fraction” of the “relevant” cases. Defendants argue that a “large fraction” means “at least half of the group in question.” *See* Docket 32 at 32. If the plurality opinion in *Casey* intended “large fraction” to mean a majority, it would have said majority. Indeed, *Casey*’s use of the phrase “large fraction” at most indicates that the number of women affected by the requirements must be more than a “small” fraction of the group in question. Admittedly, this construction of “large fraction” does little in terms of establishing the phrase’s scope. *See Casey*, 505 U.S. at 973 n. 2, 112 S.Ct. 2791 (“The joint opinion concentrates on the situations involving battered women and unreported spousal assault, and assumes, without any support in the record, that these instances constitute a ‘large fraction’ of those cases in which women prefer not to notify their husbands (and do not qualify for an exception).”) (Rehnquist, White, Scalia, Thomas, JJ. dissenting). Nonetheless, some guidance as to the rigidity of the phrase “large fraction” is available.

In *Casey*, the Supreme Court addressed the constitutionality of, among other provisions, a “spousal notification requirement.” *1062 505 U.S. at 887, 112 S.Ct. 2791. The relevant cases in *Casey* with regard to that requirement were “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.” *Id.* at 895, 112 S.Ct. 2791. The Court held that the requirement was unconstitutional under the “large fraction” test after it found that the requirement was “likely to prevent a *significant* number of [those] women from obtaining an abortion.” 505 U.S. at 893, 894, 112 S.Ct. 2791 (emphasis added). This language and reasoning indicates that the term “large fraction” should not be construed as some numerical threshold that must be established.¹⁰

While certainly not establishing the bottom end of what constitutes a “large fraction,” it appears that the Eighth Circuit Court of Appeals’ decision in *Miller* comes the

closest.¹¹ In *Miller*, the Eighth Circuit Court of Appeals addressed the validity of South Dakota’s bypass procedure for minors seeking an abortion without parental consent. 63 F.3d at 1458. In the opinion, two different sets of relevant cases were analyzed. The first set involved those pregnant minors who did not have access to a “bypass procedure” because they did “not fall under [the] abuse exception,” even though they “could show that an abortion is in their best interests.” *See id.* at 1462. The second set involved pregnant minors who had access to a “bypass procedure” because they were abused, but were nonetheless unable “to use the abuse exception” due to the minor “blam[ing] themselves for the abuse” or being “very protective of the abusive parent.” *See id.* at 1463. The Eighth Circuit Court of Appeals found that the challengers had “shown that a large fraction of minors seeking pre-viability abortions would be unduly burdened by South Dakota’s parental-notice statute, despite its abuse exception.” *Id.*

With regard to the first set of relevant cases, which involved the “best interest” minors, the court rejected the argument that “the minor could simply notify her other parent” because “many of them, as a practical matter, have only one parent to notify.” *Id.* at 1462 n. 10. According to the Eighth Circuit Court of Appeals, approximately 18 percent warranted use of the descriptive term “many.” *See id.* (“Roughly eighteen [percent] of South Dakota’s minors live in single-parent homes; many of them, as a practical matter, have only one parent to notify.”). The Eighth Circuit Court of Appeals struck down this portion of the statute because the challengers had “shown that a large fraction of [these] minors seeking pre-viability abortions would be unduly burdened by South Dakota’s parental-notice statute, despite its abuse exception.” *Id.* at 1463.

With regard to the second set of relevant cases, which involved minors that were abused, the Eighth Circuit Court of Appeals recognized that “[a] minor faced with the untenable choice of turning in her *1063 parent or forgoing an abortion will often delay her decision until it is too late; she may even commit suicide rather than choose between two such agonizing choices.” *Id.* (emphasizing that “[e]ven if South Dakota’s exception were otherwise acceptable, its failure to provide an alternative procedure for these minors would doom it”). The number of the abused minors who would choose not to utilize the “bypass procedure” was not explicitly identified. Nonetheless, it stands to reason that many of those minors would be hesitant to report their parents.

Here, in nearly every instance where the Pregnancy Help Center Requirements are relevant, a woman who chooses

to undergo an abortion will experience a high degree of degradation because she will be forced to disclose her decision to someone who is fundamentally opposed to it. Women will also be afraid of being berated, belittled, or confronted about their decision, being subsequently contacted by the pregnancy help center, and having their decision to have an abortion become public information. As a result, women will delay or refrain from consulting with the pregnancy help centers, which will prevent them from being able to carry out their decision to undergo an abortion. *See Casey*, 505 U.S. at 893–95, 112 S.Ct. 2791; *Miller*, 63 F.3d at 1462–63. Thus, the Pregnancy Help Center Requirements constitute a substantial obstacle for a large fraction of the relevant cases.

Plaintiffs have therefore demonstrated that they are likely to succeed with regard to their claim that the Pregnancy Help Center Requirements violate the Fourteenth Amendment's Due Process Clause because they create an undue burden on the woman's choice to obtain a legal abortion. *See Casey*, 505 U.S. at 877, 112 S.Ct. 2791 ("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.").

To summarize, plaintiffs have demonstrated that they are likely to succeed on their challenges to the Pregnancy Help Center Requirements because the Requirements compel patients to speak in violation of the First Amendment's Free Speech Clause and because they constitute an undue burden on a woman's choice to undergo an abortion in violation of the Fourteenth Amendment's Due Process Clause.

B. The 72-Hour Requirement—Undue Burden Analysis

The beginning portion of section 3 of the Act establishes that before obtaining an abortion, a patient must wait at least 72 hours between her initial consultation and an abortion. Specifically, section 3 reads in relevant part as follows:

No surgical or medical abortion may be scheduled except by a licensed physician and only after the physician physically and personally meets with the pregnant mother, consults with her, and performs an assessment of her medical and personal circumstances. Only after the physician completes the

consultation and assessment complying with the provisions of this Act, may the physician schedule a surgical or medical abortion, but in no instance may the physician schedule such surgical or medical abortion to take place in less than seventy-two hours from the completion of such consultation and assessment except in a medical emergency[.]

Section 3 also limits when and how a patient can consent to the medical procedure. This portion of section 3 states:

No physician may take a signed consent from the pregnant mother unless the pregnant mother is in the physical presence *1064 of the physician and except on the day the abortion is scheduled, and only after complying with the provisions of this Act as it pertains to the initial consultation, and only after complying with the provisions of subdivisions 34–23A–10. 1(1) and (2).¹²

Finally, section 4 establishes that "no physician may ... perform an abortion [ ] unless the physician has fully complied with the provisions of this Act[.]"

Plaintiffs challenge these portions of section 3 and 4, hereafter identified as the 72-Hour Requirement, on two grounds: (1) they create an undue burden on women's rights to obtain an abortion; and (2) they violate the patients' and plaintiffs' rights to equal protection of the laws. Because plaintiffs do not brief their equal protection claim, the court will only conduct an undue burden analysis.

^[10] Similar to the other provisions in the Act, whether the 72-Hour Requirement constitutes an "undue burden" depends on whether, in a large fraction of the cases where it is relevant, the 72-Hour Requirement creates a "substantial obstacle to a woman's choice to undergo an abortion." *See Miller*, 63 F.3d at 1458. There are three issues that must be resolved in order to determine whether plaintiffs have met their burden: (1) in what cases is the 72-Hour Requirement "relevant;" (2) does the requirement create a "substantial obstacle to the woman's choice to undergo an abortion" in those cases where the 72-Hour Requirement is "relevant;" and (3) is the substantial obstacle present in a "large fraction" of the "relevant" cases.

On its face, the 72-Hour Requirement applies to every woman who chooses to undergo an abortion. According to defendants, the requirement is therefore relevant to every woman who chooses to undergo an abortion. Because the 72-Hour Requirement imposes a substantial obstacle on almost every woman who chooses to undergo an abortion, the court assumes, without deciding, that defendants' broad construction of the relevant cases is proper. *But see Casey*, 505 U.S. at 894, 112 S.Ct. 2791 ("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.").

With regard to whether the 72-Hour Requirement constitutes a substantial obstacle, plaintiffs argue with supporting evidence that women could be forced to wait up to one month between their initial consultation and the abortion procedure if the same physician is required to conduct both the initial consultation and the abortion. *See* Docket 10-6 at 6 ("[D]ue to the physicians' schedules, a woman could be delayed up to a month in order to have two appointments with the same physician."). This is because there is only one clinic in South Dakota, which provides abortions one day a week on average. Docket 10-6 at 4. And the three to four physicians who perform the abortions take turns flying into Sioux Falls about once a month. Docket 10-6 at 4. Defendants argue that such a delay will not occur because there is no requirement that the initial consultation be performed by the same physician who performs the abortion.

Section 4 of the Act states that "no physician may ... perform an abortion, unless the physician has fully complied with the provisions of this Act and first obtains from the pregnant mother, a written, signed statement setting forth all information required by subsection (3)(b) of *1065 section 3 of this Act." Defendants' argument that "the physician" actually means "a physician" is without merit because when a statute is "not ambiguous," "[i]t is to be assumed that [the statute] means what it says and that the legislature has said what it meant." *Kreager v. Blomstrom Oil Co.*, 298 N.W.2d 519, 521 (S.D.1980) (citation omitted). Such an alteration is therefore beyond the court's authority.

Even if the physician who performed the abortion was not required to have conducted the initial consultation, the 72-Hour Requirement still creates a substantial obstacle considering the circumstances that surround many of the women who choose to undergo an abortion in South Dakota. For example, 56 percent of women who chose to undergo an abortion "during the year beginning March 1, 2010," had "incomes that [were] 100% or less than the

federal poverty level." Docket 10-6 at 4. And 87 percent of the women who chose to undergo an abortion during that same time period lived "at or below 200 percent of the [Federal Poverty Level]." Docket 10-6 at 4. Furthermore, approximately 30 percent of the women who chose to undergo an abortion during this time period traveled more than 150 miles to the abortion clinic, for a total of 300 miles. Docket 10-6 at 3.

Because the 72-Hour Requirement effectively requires two trips, almost every woman will be forced to cope with the financial burdens created by the additional trip. These burdens are great when considering the fact that approximately 87 percent of the women are at or below 200 percent of the Federal Poverty Level. For many of these women, it stands to reason that they will be unable to afford the second trip and will abstain from obtaining an abortion even though they have chosen to undergo one. And women who live farther away are even more likely to be unable to afford a second trip. The inability to pay for the additional trip also becomes worse for the women who are stay-at-home mothers because they will be required to make additional arrangements for childcare. Docket 10-6 at 4. And if a pregnant woman has a job, she will be required to take twice as much time off from work. Docket 10-6 at 4. The court finds that these financial circumstances constitute a substantial obstacle for a large fraction of the relevant cases.

The effective doubling of the financial burden created by the 72-Hour Requirement is arguably insignificant when compared to the other obstacles created by the 72-hour delay. For example, even if the delay between the initial consultation and the abortion is only one week, pregnant women who choose to undergo an abortion can be denied the ability to undergo a medication abortion, which may be their chosen method of abortion, because of the delay. Docket 10-6 at 2-3. A medication abortion is only available until 9 weeks after the first day of the woman's last menstrual period, after which time a surgical abortion is required. Docket 10-6 at 2. For those women who refuse to undergo a surgical abortion in such situations, the 72-Hour Requirement effectively denies them of their right to an abortion. As to those women who choose a surgical abortion near the end of the first trimester, the delay created by the 72-Hour Requirement will prevent them from being able to obtain any abortion in South Dakota because these abortions are only available through the first 13.6 weeks after the first day of the woman's last menstrual period. Docket 10-6 at 2-3. It stands to reason that the number of women who are effectively denied their right to undergo an abortion increases as the required period of delay increases.

*1066 Moreover, it is generally accepted that women are often the victims of abuse. And abusers often forcibly impregnate their partners to maintain control or increase their control over their women. Docket 10-7 at 7-8. The abusers in such relationships closely monitor the women. Docket 10-7 at 9. For example, the abuser will often keep track of the mileage on the car or remove the distributor cap on the car to prevent the woman from leaving the house. Docket 10-7 at 9. Abusers will call the woman numerous times at work or home to ensure that she is there. Docket 10-7 at 9. An abuser will also regularly appear at the woman's place of work unexpectedly "to check up on her." Docket 10-7 at 9. For those women who are in such relationships, the 72-Hour Requirement creates an incredible obstacle because it requires them to make separate trips, which for many is effectively impossible to do because two trips double the chances of being "caught" and punished by the abusive partner. Docket 10-7 at 9-10.

In summary, all women who choose to undergo an abortion will be forced to wait between 7 to 30 days before actually being able to obtain an abortion. That

constitutes a substantial obstacle for those women who have chosen to undergo an abortion near the end of the first trimester because there are no second trimester abortions available in South Dakota. Moreover, because every woman will be forced to make two trips, many women will not undergo an abortion because they will be unable to financially afford a second trip. Furthermore, the 72-Hour Requirement creates a substantial obstacle for those women who are unable to make a second trip because it places them in greater risk of being caught by their abuser.

When considering the numerous substantial obstacles created by the 72-Hour Requirement, there can only be one conclusion: it creates a substantial obstacle for a large fraction of the women who choose to undergo an abortion in South Dakota. Plaintiffs have therefore demonstrated that they are likely to succeed on their claim that the 72-Hour Requirement constitutes an undue burden on a woman's ability to obtain an abortion.

Footnotes

- ¹ In their brief in support of the motion for preliminary injunction, plaintiffs do not argue that certain provisions violate the Equal Protection Clause.
- ² The "likely to prevail on the merits" standard is a "more rigorous standard for demonstrating a likelihood of success on the merits" than the "fair chance" standard that would otherwise apply. *Id.* at 733.
- ³ Because the court finds that plaintiffs are likely to succeed on the merits of the narrower issue of the constitutionality of specific provisions of the Act, it will not address at this time the broader issue of the Act's constitutionality as a whole.
- ⁴ At this stage of the proceedings, the court only addresses the undue burden and the patient free speech claim for purposes of determining whether plaintiffs are likely to succeed on the merits.
- ⁵ Under section 5 of the Act, a pregnancy help center must certify that "one of its principal missions is to educate, counsel, and otherwise assist women to help them maintain their relationship with their unborn children," and it cannot have "referred any pregnant women for an abortion at any time in the three years immediately preceding July 1, 2011."
- ⁶ Specifically, plaintiffs argue that the Pregnancy Help Center Requirements create an undue burden for four reasons: (1) the Act does not adequately protect the patient's confidentiality; (2) the pregnancy help centers are not required to act in an expeditious manner; (3) the pregnancy help centers are allowed to give untruthful and misleading information; and (4) the Pregnancy Help Center Requirements unduly deter physicians from offering abortion services.
- ⁷ Defendants also argue that the Act has a legitimate purpose. Defendants acknowledge, though, that even if a statute seeks to further a legitimate governmental purpose, it may still constitute an undue burden. Docket 32 at 26. *See also Casey*, 505 U.S. at 877, 112 S.Ct. 2791 ("And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."). The court assumes, without deciding, that the Pregnancy Help Center Requirements have a legitimate purpose.
- ⁸ As recently noted by the Eighth Circuit Court of Appeals, "the standards enunciated by the *Casey* plurality opinion [are] controlling precedent in abortion cases." *Rounds*, 530 F.3d at 733 n. 8 (citations omitted).
- ⁹ The plain language of the Pregnancy Help Center Requirements establishes that a pregnant woman must consult with a pregnancy help center only if she chooses to undergo an abortion. There is nothing in the Act that requires a pregnant woman who does not want an abortion to consult with a pregnancy help center. There is also nothing in the Act that requires a pregnant woman who is

only considering whether or not to undergo an abortion to consult with a pregnancy help center. The Pregnancy Help Center Requirements are targeted only at those pregnant women who have chosen to undergo an abortion.

- 10 The other case in which the Supreme Court has found a statute to be unconstitutional is *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000). That case is of little help with regard to this issue because the defendant did “not deny that the statute impose[d] an ‘undue burden’ if it applies to the more commonly used ... procedure [.]” *Id.* at 938, 120 S.Ct. 2597. Thus, the central issue was essentially a statutory interpretation issue.
- 11 In *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir.1999), the Eighth Circuit Court of Appeals held that the statute “impose[d] an undue burden on a woman’s right to choose to have an abortion” because it “prohibit[ed] the most common procedure for second-trimester abortions [.]” *Id.* at 1151. Thus, this decision does little in terms of establishing what is meant by a “large fraction.”
- 12 Portions of SDCL 34–23A–10.1(1) were found by the district court to be unconstitutional in *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 650 F.Supp.2d 972 (D.S.D.2009). That case is currently before the Eighth Circuit Court of Appeals.
- 13 Plaintiffs did not discuss in their brief how the Coercion Provisions violate the Fourteenth Amendment’s Equal Protection Clause. The court therefore expresses no opinion as to whether plaintiffs are likely to succeed on the merits with regard to that claim. The court does not reach the undue burden claim because the Coercion Provisions are unconstitutionally vague.
- 14 It is questionable whether the argument made by defendants even constitutes an official opinion by the Attorney General.
- 15 The phrase “complications associated with abortion” does not appear anywhere else in the Act. The court presumes that the legislature meant to define the term “complications associated with *legal* abortion” because this phrase is used in defining what is meant by “risk factor associated with abortion.” See Section 7(2) (emphasis added).
- 16 The court expresses no opinion as to whether plaintiffs are likely to succeed on the merits with regard to their claim that the Risk Factors Requirement violates patients’ and physicians’ rights to equal protection of the laws or that the Risk Factors Requirement is unconstitutionally vague.
- 17 The burden explicitly imposed on the challenger by the Eighth Circuit in *Rounds* appears to be inconsistent with the burden implicitly imposed on the government in *Casey*. This court must follow the most recent decision of the Eighth Circuit Court of Appeals.
- 18 Future plaintiffs may “obtain a civil penalty in the amount of ten thousand dollars, plus reasonable attorney’s fees and costs, jointly and severally from the physician who performed the abortion and the abortion facility[.]” This amount is “in addition to any damages that the woman or her survivors may be entitled to receive under any common law or statutory provisions, ... [and] in addition to the amounts that the woman or other survivors of the deceased unborn child may be entitled to receive under any common law or statutory provisions[.]” See Section 8 of the Act.
- 19 By itself, section 5 does not regulate abortions, women seeking abortions, or physicians who perform abortions.
- 20 Subsection 7 of section 5 references “section 11 of this Act as it relates to discussion of religious beliefs,” but section 11 does not deal with religion.

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

MKB Management Corp, d/b/a Red
River Women's Clinic, Kathryn L.
Eggleston, M.D.,

Plaintiffs,

vs.

File No. 09-2011-CV-02205

Birch Burdick, in his official capacity
as State Attorney for Cass County,
Terry Dwelle, M.D., in his official
capacity as the chief administrator of
the North Dakota Department of
Health,

Defendants.

MEMORANDUM OPINION AND ORDER

February 16, 2012

Introduction

This action challenges the validity of most of the amendments to the North Dakota Abortion Control Act pertaining to medical or medication abortions (amendments). They were passed by the 2011 Legislative Assembly, as part of House Bill 1297.

The following portions of section 6 are at issue:

(2) It is unlawful to knowingly give, sell, dispense, administer, otherwise provide, or prescribe any abortion-inducing drug to a pregnant woman for the purpose of inducing an abortion in that pregnant woman, or enabling another person to induce an abortion in a pregnant woman, unless the person who gives, sells, dispenses, administers, or otherwise provides or prescribes the abortion-inducing drug is a physician, and the provision or prescription of the abortion-inducing drug satisfies the protocol tested and authorized by the federal food and drug administration and as outlined in the label for the abortion-inducing drug.

(4) Any physician who gives, sells, dispenses, administers, prescribes, or otherwise provides an abortion-inducing drug shall enter a signed contract with another physician who agrees to handle emergencies associated with the use or ingestion of the abortion-inducing drug. The physician shall produce the signed contract on demand by the patient, the department of health, or a criminal justice agency. Every pregnant woman to whom a physician gives, sells, dispenses, administers, prescribes, or otherwise provides any abortion-inducing drug must be provided the name and telephone number of the physician who will be handling emergencies and the hospital at which any emergencies will be handled. The physician who contracts to handle emergencies must have active admitting privileges and gynecological and surgical privileges at the hospital designated to handle any emergencies associated with the use or ingestion of the abortion-inducing drug.

(5) When an abortion-inducing drug or chemical is used for the purpose of inducing an abortion, the drug or chemical must be administered by or in the same room and in the physical presence of the physician who prescribed, dispensed, or otherwise provided the drug or chemical to the patient.

H.B. 1297, § 6, 62nd Legis. Assemb. (N.D. 2011), codified at N.D. Cent. Code § 14-02.1-03.5.

Several relevant definitions are also included in this challenge. They are set forth in section 1, and provide as follows:

"Abortion-inducing drug" means a medicine, drug, or any other substance prescribed or dispensed with the intent of causing an abortion.

"Drug label" means the pamphlet accompanying an abortion-inducing drug which outlines the protocol tested and authorized by the federal food and drug administration and agreed upon by the drug company applying for the federal food and drug administration authorization of that drug. Also known as "final printing labeling instructions", [sic] drug label is the federal food and drug administration document that delineates how a drug is to be used according to the federal food and drug administration approval.

Id. § 1, codified at N.D. Cent. Code § 14-02.1-02.

The amendments were scheduled to take effect on August 1, 2011. On July 21, 2011, an order was entered restraining defendants from enforcing any of the challenged provisions until plaintiffs' motion for a temporary injunction could be heard and decided. At the request of all parties, the schedule was subsequently extended on multiple occasions. In the interim, cross motions for summary judgment were also submitted and briefed. Most recently, plaintiffs filed a motion in limine.

A hearing on all pending motions was held on January 27, 2012. Suzanne Novak argued on behalf of plaintiffs, and Kirsten Franzen on behalf of defendant Terry Dwelle, M.D. ("DOH" or "state"). Both sides were resolute, unwilling to make any significant concessions. On one point, however, there was agreement. All of the challenges put forth by plaintiffs are constitutional in dimension. Accordingly, there is no room for the maxim that courts should avoid decisions on constitutional grounds when an alternative means of resolving the dispute is available. State v. Friedt, 2007 ND 108, ¶ 7, 735 N.W.2d 848.

By way of preview, this opinion concludes further proceedings are necessary, but plaintiffs are likely to ultimately prevail with their primary constitutional challenge, regardless of whether the result is based on state or federal law. Accordingly,

enforcement of the amendments will continue to be enjoined during the pendency of these proceedings. Consideration of the alternative constitutional challenges will be deferred until the record is complete.

5. Undue Burden – Casey

Turning to the most forgiving approach, it seems that application of the Casey undue burden standard likely leads to the same result.⁶¹ It simply requires more explanation.

a. Procedural Bans

As a starting proposition, it is important to remember the laws under review in Casey all implicated a state's interest in ensuring the decision is properly informed. Without question, since that decision federal courts have typically upheld similar laws in a relatively cursory manner. See, e.g., Fargo Women's Health Org. v. Sinner, 819 F.Supp. 865 (D. N.D. 1993). The amendments, however, were not designed to express the state's interest in potential life, to inform women, or to persuade them to chose childbirth. Instead, their clear purpose is "to cull the list of available abortion techniques" by placing severe restrictions on a method that was previously legal and readily available. Rhode Island Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 313 (D. R.I. 1999), *aff'd* 939 F.3d 104 (1st Cir. 2001). The constitutional implications of procedural bans or restrictions are very different from those applicable to informational requirements of the type upheld in Sinner and Schafer.

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⁶¹ During the hearing, counsel for DOH confirmed that it regards the Casey plurality opinion as the controlling law. *Trans.*, pp. 26-27. Counsel also conceded that federal law sets the "floor" for any analysis, and state constitutional rights must be at least co-extensive. *Id.* at 44-45.

The only procedural ban that has sustained a constitutional challenge to date is the ban on the intact dilation and extraction (D&X) procedure upheld in Carhart II, 550 U.S. 124 (2007). During oral argument, counsel agreed with this conclusion. Trans., p. 41. Furthermore, in Carhart II the Court was careful to distinguish the common first-trimester abortion methods, including the use of medication to terminate the pregnancy. Id. at 134.⁶²

Conversely, laws which have the intentional or unintentional effect of prohibiting any safe and effective method of abortion used on a pre-viability basis have uniformly been held to impose an undue burden under Casey. See, e.g., Whitehouse, 66 F. Supp. 2d at 313-14 (invalidating law that would eliminate common and safe second trimester procedure from list of legal procedures); Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604, 612 (E.D. La. 1999), aff'd 221 F.3d 811 (5th Cir. 2000) (a law that has the effect of banning any common, readily-available, and safe method is invalid on its face); Little Rock Fam. Planning Serv., P.A. v. Jegley, 192 F.3d 794 (8th Cir. 1999) (striking law that inadvertently extended ban to D&E and suction curettage procedures commonly used during second trimester); Planned Parenthood of So. Ariz, Inc. v. Woods, 982 F. Supp. 1369, 1376-78 (D. Ariz. 1997) (ban on safe and commonly-used second-trimester procedures is facially unconstitutional). Furthermore, each of these decisions involved a broad, facial challenge brought on a pre-enforcement basis.

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⁶² The contrast between a medical abortion and an "intact D&X" could not be more stark. The latter procedure is performed late in a pregnancy, when the fetus is well developed and its bones and ligature have begun to harden. It is the infamous "partial-birth abortion." The surgeon dilates the cervix and then uses instruments to grab the fetus and extract it intact. In order to allow the head to pass through the cervix, the physician typically crushes the skull with instruments before completing the extraction. Carhart II, 550 U.S. at 137-38.

Planned Parenthood of Central New Jersey v. Farmer, 220 F.3d 127 (3d Cir. 2000) is typical of these holdings. In 1997, the New Jersey Legislature passed a law that was only intended to ban the intact D&X procedure. Due to inarticulate language, however, the legislation was impossible to construe in such a limited manner. Instead, it had the effect of also banning some of “the safest, most common and readily available conventional pre- and post-viability abortion procedures.” Id. at 144. For this reason, the law was found to be clearly unconstitutional, as it placed an undue burden on a woman’s right to chose her preferred method of abortion. Id.

Similarly, in Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999), the court discussed what were then “the principal methods of performing abortions in the United States.” Id. at 861. The methods described included the use of medication to induce expulsion⁶³ and vacuum aspiration. Without feeling any need for elaboration, the court simply noted that prohibition of any one of these procedures “would conflict with the right of abortion” recognized by Casey. Id.

It is beyond dispute that a medical abortion is now a common and available method of terminating a pregnancy, particularly during its early stages. In general, the risks associated with any abortion tend to increase in proportion to the duration of the pregnancy. Likewise, efficacy tends to diminish over time. Due to the need for an abundance of judicial caution, it will be assumed the state has created issues of fact regarding the relative safety and efficacy of medical abortions. Nonetheless, it seems

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⁶³ This decision was written before the FDA approved the widespread distribution of mifepristone. Before this drug was generally available, methotrexate was frequently used in its place. Ryan, 195 F.3d at 861. Methotrexate was initially developed for use in chemotherapy (cancer treatment), and is not labeled for use in abortions.

highly improbable that such concerns could be comparable to those associated with the second trimester procedures courts universally regard as a matter of right. Therefore, it is very likely the *de facto* ban effectuated by the amendments would, by itself, result in a finding of facial unconstitutionality under Casey.

b. Lack of Health Exception

The lack of appropriate exceptions also appears to clearly be a fatal infirmity. Roe held that even when a state was otherwise free to regulate or prohibit abortion, any law must contain an exception when necessary to protect the life or health of the woman. Roe, 410 U.S. at 163-64. Casey reaffirmed that post viability a statute may restrict or prohibit abortion, except when the woman's life or health was endangered. Casey, 505 U.S. at 846. In Carhart I, this was clarified with the comment that "[s]ince the law requires a health exception in order to validate even a post viability abortion regulation, it at a minimum requires the same in respect to previability regulations." Carhart I, 530 U.S. at 930.

This may stop short of a *per se* constitutional requirement, "[b]ut where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health Casey requires the statute to include a health exception when the procedure is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Taft, 444 F.3d at 511. Furthermore, a health exception is necessary even if the circumstances that trigger it "rarely occur." Id.

In general, the procedures utilized at Red River to perform surgical abortions are regarded by the medical community as both highly effective and low in risk. However, complicating factors can significantly increase both the degree of difficulty and associated hazards, at the same time that they reduce the chances of a successful result. Eggelston aff. ¶ 20.

Many physical conditions make it more difficult for physicians to locate or remove the embryonic tissue when attempting a surgical abortion. Such conditions include:

- Uterine anomalies including a bicornuate uterus (a uterus with two cavities) or a uterine didelphys (two complete uterine structures).
- Obesity or other conditions that increase the patient's body size.
- Female genital cutting, a cultural practice in some African, Asian, and Middle Eastern countries.
- Both severe antiflexion (when the uterus is tipped towards the abdomen) and severe retroversion (when the uterus is tipped towards the back of the abdomen).
- Obstructive uterine fibroids.
- Cervical stenosis (tightly closed uterus).
- Any other physical condition that makes the opening to the cervix unusually small, narrow, or scarred.

Id. ¶ 21; Grossman aff. ¶ 10 .

Patients with some medical conditions are not appropriate candidates for a surgical abortion. Common examples include individuals with a severe seizure disorder

or an allergy to lidocaine. Eggeston aff. ¶ 21.

In cases where a surgical abortion is contraindicated, the medical approach is usually the procedure of choice from a standpoint of minimizing risk to the patient's health. Grossman aff. ¶ 10. DOH has failed to controvert this. In her affidavit, Dr. Harrison essentially argues that the same contraindications to a surgical abortion also impair the prospects for a successful medical abortion. In turn, this increases the odds that a surgical procedure will still be required on a follow-up basis. Harrison aff. ¶ 19.

The same argument was advanced in Taft and found to be "unavailing." Taft, 444 F.3d at 512. Although complications may reduce the odds to some extent, medical abortions will still be successful in the vast majority of cases. The risky surgical follow-up would only be required in those rare cases where the medical approach failed. There is no justification for forcing all patients to undergo the surgical procedure that carries significantly increased risks, just because a few of them will ultimately be forced to assume those risks anyway. Id.

By the time Taft found its way back to the trial court, Carhart II had been decided. Accordingly, defendants then argued the lack of a health exception was no longer a proper basis for a facial challenge. Based on what appears to be an almost identical factual record,⁶⁴ the district court disagreed. Planned Parenthood S.W. Ohio Region v. DeWine, no. 1:04-CV-493, order at 22-27 (May 23, 2011). Carhart II was distinguished because in that case there was medical uncertainty as to whether an

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⁶⁴ This refers only to the record regarding physical contraindications for a surgical abortion. The health implications for rape and abuse victims do not appear to have been addressed in the Ohio litigation.

exception was ever necessary to preserve a woman's health. By contrast, in the Ohio case, as in this case, defendants have conceded "that surgical abortions pose greater risks for women with medical complications." Id. at 25.

c. Victims of Abuse

In addition to the cases where physical complications make medical abortion the safest option, there are two broad categories where the detrimental effect of the ban imposed by the amendments is uncontroverted, real, and extreme – victims of sexual abuse and women living in abusive relationships.

Although the existing record provides little detail, it is assumed the surgical procedure performed at Red River is a variation of vacuum aspiration. This requires the insertion of a plastic or metal cannula into the woman's uterus, so the embryonic tissue can be evacuated utilizing a vacuum process. Dilation of the cervix, using mechanical or osmotic dilators, is usually required before insertion of the cannula. Eggelston aff. ¶ 20. Therefore, an early surgical abortion requires multiple physical invasions of the patient's genital area, performed while the patient is awake. It also places the provider in temporary control of that area. Needle aff. ¶ 6.

Most women who are victims of sexual assault suffer both short- and long-term emotional trauma. Common examples include fear and anxiety, flashbacks, depression, loss of sexual libido, and loss of a sense of autonomy or self-worth. Simply stated, if the pregnancy is the result of a criminal violation, terminating that pregnancy with a surgical abortion requires that the victim endure a second form of physical violation. Id. ¶ 5. For some victims – even when they fully intend and desire to end the

pregnancy – this can be unacceptable in psychological or emotional terms. If forced to proceed with the surgical procedure, the emotional re-traumatization can be extreme.

Id. ¶ 6.

A medical abortion does not involve using dilators to stretch the cervix, or inserting a vacuum device into the uterus. Accordingly, the aversion that rape and abuse victims typically feel for the surgical approach does not usually extend to a medical abortion. Id.

Surgical abortions can also create unthinkable predicaments for women living with domestic violence. Victims of this form of abuse must often adjust their own life to the demands of their abuser. The risk of violence tends to increase when the woman does not comply. In particular, abusers often seek to control their partner's sexuality. An abuser may seek to prevent his female partner from having an abortion, or inflict violence on her if she proceeds without his knowledge or consent. Id. ¶ 10.

Having a child when in an abusive relationship often carries with it a fear that the child will also be abused. There is also the inevitable concern the abuser will thereby become a permanent and inextricable part of the mother and child's lives. Many women in this situation justifiably fear their partner will learn they are pregnant, or are terminating the pregnancy. Id. ¶ 8.

For victims of domestic violence, submitting themselves to the control of their abusive partners usually requires that they account for their time, whereabouts, expenditures, and travel. Travel to an abortion clinic, particularly at some distant location, will necessarily be difficult to hide or explain. The consequences of discovery

could well be dire. Potential outcomes include renewed physical violence, or worse. Even if there is no discovery, or there are no resulting consequences, the stress and anxiety experienced by any woman in this situation is certain to be severe. *Id.* ¶¶ 8, 11. Therefore, any circumstance that requires additional trips to the clinic has very serious implications for women faced with this conundrum. *Kromenaker aff.* ¶ 21.

Similar realities were recognized by the district judge in South Dakota when she enjoined the 2011 amendments to the South Dakota abortion laws. In the words of that decision:

Moreover, it is generally accepted that women are often the victims of abuse. And abusers often forcibly impregnate their partners to maintain control or increase their control over their women. The abusers in such relationships closely monitor the women. For example, the abuser will often keep track of the mileage on the car or remove the distributor cap on the car to prevent the woman from leaving the house. Abusers will call the woman numerous times at work or home to ensure that she is there. An abuser will also regularly appear at the woman's place of work unexpectedly 'to check up on her.' For those women who are in such relationships the [challenged law] creates an incredible obstacle because it requires them to make separate trips, which for many is effectively impossible to do because two trips double the chances of being 'caught' and punished by the abusive partner.

Daugaard, 799 F. Supp. 2d at 1066.

Obtaining a medical abortion may also require fewer matters to be explained to an abusive partner. In particular, a medical abortion can be disguised, if necessary, as a spontaneous abortion. The bleeding and other attributes of medical abortion resemble those of a miscarriage. By comparison, a surgical abortion may be difficult or impossible to either disguise or explain. *Needle aff.* ¶ 11.

Dr. Harrison does opine in her affidavit that women who have abusive partners are “most in need of a competent caregiver to assess her for pain control and hemorrhage” following the administration of misoprostol. Harrison aff. ¶ 22. It seems to be common sense, however, that any woman can self-assess her level of pain and hemorrhage, without the need for assistance from a spouse or partner. Moreover, Dr. Harrison misses the essential concern. Because it requires the woman to make a second trip to the same destination within days, the requirement for clinical administration of misoprostol greatly increases the odds of discovery by her abuser. In any case where a woman has good reason to fear that discovery, the burden imposed by the amendments is unjustifiable and undue. Casey, 505 U.S. at 895.

Therefore, for victims of rape or sexual abuse, and for women living in an abusive relationship, a medical abortion may well be the only viable option. DOH does not even mention pregnancies resulting from sex crimes in any of its responses. Through its expert’s affidavit, it concedes that women living with abuse “deserve help and sympathy,” but it fails to address their true plight. Harrison aff. ¶ 22. It is unacceptable to simply ignore these victims. For them, the ban on medical abortions is not simply an undue burden. It is unconscionable.

Because the need for appropriate exceptions has not been addressed or controverted by the state, to this extent the outcome is preordained. It would be appropriate to grant partial summary judgment on these issues, but that would not end the dispute. In Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006), the Court held laws that are constitutionally infirm due only to the lack of a

health exception are otherwise still enforceable. See also, Taft, 444 F.3d at 515-17. Because the broader challenges will still need to be tried, there is no advantage to a partial judgment at this juncture. Conversely, there is no need to limit the scope of the temporary injunction, as it appears likely the broad facial challenges will also succeed.

d. Others

Although the record provides no detail, it is hopefully safe to assume that most of the pregnancies terminated by medical abortion are the result of consensual sex acts. Likewise, the majority of the women who receive medical abortions at Red River undoubtedly do so with the support of their spouses or significant others. Finally, the contraindications to a surgical abortion are rare. Therefore, for most patients a medical abortion is simply a matter of choice.

For some, this results from a simple fear of surgery, or a desire for the emotional support family members or partners can provide if much of the process occurs in their home, or a comparable setting. Eggelston aff. ¶ 21. Other explanations for a preference for the medical approach include: it is more natural; it can be performed earlier in the pregnancy; and it is less invasive. Cochrane, 2004 Medical Abortion Review, p. 3.

DOH argues a woman has no right to choose her preferred method of abortion, and states are free to ban specific methods providing at least one remains. Trans., pp. 38-39. There is no basis, either in law or medicine, for such conclusions.

Part of the core holding in Casey was the affirmation that before viability a state may neither prohibit abortion nor impose a substantial obstacle on “the woman’s

effective right to elect the procedure.” Casey, 505 U.S. at 846. States cannot be permitted to place “a heavy, and unnecessary, burden on women’s access to a relatively inexpensive, otherwise accessible, and safe abortion procedure.” City of Akron v. Akron Center for Reprod. Health, 462 U.S. 416, 438 (1983) (overruled on other grounds by Casey). As noted in a previous section, courts have uniformly held the legislative prohibition of previously viable and available methods or procedures is always a violation of the federal constitution, as interpreted in Casey.

It is also a violation of the fundamental medical tenets surrounding the requirement for informed consent. Patients, in consultation with their physician, have the absolute right to choose the method, whenever reasonable options exist. There is no place for legislative interference with such personal rights and decisions.

In Daugaard, the court described in detail the undue burdens that would result if all patients were required to make an additional trip to the clinic where the abortion procedure was performed. After discussing the practical and financial burdens, the court went on to note that associated delays may also eliminate the option of a medical abortion as the time window for performing this procedure could close in the interim. In the court’s estimation, the burdens imposed by the additional trip to the clinic were “arguably insignificant” when compared to the denial of “the ability to undergo a medication abortion, which may be their chosen method of abortion ... .” Daugaard, 799 F. Supp. 2d at 1065.

In summary, although the amendments have the practical effect of banning medical abortions in all cases, the resulting burdens will not be the same in every case.

For patients with physical contraindications to the typical surgical approach, the ban could force them to undergo a more complicated and risk-prone surgical procedure in an inpatient setting. For patients who have already been victimized by sex crimes or abuse, the consequences are calculated to be extreme and unthinkable. For others the burdens may not be so great, but they still appear to be unnecessary and undue. Therefore, it is unlikely the amendments could sustain a facial challenge under the “effects prong” of the Casey undue burden standard.

e. Purpose Prong

Under Casey, a statute is also unconstitutional if its “purpose” was to place a substantial obstacle in the path of a woman’s right to choose. Casey, 505 U.S. at 877. After thus indicating the legislature’s purpose must be considered, Casey again provided almost no guidance as to how this task should be accomplished. All it said is that a statute “must be calculated to inform the woman’s free choice, not hinder it.” Id. at 877. Clearly the amendments were not designed to inform. Whether they were calculated to hinder is not so clear.

Following Casey, numerous lower federal courts have struggled to determine when and how an impermissible purpose inquiry should be performed. The Supreme Court has done little to clarify or resolve such issues. A single case well illustrates all this.

In Armstrong v. Muzarek, 906 F. Supp. 561 (D. Mont. 1995), the district court concluded plaintiffs would have to prove “none of the individual legislators approving the passage of [the restriction] was motivated by a desire to foster the health of a

woman seeking an abortion.” Id. at 567. The Ninth Circuit reversed, reasoning the appropriate standard was proof the “predominant factor motivating the legislature’s decision” was the desire to make abortions more difficult. Armstrong v. Muzarek, 94 F.3d 566, 567 (9th Cir. 1996). The Supreme Court granted certiorari and immediately reversed the Court of Appeals, without saying anything helpful regarding the appropriate standard. Muzarek v. Armstrong, 520 U.S. 968 (1997).

Following Muzarek, the Casey purpose prong appears to have been largely ignored. An exception is Okpalobi v. Foster, 190 F.3d 377 (5th Cir. 1999), where the Fifth Circuit stated proper considerations include “the language of the challenged act, its legislative history, the social and historical context of the legislation, [and] other legislation concerning the same subject matter as the challenged measure.” Id. at 354. Although all these things have been considered here, nothing jumps out.

The language of the amendments does not exude an improper motive.⁶⁵ Based on a review of the legislative history, there is no obvious indication that the proponents of H.B. 1297 did not believe what they said. There is no current means of assessing the social or historical context of the legislation. As they are unprecedented, there is also nothing to compare the amendments against.

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⁶⁵ As indicated above, the means selected by the legislature to regulate medical abortions all have the practical effect of banning the procedure. Without any offsetting benefit, this could certainly support an inference the amendments were designed only to impair access and choice. “Where a requirement serves no purpose other than to make abortions more difficult, it strikes at the heart of a protected right, and is an unconstitutional burden on that right.” Planned Parenthood of Greater Iowa, Inc. v. Atchison, 126 F.3d 1042, 1049 (8th Cir. 1997). Moreover, the amendments do seem to specifically target Red River, and its well known practices. Under both federal and state law, however, a finding of unconstitutionality requires more than an inference. Muzarek, 520 U.S. at 972; Palluck v. Bd. of Cnty. Com’rs, Stark Cnty., 307 N.W.2d 852, 857-58 (N.D. 1981).

In summary, a preliminary assessment of the Casey purpose prong is troubling, but inconclusive. It is also not known if this is an issue the parties will pursue at trial. Further consideration will be given if appropriate, but at this juncture it is not necessary. The Casey undue burden test "is disjunctive." Okpalbobi, 190 F.3d at 354. A finding the law fails either the purpose prong or the effect prong is dispositive. Id.

5. Severability and Judicial Surgery

Any constitutional analysis must also consider whether it is possible to construe the law in a manner that avoids infirmities. City of Fargo v. Salsman, 2009 ND 15, ¶ 21, 760 N.W.2d 123. Likewise, valid portions must be permitted to stand if it is possible to strike only the provisions that are clearly unconstitutional. N.D. Cent. Code § 1-02-20.

The requirement for an emergency services contract is exclusively set forth in a separate subsection of the amendments. H.B. 1297, § 6(4). The same is true of the language requiring the physical presence of the prescribing physician when an abortion-inducing drug is administered. Id. § 6(5). From a mechanical standpoint, it would be easy to invalidate and sever these provisions. However, that would solve only part of the problem. It would still leave the impossible conundrum created by the portions of the amendments that prohibit off-label usage.

Can subsection 6(2) be construed to permit medical abortions performed in strict compliance with the protocol set forth in the Mifeprex FPL? This seems to have clearly been the legislature's intent. In its supplemental brief, DOH argues in support of such an interpretation. The problem is that this result seems to be impossible to achieve due to the explicit language of the amendments.

"When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." N.D. Cent. Code § 1-02-05. Although "every reasonable construction must be resorted to ... the canon of constitutional avoidance does not apply if the statute is not genuinely susceptible to two constructions." Carhart II, 555 U.S. at 153-54 (citations and internal quotations omitted).

In an attempt to save the amendments, DOH now suggests that misoprostol is not an "abortion-inducing drug." This is a real stretch. Misoprostol is an integral and essential part of the procedure. It causes the expulsion of the products of conception, and no medical abortion is deemed to be successful and complete until this occurs. Furthermore, the definition of "abortion" contained in the North Dakota Abortion Control Act has been amended to eliminate any possibility of this interpretation. N.D. Cent. Code § 14-02.1-02(1).

During the hearing, DOH also suggested that because misoprostol is required by the Mifeprex FPL, the requirement to follow this "label" is an implicit endorsement of the use of misoprostol. Trans., pp. 29-30. This might be a plausible interpretation, were it not for the other language in the subsection that unambiguously prohibits any medication not specifically labeled for use in medical abortions.

As DOH's response to these proceedings consists largely of an attempt to defend the protocol described in the Mifeprex FPL, the materiality of that response is called into question. Nonetheless, in keeping with the desire to explore any possible means of avoiding a finding of unconstitutionality, this has also been considered. It

III. How do Courts Determine Improper Purpose?

The *Casey* Court held that a restriction on abortion rights does not violate the Due Process Clause unless it has the purpose or effect of imposing an undue burden on women seeking abortion. The Supreme Court in *Mazurek v. Armstrong* seemed to suggest that an impermissible purpose will only be found if the law succeeds in achieving an impermissible effect. Do you agree with the Supreme Court in *Mazurek* that the fact that the law was drafted by an anti-abortion group “says nothing significant” about the state legislature’s purpose in passing a law restricting the performance of abortions?

Casey also did not specify where to look for improper purpose. When might it be appropriate for courts to consider a law’s broader context, if ever? In *Jane L. v. Bangerter* the Tenth Circuit held that a law prohibiting nontherapeutic abortions after twenty weeks did evince an impermissible purpose to create an undue burden. In so finding, the court looked to the legislative context in which the law was passed. In addition to enacting the law itself, the legislature established an abortion litigation trust fund, which the court recognized as a clear indication that the state’s purpose was to use the law as a vehicle to challenge *Roe v. Wade*. Legislatures are rarely so straightforward in indicating an improper purpose, however. Therefore, the Fifth Circuit, in *Okpalobi v. Foster*, established a four-prong test to glean improper purpose by analyzing not just the legislative language and history, but its social and historical context, as well as the existence of other laws covering the same subject matter. Consider what kinds of evidence may be used under the social and historical context prong to illuminate the improper purpose behind a law.

Consider also whether the effects of a law may demonstrate that a law was passed for an improper purpose. In *Planned Parenthood of the Heartland v. Heinenman*, plaintiffs challenged legislation that imposed potentially crippling liability on doctors performing abortions. Because the chilling effect of such liability would be strong enough to prevent many doctors from performing abortions, the North Dakota District Court found that the law’s true purpose was to prevent abortions, thus violating *Casey*.

117 S.Ct. 1865

520 U.S. 968, 117 S.Ct. 1865, 138 L.Ed.2d 162, 65 USLW 3817, 65 USLW 3822, 97 Cal. Daily Op. Serv. 4532, 97 Daily Journal D.A.R. 7493

(Cite as: 520 U.S. 968, 117 S.Ct. 1865)

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Supreme Court of the United States
Joseph P. MAZUREK, Attorney General of
Montana

v.

James H. ARMSTRONG et al.
No. 96-1104.

June 16, 1997.

Physicians and physician-assistant challenged constitutionality of Montana statutory provision restricting performance of abortions to licensed physicians and moved for preliminary injunctive relief. The United States District Court for the District of Montana, Paul G. Hatfield, Chief Judge, 906 F.Supp. 561, held that preliminary injunctive relief was not warranted for "physicians only" statutory provision. Physicians and physician-assistant appealed. The Ninth Circuit Court of Appeals, 94 F.3d 566, vacated and remanded. Certiorari was granted. The Supreme Court held that physicians and physician-assistant failed to establish likelihood of prevailing on merits of claim that Montana statutory provision violated due process by imposing an undue burden on women's right to choose to terminate pregnancy prior to viability of fetus, and thus, physicians and physician-assistant were not entitled to preliminary injunctive relief.

Petition for certiorari granted.

Justice Stevens filed a dissenting opinion in which Justices Ginsburg and Breyer joined.

West Headnotes

Civil Rights 78 1457(7)

78 Civil Rights

78III Federal Remedies in General

78k1449 Injunction

78k1457 Preliminary Injunction

78k1457(7) k. Other Particular Cases

and Contexts. Most Cited Cases

(Formerly 78k268)

Group of licensed physicians and one physician-assistant failed to establish likelihood of prevailing on merits of claim that Montana statute restricting performance of abortions to licensed physicians violated due process by imposing an undue burden on women's right to choose to terminate pregnancy prior to viability of fetus, and thus, physicians and physician-assistant were not entitled to preliminary injunctive relief. U.S.C.A. Const.Amend. 14; MCA 50-20-109.

**1865 *969 PER CURIAM.

In 1995, the Montana Legislature enacted a statute restricting the performance of abortions to licensed physicians. 1995 Mont. Laws, ch. 321, § 2 (codified at Mont.Code Ann. § 50-20-109 (1995)). Similar rules exist in 40 other States in the Nation.^{FNI} The **1866 Montana law was challenged almost immediately*970 by respondents, who are a group of licensed physicians and one physician-assistant practicing in Montana. The District Court denied respondents' motion for a preliminary injunction, finding that they had not established any likelihood of prevailing on their claim that the law imposed an "undue burden" within the meaning of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). 906 F.Supp. 561, 567 (Mont.1995). The Court of Appeals for the Ninth Circuit vacated the District Court's judgment, holding that respondents had shown a "fair chance of success on the merits" of their claim, and thus had met the threshold requirement for preliminary injunctive relief under Circuit precedent. 94 F.3d 566, 567-568 (1996). The case was remanded to the District Court with instructions to reconsider the "balance of hardships" and determine whether entry of a preliminary injunction was ultimately warranted. *Ibid.* *971 The District Court has not yet reconsidered the merits of the preliminary injunction motion, but it has entered (based on the parties' stipulations) an injunction

pending appeal pursuant to Federal Rule of Civil Procedure 62(c), and has postponed its hearing on the preliminary injunction motion until our disposition of petitioner's certiorari petition. Order Granting Injunction Pending Appeal, No. CV 95-083-GF-PGH (Mont., Nov. 5, 1996), App. to Pet. for Cert. 31a-32a. As a consequence, Montana's physician-only requirement is unenforceable at the present time against respondent Susan Cahill, who is the only nonphysician licensed to perform abortions in Montana.

FN1. See Ala. Admin. Code Rules 420-5-1-.01(2)(k), 420-5-1-.03(2)(a) (Supp.1990) (limiting performance of abortions to "physicians duly licensed in the State of Alabama," which in turn requires meeting the criteria in Ala.Code § 34-24-70 (Supp.1996)); Alaska Stat. Ann. §§ 08.64.200, 18.16.010(a)(1) (1996); Ark.Code Ann. § 5-61-101(a) (1993); *id.*, § 17-95-403 (1995); Cal. Health & Safety Code Ann. § 123405 (West 1996) (as interpreted under prior statutory designation in 74 Op. Cal. Atty. Gen. 101 (1991)); Colo.Rev.Stat. § 12-36-107 (1991 and Supp.1996); *id.*, §§ 18-6-101(1), 18-6-102 (1986); Conn. Agencies Regs. § 19-13-D54(a) (1997) (limiting performance of abortions to "person [s] licensed to practice medicine and surgery in the State of Connecticut," which in turn requires meeting the criteria in Conn. Gen.Stat. § 20-10 (Supp.1997)); Del.Code Ann., Tit. 24, §§ 1720, 1790(a) (Supp.1996); *sed* physician[s]"); Miss.Code Ann. § 73-25-3 (1995); *id.*, § 97-3-3(1) (1994) (as interpreted in *Spears v. State*, 278 So.2d 443 (Miss.1973)); Mo.Rev.Stat. §§ 188.015(5), 188.020 (1996); *id.*, § 334.031 (1989); Neb.Rev.Stat. § 28-335 (1995); *id.*, § 71-1,104 (Supp.1996); Nev.Rev.Stat. § 442.250(1)(a) (1991); *id.*, § 630.160 (1995); N.J. Admin. Code § 13:35-4.2(b) (1997) (limiting performance of abortions

to "physician[s] licensed to practice medicine and surgery in the State of New Jersey," which in turn requires meeting the criteria in N.J. Stat. Ann. §§ 45:9-6, 45:9-7 (West 1991), and N.J. Stat. Ann. § 45:9-8 (West Supp.1997)); N.M. Stat. Ann. §§ 30-5-1(C), 30-5-3 (1994) (as interpreted in N.M. Op. Atty. Gen. 90-19 (1990)); N.M. Stat. Ann. § 61-6-11 (1996); N.C. Gen.Stat. § 14-45.1(a) (1993); *id.*, § 90-9 (Supp.1996); N.D. Cent.Code § 14-02.1-04(1) (1991); *id.*, § 43-17-18 (1993); Ohio Rev.Code Ann. § 2919.11 (1996); *id.*, §§ 4731.091, 4731.41 (1994); Okla. Stat., Tit. 59, § 493.1 (Supp.1997); *id.*, Tit. 63, § 1-731(A) (1997); 18 Pa. Cons.Stat. §§ 3203, 3204(a) (1983 and Supp.1997); 63 Pa. Cons.Stat. §§ 271.6, 422.28 (1996); R.I.Code R. 14.000.009, 600.1 (1996) (limiting performance of abortions to "physicians licensed under the [applicable provisions of Rhode Island law]," which in turn requires meeting the criteria in R.I. Gen. Laws § 5-37-2 (1995)); S.C.Code Ann. § 40-47-90 (Supp.1996) (as implemented by S.C.Code Ann. Regs. §§ 81-80, 81-81, 81-90 (Supp.1996)); S.C.Code Ann. §§ 44-41-10(b), 44-41-20 (1985); S.D. Codified Laws § 34-23A-1(4) (Supp.1997); *id.*, §§ 34-23A-3, 34-23A-4, 34-23A-5 (1994); *id.*, § 36-4-11 (Supp.1997); Tex. Health & Safety Code Ann. § 245.010(b) (1992); Tex.Rev.Civ. Stat. Ann., Art. 4495b, § 3.04 (Vernon Supp.1997); Utah Code Ann. §§ 58-67-302, 58-68-302 (Supp.1996); *id.*, § 76-7-302(1) (1995); Va.Code Ann. §§ 18.2-71, 18.2-72, 18.2-73, 18.2-74 (1996); *id.*, § 54.1-2930 (1994); Wash. Rev.Code §§ 9.02.110, 9.02.120, 9.02.170(4) (Supp.1997); *id.*, §§ 18.57.020, 18.71.050 (Supp.1997); Wis. Stat. § 448.01(5) (1988); *id.*, § 940.15(5) (1996); Wyo. Stat. § 33-26-303 (Supp.1996); *id.*, § 35-6-111 (1994).

The Court of Appeals' conclusion that respondents had established a "fair chance of success on the merits" of their constitutional challenge is inconsistent with our treatment of the physician-only requirement at issue in *Casey*. That requirement involved only the provision of *information* to patients, and not the actual *performance* of abortions, yet we nonetheless held—overruling our prior holding in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 448, 103 S.Ct. 2481, 2502, 76 L.Ed.2d 687 (1983)—that the limitation to physicians was valid. *Casey, supra*, at 884–885, 112 S.Ct., at 2824–2825. We found that "[s]ince there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a *substantial obstacle to a woman seeking an abortion*, ... it is not an undue burden." 505 U.S., at 884–885, 112 S.Ct., at 2824 (emphasis added). The District Court, quoting this precise passage, held: "There exists insufficient evidence in the record to support the conclusion [that] the requirement that a licensed physician perform an abortion would amount, 'in practical terms, to a *substantial obstacle to a woman seeking an abortion*.' Accordingly, it is unlikely that [respondents] will prevail upon their suggestion that the requirement constitutes an 'undue burden' within the meaning of *Casey*." 906 F.Supp., at 567 (quoting *Casey, supra*, at 884, 112 S.Ct., at 2824 (emphasis added)).

*972 The Court of Appeals never contested this District Court conclusion that there was "insufficient **1867 evidence" in the record that the requirement posed a "substantial obstacle to a woman seeking an abortion." Instead, it held that the physician-only requirement was arguably invalid because its *purpose*, according to the Court of Appeals, may have been to create a substantial obstacle to women seeking abortions. 94 F.3d, at 567. But even 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 (here it is uncontested that

there was insufficient evidence of a "substantial obstacle" to abortion) could render the Montana law invalid—there is no basis for finding a vitiating legislative purpose here. We do not assume unconstitutional legislative intent even when statutes produce harmful results, see, e.g., *Washington v. Davis*, 426 U.S. 229, 246, 96 S.Ct. 2040, 2050–2051, 48 L.Ed.2d 597 (1976); much less do we assume it when the results are harmless. One searches the Court of Appeals' opinion in vain for any mention of any evidence suggesting an unlawful motive on the part of the Montana Legislature. If the motion at issue here were a defendant's motion for summary judgment, and if the plaintiff's only basis for proceeding with the suit were a claim of improper legislative purpose, one would demand *some* evidence of that improper purpose in order to avoid a nonsuit. And what is at issue here is not even a defendant's motion for summary judgment, but a plaintiff's motion for preliminary injunctive relief, as to which the requirement for substantial proof is much higher. "It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948, pp. 129–130 (2d ed.1995) (emphasis added; footnotes omitted).

*973 Respondents claim in this Court that the Montana law must have had an invalid purpose because "all health evidence contradicts the claim that there is any health basis" for the law. Brief in Opposition 7. Respondents contend that "the only extant study comparing the complication rates for first-trimester abortions performed by [physician-assistants] with those for first-trimester abortions performed by physicians found no significant difference." *Ibid*. But this line of argument is squarely foreclosed by *Casey* itself. In the course of upholding the physician-only requirement at issue in that case, we emphasized 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." 505 U.S., at 885, 112 S.Ct., at 2824 (emphasis added). Respondents fall back on the fact that an anti-abortion group drafted the Montana law. But that says nothing significant about the legislature's purpose in passing it.

Today's dissent, for its part, claims that "there is substantial evidence indicating that the sole purpose of the statute was to target a particular licensed professional" (respondent Susan Cahill). *Post*, at 1870. It is true that the law "targeted" Cahill in the sense that she was the only nonphysician performing abortions at the time it was passed. But it is difficult to see how that helps rather than harms respondents' case. The dissent does not claim that this was an unconstitutional bill of attainder, nor was that the basis on which the Court of Appeals relied. (Such a contention would be implausible as applied to a provision so commonplace as to exist in 40 other States, see n. 1, *supra*.) And the basis on which the Court of Appeals *did* rely (that the purpose of the law may have been to create a "substantial obstacle" to abortion) is positively contradicted by the fact that only a single practitioner is affected. That is especially so since under the old scheme Cahill could only perform *974 abortions with a licensed physician (who also performs abortions) present, see Brief in Opposition 4, meaning that no woman seeking an abortion would be required by the new law to travel to a different facility than was previously available. All this strongly supports the District Court's finding, after hearing testimony, that there was insufficient evidence that the law created a "substantial obstacle" to abortion.

**1868 And there is simply no evidence that the legislature intended the law to do what it plainly did not do.^{FN2}

FN2. Since the record does not support a conclusion that "the legislature's predominant motive, *post*, at 1870-1871, was to create a "substantial obstacle" to abortion, it is quite unnecessary to address "whether

the Court of Appeals misread this Court's opinions in *Miller [v. Johnson]*, 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995),] and *Shaw*," *post*, at 1871.

The Court of Appeals' decision is also contradicted by our repeated statements in past cases—none of which was so much as cited by the Court of Appeals, despite the District Court's discussion of two of them—that the performance of abortions may be restricted to physicians. We first expressed this view (although it was not necessary to our holding) in *Roe v. Wade*, 410 U.S. 113, 165, 93 S.Ct. 705, 732-733, 35 L.Ed.2d 147 (1973), saying that "[t]he State may define the term 'physician,' ... to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined." We reiterated this view in *Connecticut v. Menillo*, 423 U.S. 9, 11, 96 S.Ct. 170, 171-172, 46 L.Ed.2d 152 (1975) (*per curiam*), where, in the course of holding that the Federal Constitution posed no bar to the conviction of a person with no medical training for the performance of an abortion, we said that "prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference." Finally, in *Akron*, in the course of striking down a requirement that licensed physicians rather than other medical personnel provide specified information to patients (the holding overruled in *Casey*), we emphasized that our prior cases "left no doubt that, to ensure the safety of *975 the abortion procedure, the States may mandate that only physicians perform abortions." 462 U.S., at 447, 103 S.Ct., at 2502 (citing *Roe*, *supra*, at 165, 93 S.Ct., at 732-733, and *Menillo*, *supra*, at 11, 96 S.Ct., at 171-172).

Respondents urge us to ignore the error in the Court of Appeals' judgment because the case comes to us prior to the entry of a final judgment in the lower courts. It is true that we are ordinarily reluctant to exercise our certiorari jurisdiction in that circumstance. See, e.g., *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258, 36 S.Ct. 269,

271, 60 L.Ed. 629 (1916). But our cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts, see, e.g., *Estelle v. Gamble*, 429 U.S. 97, 98, 97 S.Ct. 285, 288, 50 L.Ed.2d 251 (1976); *United States v. General Motors Corp.*, 323 U.S. 373, 377, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945); see also R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 4.18 (7th ed.1993) (citing cases), and we conclude here that reversal of the Court of Appeals' judgment in a summary disposition is appropriate, for two reasons. First, as already noted, the Court of Appeals' decision is clearly erroneous under our precedents.^{FN3}

Second, the lower court's judgment has produced immediate consequences for Montana-in the form of a Rule 62(c) injunction against implementation of its law pending the District Court's resolution of respondents' motion for a preliminary injunction-and has created a real threat of such consequences for the six other States in the Ninth Circuit that have physician-only requirements.^{FN4} Indeed, plaintiffs *976 in the Ninth Circuit seeking to challenge those States' laws may well be able to meet the threshold**1869 "fair chance of success" requirement for a preliminary injunction merely by alleging an improper purpose for the physician-only rule, since, as noted above, the Court of Appeals did not appear to rely on any evidence suggesting an unlawful motive on the part of the Montana Legislature.^{FN5}

FN3. The dissent says that the Court of Appeals did not resolve any important issue of law in this case, but instead merely remanded to the District Court after "determin[ing] that a further inquiry into the facts [was] appropriate." *Post*, at 1871. We disagree. The Court of Appeals expressly found, and it was necessary to its disposition, that respondents had shown a "fair chance of success" on their claim of undue burden. 94 F.3d 566, 567-568 (C.A.9 1996). As already explained, that determination of law is inconsistent with our precedents.

FN4. See Alaska Stat. Ann. §§ 08.64.200, 18.16.010(a)(1) (1996); Cal. Health & Safety Code Ann. § 123405 (West 1996) (as interpreted under prior statutory designation in 74 Op. Cal. Atty. Gen. 101 (1991)); Haw.Rev.Stat. §§ 453-4, 453-16(a)(1) (1993); Idaho Code § 18-608 (1997); *id.*, §§ 54-1803(3), 54-1803(4) (1994); Nev.Rev.Stat. § 442.250(1)(a) (1991); *id.*, § 630.160 (1995); Wash. Rev.Code §§ 9.02.110, 9.02.120, 9.02.170(4) (Supp.1997); *id.*, §§ 18.57.020, 18.71.050 (Supp.1997).

FN5. The dissent contends that some States which restrict the performance of abortions to licensed physicians may define "licensed physician" to include "physician-assistant" when the latter works under the former's supervision; thus, the dissent says, the Court of Appeals' decision may not in fact be inconsistent with the physician-only regimes of other States. *Post*, at 1871. But the provisions of state law to which the dissent points reflect the general definition of what qualifies as the "authorized practice" of medicine, without making any specific reference to abortion. See, e.g., Fla. Stat. §§ 458.303(1)(a), 458.327(1), 458.347 (1991 and Supp.1997); *post*, at 1871, n. 7 (citing statutes). Thus, for example, under Florida law, the performance of an abortion by a physician-assistant would not constitute "practic[ing] medicine ... without a license" for purposes of the felony defined in Fla. Stat. Ann. § 458.327(1) (Supp. 1997), but there is no reason to think it would not violate the more specific prohibition on the performance of abortions by persons other than "a doctor of medicine or osteopathic medicine licensed by the state under chapter 458 or chapter 459," Fla. Stat. Ann. §§ 390.001(1)(a), 390.001(3) (1993). A formal opinion by the Attorney

General of California has reached precisely this conclusion under that State's law: "[W]e cannot accept the notion that the Legislature meant to gainsay th[e] carefully tailored and highly specific determination [that abortions should be performed by licensed physicians] when it ... adopted the general language of the Physician Assistant Practice Act." 74 Op. Cal. Atty. Gen. 101, 108 (1991).

For the foregoing reasons, we grant the petition for certiorari, reverse the judgment of the Court of Appeals, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

*977 Justice STEVENS, with whom Justice GINSBURG and Justice BREYER join, dissenting.

The Court may ultimately prove to be correct in its conclusion that the Court of Appeals should have affirmed the District Court's refusal to preliminarily enjoin that portion of the statute disqualifying Susan Cahill from performing abortions in Montana. Nevertheless, I do not agree that this decision has sufficient importance to justify review of the merits at this preliminary stage of the proceeding. The background of the litigation and a comment on the Court of Appeals' discussion of legislative motive will help to explain why I am not persuaded that the Court's summary disposition is appropriate.

Since 1977, respondent Cahill, a licensed physician's assistant, has been performing first-trimester abortions in Kalispell, Montana, under the supervision of Dr. James Armstrong. She is the only non-physician in Montana who performs abortions.

Since 1974, Montana law has provided that an abortion could be performed only by a licensed physician. See Mont.Code Ann. § 50-20-109(1)(a) (1995). Because the term "licensed physician," as used in that statute, was construed to include licensed physician assistants working under the di-

rect supervision of a physician pursuant to a state approved plan,^{FN1} it did not disqualify Cahill from continuing her work with Dr. Armstrong.

FN1. See *Doe v. Esch*, No. CV-93-060-GF-PGH (Nov. 26, 1993), App. to Pet. for Cert. 33a (enjoining State from enforcing the licensed physician provision against a physician assistant, supervised by a licensed physician, who has received approval from the State Board of Medical Examiners to conduct abortions); see also Mont.Code Ann. § 37-20-403 (1993) (recognizing physician assistant as agent of the supervising physician); *id.*, § 37-20-303 (1995) (authorizing Board of Medical Examiners to approve physician assistant utilization plans detailing range of physician assistants' practice); 906 F.Supp. 561, 564 (Mont.1995) (noting that the Montana Board of Medical Examiners construed its authority to include approval of Cahill's utilization plan allowing her to perform first-trimester abortions).

*978 In 1995, the Montana Legislature enacted the statute at issue in this litigation. This statute banned physician assistants from performing abortions, provided that second-trimester abortions could only be performed in licensed hospitals, and prohibited any form of advertising of abortion services. See 1995 Mont. Laws, ch. 321. The record strongly indicates that the physician assistant provision was aimed at excluding one specific person**1870 - respondent Cahill - from the category of persons who could perform abortions. Although this is not apparent on the face of the statute, the parties agree that because Cahill is the only physician assistant who performs abortions in the State of Montana, she is the only person affected by the ban. Furthermore, the legislative hearings preceding the enactment of the statute contain numerous references to Cahill by name,^{FN2} and the injunction against enforcement of this provision of the statute pending the appeal applies only to Cahill.^{FN3}

FN2. See Minutes of Committee on Public Health, Welfare & Safety, Montana Senate, 54th Legislature (Mar. 10, 1995), reprinted in App. to Pet. for Cert. 50a-60a.

FN3. "1. The injunction shall apply only to Plaintiff Susan Cahill and will allow her to practice under those terms in effect prior to October 1, 1995. Plaintiff Cahill must be supervised by a licensed physician and shall operate under the physician assistant-certified utilization plan previously approved by the Montana State Board of Medical Examiners that includes the performance of abortions pursuant to the provisions of Mont.Code Ann. Title 37, chapter 20. No other physician assistants-certified will be allowed to perform abortions in Montana under the terms of this stipulation or the Court's order." App. to Pet. for Cert. 32a.

The likelihood that the legislature may have enacted the statute for the sole purpose of targeting Cahill is suggested by the fact that the other two provisions in the 1995 Act—the hospitalization requirement and the advertising ban—were clearly invalid because they were reenactments of two provisions that already had been held unconstitutional in *979 earlier litigation,^{FN4} and that the State, in this litigation, conceded to be unconstitutional.^{FN5} This history, together with Cahill's claim that the same antiabortion groups who had repeatedly targeted Cahill and Armstrong's practice were the proponents of the 1995 legislation, provided the basis for Cahill's argument that the statute was invalid as a bill of attainder, as well as an undue burden on the right to an abortion.

FN4. In *Doe v. Esch*, *supra*, the court enjoined enforcement of the hospitalization requirement, and in *Doe v. Deschamps*, 461 F.Supp. 682 (Mont.1976), the court held that the advertising and solicitation prohibition were unconstitutional.

FN5. Respondents challenged these two provisions—along with the ban on performance of abortions by physician assistants, and the State did not contest that it was bound by the prior judgments from enforcing these prohibitions. See 906 F.Supp., at 563.

The discussion of legislative motive in the opinion of the Court of Appeals was a response to two decisions of this Court that suggest that such an inquiry is sometimes proper. In determining whether the "requirements serve no purpose other than to make abortions more difficult," within the meaning of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 901, 112 S.Ct. 2791, 2832-2833, 120 L.Ed.2d 674 (1992), the Court of Appeals looked to our recent decisions in *Miller v. Johnson*, 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), and *Shaw v. Hunt*, 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996).^{FN6} Today, the Court ignores those cases, but concludes that the record is barren of evidence of any improper motive. As the discussion above indicates, this is not quite accurate; there is substantial evidence indicating that the sole purpose of the statute*980 was to target a particular licensed professional. The statute removed the only physician assistant in the State who could perform abortions, yet there was no evidence that her practice posed any greater health risks than those performed by doctors with the assistance of unlicensed personnel. When one looks at the totality of circumstances surrounding the legislation, there is evidence from which one could conclude that the legislature's **1871 predominant motive, see *id.*, at 1866-1867, was to make abortions more difficult.

FN6. The Court of Appeals reasoned: "Legislative purpose to accomplish a constitutionally forbidden result may be found when that purpose was 'the predominant factor motivating the legislature's decision.' *Miller* [, 515 U.S., at 916, 115 S.Ct., at 2488]. Such a forbidden purpose

may be gleaned both from the structure of the legislation and from examination of the process that led to its enactment. *Shaw* [, 517 U.S., at 905-907, 116 S.Ct., at 1900-1902]. A determination of purpose in the present case, then, may properly require an assessment of the totality of circumstances surrounding the enactment of Chapter 321, and whether that statute in fact can be regarded as serving a legitimate health function." 94 F.3d 566, 567 (C.A.9 1996).

In any event, the Court of Appeals did not reach the constitutional issue that is presented by this litigation. The Court of Appeals simply remanded this action to the District Court because it found that the District Court had unduly confined its analysis of what constitutes an impermissible purpose. Although the parties stipulated to the entry of a limited injunction pending appeal that temporarily protects Cahill and no one else, there is no indication yet from either the District Court or the Court of Appeals that either a permanent or preliminary injunction will ever be entered against enforcement of the physician-only provision of the statute.

As I read the decisions of the Court of Appeals and the District Court, this case involves an extremely narrow issue concerning the State's power to reduce by one the small number of professionals in Montana who can lawfully perform abortions in that State. I do not perceive the slightest threat to the 40 "physician only" laws cited at the outset of the Court's opinion, particularly since some of these States might allow licensed assistants to perform abortions under the supervision of a physician as was the practice in Montana prior to 1995.^{FN7} Because physician assistants working under *981 the supervision of a physician might be included in the definition of "physician," it is not clear at this stage that the Court of Appeals' decision challenges any of this Court's statements (for the most part dicta), *ante*, at 1867-1868, that a State may restrict the performance of abortions to physicians. I think the

Court would be well advised to await further developments in the case before intervening. Surely, the Court of Appeals' determination that a further inquiry into the facts is appropriate before making a final decision on the motion for a preliminary injunction does not provide a proper basis for summary action in this Court.

FN7. Some of the States that have physician-only laws also have statutes that broadly define the medical duties that physicians can delegate to physician assistants. See, e.g., Conn. Gen.Stat. §§ 20-12a, 20-12d (Supp.1997); Fla. Stat. § 458.347 (Supp.1997); Ill. Comp. Stat., ch. 225, §§ 95/1, 95/4(3) (1993 and Pamph.1997 Supp.); Ind.Code §§ 25-27.5-5-2, 25-27.5-6-3 (1995); Iowa Code §§ 148C.1, 148C.4 (1989); La.Rev.Stat. Ann. §§ 37:1360.22(5), 37:1360.28, 37:1360.31.A(1), 37:1360.31.B (West Supp.1997); Me.Rev.Stat. Ann., Tit. 32, § 3270-A (Supp.1996); Mass. Gen. Law § 112:9E (1996); Neb.Rev.Stat. § 71-1,107.17 (1996); R.I. Gen. Laws § 5-54-8 (1995). My research indicates that Montana and California are the only States that explicitly prohibit physician assistants from performing abortions. See 74 Op. Cal. Atty. Gen. 101 (1991) (declining to construe the physician assistant statute to allow physician assistants to perform abortions).

Having decided to take the case, however, it does seem to me that the Court should provide some enlightenment as to whether the Court of Appeals misread this Court's opinions in *Miller* and *Shaw v. Hunt*.

In my judgment, the petition for certiorari should be denied.

U.S.Mont., 1997.

Mazurek v. Armstrong

520 U.S. 968, 117 S.Ct. 1865, 138 L.Ed.2d 162, 65

117 S.Ct. 1865

520 U.S. 968, 117 S.Ct. 1865, 138 L.Ed.2d 162, 65 USLW 3817, 65 USLW 3822, 97 Cal. Daily Op. Serv. 4532, 97

Daily Journal D.A.R. 7493

(Cite as: 520 U.S. 968, 117 S.Ct. 1865)

USLW 3817, 65 USLW 3822, 97 Cal. Daily Op.

Serv. 4532, 97 Daily Journal D.A.R. 7493

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102 F.3d 1112, 65 USLW 2472, 97 CJ C.A.R. 4
(Cite as: 102 F.3d 1112)

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United States Court of Appeals,
Tenth Circuit.

JANE L., on behalf of herself and all others similarly situated; Utah Women's Clinic, P.C.; Planned Parenthood Association of Utah; David Hansen, M.D.; Madhuri Shah, M.D.; John Carey, M.D.; Dan Chichester, M.D.; Kirtly Parker Jones, M.D.; Neil K. Kochenour, M.D.; Rhonda Lehr, M.D.; Claire Leonard, M.D.; Kenneth Ward, M.D.; Bonnie Jeanne Baty, M.D.; Susan Elizabeth Lyons, L.C.S.W.; Janet Lynn Wolf, L.C.S.W.; Leslie McDonald-White, L.C.S.W.; Reverend David Butler; Reverend Barbara Hamilton-Holway; Reverend George H. Lower; Reverend Lyle D. Sellards; Reverend Doctor Alan Condie Tull; Marie Soward Green; Rabbi Frederick L. Wenger; Jane J. Freedom, (Pseudo-Name); Julie Spouse, (Pseudo-Name); American College Of Obstetricians and Gynecologists, Utah Sections; Penny Thompson; Wendy Edwards, Plaintiffs-Appellants

v.

Norman H. BANGERTER, as Governor of the State of Utah; Paul Van Dam, Attorney General, as Attorney General of Utah, Defendants-Appellees.

Nos. 93-4044, 93-4059.

Dec. 23, 1996.

Action was brought challenging constitutionality of Utah statute regulating abortion. The United States District Court for the District of Utah, J. Thomas Greene, J., 809 F.Supp. 865, declared that statute's provision regulating abortions up to 20 weeks gestational age was unconstitutional, but that another provision regulating abortions after 20 weeks gestational age was both constitutional and severable, and plaintiffs appealed as to latter provision. The Court of Appeals, 61 F.3d 1493, reversed as to latter provision on grounds that it was not severable. Granting petition for certiorari, the Supreme Court, 518 U.S. 137, 116 S.Ct. 2068, 135 L.Ed.2d 443, summarily reversed judgment that provisions were not severable and remanded. On remand, the Court of Appeals, Seymour, Chief Judge, held that provision permitting abortions after 20 weeks gestational age only in three narrow circumstances placed undue burden on right to choose whether to abort a nonviable fetus, and was therefore

unconstitutional.

Affirmed in part, reversed in part.

West Headnotes

[1] Constitutional Law 92 4452

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)22 Privacy and Sexual Matters

92k4451 Abortion, Contraception, and Birth Control

92k4452 k. In General. Most Cited Cases

(Formerly 92k274(5))

Under *Planned Parenthood v. Casey*, only where state regulation imposes an undue burden on a woman's ability to choose to terminate or continue her pregnancy before viability does the power of the state reach into the heart of the liberty protected by due process clause. U.S.C.A. Const.Amend. 14.

[2] Abortion and Birth Control 4 106

4 Abortion and Birth Control

4k106 k. Fetal Age and Viability; Trimester. Most Cited Cases

(Formerly 4k0.5)

Undue burden exists on a woman's ability to choose to terminate her pregnancy before viability, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 969

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)1 In General

92k969 k. Scope of Inquiry in General. Most Cited Cases

102 F.3d 1112, 65 USLW 2472, 97 CJ C.A.R. 4
(Cite as: 102 F.3d 1112)

(Formerly 92k47)

Legislative purpose to accomplish a constitutionally forbidden result may be found when that purpose was the predominant factor motivating legislature's decision; such a forbidden purpose may be gleaned both from the structure of the legislation and from examination of the process that led to its enactment.

[4] Abortion and Birth Control 4 106

4 Abortion and Birth Control

4k106 k. Fetal Age and Viability; Trimester. Most Cited Cases
(Formerly 4k1.30)

Constitutional Law 92 4452

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)22 Privacy and Sexual Matters

92k4451 Abortion, Contraception, and Birth Control

92k4452 k. In General. Most Cited Cases
(Formerly 92k274(5))

Utah statute that permitted abortions after 20 weeks gestational age only in three narrow circumstances placed an undue burden on right to choose the abortion of a nonviable fetus, and therefore violated due process under *Planned Parenthood v. Casey*; statute had both the impermissible purpose and impermissible effect of placing an insurmountable obstacle in the path of a woman seeking nontherapeutic abortion of a nonviable fetus after 20 weeks. U.S.C.A. Const.Amend. 14; U.C.A. § 76-7-302(3).

[5] Abortion and Birth Control 4 106

4 Abortion and Birth Control

4k106 k. Fetal Age and Viability; Trimester. Most Cited Cases
(Formerly 4k0.5)

Viability of a fetus, as point at which states may ban nontherapeutic abortions, is a matter for attending physician, rather than the legislature, to determine. U.S.C.A. Const.Amend. 14.

[6] Abortion and Birth Control 4 106

4 Abortion and Birth Control

4k106 k. Fetal Age and Viability; Trimester. Most Cited Cases

(Formerly 4k1.30)

Statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice to abort a nonviable fetus cannot be considered a permissible means of serving its legitimate ends. U.S.C.A. Const.Amend. 14.

[7] Abortion and Birth Control 4 106

4 Abortion and Birth Control

4k106 k. Fetal Age and Viability; Trimester. Most Cited Cases
(Formerly 4k1.30)

In determining whether a statute has impermissible effect of placing substantial obstacle in the path of a woman seeking abortion before fetus attains viability, legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects; proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant. U.S.C.A. Const.Amend. 14.

*1113 Janet Benshoof and Simon Heller of The Center for Reproductive Law & Policy, New York City; Jeffrey R. Oriff of the American Civil Liberties Union of Utah, Salt Lake City, UT; and A. Howard Lundgren of Bugden & Lundgren, Salt Lake City, UT, on the brief for Plaintiffs-Appellants.

Carol Clawson, Utah Solicitor General, Jan Graham, Utah Attorney General, Jerrold S. Jensen, Utah Assistant Attorney General, and Brent A. Burnett, Utah Assistant Attorney General, Salt Lake City, UT, on the brief for Defendants-Appellees.

Before SEYMOUR, Chief Judge, PORFILIO, Circuit Judge, and BROWN, Senior District Judge.^{FN*}

^{FN*} Honorable Wesley E. Brown, Senior United States District Judge, District of Kansas, sitting by designation.

SEYMOUR, Chief Judge.

In Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir.1995)

(*Jane L. IV*), this court considered the constitutionality of certain provisions of the Utah laws regulating abortions. The Utah statute setting out the circumstances under which an abortion was permitted contained one section regulating abortions occurring before twenty weeks gestational age, *see Utah Code Ann. § 76-7-302(2)* (1995), and one section regulating abortions after twenty weeks gestational age, *see id. § 302(3)*. The district court had declared section 302(2) unconstitutional, *see Jane L. v. Bangerter*, 809 F.Supp. 865, 870 (D.Utah 1992) (*Jane L. III*), and defendants *1114 did not challenge that ruling. Plaintiffs argued on appeal that section 302(3) was not severable from section 302(2), and that section 302(3) was therefore invalid along with section 302(2). In the alternative, plaintiffs contended that if section 302(3) were severable, it was nonetheless unconstitutional on its face. We determined as a matter of Utah law that the provisions were not severable and invalidated section 302(3) on that basis. *See Jane L. IV*, 61 F.3d at 1496-99. Accordingly, we did not address the constitutionality of section 302(3) standing alone. *See id.* at 1497 n. 3.

The Supreme Court granted certiorari and limited its review to our holding that the two provisions of the Utah statute were not severable. The Court summarily reversed the judgment as to that issue, and remanded the case to us for further proceedings. *See Leavitt v. Jane L.*, 518 U.S. 137, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996) (per curiam). The only issue before us on remand is the one we did not previously reach: ^{FN1} the constitutionality of Utah's attempt to regulate abortions after twenty weeks gestational age as set out in section 302(3). ^{FN2}

FN1. In addition to holding that *Utah Code Ann. § 76-7-302(3)* (1995) was not severable, we also held that the provision on fetal experimentation, *id. § 310*, was unconstitutionally vague, and that the sections governing the choice of methods for postviability abortions, *id. §§ 307, 308*, were unconstitutional. *See Jane L. IV*, 61 F.3d at 1499-1505. The Supreme Court expressly did not review those rulings and we do not revisit them here.

FN2. The panel heard argument on this issue before deciding *Jane L. IV*. We have determined unanimously that additional oral argument would not materially assist the de-

termination of this appeal. *See Fed.R.App.P. 34(a)*; 10th Cir.R. 34.1.9.

Section 302(3) provides: "After 20 weeks gestational age, measured from the date of conception, an abortion may be performed only for those purposes and circumstances described in Subsections 2(a), (d), and (e)." *Utah Code Ann. § 76-7-302(3)*. ^{FN3} Under the listed subsections, an abortion is allowed when necessary to save the pregnant woman's life, *id. § 302(2)(a)*, to prevent grave damage to the pregnant woman's health, *id. § 302(2)(d)*, or to prevent the birth of a child with grave defects, *id. § 302(2)(e)*. The parties agree that section 302(3) embodies a legislative judgment equating viability with twenty weeks gestational age as measured from conception, and on that basis restricts the availability of abortion after twenty weeks to three narrow circumstances. The district court held that section 302(3) did not constitute an undue burden on a woman's right to choose under *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), because the record before the court contained no evidence that nontherapeutic abortions after twenty weeks had ever been performed in Utah, or that any woman in Utah wants or has ever attempted to obtain an abortion that late in her pregnancy. Plaintiffs contend on appeal that, by establishing a date of viability, the statute stands in direct conflict with controlling Supreme Court precedent, and that the statute imposes an undue burden prohibited by *Casey*. Defendants assert to the contrary that under *Casey* a state may establish a presumption of viability.

FN3. Gestational age is generally "determined by computing the time from the first day of the last menstrual period [lmp]." 2 J.E. Schmidt, M.D., *Attorneys' Dictionary of Medicine* at G-63 (1996). Utah law, however, measures gestational age differently and perhaps uniquely by computing it from the date of conception. Thus, "20 weeks gestational age" as used in section 302(3) equates with 22 weeks gestational age as this computation is generally made.

In *Casey*, the Supreme Court reaffirmed the central holding of *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), that

viability marks the earliest point at which the State's

interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it *1115 has done since *Roe* was decided; which is to say that no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

Casey, 505 U.S. at 860, 112 S.Ct. at 2811-12.

After the decision in *Roe*, the Supreme Court addressed the critical definition of viability in a series of cases. In *Planned Parenthood v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the Court stated it had "recognized in *Roe* that viability was a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term." *Id.* at 64, 96 S.Ct. at 2838-39. Accordingly, the Court held:

[I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

Id.

In *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), the Court reviewed its holdings in *Roe*, its companion case, *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), and *Danforth*, and pointed out that those cases had "stressed viability, [and] declared its determination to be a matter for medical judgment." 439 U.S. at 388, 99 S.Ct. at 682.

We reaffirm these principles. Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support.

Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point. And we have recognized no attempt to stretch the point of viability one way or the other.

Id. at 388-89, 99 S.Ct. at 682. Finally, in *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), the Court reiterated its holdings in *Danforth* and *Colautti* that the determination of viability is a matter for the judgment of the attending physician, and that therefore the legislature could not give one element, such as gestational age, dispositive weight. *See id.* at 516-17, 109 S.Ct. at 3055-56 (plurality); *id.* at 526-27, 109 S.Ct. at 3061-62 (O'Connor, J., concurring); *id.* at 545 n. 6, 109 S.Ct. at 3071 n. 6 (Blackmun, J., joined by Brennan, J., and Marshall, J., concurring and dissenting).

It is indisputable that section 302(3) of the Utah abortion statute, which effectively defines viability as occurring at twenty weeks gestational age, is directly contrary to the Supreme Court authority set out above. Defendants argue that the section nonetheless passes constitutional muster under *Casey*. In deciding that issue, we must first determine the standard of review applicable after *Casey*.

[1] In *Casey*, the Court held that "[o]nly where state regulation imposes an undue burden on a woman's ability to [choose to terminate or continue her pregnancy before viability] does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Casey*, 505 U.S. at 874, 112 S.Ct. at 2819. In so doing, the Court expressly rejected the strict scrutiny standard applied by cases after *Roe* to evaluate regulations bearing upon the abortion decision. *See id.* at 871, 112 S.Ct. at 2817. Plaintiffs argue that the Court's rejection of strict scrutiny was directed only to previability abortions, and that this standard still governs in the context of postviability abortions. We believe this argument misperceives the nature of the alleged constitutional flaw in section 302(3). If that section is constitutionally impermissible, it is because by mandating a definition of viability that may not be correct in a given case, it impacts the

choice of a woman whose fetus remains nonviable after twenty weeks from conception. The section therefore is most properly analyzed *1116 under the standard applicable to previability regulations.

That determination does not end the inquiry, however, because the standard applicable to previability regulations after *Casey* is a matter of some dispute. See *Planned Parenthood v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir.1995) (noting split in circuits and among Justices). The district court in this case appears to have applied the test set out in *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987), which requires the challenger to establish that no set of circumstances exists under which the law would be valid. See *Jane L. III*, 809 F.Supp. at 871-72, 878 & n. 33. Although the Court in *Casey* did not expressly reject the *Salerno* test, it did not apply it. Instead the Court evaluated the regulations under the "undue burden" standard, which invalidates 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." *Casey*, 505 U.S. at 877, 112 S.Ct. at 2820. In articulating the "undue burden" standard, the Court stated that it was "set[ting] forth a standard of general applicability." *Casey*, 505 U.S. at 876, 112 S.Ct. at 2820. We therefore agree with the Eighth Circuit in *Miller*, 63 F.3d at 1458, that the proper test after *Casey* is the "undue burden" standard applied by the Court in that case.^{FN4}

FN4. The undue burden test is meant to evaluate the constitutionality of regulations that burden a woman's right to choose a pre-viability abortion. Section 302(3) does much more than pose an obstacle to that choice. It defines viability in terms of gestational age. For a woman seeking the nontherapeutic abortion of a fetus that is not viable despite fitting the statutory definition in section 302(3), however, that section goes beyond creating a hindrance and imposes an outright ban. Rather than apply *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), in these circumstances, it may be more appropriate simply to conclude that the section is invalid as contrary to controlling Supreme Court precedent precluding a legislature from defining the critical fact of viability as Utah has done here. In any event, as we discuss in text, section 302(3) is

clearly invalid under *Casey* as having both the purpose and effect of placing a substantial burden on a woman's decision to choose a previability abortion.

[2][3] Under *Casey*, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." 505 U.S. at 878, 112 S.Ct. at 2821. "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." *Id.* at 877, 112 S.Ct. at 2820. "Legislative purpose to accomplish a constitutionally forbidden result may be found when that purpose was 'the predominant factor motivating the legislature's decision.' Such a forbidden purpose may be gleaned both from the structure of the legislation and from examination of the process that led to its enactment." *Armstrong v. Mazurek*, 94 F.3d 566, 567 (9th Cir.1996) (quoting *Miller v. Johnson*, 515 U.S. 900, ---, 115 S.Ct. 2475, 2488, 132 L.Ed.2d 762 (1995) and citing *Shaw v. Hunt*, 517 U.S. 899, ---, ---, 116 S.Ct. 1894, 1899-1901, 135 L.Ed.2d 207 (1996)).^{FN5}

FN5. Neither the district court nor the State has focused on the fact that under *Casey*, a law is invalid if *either* its purpose *or* effect is to place a substantial obstacle in the path of a woman seeking to abort a nonviable fetus. See *Casey*, 505 U.S. at 877, 112 S.Ct. at 2820-21. The district court did not analyze the purpose of section 302(3) in assessing whether it poses an undue burden, addressing only its effect. See *Jane L. v. Bangerter*, 809 F.Supp. 865, 873-74 (D.Utah 1992) (*Jane L. III*). The State makes only a passing reference to purpose on appeal. Indeed, as we point out in text, to the extent the State addresses purpose at all, it concedes that the section's purpose is to prevent the abortion of nonviable fetuses after 20 weeks from conception.

[4][5] As we pointed out in *Jane L. IV*, 61 F.3d at 1495, the Utah legislature's intent in passing the abortion provisions was to provide a vehicle by which to challenge *Roe v. Wade*, as demonstrated by the legislature's establishment of an abortion litigation trust account. In so doing, the State made a deliberate

decision to disregard controlling Supreme Court precedent set out in *Roe*, *Danforth*, *Colautti*, and *Webster*, and to ignore the Supreme Court's repeated directive that viability is a matter for an attending *1117 physician to determine.^{FN6} In our view, the State's determination to define viability in a manner specifically and repeatedly condemned by the Court evinces an intent to prevent a woman from exercising her right to choose an abortion after twenty weeks in those instances in which the fetus is not viable. This intent is confirmed by the State's briefs on appeal, in which the State in essence concedes that the section was intended to prevent the nontherapeutic abortion of nonviable fetuses after twenty weeks because in the State's view women who seek such abortions have waited too long. Contrary to the Court's reaffirmation in *Casey* that a woman has a right to terminate her pregnancy before viability, see *Casey*, 505 U.S. at 870-71, 112 S.Ct. at 2816-17, the State defends section 302(3) because it "requir[es] pregnant women to exercise their right to choose nontherapeutic abortion during the many weeks prior to the 21st week post-conception-after which the abortion process is difficult and traumatic *without regard to fetal viability*." Br. of Aplees. on Remand, at 21 (emphasis added). In sum, we conclude that section 302(3) was enacted with the specific purpose of placing an insurmountable obstacle in the path of a woman seeking the nontherapeutic abortion of a nonviable fetus after twenty weeks, and it therefore imposes an unconstitutional undue burden on her right to choose under *Casey*.

^{FN6} The State contends these cases are no longer valid after *Casey* to the extent they commit the determination of viability to the medical judgment of the attending physician and prohibit a legislature from defining viability in terms of gestational age. To the contrary, we view the Court's reaffirmation in *Casey* that "[w]henver it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided," 505 U.S. at 860, 112 S.Ct. at 2811-12, coupled with the Court's failure to disturb clear past precedent on how viability is to be determined, as convincing indications that those precedents still govern the issue. Moreover, it is important to emphasize that the Utah provisions were passed before *Casey* was handed down. Consequently, *Casey*'s effect on these cases sheds no light on the State's purpose in passing

legislation in direct conflict with them.

[6][7] We also conclude that the section is invalid because it has an impermissible effect. "[A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U.S. at 877, 112 S.Ct. at 2820. The Supreme Court made clear in *Casey* that in determining effect, "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.... 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." *Id.* at 894, 112 S.Ct. at 2829. In addressing whether section 302(3) is an undue burden, therefore, *Casey* instructs us that we must assess its impact on the women upon whom it operates, that is, those women seeking nontherapeutic abortions of nonviable fetuses after twenty weeks from conception. For those women, section 302(3) imposes more than a substantial obstacle; it constitutes an outright ban.

The district court held as a matter of law that section 302(3) nevertheless does not impose an undue burden under *Casey* because the record contains no evidence that any woman wants or has attempted to obtain such a late nontherapeutic abortion in Utah. *Jane L. III*, 809 F.Supp. at 873. Plaintiffs contend that the lower court's view of the record for summary judgment purposes is erroneous. We agree. The record contains evidence through the declaration of the director of the Utah Women's Health Clinic, a facility that performs approximately seventy-five percent of the abortions in Utah, that the Clinic routinely refers to another state those Utah residents needing an abortion after twenty weeks. She stated that in 1990, for example, the Clinic referred out of state ten to fifteen women who needed such abortions. Supp.App. of Aplees., at 158-60. While this and other evidence in the record indicate that the number of women in Utah desiring abortions after twenty weeks may be small, the undisputed evidence also demonstrates that some members of this group are women seeking nontherapeutic abortions of nonviable fetuses. It is thus apparent that a group of women exists in Utah for whom section *1118 302(3) actually operates as an impermissible ban on the right to abort a nonviable fetus.

We accordingly hold that section 302(3) has both the

purpose and effect of placing a substantial obstacle in the path of a woman seeking to abort a nonviable fetus. It therefore imposes an undue burden on a woman's right to choose. The State's arguments to the contrary are disingenuous and unpersuasive because they are grounded on its continued refusal to accept governing Supreme Court authority holding that viability is a matter to be determined by an attending physician, and that until viability is actually present the State may not prevent a woman from choosing to abort.

In sum, we hold that section 302(3) is unconstitutional in that it unduly burdens a woman's right to choose to abort a nonviable fetus.^{FN7} For the reasons set out in our prior opinion, 61 F.3d at 1505, as modified herein, we AFFIRM the judgment of the district court in part and REVERSE in part.

FN7. Because we strike down section 302(3) as unconstitutional, we need not reach plaintiffs' challenge to one of the circumstances in which a woman may obtain a postviability abortion. Under section 302(3), such an abortion is permitted, inter alia, to prevent grave damage to the woman's health. Plaintiffs argue that this provision goes beyond the holding in *Roe*, reaffirmed in *Casey*, that a State may proscribe postviability "abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Casey*, 505 U.S. at 879, 112 S.Ct. at 2821 (quoting *Roe*, 410 U.S. at 164-65, 93 S.Ct. at 732-33).

We note nevertheless that we addressed identical language in *Jane L. IV* when considering the constitutionality of the Utah provisions governing a doctor's choice of methods for performing postviability abortions. See *Jane L. IV*, 61 F.3d at 1502-05. Those provisions would "require a doctor to use the abortion method that would best assure the unborn child's chances of survival unless such a method would gravely damage a woman's health." *Id.* at 1503. We held that "[b]y requiring a woman to suffer 'grave damage' to her health before her liberty interests predominate, the Utah legislature violated those portions of *Roe* and *Thornburgh v.*

American College of Obstetricians & Gynecologists, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779(1986)] that *Casey* reaffirmed, and unconstitutionally devalued a woman's privacy rights." *Jane L. IV*, 61 F.3d at 1504.

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Jane L. v. Bangerter

102 F.3d 1112, 65 USLW 2472, 97 CJ C.A.R. 4

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724 F.Supp.2d 1025
United States District Court,
D. Nebraska.

PLANNED PARENTHOOD OF the HEARTLAND
and Dr. Jill L. Meadows, Plaintiffs,

v.

Dave HEINEMAN, Governor of Nebraska, in his official capacity; Jon Bruning, Attorney General of Nebraska; in his official capacity; Kerry Winterer, Chief Executive Officer, and Dr. Joann Schaefer, Director of the Division of Public Health, Nebraska Department of Health and Services, in their official capacities; and Crystal Higgins, President, Nebraska Board of Nursing, and Brenda Bergman-Evans, President, Nebraska Board of Advanced Practice Registered Nurses, in their official capacities, Defendants.

No. 4:10CV3122. | July 14, 2010.

Synopsis

Background: Abortion provider and its medical director brought § 1983 action against governor and various state officials challenging constitutionality of bill amending Nebraska's criminal code and imposing disclosure requirements on abortion providers. Plaintiffs moved for temporary restraining order (TRO) or preliminary injunction to enjoin defendants from enforcing the bill's terms.

Holdings: The District Court, Laurie Smith Camp, J., held that:

[1] plaintiffs satisfied injury-in-fact requirement for standing;

[2] plaintiff's satisfied causation and redressability elements of standing;

[3] Eleventh Amendment did not bar suit;

[4] plaintiffs were likely to succeed on the merits of their claims that the bill would place substantial obstacles in the path of women seeking abortions in Nebraska;

[5] plaintiffs were likely to succeed on the merits of their claims that sections of the bill were void for vagueness;

[6] plaintiffs were likely to succeed on the merits of their claims that the bill violated First Amendment rights of abortion providers; and

[7] the public interest supported injunction.

Motion granted in part and denied in part.

West Codenotes

Validity Called into Doubt

West's Neb.Rev.St. §§ 28-101, *1030 28-326, 28-327, 28-327.03, 28-327.04, 28-340, 38-2021

Attorneys and Law Firms

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Opinion

MEMORANDUM AND ORDER

LAURIE SMITH CAMP, District Judge.

This matter is before the Court on the Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Filing No. 2).¹ The Motion is supported by a brief and indexes of evidence (Filing Nos. 4, 3, and 31). Defendants entered a Notice of Appearance (Filing No. 21), and the Court conferred with counsel for the parties on June 29, 2010, for purposes of establishing a briefing schedule. In accordance with the agreed-upon schedule, Defendants submitted their Brief (Filing No. 39) and Index of Evidence (Filing No. 40), and Plaintiffs submitted a Reply Brief (Filing No. 49). Defendants objected (Filing No. 37) to Plaintiffs' Index of Evidence, and Plaintiffs responded to the objections (Filing No. 50). Although the Defendants' evidentiary objections will be denied for purposes of the Court's analysis of the pending Motion, the Court has considered the objections when determining what weight to give to the Plaintiffs' evidence. Oral argument was heard on July 13, 2010. For the reasons discussed below, the Motion will be granted in part and denied in part.

II. DATAPHASE FACTORS

A. Likelihood of Success on the Merits

As the Eighth Circuit requires, this Court will first consider whether Plaintiffs have demonstrated a likelihood of success on the merits of their claims.

The Defendants recognize that LB 594 is unconstitutional, in part. “Defendants acknowledge that Commerce Clause jurisprudence ... prohibits the enforcement of § 10(4) of LB 594 to conduct that occurs outside the state of Nebraska.” (Defendants’ Brief, Filing No. 39 at 25). “Despite the fact that § 10(4) of LB 594 unconstitutionally extends the reach of the Act to conduct that occurs outside of Nebraska, it can be severed and the remaining portions of the Act upheld.” (*Id.* at 16).

This Court appreciates the Defendants’ integrity and candor in acknowledging that LB 594 violates the Commerce Clause of the United States Constitution. This Court concurs with that conclusion and finds that Plaintiffs are not only “likely,” but certain to prevail on their challenge to the constitutionality of LB 594, under the Commerce Clause.

The Court will turn to the Plaintiffs’ likelihood of success on their liberty-and-privacy-interest, void-for-vagueness, and First Amendment claims. Because, for reasons discussed below, the Court concludes that Plaintiffs have demonstrated a likelihood of success on the merits of those claims, and because the Defendants have conceded Plaintiffs’ certainty of success on their Commerce Clause claim, the remaining claims based on Equal Protection, and privacy interests of adult and minor patients with respect to mandated disclosures, will not be addressed at this juncture.

1. Due Process: Liberty and Privacy Interests

[22] [23] The Fourteenth Amendment to the United States Constitution provides, in part, that no State shall deprive any person of liberty without due process of law. The liberty interest protected by the Fourteenth Amendment long has been recognized to encompass a right to be free from undue governmental interference in matters that are intensely private, such as “marriage, procreation, contraception, family relationship, and child rearing and education.” *Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). This aspect of due process has, at times, been referred to as “zones of privacy” (*id.* at

712, 96 S.Ct. 1155), a “right of privacy” (*id.* at 713, 96 S.Ct. 1155), or simply a “right to be let alone.” (*Eisenstadt v. Baird*, 405 U.S. 438, 454, n. 10, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972)) (quoting *Olmstead v. U.S.*, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928)) (“The makers of our Constitution ... conferred, as against the government, the right to be let alone—the most comprehensive of rights and the most valued by civilized men.”) The right was *1043 applied in the context of abortion in *Roe v. Wade*,⁶ and has been re-affirmed by the Supreme Court in that context over the last 37 years.

In one case in which it recognized the right of privacy, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), the Supreme Court said: “The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.” *Id.* at 399, 43 S.Ct. 625.

[24] [25] [26] What may constitute undue interference by a state, with respect to this liberty interest in the context of abortion, was recently articulated by the Supreme Court in *Gonzales v. Carhart*, 550 U.S. 124, 146, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007). “Before [fetal] viability, a State ‘may not prohibit any woman from making the ultimate decision to terminate her pregnancy.’” *Id.* at 146, 127 S.Ct. 1610 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)). “It also may not impose upon this right an undue burden, which exists if a regulation’s ‘purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.’” *Id.* (quoting *Casey*, 505 U.S. at 878, 112 S.Ct. 2791). “On the other hand, ‘[r]egulations 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.’” *Id.* (quoting *Casey*, 505 U.S. at 877, 112 S.Ct. 2791).

[27] Accordingly, the issue before this Court with respect to the Plaintiffs’ liberty-and-privacy-interest Due Process challenge, is whether the Plaintiffs’ are likely to demonstrate that LB 594 has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.⁷

a. Purpose of LB 594

As noted above, in discussion of section 2 of the bill, the section expresses the Nebraska Legislature's concern that "the existing standard of care for preabortion screening and counseling is not always adequate to protect the health needs of women," and "[t]hat clarifying the minimum standard of care for preabortion screening and counseling in statute is a practical means of protecting the well-being of women." The section also re-states the Legislature's earlier language to the effect that the Supreme Court of the United States over-stepped its authority when issuing its decision in *Roe v. Wade*, and that the Nebraska Legislature intends to protect *1044 the life of unborn children whenever possible.

No such legislative concern for the health of women, or of men, has given rise to any remotely similar informed-consent statutes applicable to other medical procedures, regardless of whether such procedures are elective or non-elective, and regardless of whether such procedures pose an equal or greater threat to the physical, mental, and emotional health of the patient. From a plain reading of the language of the bill,⁸ and the absence of any similar statutory "protections" for the health of patients in other contexts, this Court infers that the objective underlying LB 594 is the protection of unborn human life.

[28] "[T]he legitimate interest of the Government in protecting the life of the fetus that may become a child" is recognized in *Gonzales*, 550 U.S. at 146, 127 S.Ct. 1610, as it was in *Casey*, 505 U.S. at 846, 112 S.Ct. 2791. The question then becomes whether the purpose of the bill is to effect this goal by placing a substantial obstacle in the path of women seeking an abortion.

The bill places certain obstacles in the path of women seeking abortions by (1) requiring medical providers to make risk assessments and disclosures that, if the bill is read literally, would be impossible or nearly impossible to perform,⁹ (2) requiring medical providers to speculate about what conduct is mandated under the bill, if it is not to be read literally, but instead given some reasonable interpretation,¹⁰ and (3) placing physicians who perform abortions in immediate jeopardy of crippling civil litigation, thereby placing women in immediate jeopardy of losing access to physicians who are willing to perform abortions.¹¹

*1045 The threat of such litigation is real, and imminent. As the Supreme Court said in *Gonzales*, "[w]hile we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and

sustained." 550 U.S. at 159, 127 S.Ct. 1610. The four dissenting justices in *Gonzales* considered this "antiabortion shibboleth" to be patronizing, and a "way of thinking [that] reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited." (*Id.* at 183–84, 127 S.Ct. 1610). Instead, this Court accepts the premise expressed in the majority opinion as reflecting a firm grasp of the obvious: Some women who obtain abortions will come to regret that choice. That fact is inevitable, because any major decision will lead to regret in some percentage of cases.¹² For the woman who comes to regret having had an abortion, LB 594 provides her with a target to blame—a physician stripped of the usual statutory and common law defenses, and made civilly liable for the most extensive damages,¹³ by way of an "informed consent" mandate that is either impossible to satisfy, or so vague that the physician (and a jury) are left to speculate about its meaning. LB 594 also provides the remorseful woman and her lawyer with a very substantial financial incentive to initiate such litigation, whether or not she truly does regret her decision to obtain an abortion—her regret is *presumed*. (Section 10(1).) Although this presumption is "rebuttable," it is difficult to conceive how any defendant could effectively rebut such as assertion.

LB 594 effectively cloaks such plaintiffs as private attorneys general, as is done in RICO¹⁴ and civil rights actions,¹⁵ with the *1046 apparent object of turning them into quasi-prosecutors, dedicated to eliminating the activity the Legislature has found to be objectionable.

The bill's framework, therefore, creates a profound chilling effect, compounded by (1) its purported extension of its reach to any doctor advertising abortion services in Nebraska, whether or not the doctor, patient, or any medical procedure has any other connection with the state (section 10(4)),¹⁶ and (2) its tolling of the statute of limitations for any actions that may accrue while enforcement of the bill is enjoined by a judge or judges questioning its constitutionality (section 11).

Like the civil liability statute addressed by the Eighth Circuit in *Planned Parenthood, Sioux Falls Clinic v. Miller*, LB 594's civil liability mechanism appears to be "more than enough to chill the willingness of physicians to perform abortions, [and] an undue burden on a woman's right to choose whether to terminate her pre-viability pregnancy." 63 F.3d at 1467.

At this preliminary stage, this Court finds that Plaintiffs are likely to succeed on the merits of their Due Process liberty-and-privacy-interest claim, because the purpose of the bill appears to be the preservation of unborn human

life through the creation of substantial, likely insurmountable, obstacles in the path of women seeking abortions in Nebraska.

Defendants suggest that this Court should “go beyond the literal language” of LB 594 and give it a “sensible construction” so as “to effectuate the underlying purposes of the law.” (Defendants’ Br., Filing No. 39, at 16.) They contend that “[d]espite its admittedly broad language, the Act can be construed to require abortion providers to inform patients of only those risk factors deemed by the abortion provider, in his or her professional judgment, to be relevant to the particular patient, in accordance with the Legislature’s intention.” (*Id.* at 18.) Defendants note that during floor debate, the sponsoring senator stated that “the Act ‘does not impose any requirements on abortion providers that are contrary to the standard of care for screening for which it applied to other medical procedures.’ ” (*Id.*) The sponsor’s assertion is flatly contrary to the language of LB 594, which provides that “Nothing in section 28–327 shall be construed as defining a standard of care for any medical procedure other than an induced abortion.” (Section 11(2).)

From a plain reading of the statute, and based on the

evidence now available, the only sensible construction that this Court can provide for LB 594’s risk-assessment and informed-consent requirements is that the Legislature intended to place a substantial, if not insurmountable, obstacle in the path of any woman seeking an abortion in Nebraska.

b. Effect of LB 594

For the reasons stated above, even if this Court were to presume that the passage of LB 594 was motivated in whole or part by a desire to protect the health of women, this Court finds that the Plaintiffs are likely to succeed on the merits of their Due Process liberty-and-privacy-interest claims, because the effect of LB 594 will be to place substantial, likely insurmountable, obstacles in the path of women seeking abortions in Nebraska.

Footnotes

- ¹ On July 12, 2010, Planned Parenthood moved to amend its Complaint to add as a party plaintiff Dr. Jill L. Meadows, M.D. The Court granted the motion, and the Amended Complaint appears at Filing No. 51.
- ² Assistant Attorney General Katherine Spohn’s Brief submitted on behalf of the Defendants was thorough and well-reasoned, despite being prepared on relatively short notice. The very capable representation of the Defendants by the Office of the Nebraska Attorney General obviates the need for the Court to consider amici briefs.
- ³ The bill allows the evaluation and disclosure to be made by a physician, psychiatrist, psychologist, mental health practitioner, physician assistant, registered nurse, or social worker licensed under the Uniform Credentialing Act. Nothing in the bill appears to prevent a plaintiff from naming such individuals, or a providers such as Planned Parenthood, as defendants.
- ⁴ Class III misdemeanors carry penalties of imprisonment up to three months and fines up to \$500; and Class II misdemeanors carry penalties of imprisonment up to six months and fines up to \$1,000. Neb.Rev.Stat. § 28–106.
- ⁵ The district court had issued a temporary restraining order, staying the effective date of the act, but it appears that the parties stipulated to the stay “pending final determination of the constitutional questions.” *Planned Parenthood, Sioux Falls Clinic v. Miller*, 860 F.Supp. 1409, 1411 (S.D.1994).
- ⁶ “This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” *Roe*, 410 U.S. at 153, 93 S.Ct. 705.
- ⁷ Because Plaintiffs provide only pre-viability abortions, there is no issue for the Court to address with respect to fetal viability. Amended Complaint, ¶ 7. With respect to Plaintiffs’ standing to assert the rights of patients in connection with the liberty-and-privacy-interest Due Process challenge, Plaintiffs have demonstrated the requisite relationship to the patients, and the patients’ lack of ability to assert their own right. See *Singleton*, 428 U.S. at 115–16, 96 S.Ct. 2868.
- ⁸ “[A]s we have held previously, we ‘look to direct and indirect evidence to determine whether a state adopted a statute with a discriminatory purpose,’ which may include evidence in the form of ‘statements by lawmakers.’ ” *Jones v. Gale*, 470 F.3d at 1269 (quoting *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065 (8th Cir.2004)). While the legislative history of the bill is in evidence (Filing No. 40), and while other evidence of interest, such as campaign speeches or literature, may be relevant to the

determination of the bill's purpose, at this stage of the proceedings the Court relies on the plain language of the bill.

9 See Affidavit of Kelly Blanchard ("Blanchard Aff.") Filing No. 31-5, ¶¶ 12-27.

10 For example, the definitions of "Complications associated with abortion" and "Risk Factor associated with abortion" in section 3(2) and (11) of the bill are unclear to this Court, and to the medical professionals whose affidavits are in evidence: Affidavit of Penelope A. Dickey, Filing No. 31-2, ¶¶ 11-14; Affidavit of Paul Appelbaum, M.D., Filing No. 31-3, ¶¶ 3-5; Affidavit of Darla Eisenhauer, M.D., Filing No. 31-4, ¶¶ 5-14; Blanchard Aff. ¶¶ 7-31; Affidavit of Jill Meadows, M.D. ("Meadows Aff."), Filing No. 31-6, ¶¶ 9-38 ("[I]f reasonable limitations may be read into the Act, I do not know how to determine what they are." (*Id.*, ¶ 10).) In further example, the peer-reviewed "International Journal of Qualitative Studies on Health and Well-Being" has been published since 2006 but only articles since 2009 can be searched using PubMed or the search engine used to find articles in the Thomson Reuters Scientific Master Journal List. Similarly, the journal "Psychology, Health & Medicine," was first published in 1996 but can only be searched for articles after 2006. (*See* Blanchard Aff. ¶¶ 13-21.) Thus, even the broadest possible search using search logic of either index will not retrieve every responsive article for a period as short as the last fifteen years. At this early stage of the proceedings, this Court infers that the statements of these medical professionals are credible, based upon their curriculum vitae and the logic of their statements.

11 As the Honorable Judge Richard Battey observed when finding certain private, civil remedies unconstitutional in *Planned Parenthood, Sioux Falls Clinic v. Miller*, 860 F.Supp. 1409 (S.D.1994), enjoining their enactment: "If this statutory provision is allowed to stand, there may not be any provider willing to subject himself or herself to the vagaries of the statute. What then would be the choice remaining for those women who desire to exercise their constitutional rights consistent with *Roe* and *Casey*?" *Id.*, at 1418. Judge Battey noted that there was at that time only one physician in South Dakota willing to perform abortions. *Id.*

12 Like the Supreme Court majority in *Gonzales*, this Court has "no reliable data" to measure the phenomenon, but notes that unscientific surveys readily available on the Internet indicate that parent "regret" levels reach as high as the infamous 70 percent tallied by columnist Ann Landers in 1975 when she received 10,000 letters from readers in response to her inquiry: "Do you regret having children?" The enactment of Nebraska's short-lived "Safe Haven Law" in July of 2008 caused parents from around the nation to stream into Nebraska to relinquish their children. More reliable data are available reflecting regret levels for the decision to marry—an important choice presumably preceded by sober thought and deliberation. The most important choices have consequences, and no matter how well-reasoned and fully deliberated, those decisions can lead to remorse. That is part of the price we pay for our freedom. (Only Edith Piaf was without regret. Had she been sober, she, too, might have had second-thoughts.)

13 The plaintiff may obtain damages for pain, suffering, inconvenience, mental suffering, emotional distress, psychological trauma, loss of society or companionship, loss of consortium, injury to reputation, humiliation, wrongful death of the unborn child, and costs and attorney fees. (Sections 6(1), (2), (3), and 10(2).)

14 Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968. "The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella v. Wood*, 528 U.S. 549, 557, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000).

15 "[I]ndividuals injured by racial discrimination act as "'private attorney[s] general,' vindicating a policy that Congress considered of the highest priority." *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989). [T]he ... plaintiff ... is ... 'the chosen instrument of Congress [.]'" *Id.* at 759, 109 S.Ct. 2732 (applying Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*).

16 Acknowledged by the Defendants to be unconstitutional.

17 See generally Meadows Aff. ¶¶ 18-38.

18 Following the analytical framework that appears to be suggested by the Eighth Circuit in *Rounds*, once it is determined that First Amendment rights are implicated, this Court must consider whether LB 594 is "narrowly tailored to serve a compelling state interest." A more logical framework would be to end the inquiry once it is demonstrated that the bill requires medical providers to give untrue, misleading, or irrelevant information to patients. Finding a First Amendment violation at that juncture appears to be consistent with language from *Casey*, referred to by the Supreme Court with approval in *Gonzales*: In *Casey* the controlling opinion held an informed-consent requirement in the abortion context was "no different from a requirement that a doctor give certain specific information about any medical procedure." The opinion states "the doctor-patient relation here is entitled to the same solicitude it receives in other contexts." *Gonzales*, 550 U.S. at 163, 127 S.Ct. 1610 (internal citations omitted.)

19 While the U.S. District Court for the District of South Dakota did enjoin the effective date of a statute in *Planned Parenthood, Sioux Falls Clinic v. Miller*, which action was upheld by the Eighth Circuit, it was done with the stipulation of the Governor and Attorney General, the named defendants. *Miller*, 860 F.Supp. at 1421.

190 F.3d 337
United States Court of Appeals,
Fifth Circuit.

Ifeanyi Charles Anthony OKPALOBI, doing
business as Gentilly Medical Clinic for Women,
Plaintiff-Appellee,
and
Causeway Medical Suite; Bossier City Medical
Suite; Hope Medical Group for Women; Delta
Women's Clinic; Women's Health Clinic; James
Deguerce; A. James Whitmore, III,
Intervenors-Appellees,

v.

Mike FOSTER, Governor of the State of Louisiana;
Richard P. Ieyoub, Attorney General of Louisiana;¹
State of Louisiana, Substituted in place of Kenneth
Duncan, Treasurer of the State of Louisiana,
Defendants-Appellants.

No. 98-30228. | Sept. 17, 1999.

Providers of abortion services brought suit challenging Louisiana statute making abortion provider liable, in tort, to woman obtaining abortion for any damage occasioned by the abortion. The United States District Court for the Eastern District of Louisiana, G. Thomas Porteous, Jr., J., 981 F.Supp. 977, enjoined enforcement of statute, finding it unconstitutional. State appealed. The Court of Appeals, Wiener and Robert M. Parker, Circuit Judges, held that: (1) making Governor and Attorney General of Louisiana defendants did not violate Eleventh Amendment; (2) case or controversy requirement was satisfied; (3) providers had standing to assert their rights and were proper proponents of their patients' rights; (4) statute imposed undue burden on woman's right to seek pre-viability abortion; and (5) statute was unconstitutionally vague.

Affirmed.

E. Grady Jolly, Circuit Judge, filed dissenting opinion.

Attorneys and Law Firms

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Priscilla Joyce Smith, Center for Reproductive Law & Policy, New York City, William E. Rittenberg, *341 Rittenberg & Samuel, New Orleans, LA, for Intervenors-Appellees.

Robert B. Barbor, Louisiana Dept. of Justice, Civil Div., Roy A. Mongrue, Jr., Asst. Atty. Gen., Baton Rouge, LA, for Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JOLLY, WIENER and PARKER, Circuit Judges.

Opinion

WIENER and ROBERT M. PARKER, Circuit Judges:

Mike Foster, Governor of Louisiana, Richard P. Ieyoub, Attorney General of Louisiana, and the State of Louisiana (collectively "the State") appeal the district court's order permanently enjoining "the operation and effect" of Louisiana Revised Statutes Annotated, Title 9, Section 2800.122 (West Supp.1999) ("Act 825" or "the Act"), which makes an abortion provider liable, in tort, to the woman obtaining an abortion for any damage occasioned by the abortion. The district court held the Act unconstitutional and enjoined its enforcement, finding that the Act is unconstitutionally vague and that it imposes an undue burden on a woman's right to seek a pre-viability abortion. We affirm.

I. PROCEDURAL HISTORY AND STANDARD OF REVIEW

The original complaint of Ifeanyi Charles Anthony Okpalobi ("Dr. Okpalobi") was filed in district court on July 15, 1997. Five health care clinics and two more physicians ("Intervenors") intervened on behalf of Dr. Okpalobi and filed a motion for a temporary restraining order ("TRO") and preliminary injunction to restrain the operation of Act 825.³ The State opposed the motion. After a hearing, the district court granted a TRO in an order dated August 14, 1997, one day before the Act was scheduled to take effect.

The district court held a hearing on the Plaintiffs' motion for preliminary injunction on December 10, 1997. On January 7, 1998, the district court issued an order declaring that Act 825 "has the purpose and effect of infringing and chilling the exercise of constitutionally protected rights of abortion providers and woman [sic] seeking abortions," concluding that the Plaintiffs had demonstrated a substantial likelihood of success on the

merits of their Fourteenth amendment claim and granting the preliminary injunction. *See Okpalobi v. Foster*, 981 F.Supp. 977, 986 (E.D.La.1998). On February 11, 1998, pursuant to an agreement of the parties, the district court converted the preliminary injunction to a permanent injunction. The agreed permanent injunction contains no express declaratory judgment language, but permanently enjoins the Act "in its entirety for the reasons stated in the granting of the preliminary injunction." Because of the express reference to the earlier order declaring the Act unconstitutional and because the only basis for the injunction articulated is the district court's decision that the Act violates the Constitution, the order before us on appeal of necessity grants the Plaintiffs' request for both declaratory and injunctive relief.

The State timely filed an appeal. We must now determine whether the district court abused its discretion when it declared that Act unconstitutional and permanently enjoined its enforcement. *See Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096, 1102 (5th Cir.), *cert. denied*, *342 522 U.S. 943, 118 S.Ct. 357, 139 L.Ed.2d 278 (1997). "The district court abuses its discretion if it (1) relies on clearly erroneous factual findings when deciding to grant or deny the permanent injunction, (2) relies on erroneous conclusions of law when deciding to grant or deny the permanent injunction, or (3) misapplies the factual or legal conclusions when fashioning its injunction relief." *Id.* (internal quotations omitted)(citing *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916-17 (5th Cir.1996)). The district court's conclusions of law, including the declaration that Act 825 is unconstitutional, are reviewed *de novo*. *See North Alamo Water*, 90 F.3d at 915.

[1] [2] The procedural posture in which this case is presented limits our review of the district court's factual findings. The only factual findings before us on review were made in the context of the district court's grant of the Plaintiffs' motion for a preliminary injunction. A preliminary injunction requires the movant, by a clear showing, to carry the burden of persuasion. *See Mazurek v. Armstrong*, 520 U.S. 968, 117 S.Ct. 1865, 1867, 138 L.Ed.2d 162 (1997). The court found that the Plaintiffs had met their burden of proof, establishing, along with all other requirements for granting a preliminary injunction, a "substantial likelihood of success on the merits." *See Okpalobi*, 981 F.Supp. at 981. This is not the same as holding that the Plaintiffs had established disputed facts as a matter of law. The district court's grant of preliminary injunction, although interlocutory, was immediately appealable. *See* 28 U.S.C. § 1292(a)(1). The State, however, did not appeal it. Rather, the case went forward to final disposition of the Plaintiffs' complaint

seeking permanent injunction. Moreover, the parties agreed to the entry of a permanent injunction without further evidence or argument. By its agreement to make the temporary injunction permanent, the State waived any argument about the factual sufficiency of the record to support a permanent injunction. If the record contains evidence that supports the district court's finding of "substantial likelihood of success on the merits," we cannot hold the findings of fact to be clearly erroneous.

II. FACTS

The Plaintiffs comprise three physicians and five health care clinics that provide abortion services in Louisiana. *See Okpalobi*, 981 F.Supp. at 980. The Plaintiffs submit that they provide over 80% of all abortions in Louisiana. *See id.* No patient of either the physicians or the clinics appears as a party to this suit. *See id.*

The evidence in the record consists of two affidavits submitted to the district court to support the Plaintiffs' motion for preliminary injunction.⁴ The first affidavit was executed by the administrator of Hope Medical Group for Women, a Shreveport Louisiana abortion provider. Hope's administrator asserts that Act 825 "will leave Hope no option but to cease providing abortions to our patients who need pregnancy terminations" because the Act leaves the clinic and its physicians "susceptible to significant liability."

The second affidavit was submitted by a physician who provides abortions in Baton Rouge and New Orleans, Louisiana. He also asserts that if Act 825 takes effect, he would have no choice but to discontinue his abortion practice. "The constant and real threat of large money judgments against me, when I have done no wrong, is not a risk I could reasonably bear."

III. DISCUSSION

A. The Act

This case requires us to determine the constitutionality of Act 825, which would *343 have taken effect on August 15, 1997. The Act states:

2900.12 Liability for termination of a pregnancy

A. Any person who performs an abortion is liable to the mother of the unborn child for any damage occasioned

or precipitated by the abortion, which action survives for a period of three years from the date of discovery of the damage with a preemptive period of ten years from the date of the abortion.

B. For purposes of this Section:

(1) "Abortion" means the deliberate termination of an intrauterine human pregnancy after fertilization of a female ovum, by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead unborn child.

(2) "Damage" includes all special and general damages which are recoverable in an intentional tort, negligence, survival, or wrongful death action for injuries suffered or damages occasioned by the unborn child or mother.

(3) "Unborn child" means the unborn offspring of human beings from the moment of conception through pregnancy and until termination of the pregnancy.

C.(1) The signing of a consent form by the mother prior to the abortion does not negate this cause of action, but rather reduces the recovery of damages to the extent that the content of the consent form informed the mother of the risk of the type of injuries or loss for which she is seeking to recover.

(2) The laws governing medical malpractice or limitations of liability thereof provided in Title 40 of the Louisiana Revised Statutes of 1950 are not applicable to this Section.

LA.REV.STAT. ANN. § 9:2800.12 (West Supp.1999).

I. Purpose

a. The Inquiry

The *Casey* Court provided little, if any, instruction regarding the type of inquiry lower courts should undertake to determine whether a regulation has the "purpose" of imposing an undue burden on a woman's right to seek an abortion. Other than setting forth the above-stated test, the Court added only that: "[a] statute with this purpose [placing a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability] 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." *Casey*, 505 U.S. at 877, 112 S.Ct. 2791.

¹²¹ We are not without guidance, however, as abortion

law is not the only realm of jurisprudence in which courts are required to question whether a measure has been adopted for an impermissible purpose. Such an inquiry is also mandated in both voting rights and Establishment Clause cases. In those cases, the Supreme Court has instructed that we should typically afford a government's articulation of legislative purpose significant deference. See, e.g., *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). Nevertheless, we are not to accept the government's proffered purpose if it is a mere "sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987); see also *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (noting avowed purpose not sufficient to satisfy Establishment Clause inquiry). 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. See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207, (1996) (voting rights case in which Court examined shape of proposed congressional district created by legislation and state's admission in preclearance procedures and before district court that race motivated *355 creation of district); *Edwards*, 482 U.S. at 594, 107 S.Ct. 2573 ("A court's finding of improper purpose behind a statute is appropriately determined by the statute on its face, its legislative history, or its interpretation by a responsible administrative agency"). It is to such evidence that we must turn to discern whether Act 825 passes constitutional muster under the purpose prong of *Casey*'s undue burden test.

Relying on the Supreme Court case, *Mazurek v. Armstrong*, 520 U.S. 968, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997), and the Tenth Circuit case, *Jane L. v. Bangerter*, 102 F.3d 1112 (1996), the State asserts that successfully challenging an abortion statute's purpose is "quite difficult" absent a State's admission of improper motive. In *Mazurek*, the Supreme Court held that a Montana statute restricting the performance of abortions to licensed physicians was not adopted with the impermissible purpose of interfering with a woman's constitutional right to obtain an abortion. *Mazurek*, 520 U.S. at 972-76, 117 S.Ct. 1865. In so doing, the Court rejected the plaintiffs' argument that the lack of medical evidence that the Montana law would protect a woman's health demonstrated that the law was based on an impermissible purpose, quoting its earlier statement in *Casey* 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." *Id.* at 973, 117 S.Ct. 1865 (quoting *Casey*, 505 U.S. at 885, 112 S.Ct. 2791). The Court similarly discounted the involvement of anti-abortion groups in the drafting of the law. *Id.* Finally, the Court emphasized that, in light of the Court's repeated holdings that a State may restrict the performance of abortions to physicians, the Montana law clearly did not have the effect of creating a substantial obstacle to a woman's right to seek an abortion before the fetus attains viability. *Id.* at 974-75, 117 S.Ct. 1865. The Court concluded that "there is simply no evidence that the legislature intended the law to do what it plainly did not do." *Id.* at 974, 117 S.Ct. 1865.

In *Jane L*, the Tenth Circuit held unconstitutional a Utah law that equated viability with twenty weeks gestational age as measured from conception because, *inter alia*, the law had the impermissible purpose of usurping the physician's responsibility for determining fetal viability and, thus, providing a vehicle for challenging the holding of *Roe v. Wade*. *Jane L*, 102 F.3d at 1116-17. As evidence of this purpose, the court relied on the legislature's establishment of an abortion litigation trust account, the law's blatant disregard of the Supreme Court's "repeated directive" that viability is a matter for an attending physician to determine, and the State's admission in its appellate briefs that the law was "intended to prevent the nontherapeutic abortion of a nonviable fetuses after twenty weeks because in the State's view women who seek such abortions have waited too long." *Id.* at 1116-17.

The State has missed the import of these two cases—whether they are read separately or together. Neither *Mazurek* nor *Jane L* indicates either that (1) for a court to hold that a measure has the impermissible purpose of placing an undue burden on a woman's right to an abortion, the legislature actually has to admit to such a purpose or (2) indicia of improper legislative purpose, such as statutory language, legislative history and context, and related legislation, are irrelevant to the purpose prong of the "undue burden" inquiry. In *Mazurek*, the Supreme Court simply rejected as insufficient evidence of improper purpose two types of evidence not relevant here and similarly discounted by the Court on other occasions—medical data indicating that nonphysicians are capable of performing abortions safely and the involvement of certain lobbying groups in the legislative process. More importantly, *356 in attempting to glean whether the Montana statute's purpose was improper, the Court examined the language and requirements of the challenged statute in light of existing precedent—a traditional inquiry and one particularly useful here.

Similarly, although the Tenth Circuit in *Jane L* obviously relied on the fact that the state admitted to an improper purpose in its appellate brief, the court also rests its conclusion that the Utah legislature adopted the measure for a forbidden purpose on the fact that the act on its face denied physicians the discretion granted them under well-established precedent.

In short, in *Mazurek*, the Supreme Court highlights specific types of evidence that are clearly insufficient to establish improper purpose; in *Jane L*, the Tenth Circuit affirms the obvious that, if the state admits to an improper purpose in adopting an abortion measure, that measure cannot pass constitutional muster under the undue burden test; and both cases reconfirm that the established methods for assaying a legislature's purpose are valid in the abortion context. It is those methods on which we rely in determining whether Act 825 has the purpose of placing a substantial burden on a woman's right to obtain an abortion.

b. Act 825

[22] We have noted above that the State contends that the purpose of Act 825 is to encourage a physician to inform a woman of all the risks associated with having an abortion. The Act's plain language refutes such a contention. Contrary to the State's assertions, the cause of action contained in Act 825 simply does not hinge on what or how much information a physician provides to a woman prior to performing an abortion. The Act's operative language provides, without any reference to the issue of informed consent, that "[a]ny person who performs an abortion is liable to the mother of the unborn child for any damage occasioned or precipitated by the abortion..." LA.REV.STAT. ANN. § 9:2800.12(A). Damage is defined to include "injuries suffered or damages occasioned by the unborn child or mother." LA.REV.STAT. ANN. § 9:2800.12(B)(2) (emphasis added). The Act later adds that "[t]he signing of a consent form by the mother prior to the abortion does not negate this cause of action, but rather reduces the recovery of damages to the extent that the content of the consent form informed the mother of the risk of the type of injuries or loss for which she is seeking to recover." LA.REV.STAT. ANN. § 9:2800.12(C)(1) ("Reduction of Damages/Informed Consent Provision") (emphasis added).

Thus, the Act provides a cause of action (1) to women who have had an abortion (2) against the physician who performed the abortion (3) for any damage caused by the

procedure to the woman or the "unborn child"—a cause of action that (fatally, as seen below) contains no standard of care, no mens rea requirement, and no indication whatsoever regarding the steps a physician may take to avoid liability (other than to cease and desist from performing abortions). The issue of informed consent only enters the picture to reduce, not bar, damages regarding types of injuries of which the physician informed the woman prior to the abortion. Like its operative clause, the Act's "Reduction of Damages/Informed Consent" provision offers no guidance to a physician as to what he can do to satisfy Act 825's non-existent standard-of-care and state-of-mind requirements. In short, Act 825's structure and language put the lie to the State's insistence that the legislation is designed merely to enhance the information furnished to women seeking abortions.

The State's explanation of Act 825's purpose appears even more disingenuous when read *in pari materia* with the Louisiana Woman's Right to Know Act (the "Woman's Right to Know Act"), LA.REV.STAT. ANN. § 40:1299.35.6 (West Supp.1999), the measure that the State argues Act 825 is intended to supplement. That *357 act (1) specifies in a comprehensive list the information that a physician must furnish to a woman seeking an abortion, LA.REV.STAT. ANN. § 40:1299.35.6(A)(5)(a) (stating purpose of Act to "[e]nsure that every woman considering an abortion receive [sic] complete information on her alternatives and that every woman submitting to an abortion do [sic] so only after giving her voluntary and informed consent to the abortion procedure"), and (2) provides that "[a]ny physician who complies with the provisions of [the Right to Know Act] may not be held civilly liable to his patient for failure to obtain informed consent to the abortion..." LA.REV.STAT. ANN. § 40:1299.35.6(H). When Act 825's Reduction of Damages/Informed Consent language that grants a woman a cause of action for damage caused to her or her "unborn child" by an abortion is viewed in conjunction with the Woman's Right to Know Act, which denies a woman the ability to recover for damages for injuries of which she was informed before an abortion, it is undeniable that the provision is designed not to supplement the Woman's Right to Know Act, but to ensure that a physician cannot insulate himself from liability by advising a woman of the risks, physical or mental, associated with abortion. Like the district court,

we cannot avoid the conclusion that the State's proffered legislative purpose simply is not credible.

Given the deference due to state legislation, the question of whether Act 825 fails constitutional muster exclusively because it was adopted for an improper purpose might be close. We are not, however, confronted with such a situation. To the contrary, if Act 825 were to go into effect, it undoubtedly would drive Louisiana's qualified and responsible abortion providers out of business, thereby imposing an undue burden on a woman's right to seek an abortion. Thus, we are faced with the converse situation of that confronted by the Supreme Court in *Mazurek*. To paraphrase the Court, there is significant evidence that the legislature intended the law to do exactly what it would do were it to go into effect.

2. Effect

The evidence shows that the Plaintiffs, who currently provide approximately 80% of all abortions in the state, will be forced to discontinue their abortion practice if Act 825 goes into effect. The district court found that the Act constitutes an undue burden because it "sets a standard no physician can meet and creates a climate in which no provider can possibly operate," thereby significantly reducing the number of abortion providers in Louisiana. *Okpalobi*, 981 F.Supp. 977, 983-84. The district court's finding is not clearly erroneous. A measure that has the effect of forcing all or a substantial portion of a state's abortion providers to stop offering such procedures creates a substantial obstacle to a woman's right to have a pre-viability abortion, thus constituting an undue burden under *Casey*. See *Planned Parenthood v. Miller*, 63 F.3d 1452, 1465 (8th Cir.1995) (holding criminal and civil penalty provisions of abortion measure was unconstitutional because provisions would unconstitutionally chill physicians' willingness to provide abortions). As our conclusion that Act 825 will have such an effect is intimately linked to our determination that the Act is unconstitutionally vague, we proceed without pause to consider this issue.

Footnotes

- ¹ Although the record shows that the Attorney General of Louisiana was named as a party and was served with citation, he does not appear as a defendant on the docket sheet of the district court. Further, although he is named as a party in all of defendants' pleadings, in the injunction orders and on the notice of appeal, he does not appear as a party on the docket sheet in this court. He nevertheless has invoked the appellate jurisdiction of this court and is a party to this appeal.

- 2 "This section, enacted by Acts 1997, No. 825, § 1, as R.S. 9:2800.11, was redesignated as R.S. 9:2800.12, pursuant to the statutory
revision authority of the Louisiana State Law Institute." LA.REV.STAT. ANN. 9:2800.12, Historical and Statutory Notes.
- 3 On appeal, there is no meaningful distinction between the positions taken by Dr. Okpalobi and intervenors. We therefore refer to
them collectively as "Plaintiffs" or "Appellees."
- 4 The record also contains the deposition of a member of the Louisiana House of Representatives, concerning the legislative history
of the Act. The deposition was filed on the same day that the district court issued the preliminary injunction. It is not clear whether
it was available to the district court in reaching its decision.
- 5 The *Allied* court noted its disagreement with *Gras* insofar as *Gras* declined to find *Young* enforcement power in the Governor's
general duty to see to the execution of state laws, but went on to agree with the *Gras* result. See *Allied*, 473 F.Supp. at 568.
- 6 Plaintiffs originally named the Governor and the Treasurer of Louisiana as defendants, but later dismissed all claims against the
Treasurer and substituted the State of Louisiana in his stead.
- 7 The dissent approaches this difficult question from a third angle, stating in footnote 1 that the "injunction can have no legal effect
against women not part of this suit. Furthermore, Louisiana's courts are not bound by our court's determination that a particular
Louisiana law is unconstitutional (aside from dealing with the specific parties who were subject to the federal court judgment)." We
view the dissent's first statement as a misleading non sequitur and its second statement as erroneous. On the first point, it is
immaterial that the subject injunction cannot be enforced against women who are not party to the suit because the injunction is
aimed at the State of Louisiana through its responsible officials. The injunction does not prohibit a woman from filing such a suit;
it does make her suit frivolous and dismissable *ab initio* by enjoining the State from enforcing claims based on the unconstitutional
statute. As for the binding effect on Louisiana courts, the treatise cited in support of the dissent's footnote, RICHARD H.
FALLON, ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 209 (4th ed.1996),
does not support the dissent's assertion. In discussing a federal court's ruling on overbreadth of a state criminal statute, the treatise
merely points out that if a state court later interprets the state statute less broadly than the federal court, it may avoid the problem of
overbreadth identified by an earlier federal court decision. Although Louisiana Courts are free to disagree with our *interpretation*
of their statute, neither the treatise cited, nor any other authority of which we are aware, allows state courts to ignore federal court
interpretations of the U.S. Constitution, much less to enforce a state statute that has been declared unconstitutional *vel non* by a
federal court.
- 8 In addition to constitutional standing requirements, the court has fashioned principles of judicial restraint, which have come to be
known as "prudential" considerations. See *Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir.1994). These self-imposed constraints are
intended to ensure the proper role of the courts in our tripartite system of government by avoiding judicial resolution of abstract
questions that would be more appropriately addressed by other governmental institutions. See *id.* (citing *Warth v. Seldin*, 422 U.S.
490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).
- 9 We must not, however, conflate third party standing, which allows a plaintiff with an injury in fact to serve as a proponent of
another party's constitutional rights, with procedural mechanisms that allow a litigant to actually represent an absent party's
interests, which require much tighter identity of interests. See, e.g., *Society of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1288
(5th Cir.1992)(setting out the requirements for an association to bring suit on behalf of its members); see also, FED.R.CIV.P. 23
(requiring commonality and typicality of claims or defenses as prerequisites to class action).
- 10 The void-for-vagueness doctrine has been employed most often to strike down laws that impose criminal sanctions. See, e.g.,
Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979)(striking down a statute imposing civil and criminal
penalties against abortion providers who fail to comply with statutory requirements). Even though the imposition of criminal
penalties requires a statute to provide an even higher level of certainty, the doctrine is not limited to the criminal context. See
Kolender v. Lawson, 461 U.S. 352, 358 n. 8, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); see also *Village of Hoffman Estates v.*
Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)(applying void for vagueness doctrine in civil
context and holding that an ordinance that regulated the business of selling drug paraphernalia was not void for vagueness because
the law was sufficiently clear.)
- 11 Thomas R. Eller, *Informed Consent Civil Actions for Post-Abortion Psychological Trauma*, 71 Notre Dame L.Rev. 639 (1996).
- 1 Although the district court opinion suggests that the judgment operates universally against all who would claim its benefits, an
injunction operates only to enjoin those persons involved in the lawsuit. See Fed.R.Civ.P. 65(d). The injunction can have no legal
effect against women not part of this suit. Furthermore, Louisiana's courts are not bound by our court's determination that a
particular Louisiana law is unconstitutional (aside from dealing with the specific parties who were subject to the federal court
judgment). Because "state courts and lower federal courts stand in a coordinate rather than a hierarchical relationship," Louisiana
courts may choose to view the majority's opinion as persuasive precedent, or they may not. See generally, RICHARD H.

FALLON, ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 209 (4th ed.1996).

- 2 The abortion clinics and Dr. Whitmore are intervenors, but for simplicity I refer to them, along with Dr. Okpalobi (the initial plaintiff), collectively as the "plaintiffs" throughout this dissent.
- 3 Although both the State of Louisiana and Governor Foster (in his official capacity) have been named as defendants, there is in effect only one defendant in this case. The state acts only through its officials, and the only official named was the governor. Thus, when I only refer to the defendant governor, that reference includes the State of Louisiana.
- At the beginning of this lawsuit, both Governor Foster and Treasurer Duncan were named, in their official capacities, as defendants. Dr. Okpalobi, the original plaintiff, named the treasurer as a defendant because Dr. Okpalobi pressed a Takings Clause claim. The treasurer was, apparently, named as a defendant in an attempt to secure an injunction ordering the treasurer to pay money out of the state treasury. Dr. Okpalobi later amended his complaint to substitute the State of Louisiana for Treasurer Duncan. The plaintiffs have never explained any threatened, or even conceivable, action that either the governor or the state itself might take to "enforce" Act 825.
- 4 The legislation is described in *Muskra*, 219 U.S. at 348–51, 31 S.Ct. 250, and *Gritts v. Fisher*, 224 U.S. 640, 642–46, 32 S.Ct. 580, 56 L.Ed. 928 (1912).
- 5 Specifically, the plaintiffs argued that the 1906 Act "arbitrarily takes from the [plaintiffs] and others similarly situated property which is theirs and gives it to others, and therefore is violative of due process of law." *Gritts*, 224 U.S. at 646–47, 32 S.Ct. 580.
- 6 No sovereign immunity issue existed in *Muskra* and *Gritts* because Congress had waived the United States' sovereign immunity by passing the 1907 Act that specified the United States as a defendant in suits challenging the legislation. *See Muskra*, 219 U.S. at 350, 31 S.Ct. 250 (quoting that portion of the Act that specifies the United States as a defendant).
- 7 As the majority notes, the defendants in this case waived their right to a trial on the merits. This should be a clue that the named defendants are not the proper parties for a challenge to Act 825. It is rare indeed that a party, who continues to contest the merits of the case, will agree to waive the right to a trial. Surely a party who has a genuine stake in the availability of a cause of action under Act 825—that is, a woman injured during an abortion procedure—would have taken on a more spirited defense of Act 825 and demanded that the plaintiffs prove their factual allegations at trial. It is also worth noting that the defendants also attempted to waive oral argument before our court. These repeated waivers of rights by the defendants should raise some suspicion that there may not be an Article III case or controversy presented in this case.

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IV. Speech, the Undue Burden Standard, & the First Amendment

Applying the newly articulated undue burden standard, the *Casey* Court held that the state did not violate the Due Process Clause by requiring speech that is truthful, non-misleading, and relevant to a woman's choice of whether to have an abortion. Since *Casey*, most courts looking at laws mandating speech in the abortion context have utilized this "truthful and non-misleading" standard under the Due Process Clause, with some even applying it to First Amendment claims.

How should courts define "truthful and non-misleading?" A South Dakota law challenged in *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds* requires, among other things, that doctors inform women that abortion leads to an increased risk of suicide ideation and suicide. The district court found this message to be ideological, as well as untruthful and misleading. Plaintiffs successfully argued that there is no causal medical link between abortion and suicide, and that doctors should not be required to make statements that go against their medical judgment. The Eighth Circuit disagreed, holding that the suicide warning was allowable and that the message regarding suicide risk should be considered untruthful or misleading only if plaintiffs can "show that abortion has been ruled out, to a degree of scientifically accepted certainty, as a statistically significant casual factor in post-abortion suicides."

Consider the recent divide between a district court and the Fifth Circuit on the issue of whether a Texas law requiring doctors to verbally describe an ultrasound to a patient seeking abortion violates the doctors' First Amendment right to refrain from speech. The District Court in *Texas Med. Providers Performing Abortion Services v. Lakey* analyzed the case under the First Amendment, as pleaded by the plaintiffs; it found that the law triggered strict scrutiny and failed that test because it was not narrowly tailored to further a compelling interest. Although plaintiffs did not bring an undue burden claim, the Fifth Circuit held that Texas' mandatory ultrasound law should be subject to Fourteenth Amendment undue burden analysis, and not a First Amendment analysis. In overruling the district court, Judge Edith Jones held,

If the disclosures are truthful and non-misleading, and if they would not violate the woman's privacy under the *Casey* plurality opinion, then Appellees would, by means of their First Amendment claim, essentially trump the balance *Casey* struck between women's rights and the states' prerogatives.

Similar to the district court in *Lakey*, the district court in *Stuart v. Huff* engaged in a First Amendment analysis of a North Carolina law that required doctors to describe a woman's ultrasound images to her. Although defendants wanted the court to analyze the law under the undue burden standard, the court rejected that approach, noting that the *Casey* Court applied the undue burden standard only in evaluating the issues concerning women's liberty interests under the Due Process Clause, not to the First Amendment claim it considered.

530 F.3d 724

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~.

United States Court of Appeals,
Eighth Circuit.

PLANNED PARENTHOOD MINNESOTA,
NORTH DAKOTA, SOUTH DAKOTA; Carol E.
Ball, M.D., Appellees,

v.

Mike ROUNDS, Governor, in his official capacity;
~~Larry Long~~, Attorney General, in his official
capacity, Appellants,
Alpha Center; Black Hills Crisis Pregnancy Center,
doing business as Carenet; Dr. Glenn A. Ridder,
M.D.; Eleanor D. Larsen, M.A., LSWA,
Intervenors on Appeal.

No. 05-3093. | Submitted: April 11, 2007. | Filed:
June 27, 2008.

Synopsis

Background: Abortion provider brought action to enjoin amendments to state's informed consent law from taking effect, on ground that amendments violated First and Fourteenth Amendments, and moved for preliminary injunction. The United States District Court for the District of South Dakota, Karen E. Schreier, J., 375 F.Supp.2d 881, granted motion. State appealed.

Holdings: The Court of Appeals, sitting en banc, Gruender, Circuit Judge, held that:

[1] abortion provider failed to demonstrate the requisite likelihood of success on its claim that disclosure which was statutorily required of physicians was untruthful or misleading, and

[2] court did not have to reach issue of whether physician certification requirement did not allow physician to disassociate him or herself from required disclosure.

Vacated and remanded.

Loken, Chief Judge, concurred in the result and filed statement.

Murphy, Circuit Judge, filed dissenting opinion in which Wollman, Bye, and Melloy, Circuit Judges, joined.

West Codenotes

Negative Treatment Vacated
S.D.C.L. § 34-23A-10.1.

Attorneys and Law Firms

*725 John P. Guhin, AAG, argued, Patricia J. DeVaney and Bobbi J. Rank, on the brief, Pierre, SD, for appellant.

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*726 Benjamin W. Bull and Jordan W. Lorence, on the brief, Scottsdale, AZ, for amicus parties.

Before, LOKEN, Chief Judge, WOLLMAN, MURPHY, BYE, RILEY, MELLOY, SMITH, COLLOTON, GRUENDER, BENTON and SHEPHERD, Circuit Judges, en banc.

Opinion

GRUENDER, Circuit Judge.

The Governor and Attorney General of South Dakota ("the State"), along with the intervenor crisis pregnancy centers, appeal the district court's preliminary injunction preventing the 2005 version of South Dakota's statute regulating informed consent to abortion from becoming effective. For the reasons discussed below, we vacate the preliminary injunction and remand to the district court for further proceedings.

I.

In 2005, South Dakota enacted House Bill 1166 ("the Act"), amending the requirements for obtaining informed consent to an abortion as codified in S.D.C.L. § 34-23A-10.1. Section 7 of the Act requires the performing physician to provide certain information to the patient as part of obtaining informed consent prior to an abortion procedure and to certify that he or she believes

the patient understands the information. The provisions of § 7 relevant to the preliminary injunction are as follows (emphases added):

No abortion may be performed unless the physician first obtains a voluntary and informed written consent of the pregnant woman upon whom the physician intends to perform the abortion, unless the physician determines that obtaining an informed consent is impossible due to a medical emergency and further determines that delaying in performing the procedure until an informed consent can be obtained from the pregnant woman or her next of kin in accordance with chapter 34-12C is impossible due to the medical emergency, which determinations shall then be documented in the medical records of the patient. A consent to an abortion is not voluntary and informed, unless, in addition to any other information that must be disclosed under the common law doctrine, the physician provides that pregnant woman with the following information:

(1) A statement in writing providing the following information:

(a) The name of the physician who will perform the abortion;

(b) *That the abortion will terminate the life of a whole, separate, unique, living human being;*

(c) *That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota;*

(d) *That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated;*

(e) A description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including:

(i) Depression and related psychological distress;

(ii) Increased risk of suicide ideation and suicide;

***

***

(2) A statement by telephone or in person, by the physician who is to perform the abortion, or by the

referring physician, or by an agent of both, at least *727 twenty-four hours before the abortion, providing the following information:

(a) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

(b) That the father of the unborn child is legally responsible to provide financial support for her child following birth, and that this legal obligation of the father exists in all instances, even in instances in which the father has offered to pay for the abortion;

(c) *The name, address, and telephone number of a pregnancy help center in reasonable proximity of the abortion facility where the abortion will be performed; ...*

***

[¶ 2] Prior to the pregnant woman signing a consent to the abortion, she shall sign a written statement that indicates that the requirements of this section have been complied with. *Prior to the performance of the abortion, the physician who is to perform the abortion shall receive a copy of the written disclosure documents required by this section, and shall certify in writing that all of the information described in those subdivisions has been provided to the pregnant woman, that the physician is, to the best of his or her ability, satisfied that the pregnant woman has read the materials which are required to be disclosed, and that the physician believes she understands the information imparted.*

In addition, § 8(4) of the Act amended S.D.C.L. § 34-23A-1 to define "Human being" for the purposes of the informed-consent-to-abortion statute as "an individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation." A physician who violates the Act knowingly or in reckless disregard is guilty of a Class 2 misdemeanor. S.D.C.L. § 34-23A-10.2.

Planned Parenthood Minnesota, North Dakota and South Dakota and its medical director Carole E. Ball, M.D. (collectively "Planned Parenthood") sued to prevent the Act from taking effect, claiming that the disclosure requirements in § 7(1)(b)-(d) and the physician certification requirement in § 7 ¶ 2 violate physicians' free speech rights; that the disclosure requirements in §§ 7(1)(e)(i)-(ii) and (2)(c) are unconstitutionally vague in that they fail to give physicians adequate notice of the conduct proscribed; that being subjected to the disclosures

in § 7(1)(b)-(d) unduly burdens patients' rights to an abortion and violates their free speech rights; and that § 7 unduly burdens patients' right to an abortion because its health exception is inadequate.

In June 2005, Planned Parenthood moved for a preliminary injunction to prevent the Act from taking effect as scheduled on July 1, 2005. In support of the argument that §§ 7(1)(b)-(d) would violate physicians' free speech rights by compelling them to deliver the State's ideological message, rather than truthful and non-misleading information relevant to informed consent to abortion, Planned Parenthood's evidence consisted solely of affidavits from Dr. Ball and bioethicist Paul Root Wolpe, Ph.D. In her affidavit, Dr. Ball described her professional background, including a board certification in obstetrics and gynecology. Without elaboration, Dr. Ball stated that the disclosures in §§ 7(1)(b)-(d) "are statements of ideology and opinion, not medicine or fact." Ball Aff. ¶ 2. Dr. Ball also stated that she would be unable to clarify the disclosures upon a patient's request, as required by § 7, "because these are not medical statements or facts that I am trained as a Medical Doctor to address." *Id.* ¶ 4. The affidavit *728 made no reference to the Act's definition of "human being" in § 8(4).

Dr. Wolpe's affidavit included a curriculum vitae detailing his expertise in "the area of ideology in medicine and bioethics." Wolpe Aff. ¶ 1. Dr. Wolpe stated that the proposition "that from the moment of conception, an embryo or fetus is a 'whole, separate, unique, living human being' ... is not a scientific or medical fact, nor is there a scientific or medical consensus to that effect." *Id.* ¶¶ 2, 3. Dr. Wolpe further averred that "to describe an embryo or fetus scientifically and factually, one would say that a living embryo or fetus in utero is a developing organism of the species *Homo Sapiens* which may become a self-sustaining member of the species if no organic or environmental incident interrupts its gestation." *Id.* ¶ 6.

In its opposition to the motion for preliminary injunction, the State introduced portions of the Act's legislative history¹ and several affidavits. The legislative history includes testimony from several women who had obtained abortions in South Dakota and felt their decisions would have been better informed if they had received from their abortion providers the information required by § 7. In addition, the legislative history includes testimony from experts such as Marie Peeters-Ney, M.D., a physician and geneticist, explaining the scientific basis for the disclosure required by § 7(1)(b) that "the abortion will terminate the life of a whole, separate, unique, living human being." Dr. Peeters-Ney testified that use of the term "human being"

was accurate because:

Becoming a member of our species is conferred immediately upon conception. At the moment of conception a human being with 46 chromosomes comes into existence. These chromosomes, the organization, the chromosomal pattern is specifically human. The RNA, the messenger protein, the proteins are distinctly human proteins. So this new human being is a member of our species, and humanity is not acquired sometime along the path, it occurs right at conception.

Senate State Affairs Comm. Hearing at 25. Dr. Peeters-Ney also stated that an embryo or fetus is whole in the sense that "[a]ll the genetic information sufficient and necessary to mature, and the information that is needed for this human being's entire life is present at the time of conception"; that it is "separate from the mother" because "[t]he genetic program is totally complete and this human being will mature according to his or her own program"; and that it is unique because it has "a totally unique genetic code." *Id.* at 25-26.

The State augmented the points raised in the legislative history with eight affidavits from medical experts and eight from women who had undergone abortions or worked at crisis pregnancy centers. For example, David Fu-Chi Mark, Ph.D., a molecular biologist employed in the pharmaceutical industry, stated that the Act's definition of "human being" as an "individual living member of the species *Homo sapiens*," including human beings living in utero, makes it clear that the statement under [§ 7(1)(b)] is stated as a scientific fact and nothing more. As such, it is truthful and scientifically accurate." Mark Aff. ¶ 1. The affidavit described in detail the DNA and RNA science supporting the accuracy of the statement. Similarly, Bruce Carlson, M.D., Ph.D., a professor of *729 medicine and author of a widely used textbook on human embryology, stated that "[t]he post implantation human embryo is a distinct individual human being, a complete separate member of the species *Homo sapiens*, and is recognizable as such." Carlson Aff. ¶¶ 1, 5.

The district court held a hearing on the motion for preliminary injunction. Planned Parenthood argued that patients receiving the disclosure in § 7(1)(b) would never receive the limited statutory definition of "human being." Prelim. Inj. Mot. Hr'g (June 28, 2005) Tr. at 20; *see id.* at 25 ("If you want to talk about *Homo sapiens*, and go on and talk about there is a developing organism that is unique, that may be correct. That is not what the State's message attempts to do here."). Planned Parenthood contended that, as a result, patients would understand the

plain meaning of “whole, separate, unique, living human being” to mean a “person” in the fullest moral and legal sense and that this compelled disclosure that a fetus or embryo is a “person” would violate *Roe v. Wade*² and its progeny. *Id.* at 20–21. Planned Parenthood likewise argued that §§ 7(1)(c) and (d) were infirm based on their reference to the fetus or embryo as a “human being.” *Id.* at 23. Planned Parenthood also asserted that the Act’s certification requirement would not allow the physician to disassociate himself or herself from the Act’s ideological message. *Id.* at 13.

The State responded that every patient would receive the definition that “human beings are defined as members of the species *Homo sapiens*” because “that’s right in the statute.” *Id.* at 46. With regard to disassociation, the State contended that “all [the physician] has to do is explain that basic scientific fact and then he can go on and have any kind of discussion about philosophy, theology or morality, or whatever it is that he wants to talk about.... [The physician’s] only obligation is regarding this narrow scientific fact.” *Id.* at 47.

[¹¹] The district court, applying our *Dataphase*³ test, granted a preliminary injunction based on its finding that Planned Parenthood had a fair chance of success on its claim that § 7(1)(b) violated physicians’ free speech rights and that the balance of harms favored Planned Parenthood. *See Planned Parenthood v. Rounds*, 375 F.Supp.2d 881 (D.S.D.2005). The district court apparently accepted the argument that the Act’s limited definition of “human being” would not be included in any disclosure, or, if included, would have no effect on the patient’s understanding of the term, finding that the Act

requires abortion doctors to enunciate the State’s viewpoint on an unsettled medical, philosophical, theological, and scientific issue, that is, whether a fetus is a human being. *See Roe v. Wade*, 410 U.S. 113, 159, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (the word person as used in the Fourteenth Amendment does not include the unborn); [*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 913, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)] (Stevens, J., concurring) (fetus is a developing organism that is not yet a person).

*730 *Id.* at 887. The district court also emphasized the absence of a provision in the Act expressly allowing physicians to disassociate themselves from the required disclosures. *Id.* Citing § 10 of the Act, which states that the prior version of S.D.C.L. § 34–23A–10.1 should remain in effect if “the provisions” of § 7 of the Act are preliminarily enjoined, the district court also preliminarily enjoined §§ 7(1)(c)–(e), (2) and ¶ 2

without any further analysis. *Id.* at 889. The two crisis pregnancy centers and their members intervened in the case in July 2005 and participated in the briefing and argument of this matter on appeal. After a divided panel of this court affirmed the grant of the preliminary injunction, we elected to grant rehearing en banc.

III.

[¹⁴] The district court granted the preliminary injunction based solely on Planned Parenthood’s claim that § 7(1)(b) violates physicians’ First Amendment rights to be free from being compelled to speak.⁷ We review that decision for an abuse of discretion. *Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir.2006). “An abuse of discretion occurs where the district court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions.” *Id.* at 503–04. In the instant case, the district court rested its conclusion on an error of law when it ignored the statutory definition of “human being” in § 8(4) of the Act. Taking into account the statutory definition, we find that Planned Parenthood’s evidence at the preliminary injunction stage does not demonstrate that it is likely to prevail on the merits.

[¹⁵] [¹⁶] We first examine the contours of the right not to speak. “[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). In general, to address a claim that a state action violates the right not to speak, a court first determines whether the action implicates First Amendment protections. *Id.* at 715, 97 S.Ct. 1428. If it does, the court must determine whether the action is narrowly tailored to serve a compelling state interest. *Id.* at 716, 97 S.Ct. 1428. “[W]here the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.” *Id.* at 717, 97 S.Ct. 1428.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court held that “a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion” implicates a physician’s First Amendment right not to speak, “but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” 505 U.S. 833, 884, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion).⁸ *734 However, the Court found no violation of the physician’s right not to speak, without need for further analysis of whether the requirements were narrowly

tailored to serve a compelling state interest, *id.*, where physicians merely were required to give "truthful, nonmisleading information" relevant to the patient's decision to have an abortion, *id.* at 882, 112 S.Ct. 2791. Significantly, information deemed relevant in *Casey* was not limited to information about the medical risks of the procedure itself; the State also required the physician to inform the patient that the father of her child would be liable for child support and that other agencies and organizations offered alternatives to abortion. *Id.* at 881, 902-03, 112 S.Ct. 2791. Such information was relevant because it "furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Id.* at 882, 112 S.Ct. 2791. Furthermore, the fact that the information "might cause the woman to choose childbirth over abortion" did not render the provisions unconstitutional. *Id.* at 883, 112 S.Ct. 2791.

In the recent *Gonzales v. Carhart* decision, the Supreme Court reaffirmed in the context of abortion that "it is clear the State has a significant role to play in regulating the medical profession" and that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman." 550 U.S. 124, 127 S.Ct. 1610, 1633, 167 L.Ed.2d 480 (2007). The Court described in detail the State's interest in regulating the information provided by physicians prior to an abortion in the context of partial-birth abortion procedures:

Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue.

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more

anguished and sorrow more profound when she learns, only after the event, what she once did not know: that

she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions.

Id. at 1634 (citations omitted).

[18] *Casey* and *Gonzales* establish that, while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion. Therefore, Planned Parenthood cannot succeed on the merits of its claim that § 7(1)(b) violates a physician's right not to speak unless it can show that the disclosure is either untruthful, misleading or not relevant to the patient's decision to have an abortion.

[19] Taken in isolation, § 7(1)(b)'s language "[t]hat the abortion will terminate the life of a whole, separate, unique, living human being" certainly may be read to make a point in the debate about the ethics of abortion. Our role, however, is to examine the disclosure actually mandated, not one phrase in isolation. Planned Parenthood's evidence and argument rely on the supposition that, in practice, the patient will not receive or understand the narrow, species-based definition of "human being" in § 8(4) of the Act, but we are not persuaded that this is so. See *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184, 1190, 170 L.Ed.2d 151 (2008) ("[W]e must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases."). South Dakota recognizes the well-settled canon of statutory interpretation that "[w]here [a term] is defined by statute, the statutory definition is controlling." *Bruggeman v. S.D. Chem. Dependency Counselor Certification Bd.*, 571 N.W.2d 851, 853 (S.D.1997). The Supreme Court emphasized the controlling nature of statutory definitions in analyzing a Nebraska partial-birth abortion statute:

When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning. *Meese v. Keene*, 481 U.S. 465,

484—485, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987) (“It is axiomatic that the statutory definition of the term excludes unstated meanings of that term”); *Colautti v. Franklin*, 439 U.S. at 392–393, n. 10, 99 S.Ct. 675 (“As a rule, ‘a definition which declares what a term ‘means’ ... excludes any meaning that is not stated’ ”)....

Stenberg v. Carhart, 530 U.S. 914, 942, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000).

Section 7(1) essentially requires the physician to deliver a written form to the patient and lists some, but not all, of the information that must be included on that form. For example, § 7(1)(e) requires the disclosure form to contain a “description of all known medical risks of the procedure,” “including” certain subcategories; such language does not purport to establish the exact wording of the disclosure form. Nothing about the structure of § 7 supports the unusual proposition that the limiting statutory definition of a term used in the required disclosure should be ignored on the basis that it is stated in a separate “definitions” section. Given the well-recognized controlling nature of statutory definitions, it would be incumbent upon one preparing the disclosure form required by § 7(1), and upon a physician answering a patient’s questions about it, to account for any applicable statutory definitions.

Once one accepts that the required disclosure must take into account the limiting definition in § 8(4), the evidence submitted by the parties regarding the truthfulness and relevance of the disclosure in § 7(1)(b) generates little dispute. The disclosure actually mandated by § 7(1)(b), in concert with the definition in § 8(4), is “[t]hat the abortion will terminate the life of a whole, separate, unique, living human being,” § 7(1)(b), and that “human being” in this *736 case means “an individual living member of the species of *Homo sapiens* ... during [its] embryonic [or] fetal age[ ],” § 8(4). The State’s evidence suggests that the biological sense in which the embryo or fetus is whole, separate, unique and living should be clear in context to a physician, cf. *Gonzales*, 127 S.Ct. at 1627 (“[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable ‘outside the womb.’”), and Planned Parenthood submitted no evidence to oppose that conclusion. Indeed, Dr. Wolpe’s affidavit, submitted by Planned Parenthood, states that “to describe an embryo or fetus scientifically and factually, one would say that a living embryo or fetus in utero is a developing organism of the species *Homo Sapiens* which may become a self-sustaining member of the species if no organic or environmental incident interrupts its gestation.” Wolpe Aff. ¶ 6. This statement appears to support the State’s evidence on the biological underpinnings of § 7(1)(b) and

the associated statutory definition. Planned Parenthood’s only other evidence, Dr. Ball’s affidavit, ignores the statutory definition of “human being.” Finally, this biological information about the fetus is at least as relevant to the patient’s decision to have an abortion as the gestational age of the fetus, which was deemed to be relevant in *Casey*. See 505 U.S. at 882, 112 S.Ct. 2791. As a result, Planned Parenthood cannot meet even the less rigorous requirement to show a fair chance of prevailing, much less the more rigorous requirement applicable here to show that it is *likely* to prevail, on the merits of its claim that the disclosure required by § 7(1)(b) is untruthful, misleading or not relevant to the decision to have an abortion. See *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (per curiam) (emphasizing that a preliminary injunction “should not be granted unless the movant, by a *clear showing*, carries the burden of persuasion” and presents proof even more substantial than that required on a motion for summary judgment) (quotation omitted)).⁹

¹⁰¹ Planned Parenthood also contends that ¶ 2 of the Act, requiring the physician to certify in writing that he or she “believes [the patient] understands the information imparted,” does not allow a physician to disassociate himself or herself from the required disclosure in § 7(1)(b). The ability to disassociate must be viewed in the context of the disclosure required. If a state-mandated disclosure is ideological in nature, the state could argue that, if the physician may completely disassociate himself or herself from the state’s ideological message, then the physician’s compelled speech rights are not implicated. Cf. *Rust v. Sullivan*, 500 U.S. 173, 200, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (holding that regulations preventing physicians who participated *737 in a federally funded program from discussing abortion with their program-funded patients did not violate the physicians’ First Amendment rights because “[n]othing in [the regulations] requires a doctor to represent as his own any opinion that he does not in fact hold” and the effect of the regulations “cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her”). On the other hand, neither *Casey* nor any other precedent of which we are aware suggests the proposition that, where a physician is required to disclose truthful and non-misleading information as part of obtaining informed consent to a procedure, the physician’s ability to disassociate from that truthful and non-misleading information is relevant to the compelled speech analysis. Because Planned Parenthood has failed to demonstrate the requisite likelihood of success on its claim that the disclosure required by § 7(1)(b) is untruthful or misleading, it has not demonstrated that there is an ideological message from

which physicians need to disassociate themselves.¹⁰ Therefore, we need not reach the disassociation issue in the instant case.

Given Planned Parenthood's failure to produce sufficient evidence to establish that it is likely to prevail on the merits of its compelled speech claim, we need not address the remaining *Dataphase* factors.¹¹ In summary, the district court *738 abused its discretion by failing to give effect to the statutory definition of "human being" in § 8(4) of the Act. Planned Parenthood's evidence at the preliminary injunction stage does not establish a likelihood of proving that, with the definition incorporated, the disclosure required by § 7(1)(b) is anything but truthful, non-misleading and relevant to the patient's decision to have an abortion, and thus "part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 884, 112 S.Ct. 2791. Accordingly, we vacate the preliminary injunction entered on compelled speech grounds by the district court.

V.

We conclude that the district court erred in granting a preliminary injunction based on Planned Parenthood's claim that the Act violates physicians' First Amendment rights. Accordingly, we vacate the preliminary injunction and remand to the district court for further proceedings consistent with this opinion.

LOKEN, Chief Judge, concurring.

Having concluded that Planned Parenthood's facial attack on § 7(1)(b) of the Act does not warrant issuance of a preliminary injunction, I join Part II and footnote 7 of the court's opinion and concur in its result.

MURPHY, Circuit Judge, with whom WOLLMAN, BYE and MELLOY, Circuit Judges, join, dissenting.

I respectfully dissent. In order to uphold an amendment to South Dakota's informed consent law which imposes unprecedented restrictions on women seeking abortions and unprecedented demands on their physicians, the court has bypassed important principles of constitutional law laid down by the Supreme Court. It has also found it necessary to revise the circuit *739 standard for preliminary injunctions and to depart from established

practice by not remanding for the district court to have the opportunity to apply the new standard to the constitutional issues raised by Planned Parenthood. Since appellants have not shown that the district court abused its discretion in issuing a preliminary injunction, its order should be affirmed.

I.

The provisions of this Act go far beyond the informed consent laws which have been upheld by the Supreme Court and the courts of appeal against constitutional challenges.¹² The unique features in the Act include the extent of its interference with the doctor patient relationship, the nature of the information it forces the attending physician to transmit to the woman patient, the requirement that doctors certify that their patient has understood the state's messages, and the provision that any question raised by a woman be attached to her personal and permanent medical record.

A woman's constitutional right to terminate her pregnancy before viability has been consistently upheld by the Supreme Court in the thirty five years since *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). See, e.g., *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 420, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (woman has constitutional right to terminate her pregnancy) (overruled on other grounds); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (woman has right to an abortion before viability without undue interference from the state); *Stenberg v. Carhart*, 530 U.S. 914, 921, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (*Carhart I*) (woman has right to choose an abortion before viability); *Gonzales v. Carhart*, 550 U.S. 124, 127 S.Ct. 1610, 1626, 167 L.Ed.2d 480 (2007) (*Carhart II*) (state may not prevent "any woman from making the ultimate decision to terminate her pregnancy").

The leading case on the constitutionality of informed consent requirements is the Supreme Court's decision in *Casey*. The Pennsylvania statute upheld there required that absent a medical emergency, a physician should inform the patient in advance of an abortion about "[t]he nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion." *Casey*, 505 U.S. at 902, 112 S.Ct. 2791. Information about the probable gestational age of the fetus and

medical risks associated with carrying the child to term were also to be provided, and the woman was to be made aware of her right to access printed materials describing the fetus and listing agencies which offer alternatives to abortion, prenatal and neonatal care, and guidance for obtaining child support. *Id.* at 902–03, 112 S.Ct. 2791. The only certification requirement was that a woman was to acknowledge in writing that the information has been made available to her. *Id.* at 903, 112 S.Ct. 2791. Finding these provisions to be reasonable measures to inform a woman's choice, the Supreme Court held that they did not amount to an undue burden on her constitutional right to have an abortion. *Id.* at 883, 112 S.Ct. 2791.

The two informed consent statutes which have previously come before our *740 court both closely tracked the *Casey* provisions and were found to be within constitutional boundaries. In *Fargo Women's Health Org. v. Schafer*, we upheld an informed consent amendment to a North Dakota abortion law and remarked on "the close similarity between the North Dakota statute and the Pennsylvania statute at issue in *Casey*." 18 F.3d 526, 532 (8th Cir.1994). The law required that absent a medical emergency, the patient be informed at least 24 hours before the procedure of the name of the physician performing the abortion and of the medical risks of an abortion and of carrying the pregnancy to term. *Id.* at 527. The patient was also to be told of the probable gestational age of the unborn child, medical assistance benefits, support liability of the father, and the availability of printed materials about fetal development and adoption services. *Id.*

In 1993 South Dakota enacted an informed consent law with provisions "substantially similar to [those] upheld by the Supreme Court in *Casey*," and we upheld it as not imposing an undue burden on a woman's right to an abortion. *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir.1995). That law required that the patient knowingly consent to an abortion and be provided with medical facts relevant to the procedure itself, as well as information about abortion alternatives and possible sources of financial and medical assistance. *See id.*

Other circuits have also upheld informed consent statutes by reference and comparison to the Pennsylvania law which passed constitutional muster in *Casey*. For example, the Seventh Circuit approved such an Indiana law in *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 686 (7th Cir.2002), and a Wisconsin law in *Karlin v. Foust*, 188 F.3d 446, 481–82 (7th Cir.1999). The Fifth Circuit similarly rejected a facial challenge to a Mississippi informed consent law

"substantially identical to similar provisions of the Pennsylvania Act at issue in *Casey*." *Barnes v. Moore*, 970 F.2d 12, 13 (5th Cir.1992) (per curiam). In addition many district courts have approved informed consent laws closely tracking the *Casey* provisions. *See, e.g., Eubanks v. Schmidt*, 126 F.Supp.2d 451, 455 n. 5 (W.D.Ky.2000) ("For purposes relevant to this [constitutional] analysis, the Pennsylvania and Kentucky informed consent statutes are identical."); *Utah Women's Clinic, Inc. v. Leavitt*, 844 F.Supp. 1482, 1486 (D.Utah 1994) ("The Utah and Pennsylvania laws are nearly identical."), *rev'd on other grounds*, 75 F.3d 564 (10th Cir.1995).

These informed consent provisions were consistent with *Casey* because they reflected the state's legitimate interest in ensuring that women receive accurate and relevant information before exercising their right to an abortion. Such disclosures educate the patient about the factual aspects of an abortion, including the medical procedure and the development of the fetus. They may also include information about available child care assistance and financial liability of the father. *See, e.g., Schafer*, 18 F.3d at 527; *Miller*, 63 F.3d at 1467; *Newman*, 305 F.3d at 686.

Comparison of the Act with the informed consent laws upheld by the courts shows that the South Dakota provisions are strikingly different from those which have passed constitutional muster. Rather than focusing on medically relevant and factually accurate information designed to assist a woman's free choice, the Act expresses ideological beliefs aimed at making it more difficult for women to choose abortions. Indeed, "[t]he obvious objective of the Act ... is to use the concept of 'informed consent' to eliminate abortions." *741 Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L.Rev. 939, 941 (2007).¹³

The Act requires that physicians make unique statements to their patients unrelated to the intended medical procedure. Several of the provisions in the Act force physicians to advise their patients on metaphysical matters about which there is no medical consensus, likely violating the First Amendment prohibition against compelled speech and placing an undue burden on the exercise of a woman's constitutional right to abort a nonviable fetus. *See Post, supra*, at 944 ("Plainly this informed consent statute pushes the constitutional envelope in numerous directions ...").

Section 7 requires the attending physician to advise the patient in writing that an abortion "terminate[s] the life of a whole, separate, unique, living human being" with whom she enjoys an existing constitutionally protected

relationship, which ends with an abortion. See §§ 7(1)(b)-(d). The physician must also tell the patient that significant risks of an abortion include depression, suicide, and suicidal ideation. See § 7(1)(e)(i)-(ii). The patient must sign each page of the state's required messages, certifying that she understands them. § 7(1) ¶ 1. Any questions she may ask or explanations she may seek, as well as the physician's responses, must be reduced to writing and placed in the patient's permanent medical record. § 7(1) ¶ 1. After physicians have complied with these requirements, they must then certify their satisfaction that the patient has read the materials and that she "understands the information imparted." § 7(1) ¶ 2. These are unique requirements, unlike those contained in other informed consent laws.

Planned Parenthood raised First and Fourteenth Amendment objections to the Act and sought injunctive relief from its enforcement. The district court issued a preliminary injunction based on the First Amendment without reaching the other constitutional issues.

II.

The First Amendment gives individuals the right to speak freely and the right to refrain from speaking without government compulsion. *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). Like any right under the Constitution, the right to speak or refrain from speaking is not absolute. While doctors have First Amendment rights not to be compelled to speak by the state, those rights may be limited by "reasonable licensing and regulation." *Casey*, 505 U.S. at 884, 112 S.Ct. 2791. In the abortion context such reasonable regulation includes the state's prerogative to assert its "legitimate interests in the health of the woman and in protecting the potential life within her." *Id.* at 871, 112 S.Ct. 2791. For that reason a state may require physicians to provide objectively truthful and nonmisleading information before obtaining a patient's informed consent to an abortion. See *id.* at 882, 112 S.Ct. 2791. But if "the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley*, 430 U.S. at 717, 97 S.Ct. 1428.

*742 The challenged Act compels doctors to declare to their patients that "the abortion will terminate the life of a whole, separate, unique, living human being." § 7(1)(b). The term "human being" lacks a particular scientific definition or medical meaning. See *Wölpe Aff.* ¶ 4. Even in common parlance the term "human being" is

susceptible to multiple meanings. Compare *NTC's Compact English Dictionary* 220 (2000) ("human being n. a person; a human creature") with 6 *The New Encyclopedia Britannica* 134 (15th ed.1998) ("a bipedal primate mammal that is anatomically related to the great apes").¹⁴ In certain situations, especially where used in contradistinction to other species of animal, it may refer to purely biological characteristics. It also may be a value judgment, indicating entitlement to the moral or political rights shared by all persons.

In the context of abortion, the term "human being" has an overwhelmingly subjective, normative meaning, in some sense encompassing the whole philosophical debate about the procedure. See *Post, supra*, at 956 ("[w]hether the fetus is a 'human being' is [ ] understood by all sides to the abortion controversy to be an essentially contested moral proposition"). Justice Scalia in his *Casey* dissent pointed out that the beginning of human life cannot be determined by the state:

The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child is a human life. Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment.

505 U.S. at 982, 112 S.Ct. 2791 (second emphasis added). See also *Roe*, 410 U.S. at 159, 93 S.Ct. 705 (no consensus on beginning of life); *Carhart I*, 530 U.S. at 980, 120 S.Ct. 2597 (Thomas, J., dissenting) ("Abortion ... ends, depending on one's view, human life or potential human life." (emphasis added)). The philosophical or religious question of when a human life comes into existence is distinct from the scientific question of whether a fetus is biologically a member of the species. See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 792, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) (White, J., dissenting) ("However one answers the metaphysical or theological question whether a fetus is a 'human being' ... one must at least recognize ... that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* ...").

The constitutionally significant difference between regulation of verifiable fact as opposed to metaphysical

belief—between neutral information and subjective idea—has been well recognized by the Supreme Court. See, e.g., *Casey*, 505 U.S. at 884, 112 S.Ct. 2791 (state may regulate speech incident to practice of medicine); *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (state may regulate the writing of prescriptions); *Pacific Gas & Elec. Co. v. Public Utilities Com'n of California*, 475 U.S. 1, 15 n. 12, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (state may not compel a party to disseminate subjective messages contrary to its own views but disclosure of factual and legal information may be mandated); *Zauderer v. Office of *743 Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) (lawyer advertising requirements did not violate First Amendment because they consisted of purely factual and uncontroversial information).

Notwithstanding a state's prerogative to require certain factual disclosures in the course of professional communications, the state may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). The Act crosses that constitutional line by requiring physicians to communicate metaphysical ideas unrelated to any legitimate state interest in regulating the practice of medicine. See *City of Akron*, 462 U.S. at 472 n. 16, 103 S.Ct. 2481 (O'Connor, J., dissenting) (informed consent laws may "violate the First Amendment rights of the physician if the state requires him or her to communicate its ideology"); cf. *Wooley*, 430 U.S. at 720, 97 S.Ct. 1428 (Rehnquist, J., dissenting) (no constitutional violation because "[t]he State has not forced appellees to 'say' anything; and it has not forced them to communicate ideas ..."). Even in areas where a state has authority to regulate, "only a compelling state interest ... can justify limiting First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 31, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) (quoting *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963)). Since the state can assert no legitimate interest in defending the compulsory communication of ideological statements which do not pertain to its regulation of the practice of medicine, these provisions can not withstand constitutional scrutiny. Cf. *Wooley*, 430 U.S. at 717, 97 S.Ct. 1428 (state's legitimate interest in fostering community pride through license plates cannot outweigh First Amendment rights given ideological nature of required message).

Nothing in the Supreme Court's recent decision in *Carhart II* changes this fundamental principle. Although a

state may use its own voice to "show its profound respect" for fetal life, *Carhart II*, 127 S.Ct. at 1633, nowhere did the Supreme Court authorize a state to commandeer the voice of a physician to disseminate its ideological message. In fact, the Court acknowledged the government's regulatory interest there in light of the prevailing medical view that a particular method of late term abortion was unnecessary because safe alternative methods existed, see *id.* at 1638, finding the Congressional ban of such a "brutal and inhumane procedure" to be consistent with the government's "legitimate interests in regulating the medical profession." *Id.* at 1633.

South Dakota's attempted regulation of the medical profession is different because it requires physicians to espouse theological or philosophical beliefs about which there is no medical consensus and which implicate no legitimate governmental regulatory interests. As recently pointed out by a unanimous New Jersey Supreme Court, "there is no consensus in the medical community or society supporting [the] position that a six-to-eight-week-old embryo is, as a matter of biological fact—as opposed to a moral, theological, or philosophical judgment—a complete, separate, unique and irreplaceable human being." *Acuna v. Turkish*, 192 N.J. 399, 930 A.2d 416, 425 (2007).¹⁵ The New Jersey court *744 recognized the "deep societal and philosophical divide" about "the profound issue of when life begins" and suggested that to compel doctors to convey such philosophical ideas to their patients about which there is no medical consensus could violate their First Amendment rights against compelled speech and place an undue burden on the exercise of a woman's constitutional right to abort a nonviable fetus. *Id.* at 426–27.

The majority summarily concludes without explanation that "[t]he State's evidence suggests that the biological sense in which the embryo or fetus is whole, separate, unique and living should be clear in context to a physician." *Ante* at 736. It appears to rely on the testimony of Dr. Peeters-Ney that a unique set of DNA is present upon conception and *her belief* that the fetus is "whole" because it has the genetic information necessary to mature, and that it is "separate" for the same reason.¹⁶ See Peeters-Ney Aff. ¶ 3. The medical fact that a unique set of DNA is present at conception, however, does not support a conclusion that the statutory adjectives preceding the word "human being" have scientific meaning. Dr. Ball testified to the contrary. She explained that the proposition that an abortion terminates the life of a "whole, separate, unique, living human being" is neither a medical statement nor a fact which medical doctors are trained to address, but rather an "ideological

pronouncement.” Ball Aff. ¶ 4. Dr. Wolpe similarly refuted assertions by several of the state’s other declarants who claimed that it is a medical or scientific fact that an embryo or fetus is a “whole, separate, unique, living human being” from the moment of conception. Wolpe Aff. ¶ 2. The record is far from showing a medical consensus that a full set of DNA constitutes a “whole, separate, unique, living human being.”

The adjectives used in the Act to modify “human being” are not statutorily defined so they must be construed “according to [their] accepted usage and a strained, impractical, or absurd result should be avoided.” *Juttelstad v. Juttelstad*, 587 N.W.2d 447, 450 (S.D.1998). A nonviable fetus is not “whole” in that it cannot maintain a separate life outside the woman’s womb, and it neither “contain[s] all components or constituents” nor does it represent “a complete entity or system.” See, e.g., *Webster’s New College Dictionary* (3d ed.2005). Likewise, “separate” in common usage means “detached,” “disconnected,” “existing independently,” or “not shared.” See, e.g., *Random House Unabridged Dictionary* (2006). A fetus cannot be established to be a “separate” human being since it is physically attached to a woman by an umbilical cord and fully contained inside her body, a connection on which its very survival depends. Cf. Wolpe Aff. ¶ 6.

Although a legislature may choose to give words its own unique definition, it cannot establish by fiat that the term “human being” has only biological connotations, for the constitutional analysis of whether the mandated statements convey factual truths or contestable ideology is not controlled by the wording of the Act. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001) (special vigilance required when *745 legislature attempts to “insulate its own laws from legitimate judicial challenge”). It is the role of the judiciary, rather than the legislature, to determine whether speech and speech regulations implicate the First Amendment. See *Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946).

To understand the constitutional issues before the court, it is important to look exactly at the words employed in § 7, for “[t]he preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says there.” *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004). While the majority contends that the attending physician would attach the Act’s definition of “human being” to the required information to be transmitted, nothing in the statute instructs a physician to do that. Section 7(1)

enumerates what the physician must tell the patient, and it contains no cross reference to the § 8 definition.¹⁷ There is no evidence in the record showing that a physician would go beyond the mandatory advisories in § 7 unless directed by the statute to do so, especially in light of the strict certification requirements and criminal penalties. See S.D.C.L. § 34–23A–10.2.

The majority acknowledges that when § 7(1)(b) is taken in isolation, it “certainly may be read to make a point in the debate about the ethics of abortion.” *Ante* at 735. In the attempt to uphold the statute, it turns to the statutory definition of “human being” in § 8(4), which it initially quotes in its entirety, *ante* at 727, but then excises in part as it seeks to employ § 8(4) to circumvent the ideological nature of the Act’s use of the term. *Ante* at 735–36. Section 8(4) defines “human being” as “an individual living member of the species *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation.” (emphasis added to portions eliminated from the majority’s discussion). Without acknowledging the elimination of the italicized portions of the definition, the majority asserts that the “truthfulness and relevance of the disclosure in § 7(1)(b) generates little dispute” once the statutory definition is taken into account. *Ante* at 735. This pronouncement is quite amazing in light of the well established precept that the point at which human life begins is indeterminable as a legal matter. See, e.g., *Roe*, 410 U.S. at 159, 93 S.Ct. 705; *Acuna*, 930 A.2d at 427 (noting the “deep societal and philosophical divide” on the issue).

The Act more than likely violates the First Amendment by compelling doctors to communicate the state’s ideology since the statutory definition of “human being” incorporates the metaphysical viewpoint that a “human being” is “living ... from fertilization.” Statutes requiring doctors to tell their patients that a human being exists at conception conflict with the Supreme Court’s admonition that a state may not adopt one theory of the beginning of life. *746 *City of Akron*, 462 U.S. at 444, 103 S.Ct. 2481; see also *Roe*, 410 U.S. at 159, 93 S.Ct. 705 (“We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”). The majority’s attempt to save the statute by speculating that doctors will incorporate the definition in § 8(4) into the required script they must deliver cannot succeed since that definition is also constitutionally flawed.

The script physicians are compelled to give by § 7(1)(b)—“that the abortion will terminate the life of a whole, separate, unique, living human being”—incorporates a value judgment and therefore escapes scientific verification. Because the point at which a living human being comes into existence can no more be established in the law or in science than the proposition that a fetus has no soul or that abortion is not a sin, the majority places an unprecedented and impossible burden of proof on Planned Parenthood by requiring it to show that the state’s forced message is “untruthful, misleading or not relevant to the patient’s decision to have an abortion.” *Ante* at 735. In contrast, *Casey* effectively placed the burden of proof on the state by declaring that “[i]f the information ... is truthful and not misleading, the requirement may be permissible.” 505 U.S. at 882, 112 S.Ct. 2791. The burden of proof assigned by the majority presupposes that all speech is demonstrably either true or false, overlooking the vast expanse of ideas that lie beyond means of proof because they appeal to subjective notions of morality, religion, or aesthetics. *See Gertz v. Welch*, 418 U.S. 323, 339, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (“Under the First Amendment there is no such thing as a false idea”); *Aviation Charter, Inc. v. Aviation Research Group/US*, 416 F.3d 864, 870–71 (8th Cir.2005) (recognizing that not all statements are susceptible of being proven true or false).

The Act effectively restricts the ability of doctors to distance themselves from the mandates of § 7(1) by requiring them to certify that their patient “understands the information imparted,” a provision with no parallel in the informed consent provisions which have survived constitutional challenge. *See, e.g.*, 18 Pa.C.S.A. § 3205; S.D.C.L. § 34–23A–1.7 (prior version); Ind.Code § 16–34–2–1.1; Utah Code Ann. § 76–7–305; Wis. Stat. § 253.10; N.D. Cent.Code § 14–02.1–02(5); Ky.Rev.Stat. § 311.725. A law that charges physicians with ensuring that the state’s metaphysical concepts are conveyed so that a patient understands them does not provide a realistic opportunity for the expression of alternate views, even if those alternate views were to represent the consensus in the medical community. Physicians may reasonably fear that they would be unable to certify that their patient understands the message if they tried to dissociate themselves from the required advisories or expressed competing views. This compelled speech is quite different from the type of medical information the state may require physicians to convey as part of its reasonable regulation of the medical profession. *See Casey*, 505 U.S. at 884, 112 S.Ct. 2791.

Even if the physician were able to disclaim sponsorship of the state’s message, the constitutional defects inherent in

compelled ideological speech would not be cured. *See Pacific Gas*, 475 U.S. at 9, 106 S.Ct. 903 (compulsory transmission of another’s speech “penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set”); *see also *747 Wooley*, 430 U.S. at 717 n. 15, 97 S.Ct. 1428 (legislation requiring license plate display of state motto unconstitutionally compelled speech because display affirms view expressed in motto, notwithstanding opportunity to disavow state’s message through bumper stickers). Views articulated by a doctor in the course of face to face contact with a patient—a context in which patients expect doctors to use their best and honest judgment—are, if anything, more likely to be attributed to the speaker than the well known slogan affixed to a state issued license plate in *Wooley* or the forced publication of third party speech in *Pacific Gas*. Moreover, the certification requirement for women seeking abortions and the mandate that any questions or comments on their part be entered into their permanent medical record are mechanisms likely to compel a woman to conform her speech to the state’s chosen messages. The Act thus likely violates the First Amendment rights of both physician and patient.

III.

The injunction issued by the district court should not be reversed without considering the other grounds for relief advanced by Planned Parenthood. It is well established that an appellate court can affirm a lower court on the basis of alternate grounds. *See Transcontinental Ins. Co. v. W.G. Samuels Co., Inc.*, 370 F.3d 755, 758 (8th Cir.2004). Planned Parenthood also alleged that the Act violates the Fourteenth Amendment by creating an undue burden on a woman’s constitutional right to terminate her pregnancy and by being unconstitutionally vague.

The Supreme Court has made clear that the state may not place an undue burden on a woman’s decision to have an abortion before viability. *See Casey*, 505 U.S. at 874, 112 S.Ct. 2791. Informed consent requirements prior to an abortion may be permissible only if they mandate the disclosure of “truthful and not misleading” information. *Id.* at 882, 112 S.Ct. 2791. The state may express in myriad ways its “respect for life, including life of the unborn.” *Carhart II*, 127 S.Ct. at 1633; provided that its requirements “inform the woman’s free choice, not hinder it.” *Casey*, 505 U.S. at 877, 112 S.Ct. 2791. Procedures that “amount in practical terms to a substantial obstacle to a woman seeking an abortion” are an undue burden and therefore constitutionally prohibited. *Id.* at 884, 112 S.Ct.

2791 (striking down spousal consent requirement because it would deter abortions "as surely as if the Commonwealth had outlawed abortions," *id.* at 894, 112 S.Ct. 2791).

The provisions mandated by §§ 7(1)(b)-(d) far exceed those at issue in *Casey* and the other statutes which have been upheld since then. Not only do the mandatory advisories raise concerns of compelled speech in violation of the First Amendment as already discussed, but they also more than likely impose an undue burden on a woman's decision to have an abortion before viability. That is because their apparent intent and probable effect is to place substantial obstacles in the way of a woman attempting to exercise her constitutional right to obtain an abortion. Under § 7(1), a woman seeking an abortion must sign "each page of the written disclosure with the certification that she has read and understands all of the disclosures ..." (emphasis added). By way of comparison, the informed consent provisions upheld by the Supreme Court and lower courts mandate only that a woman certify that required information has been made available to her. See *Casey*, 505 U.S. at 902, 112 S.Ct. 2791; see also *Newman*, 305 F.3d at 686; *Karlin*, 188 F.3d at 455; *Miller*, 63 F.3d at 1467; *748 *Schafer*, 18 F.3d at 527; *Eubanks*, 126 F.Supp.2d at 461-62.

The state's argument that it has required the disclosure of only factual information relevant to a woman's decisionmaking is unconvincing. No court has upheld an assertion like the one in § 7(1)(b) that a fetus is a "whole, separate, unique, living human being." No court has validated the definition in § 8(4) that a "human being" is "living ... from fertilization." On the contrary, courts have consistently recognized that a state may not regulate abortions based on its view of when human life commences. That a "physician [ ] inform his patient that 'the unborn child is a human life from the moment of conception' [was] a requirement inconsistent with the Court's holding in *Roe v. Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions." *City of Akron*, 462 U.S. at 444, 103 S.Ct. 2481;¹⁸ see also *Casey*, 505 U.S. at 851, 112 S.Ct. 2791 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

Under the Act a woman is given a Hobson's choice: either to certify that she understands vague and ideological statements disguised as medical information or to carry her pregnancy to term. But "[a] Hobson's choice, of this sort, is no choice at all." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.Supp.2d 1012, 1018 (D.Idaho 2005) (reporting requirement for underage patients an

undue burden on right to abortion). The Act's procedural mandates thus likely place an undue burden on a woman's ability to exercise her constitutional right to terminate her pregnancy.

The requirement in § 7(1) ¶ 2 that any question a woman asks, as well as the doctor's response, must be recorded in writing and included in her own permanent medical record likely intrudes upon "the special relationship between patient and physician [...] within the domain of private life protected by the Due Process Clause." *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 340 n. 12, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990). The Act provides no protections to ensure that this interchange or the woman's medical records will be kept confidential and not be released to other individuals.¹⁹ The state has asserted no valid regulatory interest in this requirement affecting the patient's permanent medical record. Cf. *Carhart II*, 127 S.Ct. at 1633 (state could further its legitimate interests in regulating medical profession so long as it did not impose an undue burden). Conditioning a woman's right to obtain an abortion on her willingness to give up her private relationship with her doctor likely creates an undue burden on the woman's constitutional rights by deterring her from having an abortion. See *Thornburgh*, 476 U.S. at 759, 106 S.Ct. 2169 ("The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies.").

Some of the advisories required by the Act are likely void for vagueness in violation *749 of the due process clause, partly because they do not make clear exactly what is essential to obtain the patient's informed consent. In *Carhart II*, the Supreme Court explained that statutory requirements have to be sufficiently definite so that the ordinary doctor and patient "can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." 127 S.Ct. at 1628. In contrast to the federal law at issue in *Carhart II*, which was specific in prohibiting the knowing partial delivery of an intact fetus by using surgical tools to destroy its skull, the Act does not make clear what conduct may subject a physician to criminal prosecution. It nevertheless warns that physicians who act knowingly or in reckless disregard of the statutory requirements are guilty of a Class 2 misdemeanor. See S.D.C.L. 34-23A-10.2.

The Act requires that a physician tell the patient that she "has an existing relationship with th[e] unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota." § 7(1)(c). "[B]y having an abortion, her existing

relationship and her existing constitutional rights with regards to that relationship will be terminated.” § 7(1)(d). Entirely omitted from the advisories ordered by the state is the authoritative information that the patient has a constitutional right to choose to have an abortion. *See, e.g., Casey*, 505 U.S. at 846, 112 S.Ct. 2791. The Act’s reference to a constitutional relationship between the woman and her unborn child is unclear and undefined. If a woman were to ask her doctor what precisely is meant by her “existing constitutional rights with regards to that relationship,” § 7(1)(d), and the doctor declined to answer her question on the grounds of being unqualified to discuss such vague legal concepts, the doctor could be subject to prosecution after performing an abortion. In her affidavit Dr. Ball stated that she would not be able to clarify the concepts the Act requires be communicated “because these are not medical statements or facts that I am trained as a Medical Doctor to address.” Ball Aff. ¶ 4. How then would a physician be able to certify that the patient understands the required advisories and proceed to perform an abortion? The Act thus likely amounts to a substantial obstacle for a woman seeking to exercise her right to terminate her pregnancy.

Equally problematic from a vagueness standpoint is the requirement in § 7(1)(e) that the physician provide a written description of “all known medical risks of the procedure and the statistically significant risk factors to which the pregnant woman would be subjected,” including “[d]epression and related psychological distress” and an “[i]ncreased risk of suicide ideation and suicide.” §§ 7(1)(e)(i), (ii). The statute does not define or provide guidance to physicians about what constitutes a statistically significant risk factor. Dr. Ball stated that “[c]orrelations can be strong or weak, so a statistically-significant risk can be an immaterial or remote risk ... Without additional guidance, I do not know how to determine whether something is statistically significant as set forth in the Statute, so I do not know how to ensure that I comply with the Statute.” Ball Aff. ¶ 7. Provisions such as these which fail to give a “person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute” have been found void for vagueness, especially “where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights.” *Colautti v. Franklin*, 439 U.S. 379, 390-91, 99 S.Ct. 675; 58 L.Ed.2d 596 (1979). A physician unsure of knowing how to comply with the Act might reasonably be expected to refuse to perform an abortion for fear of criminal liability.

Although legislative factfinding is reviewed under a deferential standard, courts retain “an independent constitutional duty to review factual findings where

constitutional rights are at stake.” *Carhart II*, 127 S.Ct. at 1637. The legislative determinations with respect to the state’s view that abortion results in significantly increased risks of depression or even suicide are highly questionable in light of medical studies in the United States and abroad which have refuted the theory that women undergoing abortions suffer from long term emotional harm or are more at risk than women who carry their pregnancy to term. A learned commentator has pointed out that the § 7(1)(e) provisions “very likely ... require physicians to disclose information that is false.” *See Post, supra*, at 961 (emphasis added); *see also Carhart II*, 127 S.Ct. at 1649 n. 7 (Ginsburg, J., dissenting) (citing numerous peer reviewed studies suggesting that no evidence of postabortion syndrome and related depression exists). As a 2006 Congressional report on the subject pointed out, “there is considerable scientific consensus that having an abortion rarely causes significant psychological harm.” United States House of Representatives, Minority Staff, Special Investigations Div., Comm. on Gov’t Reform, *False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers* at 11 (2006).

The Act’s broad mandate about psychological distress and suicide ideation is unlike the requirements in other informed consent laws found to be constitutional, which entrusted the communication of particular medical risks to the doctor’s best professional judgment. *See, e.g., S.D.C.L. § 34-23A-10.1(1)(b)* (prior version) (“The particular medical risks associated with the particular abortion procedure to be employed including, *when medically accurate*, the risks of infection, hemorrhage, danger to subsequent pregnancies, and infertility.”) (emphasis added); N.D. Cent.Code § 14-02.1-02(5)(a)(2) (same). By not allowing a doctor to omit the required disclosures in order to prevent serious adverse effects on a patient’s health (in exceptional circumstances other than an emergency), the Act undercuts a physician’s best medical judgment and discretion. Rejecting an argument in *Casey* that the Pennsylvania informed consent law violated the constitutional right to privacy between the pregnant woman and her physician, the Supreme Court referred to the law’s provision allowing doctors to exercise their best medical judgment by permitting them not to furnish the required advisories if they could demonstrate by a preponderance of the evidence that they reasonably believed that making the disclosures would result in a severely adverse effect on the health of the patient. *See* 505 U.S. at 883-84, 112 S.Ct. 2791. No comparable provision exists in the Act.

Footnotes

- 1 See Hearing on House Bills 1166 and 1233 Before the House State Affairs Comm. (S.D. Feb. 9, 2005); Hearing Re: House Bills 1166, 1233, 1249 Before the Senate State Affairs Comm. (S.D. Feb. 23, 2005).
- 2 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).
- 3 *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir.1981) (en banc) (holding that issuance of a preliminary injunction depends upon a “flexible” consideration of (1) the threat of irreparable harm to the moving party; (2) balancing this harm with any injury an injunction would inflict on other interested parties; (3) the probability that the moving party would succeed on the merits; and (4) the effect on the public interest).
- 4 The Eighth Circuit’s pre-*Dataphase* phrasing of this element of the traditional test, a “substantial probability” of success on the merits, typically was satisfied by a showing of a greater than fifty percent probability of success. See, e.g., *Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264, 1269 (8th Cir.1978) (applying the traditional test and concluding “that Modern Controls would probably succeed on the merits because, on the basis of the evidence before the Court, the covenant not to compete was enforceable”) (emphasis added); *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 868 (8th Cir.1977) (applying the traditional test and concluding that “it appears probable that Planned Parenthood will prevail on its claim that the ordinance is invalid”) (emphasis added). There was some disagreement in *Dataphase*, however, on the traditional meaning of “substantial probability.” Compare 640 F.2d at 113 (“Some have read this element of the [traditional] test to require in every case that the party seeking preliminary relief prove a greater than fifty per. cent likelihood that he will prevail on the merits.”) (emphasis added), with *id.* at 115 (Ross, J., concurring) (stating that the term “probability of success” must “mean a greater than fifty percent likelihood that the requesting party will prevail. If the courts which have used that phrase did not mean it to imply a better chance of prevailing than of not prevailing, they would have used the word ‘possibility’ or another word of a similar meaning. I cannot agree to this illogical exercise in semantics.”). To avoid the long and uncertain history associated with the terms “substantial probability” and “substantial likelihood” of success, we adopt the Supreme Court’s phrasing, “likely to prevail on the merits.” See *Doran*, 422 U.S. at 931, 95 S.Ct. 2561.
- 5 Our focus on likelihood of success on the merits as a threshold issue should not be construed to lessen the importance of irreparable harm in the *Dataphase* analysis. “The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.” *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). Indeed, in some cases, lack of irreparable injury is the factor that should begin and end the *Dataphase* analysis. See *Adam–Mellang v. Apartment Search, Inc.*, 96 F.3d 297 (8th Cir.1996). In this respect, where a duly enacted statute is involved, a likelihood of success on the merits may be characterized as one, but not the only, threshold showing that must be met by a movant for a preliminary injunction.
- 6 Although only a state statute is before us, our reasoning obviously indicates that the “likely to prevail on the merits” test, rather than the “fair chance” test, also should apply to the analysis of motions for preliminary injunctions of the enforcement of federal statutes. Where preliminary injunctions are sought to enjoin city ordinances or administrative actions by federal, state or local government agencies, we note that the Second Circuit has examined the circumstances surrounding such government actions to determine to what extent the challenged action represents “the full play of the democratic process” and, thus, deserves the deference of the traditional test. See *Able*, 44 F.3d at 131–32.
- 7 Planned Parenthood also advanced several other grounds in support of its motion for preliminary injunction. Because the district court’s order addressed only the compelled speech challenge to § 7(1)(b), we limit our en banc review to that ground. See *Jader v. Principal Mut. Life Ins. Co.*, 925 F.2d 1075, 1076 n. 1 (8th Cir.1991). On remand, the district court may, in its discretion, address the other arguments in support of the preliminary injunction in the first instance.
- 8 We have adopted the standards enunciated by the *Casey* plurality opinion as controlling precedent in abortion cases. *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456 n. 7 (8th Cir.1995) (recognizing the plurality opinion “as the Supreme Court’s definitive statement of the constitutional law on abortion”); see also *Stenberg v. Carhart*, 530 U.S. 914, 930, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (applying, in a majority opinion, the undue burden standard from the *Casey* plurality opinion).
- 9 The dissent recognizes that the term “human being” “may refer to purely biological characteristics.” *Post* at 742. Section 8(4) of the Act does just that, defining “human being” as a “living member of the species *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages” for purposes of the required disclosure. Like the evidence submitted by Planned Parenthood, the dissent steadfastly ignores this biology-based definition and maintains that the required disclosure is ideological in nature and, therefore, unconstitutional. By ignoring the statutory definition of “human being,” however, the dissent mischaracterizes the nature of the required disclosure and concludes that it compels a physician to answer the metaphysical question of when “human life” begins. Contrary to the dissent’s analysis, the Act, when read in light of the nonmisleading statutory definition of “human being,” does not require a physician to address whether the embryo or fetus is a “whole, separate, unique”

"human life" in the metaphysical sense.

10 We also have indicated that disassociation becomes relevant if the disclosure mandated by the state is generally truthful and non-misleading, but is misleading as to a particular patient due to her specific circumstances. See *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533–34 (8th Cir.1994) (addressing, in the context of North Dakota's informed-consent-to-abortion statute, the potential falsity of a disclosure of the availability of medical assistance benefits and paternal child support due to "unique and personal background facts" of the patient). In *Schafer*, we concluded that physicians would be able to comment on the misleading nature of the disclosures in those instances, and we found that an express statutory provision allowing physicians to disassociate from the disclosures supported our conclusion. *Id.* at 534. Planned Parenthood correctly points out that, unlike the statute in *Schafer*, the Act has no express provision allowing disassociation. Planned Parenthood further argues again that the certification requirement in § 7 ¶ 2, requiring the physician to certify in writing "that the physician believes [the patient] understands the information imparted," effectively precludes the physician from disassociating.

This argument is unavailing because Planned Parenthood introduced no evidence that the disclosure in § 7(1)(b), with the statutory definition of "human being" incorporated, would become false or misleading due to the particular circumstances of some patients. By contrast, the plaintiff in *Schafer* provided affidavits, albeit conclusory ones, to demonstrate the potential falsity of the information on medical-assistance and child-support benefits in particular circumstances. See 18 F.3d at 533–34. In the absence of some showing that there are particular circumstances in which a successful abortion will do something other than terminate the life of a whole, separate, unique, living member of the species of *Homo sapiens* during its embryonic or fetal age, Planned Parenthood cannot demonstrate that the physician's ability to disassociate is implicated in this case.

11 Our characterization of the requirement for the movant to show that it is likely to prevail on the merits as a "threshold" simply reflects that the court's consideration of the remaining *Dataphase* factors cannot tip the balance of harms in the movant's favor when the requirement is not satisfied. We acknowledge that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Kirkeby v. Furness*, 52 F.3d 772, 775 (8th Cir.1995) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion)). Nevertheless, without a showing that it will likely prevail on its claim that physicians will be compelled to deliver an ideological message, Planned Parenthood's asserted threat of irreparable harm is correspondingly weakened in comparison to the State's (and the public's) interest in providing pregnant women with all possible relevant information about abortion, thereby "reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Casey*, 505 U.S. at 882, 112 S.Ct. 2791. If the movant cannot show that it is likely to prevail on the merits, there is no reason at the preliminary injunction stage for the courts to disturb a duly elected legislature's attempt to balance these interests.

12 For the full text of the Act see the attached Addendum to the Dissenting Opinion, which also illustrates the Act's relationship to the state's prior informed consent law.

13 After the Act was enjoined by the district court, the legislature enacted the "South Dakota Women's Health and Human Life Protection Act" in 2006 (H.B. 1215, 81st Leg.(S.D.2006)), a statute banning all abortions except those necessary to save the life of the mother; that statute was repealed by popular referendum.

14 Webster's New College Dictionary (3d ed.2005) defines the noun "human" as a "human being," but fails to provide any definition for the latter term, suggesting that the task of assigning conclusive meaning to the term is ultimately reductive.

15 *Acuna* was a medical malpractice action in which the same attorney who now represents the intervenors here unsuccessfully advocated for a common law rule requiring physicians to make strikingly similar statements to their patients as those mandated by the Act.

16 A similar proposition was advanced by the respondent in *Roe*, who argued that a fetus must be a human being because it has the biological characteristics of the human species. That proposition was rejected by the Supreme Court and not reflected in its constitutional findings. See Brief of Respondent–Appellee at 30, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

17 South Dakota cites *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008), for the proposition that statutes must be taken as written. Here, it is the majority which speculates that doctors would reach beyond the statute's mandate to add a portion of § 8(4)'s definition to the advisories. While the state's cited case points with disfavor to some facial challenges to statutes, that rule does not apply to abortion legislation. See, e.g., *Richmond Medical Center v. Herring*, 527 F.3d 128, 146 (4th Cir.2008) ("Carhart II does not question the established validity of facial challenges to abortion statutes"), citing *Sabri v. United States*, 541 U.S. 600, 609–610, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004); *Carhart I*, 530 U.S. at 938–46, 120 S.Ct. 2597; *Casey*, 505 U.S. at 895, 112 S.Ct. 2791.

18 Although significant portions of *City of Akron* have been overruled, its prohibition of conveying ideological information in the guise of informed consent laws remains valid. See *Casey*, 505 U.S. at 882, 112 S.Ct. 2791.

- 19 In contrast, Massachusetts' informed consent law requires that all consent forms, transcripts of evidence, and written findings "shall be confidential and may not be released to any person except by the pregnant woman's written informed consent or by a proper judicial order, other than to the pregnant woman herself, her doctor, or any person whose consent is required." M.G.L.A. 112 § 12S.
- 20 The addendum consists of the complete text of the Act passed by the South Dakota legislature in 2005 (H.B. 1166) with the state's format showing the portions of the 1993 Act that were stricken and underlining the provisions added by the amendment.

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650 F.Supp.2d 972
United States District Court,
D. South Dakota,
Southern Division.

PLANNED PARENTHOOD MINNESOTA,
NORTH DAKOTA, SOUTH DAKOTA, and Carol E.
Ball, M.D., Plaintiffs,

v.

Mike ROUNDS, Governor, and Larry Long,
Attorney General, in their official capacities,
Defendants,

Alpha Center, Black Hills Crisis Pregnancy Center,
d/b/a Care Net, Dr. Glenn Ridder, M.D., and
Eleanor D. Larsen, M.A., L.S.W.A., Intervenor.

No. Civ. 05-4077-KES. | Aug. 20, 2009.

Synopsis

Background: Abortion providers brought action arguing that disclosures required by South Dakota's informed consent abortion statute were unconstitutional, and moved for a preliminary injunction. After the providers' motion was granted, a panel of the Court of Appeals affirmed, but, on rehearing en banc, the Court of Appeals vacated the panel decision, and reversed and remanded. Upon remand, plaintiffs, defendants, and intervenors filed motions for summary judgment.

Holdings: The District Court, Karen E. Schreier, Chief Judge, held that:

[1] statutory biological disclosure requirement was constitutional;

[2] statutory relationship disclosure requirements were unconstitutional;

[3] statutory phrase "all known medical risks" was not unconstitutionally vague;

[4] statutory phrase "statistically significant risk factors" was unconstitutionally vague;

[5] statutory suicide disclosure requirements were unconstitutional;

[6] abortion providers had standing to challenge medical emergency exception to statute; and

[7] statutory medical emergency exception was constitutional.

Motions granted in part and denied in part.

West Codenotes

Held Unconstitutional

SDCL § 34-23A-10.1(1)(c, d, e)

Attorneys and Law Firms

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Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, INTERVENORS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

KAREN E. SCHREIER, Chief Judge.

In 2005, the South Dakota Legislature passed House Bill 1166, which revised South Dakota law on informed consent to *975 abortion by expanding the disclosure requirements.¹ Plaintiffs, Planned Parenthood Minnesota, North Dakota, South Dakota and Carol E. Ball, M.D., commenced an action, arguing that the informed consent disclosures required by the statute were unconstitutional, and moved for a preliminary injunction. Docket 1 and Docket 10. This court granted the motion for preliminary

injunction, finding that the disclosures violated the First Amendment rights of the physicians by requiring them to espouse the state's ideology, and a panel of the Eighth Circuit Court of Appeals affirmed. Docket 40 and Docket 232. The Eighth Circuit Court of Appeals, on rehearing en banc, vacated the panel decision and reversed the district court's decision and remanded the case to the district court for consideration of the remaining issues. See *Planned Parenthood v. Rounds*, 530 F.3d 724 (8th Cir.2008) (*en banc*) (*Rounds III*). Upon remand, the parties filed motions regarding the preliminary injunction originally sought by plaintiffs. Docket 241, Docket 245, and Docket 246. The court consolidated the preliminary and permanent injunction motions for trial. The court allowed the parties to amend their then-pending motions for summary judgment and set new deadlines for the motions. Docket 256.

Defendants, Governor Mike Rounds and Attorney General Larry Long, now move for summary judgment with respect to the biological disclosure, relationship disclosures, medical risk disclosures, and medical emergency exception. Intervenor, Alpha Center, Black Hills Crisis Pregnancy Center, Dr. Glenn Ridder, and Eleanor Larsen, move for partial summary judgment with respect to the biological disclosure and relationship disclosures. Plaintiffs move for summary judgment with respect to the relationship disclosures, medical risk disclosures, and medical emergency exception.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Only disputes over facts that might affect the outcome of the case under the governing substantive law will properly preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is not appropriate if a dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

The moving party bears the burden of bringing forward sufficient evidence to establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The nonmoving party is entitled to the benefit of all reasonable inferences to be drawn from the underlying facts in the record. *Vette Co. v. Aetna Cas. & Sur. Co.*, 612 F.2d 1076, 1077 (8th Cir.1980). *The nonmoving party may not, however, merely rest upon allegations or denials in its pleadings, but must set forth specific facts by affidavits or otherwise showing that a genuine issue exists.* *Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 691 (8th Cir.2002).

*976 DISCUSSION

I. Biological Disclosure

^[1] Defendants and intervenors contend that the biological disclosure is constitutional as a matter of law in light of *Rounds III*. Plaintiffs agree that the court can render final declaratory relief that the biological disclosure is constitutional as long as the court determines that the statute only requires that specific biological information be provided and that this information may be provided in words chosen by the physician.

The statute requires the physician to inform the pregnant woman "[t]hat the abortion will terminate the life of a whole, separate, unique, living human being" (biological disclosure). SDCL 34-23A-10.1(1)(b). "Human being" is defined by the statute as "an individual living member of the species of *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation." SDCL 34-23A-1(4).

In *Rounds III*, 530 F.3d at 735, the Eighth Circuit determined that "Planned Parenthood cannot succeed on the merits of its claim that [the biological disclosure] violates a physician's right not to speak unless it can show that the disclosure is either untruthful, misleading or not relevant to the patient's decision to have an abortion." The court noted that "it would be incumbent upon one preparing the disclosure form required by [the statute], and upon a physician answering a patient's questions about it, to account for any applicable statutory definitions." *Id.* Consequently, the court found that

"[o]nce one accepts that the required disclosure must take into account the limiting definition [of human being], the evidence submitted by the parties regarding the truthfulness and relevance of the [biological disclosure] generates little dispute. The

disclosure actually **mandated** by [the biological disclosure], in concert with the definition [of human being], is that the abortion will terminate the life of a whole, separate, unique, living human being, [biological disclosure], and that human being in this case means an individual living member of the species of *Homo sapiens* ... during [its] embryonic [or] fetal age.”

Id. at 735–36 (emphasis added). The Eighth Circuit explained that “[t]he State’s evidence suggests that the biological sense in which the embryo or fetus is whole, separate, unique and living should be clear in context to a physician, and Planned Parenthood submitted no evidence to oppose that conclusion.” *Id.* at 736.

It is evident from the Eighth Circuit’s discussion that it found that the statute mandated that the physician inform the pregnant woman about the biological disclosure using the words set forth in the statute, especially in light of the fact that the Eighth Circuit found that the definition of “human being” should be disclosed in connection with the biological disclosure. Although defendants’ oral argument and Judge Gruender’s dissent in the initial Eighth Circuit opinion suggest that the statute does not mandate a script but rather merely directs the physician to categories of information that must be disclosed to patients, this court is bound to follow the en-banc opinion of the Eighth Circuit, which has determined that the disclosure be made with the words set out in the statute and any applicable statutory definitions.

Accordingly, the court finds that before performing abortions, the physician must inform the patient “[t]hat the abortion will terminate the life of a whole, separate, unique, living human being.” SDCL 34–23A–10.1(1)(b). But, as the State concedes in its reply brief, nothing prohibits the physician from providing the patient with additional information, including that the “*977 term ‘human being,’ as used in the statute, is used in a biological sense and not an ideological sense. Docket 289, at 6. Thus, defendants’ and intervenors’ motions for summary judgment are granted with respect to the biological disclosure.

II. Relationship Disclosures

^[2] In order to obtain informed consent to an abortion, the statute requires a physician to inform the pregnant woman “[t]hat the pregnant woman has an existing relationship

with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota.” SDCL 34–23A–10.1(1)(c). Further, in accordance with the statute, the physician must tell the pregnant woman “[t]hat by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated.” SDCL 34–23A–10.1(1)(d) (relationship disclosures).

Defendants and intervenors argue that the relationship disclosures require the same awareness as in the context of waiving parental rights. They assert that the relationship is protected under the United States Constitution pursuant to case law and is protected under the laws of South Dakota based upon South Dakota statutes addressing unborn children in the context of wrongful death and homicide causes of action as well as other similar statutes. They further argue that a relationship exists between a pregnant woman and a fetus because they are physically and psychologically connected.

Plaintiffs respond that the relationship disclosures are unconstitutional because they are untruthful and misleading. Plaintiffs assert that the United States Constitution does not protect any alleged relationship between the pregnant woman and the embryo or fetus but instead it protects the woman’s right to choose to have an abortion. Plaintiffs further assert that the laws of South Dakota do not protect any alleged relationship between the pregnant woman and the embryo or fetus because the laws concerning wrongful death actions, criminal homicide, support obligations, and life-sustaining treatment for a pregnant woman were adopted to address other concerns.

The Eighth Circuit has determined that “*Casey* and *Gonzales* [v. *Carhart*, 550 U.S. 124, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007)] establish that, while the State cannot compel an individual simply to speak the State’s ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.” *Rounds III*, 530 F.3d at 734–35. The burden is on plaintiffs to show that “the disclosure is either untruthful, misleading, or not relevant to the patient’s decision to have an abortion.” *Id.* at 735.

Here, the statute requires the physician to inform the pregnant woman that she has an existing “relationship” with an unborn human being and that an abortion will

terminate that existing "relationship." SDCL 34-23A-10.1(b)-(c). Significantly, the statute does not define the term "relationship." See SDCL 34-23A-1. But at the July 17, 2009, renewed preliminary injunction hearing, the State conceded that the term "relationship" is used in a legal context, not a biological context.

In the legal context, "relationship" is defined as "the nature and association between **two or more people**; esp. a legally recognized association that makes a difference in the participants' legal rights and duties of care." *Black's Law Dictionary*, 8th ed. (2004) (emphasis added). Accordingly, in order for a relationship to exist in *978 the legal context, there must be two persons. Under *Roe v. Wade*, 410 U.S. 113, 158, 162, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), which is still controlling precedent, the United States Supreme Court held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn" and further acknowledged that "the unborn have never been recognized in the law as persons in the whole sense." The fact that the legislature has included an unborn embryo and fetus within the meaning of the term "human being" does not elevate the status of that unborn embryo or fetus to a "person" within the meaning of the established laws. Consequently, in the legal context, a pregnant mother cannot have a "relationship" with a "human being," as that word is defined in the statute. As a result, the relationship disclosures are untruthful and misleading and, as such, are unconstitutional.

Moreover, the court is unaware and the parties have failed to cite any controlling authority finding that a legal relationship exists between a pregnant woman and an unborn embryo or fetus and that such a legal relationship is protected by the United States Constitution. In fact, all of the United States Supreme Court cases cited by defendants and intervenors in support of the relationship disclosures involve the relationship between a parent and a born child. See *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923) (noting that liberty includes the right of an individual to establish a home and raise children); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925) (recognizing that parents have a liberty interest in directing the upbringing and education of children); *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977) (stating that the Constitution protects the sanctity of the family); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599 (1982) (determining that natural parents have a fundamental liberty interest in the care, custody, and management of their children); *Lehr v.*

Robertson, 463 U.S. 248, 256, 259-260 n. 16, 103 S.Ct. 2985, 2990, 2992, 77 L.Ed.2d 614 (1983) (stating that the parent-child relationship is "sufficiently vital to merit constitutional protection in appropriate cases" and that a mother's parental relationship with a child is clear because she carries and bears the child); and *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000) (acknowledging that the liberty of parents and guardians includes the right to direct the upbringing and education of children under their control). Accordingly, the United States Supreme Court has not recognized that the relationship between a parent and an unborn embryo or fetus is a legal relationship protected by the United States Constitution. As such, this particular portion of the relationship disclosure is untruthful and misleading.

Similarly, none of the South Dakota statutes and cases cited by defendants and intervenors establish that a pregnant woman has a legal relationship with an unborn embryo or fetus or that such a relationship is protected by the laws of South Dakota. See SDCL 21-5-1 (stating that any person, including an unborn child, can bring a wrongful death cause of action but making no mention of a protected legal relationship between a pregnant mother and an unborn embryo or fetus); SDCL 22-16-4 (stating that first-degree murder is the premeditated killing of any other human being, including an unborn child but not addressing whether there is a protected legal relationship between a pregnant mother and an unborn embryo or fetus); SDCL 59-7-2.8 (stating that artificial nutrition and hydration for pregnant women to allow the continuing development and live birth of the unborn child in certain *979 circumstances is required but making no mention of a protected legal relationship between a pregnant woman and an unborn embryo or fetus); SDCL 25-7-19 (stating that the child neglect statutes apply to an unborn child that has been conceived but making no reference to a protected legal relationship between a pregnant woman and an unborn embryo or fetus); and SDCL 22-16-7 (stating that second-degree murder is a killing perpetuated by an act imminently dangerous to others and without regard for human life of another person, including an unborn child but not discussing whether there is a protected legal relationship between a pregnant mother and an unborn embryo or fetus). See also *Farley v. Mount Marty Hosp. Ass'n.*, 387 N.W.2d 42 (S.D.1986) (finding that a cause of action exists in South Dakota for the wrongful death of a viable unborn child because the purpose of the wrongful death statute is to provide a cause of action against those whose tortious conduct causes the death of another) and *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787 (S.D.1996) (finding that a cause of action exists in South Dakota for the wrongful death of a

nonviable unborn child because the statute specifically included "unborn child" within the term "person"). Therefore, South Dakota has not recognized that the relationship between a parent and an unborn embryo or fetus is a legal relationship protected by state laws. Thus, this particular portion of the relationship disclosure is also untruthful and misleading.

In sum, the relationship disclosures are untruthful and misleading. A legal relationship requires two people. The United States Constitution does not recognize an unborn embryo or fetus as a "person," in the legal sense. Further, South Dakota has not recognized an unborn embryo or fetus as a "person" in the context of a relationship with a pregnant woman. As such, neither the United States Constitution nor South Dakota law recognizes that a pregnant woman and an unborn embryo or fetus have a legal relationship. It follows that neither protects such a relationship. Accordingly, summary judgment is granted to plaintiffs on the relationship disclosures.

III. Medical Risk Disclosures

The informed consent abortion statute requires a physician to provide the pregnant woman with "[a] description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including ... (ii) Increased risk of suicide ideation and suicide." SDCL 34-23A-10.1(1)(e) (medical risk disclosures). Defendants argue that this disclosure is not vague and is truthful and non-misleading and, therefore, constitutional. Plaintiffs assert that the disclosure is vague and untruthful and misleading and, therefore, unconstitutional.²

[3] [4] [5] [6] The standard for determining whether a statute is unconstitutionally vague is whether it gives people of ordinary intelligence fair notice that certain conduct is prohibited. A statute is unconstitutionally vague where people of ordinary intelligence may apply the statute differently. Further, a statute will be held unconstitutional for vagueness where the forbidden conduct is so poorly defined that a person of common intelligence must necessarily guess at its meaning and differ as to its application. Additionally, a statute must not be so vague as to permit selective or discriminatory enforcement. See *United States v. Smith*, 171 F.3d 617, 622-23 (8th Cir.1999).

C. Increased Risk of Suicide Ideation and Suicide

^{19]} Defendants argue that the suicide ideation and suicide disclosure warning cannot be shown to be untruthful or misleading because abortion is "associated" with suicide according to medical studies and statistical studies. Defendants further assert that it constitutes good medical practice to advise patients of risks even if it cannot be proven definitely that an abortion, rather than the common risk factors, is the cause of suicide ideation or suicide. Defendants point out that the statute does not prohibit full disclosure and explanation of the data with regard to the difference between an association and cause.⁶

Plaintiffs respond that telling a woman that increased risk of suicide is a known medical risk of abortion could suggest to her that an abortion may lead to suicide, which is untruthful and misleading because it is undisputed that abortion does not cause suicide. Plaintiffs contend that the statute requires disclosure only of known medical risks caused by an abortion procedure and not medical risks associated with an abortion procedure. Plaintiffs also argue that suicide ideation and suicide are not "known" risks of abortion.

The prior informed consent statute required physicians to disclose "the particular medical risks **associated** with the particular abortion procedure to be employed." SDCL 34-23A-10.1(1)(b)(2004) (emphasis added). The 2005 amendments deleted the word "associated" from the statutory language and now require physicians to disclose "all known medical risks of the procedure" "including" an "[i]ncreased risk of suicide ideation and suicide." SDCL 34-23A-10.1(1)(e)(ii).

The South Dakota Supreme Court has recognized that it is "an established principle of statutory construction that, where the wording of an act is changed by amendment, it is evidential of an intent that the words shall have a different construction." *Lewis & Clark Rural Water Sys., Inc. v. Seeba*, 709 N.W.2d 824, 831 (S.D.2006) (citation and quotation omitted). "When a prior statute is amended by alteration of the terms, it must be presumed that it was the [Legislature's] intent to alter the meaning of the previous act in that particular." *State v. Heisinger*, 252 N.W.2d 899, 902 (S.D.1977) (citation and quotation omitted). Applying the rules of statutory construction as set forth by the South Dakota Supreme Court, this court finds that because the legislature altered the language of the informed consent provision by deleting the term "associated," the legislature intended to alter the meaning of the previous act and require that the patient be informed of medical risks that are caused by the abortion procedure, not just associated with the abortion procedure.

In the event the court finds that the statute requires a finding of causation *983 rather than association, then defendants contend that there is a rational basis to conclude that abortion may cause suicide. But the language of the statute requires disclosure of "known" medical risks of the procedure, and a "known" risk is one that is generally recognized. See *Merriam-Webster Dictionary* available at <http://www.merriam-webster.com/dictionary/known>.

In determining whether the increased risk of suicide ideation and suicide are "known" risks, the court will examine the evidence in the record. The American College of Obstetricians and Gynecologists, which is the leading professional association of physicians who specialize in the health care of women, rejects any suggestion that increased risk of suicide and suicide ideation are known risks of abortion. The American Psychological Association's Task Force on Mental Health and Abortion has reviewed the most current research in this area and concluded that there is "no evidence sufficient to support the claim that an observed association between abortion history and a mental health

problem was caused by the abortion per se, as opposed to other factors." Docket 283-4, at 24. Additionally, the United States Food & Drug Administration approved mifepristone to be used to induce an abortion without surgical procedure and did not mention suicide ideation or suicide as a risk on its labeling. Furthermore, Dr. Elizabeth Shadigian, one of defendants' designated experts, stated under oath that, "it would not be accurate to advise an elective abortion patient that abortion causes suicide." Docket 172-5, at 3. She also testified that she does not know of an elective abortion provider in the United States that warns women that suicide is one of the risks of abortion. Docket 147-15, at 14-15.

Defendants rely on their experts' opinions and five limited studies to show an association between suicide ideation and abortions. Defendants have produced no evidence, however, to show that it is generally recognized that having an abortion causes an increased risk of suicide ideation and suicide. Because such a risk is not "known," the suicide disclosure language of the statute is untruthful and misleading. Thus, plaintiffs are entitled to summary judgment in their favor on this issue.

Footnotes

- ¹ The disclosure requirements include a biological disclosure, relationship disclosures, and medical risk disclosures, which will be discussed in further detail herein.
- ² Intervenor did not move for summary judgment on this disclosure and, thus, only responded to plaintiffs' motion for summary judgment.
- ³ In response to plaintiffs' motion for summary judgment, intervenors argue that the term "known risks" is well known to the medical profession.
- ⁴ The South Dakota Supreme Court decided *Wheeldon*, 374 N.W.2d at 375, which set forth the requirement that the physician must inform the patient of "all known material or significant risks inherent in a prescribed medical procedure," in 1985.
- ⁵ While the State's expert testified risks and risk factors are usually used interchangeably, she also testified that "a risk of something is usually after a procedure or during a procedure and a risk factor is something that's predisposing." Docket 147-15 at 23.
- ⁶ In response to plaintiffs' motion for summary judgment, intervenors argue that literature supports the finding that abortion places a woman at increased risk of suicide ideation and suicide.
- ⁷ Intervenor also did not move for summary judgment on this provision and, thus, only responded to plaintiffs' motion for summary judgment. In response to plaintiffs' motion for summary judgment, intervenors argue that plaintiffs do not have standing to challenge this provision.
- ⁸ The court is aware that in *Kowalski v. Tesmer*, 543 U.S. 125, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004), the United States Supreme Court determined that attorneys do not have third-party standing to assert the rights of defendants denied appellate counsel. But that case did not directly deal with a physician-patient relationship in the context of abortion. Furthermore, *Kowalski* did not overrule *Singleton* and the court is bound to apply the precedent of *Singleton*.

686 F.3d 889
United States Court of Appeals,
Eighth Circuit.

PLANNED PARENTHOOD MINNESOTA,
NORTH DAKOTA, SOUTH DAKOTA; Carol E.
Ball, M.D., Appellees/Cross Appellants,

v.

Mike ROUNDS, Governor; Marty J. Jackley,
Attorney General, in their official capacities,
Appellants/Cross Appellees,
Alpha Center; Black Hills Crisis Pregnancy Center,
doing business as Care Net; Dr. Glenn A. Ridder,
M.D.; Eleanor D. Larsen, M.A., L.S.W.A.,
Appellants.

Christian Medical & Dental Associations;
American Association of Pro-Life Obstetricians &
Gynecologists; Catholic Medical Association;
Physicians for Life; National Association of
Pro-Life Nurses; Family Research Council; Care
Net; Heartbeat International, Incorporated;
National Institute of Family and Life Advocates,
Incorporated; Eagle Forum Education and Legal
Defense Fund; American College of Pediatricians,
Amici Curiae.

Nos. 09-3231, 09-3233, 09-3362. | Submitted:
Jan. 9, 2012. | Filed: July 24, 2012.

Synopsis

Background: Abortion providers brought action challenging constitutionality of disclosures required by South Dakota's abortion statute. After the providers' motion for preliminary injunction was granted, 375 F.Supp.2d 881, a panel of the Court of Appeals affirmed, 467 F.3d 716, but, on rehearing en banc, 530 F.3d 724, vacated the panel decision, and reversed and remanded. On remand, the United States District Court for the District of South Dakota, Karen E. Schreier, Chief Judge, 650 F.Supp.2d 972, granted summary judgment motions in part, and parties appealed. The Court of Appeals, Diana E. Murphy, Circuit Judge, 653 F.3d 662, affirmed in part, reversed in part, and remanded.

Holdings: On partial en banc rehearing, the Court of Appeals, Gruender, Circuit Judge, held that:

[1] "increased risk," as term was used in statute, existed if relative risk was significantly higher for one group when

compared to other groups;

[2] disclosure of "increased risk" of suicidal ideation and suicide was truthful; and

[3] disclosure of "increased risk" of suicidal ideation and suicide was non-misleading and relevant to patients' decision.

Reversed.

Loken, Circuit Judge, concurred and filed opinion

Colloton, Circuit Judge, concurred in part, concurred in the judgment, and filed opinion.

Murphy, Circuit Judge, dissented and filed opinion in which Wollman, Bye, and Melloy, Circuit Judges, joined.

Attorneys and Law Firms

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Mailee R. Smith, William L. Saunders, Denise M. Burke, on the brief, Washington, DC, for amici curiae, Christian Medical & Dental Associations, American Association of Pro-Life Obstetricians & Gynecologists, Catholic Medical Association, Physicians for Life, and National Association of Pro-Life Nurses.

Before RILEY, Chief Judge, WOLLMAN, LOKEN, MURPHY, BYE, MELLOY, SMITH, COLLOTON, GRUENDER, BENTON and SHEPHERD, Circuit Judges, en banc.

Opinion

GRUENDER, Circuit Judge.

The Governor and Attorney General of South Dakota ("the State"), along with two intervening crisis pregnancy centers and two of their personnel (collectively "Intervenors"), appeal the district court's permanent injunction barring enforcement of a South Dakota statute requiring the disclosure to patients seeking abortions of an "[i]ncreased risk of suicide ideation and suicide," see S.D.C.L. § 34-23A-10.1(1)(e)(ii) ("suicide advisory"), and the underlying grant of summary judgment in favor of Planned Parenthood of Minnesota, North Dakota, South Dakota and its medical director Dr. Carol E. Ball (collectively "Planned Parenthood") that this advisory would unduly burden abortion rights and would violate physicians' First Amendment right to be free from compelled speech. For the reasons discussed below, we reverse.

I.

In 2005, South Dakota enacted House Bill 1166 ("the Act"), amending the requirements for obtaining informed consent to an abortion as codified in S.D.C.L. § 34-23A-10.1. Section 7 of the Act requires physicians, in the course of obtaining informed consent, to provide certain information to the patient seeking an abortion. In June 2005, Planned Parenthood sued to prevent the Act from taking effect, contending that several of its provisions constituted an undue burden on abortion rights and facially violated patients' and physicians' free speech rights, while other provisions were unconstitutionally vague. After the district court preliminarily enjoined the Act and a divided panel of this court affirmed, this court sitting en banc vacated the preliminary injunction and remanded for further proceedings. See *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir.2008) (en banc).

On remand, the parties filed cross-motions for summary judgment with respect to the challenged provisions. The district court ruled that a biological disclosure, see §§ 34-23A-10.1(1)(b), 34-23A-1(4), and a medical emergency exception, see § 34-23A-10.1, were facially

sound with respect to the First Amendment and imposed no undue burden, while disclosures regarding the protected relationship between the patient and the unborn child, see § 34-23A-10.1(1)(c), (d), and the suicide advisory, see § 34-23A-10.1(1)(e)(ii), failed to meet both constitutional requirements. The district court also held that a requirement to disclose "all known medical risks of the procedure," see § 34-23A-10.1(1)(e), was not *893 unconstitutionally vague, but that a requirement to disclose "statistically significant risk factors," see *id.*, was.

Planned Parenthood appealed the district court's decision on the biological disclosure and the "all known medical risks" disclosure, while the State and Intervenors appealed the district court's decision on the relationship disclosures and the suicide advisory. A panel of this court affirmed unanimously with respect to the biological disclosure and the "all known medical risks" disclosure, reversed unanimously with respect to the relationship disclosures, and affirmed in a divided decision as to the suicide advisory. See *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 653 F.3d 662 (8th Cir.2011). We granted this rehearing en banc solely on the issue of the suicide advisory.¹

II.

[1] [2] We review a grant of summary judgment *de novo*. *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 653 (8th Cir.2003). In addition, we review constitutional challenges and questions of statutory interpretation *de novo*. *McDermott v. Royal*, 613 F.3d 1192, 1193 (8th Cir.2010) (per curiam).

[3] [4] Planned Parenthood contends that requiring a physician to present the suicide advisory imposes an undue burden on abortion rights and violates the free speech rights of the physician. "[W]hen the government requires [as part of the informed consent process] ... the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth," and other information broadly relevant to the decision to have an abortion, it does not impose an undue burden on abortion rights, even if the disclosure "might cause the woman to choose childbirth over abortion." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 882-83, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Moreover, "the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Id.* at 884, 112

S.Ct. 2791 (citations omitted). Thus, with respect to First Amendment concerns, “while the State cannot compel an individual simply to speak the State’s ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.” *Rounds*, 530 F.3d at 734–35; *accord Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576–77 (5th Cir.2012).

[5] In short, to succeed on either its undue burden or compelled speech claims, Planned Parenthood must show that the disclosure at issue “is either untruthful, misleading or not relevant to the patient’s decision to have an abortion.” *Rounds*, 530 F.3d at 735. To evaluate the constitutional merits of the suicide advisory, we will examine first what disclosure actually is required, second whether that disclosure is truthful, and third whether it is non-misleading and relevant to the patient’s decision to have an abortion.

IV.

[15] With regard to whether the required disclosure is truthful, *see Rounds*, 530 F.3d at 735, the State submitted into the record numerous studies published in peer-reviewed medical journals that demonstrate a statistically significant correlation between abortion and suicide. The studies were published in respected, peer-reviewed journals such as the *Obstetrical and Gynecological Survey*, the *British Medical Journal*, the *Journal of Child Psychology and Psychiatry*, the *Southern Medical Journal*, and the *European Journal of Public Health*, and there is no indication that the peer-review process was compromised for the studies at issue. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593–94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (“The fact of publication (or lack thereof) in a peer reviewed journal ... [is] a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised” because “submission to the scrutiny of the scientific community ... increases the likelihood that substantive flaws in methodology will be detected.”).

Planned Parenthood argues that these studies do not examine the correlation between abortion and suicide in sufficient detail to prove a causal link (as discussed in more detail in Part V), but, as we concluded above, the suicide advisory does not require disclosure of a causal link. With regard to the accuracy of the correlation itself,

there is nothing in the record to suggest that the underlying data or calculations in any of these studies are flawed. For example, Planned Parenthood’s own expert, Dr. Nada Stotland, admitted that one of the studies, which determined a suicide rate after abortion of 31.9 per 100,000 as compared to a suicide rate after live birth of 5.0 per 100,000, “indicates an association; not causation, but an association” between abortion and suicide. Stotland Dep. 283:22–284:9, ECF No. 152–12.⁴ When asked if she had “any quarrel with the validity of that association,” Dr. Stotland replied that she did not. *Id.* at 284:11–13.

Based on the record, the studies submitted by the State are sufficiently reliable to support the truth of the proposition that the relative risk of suicide and suicide ideation is higher for women who abort *899 their pregnancies compared to women who give birth or have not become pregnant. It also is worth noting that Planned Parenthood does not challenge the disclosure that “[d]epression and related psychological distress” is a “known medical risk [ ] of the [abortion] procedure.” S.D.C.L. § 34–23A–10.1(1)(e)(i); *see also Gonzales v. Carhart*, 550 U.S. 124, 159, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) (noting that “[s]evere depression and loss of esteem can follow” an abortion). As a matter of common sense, the onset of depression and psychological distress also would increase one’s risk of suicide and suicide ideation. *See, e.g.,* Ottar Bjerkeset et al., *Gender Differences in the Association of Mixed Anxiety and Depression with Suicide*, 192 *Brit. J. Psychiatry* 474, 474 (2008) (“Depression is thought to be the most important antecedent of suicide....”). Thus, there appears to be little dispute about the truthfulness of the required disclosure.

Finally, Planned Parenthood contends that the suicide advisory is not truthful because an increased risk of suicide after abortion is not “known” as required by the statute. *See* S.D.C.L. § 34–23A–10.1(1)(e) (requiring disclosure of “[a]ll known medical risks of the procedure”); *Rounds*, 653 F.3d at 673 (“‘[K]nown’ means generally recognized, proved, or familiar to all.”). Once again, however, this contention is premised on Planned Parenthood’s argument that the term “increased risk” implies a *causal link* that is not generally “known.” Because the statute does not require the disclosure of any causal link, Planned Parenthood’s argument on this point is misdirected. The record indicates that the disclosure actually required—that the relative risk of suicide and suicide ideation is higher for women who abort compared to women in other relevant groups—is generally “known.” For example, the ninety-one-page APA Report, on which Planned Parenthood relies extensively, was commissioned for the sole purpose of analyzing that “known” risk in more detail. *See* APA Report at 5.

As a result, we hold that the disclosure facially mandated by the suicide advisory is truthful.

V.

^[16] Despite the extensive evidence in the record of an “increased risk” of suicide, Planned Parenthood contends that disclosure of the increased risk would be misleading and irrelevant to a patient seeking an abortion, *see Rounds*, 530 F.3d at 735, because some authorities have

indicated that there is no direct causal link. In particular, Planned Parenthood argues that it is more plausible that certain underlying factors, such as pre-existing mental health problems, predispose some women both to have unwanted pregnancies and to have suicidal tendencies, resulting in a misleading correlation between abortion and suicide that has no direct causal component. Under this view, the required disclosure would be misleading or irrelevant to the decision to have an abortion because the patient’s decision would not alter the underlying factors that actually cause the observed increased risk of suicide.

Footnotes

- ¹ Apart from Section II.C of the panel opinion, which addresses the suicide advisory and was vacated by our order taking this matter en banc, the panel opinion remains in force.
- ² All cited exhibit numbers and ECF designations refer to the summary judgment exhibit numbers and ECF document heading numbers, respectively, in the district court record, No. 05–cv–4077 (D.S.D.).
- ³ This difference may be better illustrated by an example less contentious than abortion. One recent study found that prolonged television viewing resulted in an “increased risk” of mortality for individuals in any given age group. *See Anders Grøntved et al., Television Viewing and Risk of Type 2 Diabetes, Cardiovascular Disease, and All-Cause Mortality*, 305 J. Am. Med. Assoc. 23:2448 (2011). We would not demand proof that television viewing itself directly caused the adverse outcome (for example, proof of an actual decline in the health of heart muscle tissue to a fatal level during viewing) before acknowledging that a prolonged television viewer is “subjected” to the increased risk of mortality. Indeed, a measure of increased risk based on a discrete, easily reportable event such as television viewing is useful precisely because of the difficulty of tracing exactly whether and how a given action combines with other factors to directly “cause” a particular death.
- ⁴ With regard to another potential comparison group, the cited study also determined a suicide rate among women of reproductive age who did not become pregnant as in the range of 11.8 to 13.3 per 100,000. *See Mika Gissler et al., Injury Deaths, Suicides and Homicides Associated with Pregnancy, Finland 1987–2000*, 15 Eur. J. Pub. Health 5:459, 460 (2005), ECF No. 147–18.
- ⁵ The dissent notes that one study authored by Coleman and cited in her declaration on this issue later was found to contain errors. *Post* at 910. However, Coleman’s declaration cites various studies by other authors that control for these other potential causal factors and nevertheless find a persistent link between abortion and increased mental health problems. *See Coleman Decl.* ¶¶ 22–24, Sept. 16, 2008, ECF No. 290–3. Her declaration was not rebutted with respect to those studies.
- ⁶ While the APA awaits methodologically perfect research on the effect of “unwanted” or “unplanned” pregnancies, others have suggested that such perfection may not be achievable, because “pregnancies that are aborted frequently were initially intended by one or both partners and pregnancies that are initially unintended often become wanted as the pregnancy progresses, rendering assessment of wantedness/intendedness [sic] subject to considerable change over time.” *Coleman Decl.* ¶ 15, Jul. 6, 2006. In addition, “pregnancy wantedness/intendedness is open to multiple subjective interpretations.” *Id.* at ¶ 16. The APA Report does not specify what sort of data on these variables would be acceptable to resolve the issue to the APA’s satisfaction, and the report even seems to conflate the entirely separate concepts of whether a pregnancy is “wanted” with whether it was initially “planned” or “intended.” *See, e.g., APA Report* at 64 (“These studies were evaluated with respect to their ability to draw sound conclusions about the relative mental health risks associated with abortion compared to alternative courses of action that can be pursued by a woman facing a similar circumstance (e.g., an unwanted or unintended pregnancy).”).
- ⁷ National Collaborating Centre for Mental Health, *Induced Abortion and Mental Health: A Systemic Review of the Mental Health Outcomes of Induced Abortion, Including Their Prevalence and Associated Factors* (2011); Royal College of Obstetricians and Gynaecologists, *The Care of Women Requesting Induced Abortion* (2011); Gail Erlick Robinson et al., *Is There an “Abortion Trauma Syndrome?” Critiquing the Evidence*, 17 Harv. Rev. Psychiatry 268 (2009).
- ⁸ To the extent the dissent suggests that a patient will receive a physician’s detailed explanation of the disclosure only if she seeks additional explanation and clarification, *see post* at 911–12, we disagree. The statute requires the physician to provide, in writing, “[a] description” of the risks at issue, § 34–23A–10.1(1)(e), not just a recitation of the statutory language. Contrary to the dissent’s reference to a “judicial attempt to direct the content of the conversation between a patient and her doctor,” *post* at 912, we recognize that the legislature left the precise content of that description to the physician’s discretion.

- 9 We disagree with the dissent's suggestion that this is a new standard or theory about the nature of an informed consent advisory. *See post* at 911. Instead, statements about "increased risk" in the absence of conclusive proof of causation have been treated as material in a variety of contexts. *See, e.g., Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307, 312 (explaining that if studies establish, within an acceptable confidence interval, that those who use a pharmaceutical have a relative risk of greater than 1.0—that is, an increased risk—of an adverse outcome, those studies might be considered sufficient to support a jury verdict of liability on a failure-to-warn claim), *modified on reh'g*, 884 F.2d 166 (5th Cir.1989); 21 C.F.R. § 201.80(e) (requiring that prescription drug "labeling shall be revised to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug; a causal relationship need not have been proved"). The decision of the South Dakota legislature that the increased risk at issue here likewise merits an advisory is not atypical.
- 10 The majority states that the statutory phrase "to which a pregnant woman would be subjected" attaches to "statistically significant risk factors." *Ante* at 896. The phrase "statistically significant risk factors" was permanently enjoined by the district court as unconstitutionally vague, *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 650 F.Supp.2d 972, 981–82 (D.S.D.2009), however, and that ruling was not appealed by the state or the intervenors. Applying the rule of the last antecedent to the enjoined text effectively reads the phrase "to which a pregnant woman would be subjected" out of the statute as well, counter to the legislature's intent as expressed in its findings.
- 11 While citing dictum from *Gonzales* that "[s]evere depression and loss of esteem can follow" abortion in support of the advisory's truthfulness, the majority ignores the Court's concession there that it "find[s] no reliable data to measure the phenomenon...." *Gonzales*, 550 U.S. at 159, 127 S.Ct. 1610. The absence of "reliable data" undermines reliance here on an isolated statement in a lengthy opinion dealing with an uncommon medical procedure.

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834 F.Supp.2d 424
United States District Court,
M.D. North Carolina.

Gretchen S. STUART, M.D., et al., Plaintiffs,
v.
Janice E. HUFF, M.D., et al., Defendants.

No. 1:11CV804. | Dec. 19, 2011.

Synopsis

Background: North Carolina physicians and health care providers filed suit on behalf of themselves and their patients challenging the constitutionality of the North Carolina Women's Right to Know Act, which required providers to perform an ultrasound in advance of abortion procedure, to make such ultrasound images visible to the patient, and to describe the images to the patient. Plaintiffs moved for preliminary injunction to bar enforcement of the Act pending resolution of the case.

Holdings: The District Court, Catherine C. Eagles, J., held that:

[1] strict scrutiny would apply to First Amendment challenge to Act;

[2] First Amendment challenge to Act was likely to succeed, supporting issuance of preliminary injunction;

[3] void-for-vagueness challenge to penalty provisions was not likely to succeed, as required for issuance of preliminary injunction on due process grounds; and

[4] void-for-vagueness challenge to informed consent provisions would not support issuance of preliminary injunction.

Motion granted.

West Codenotes

Validity Called into Doubt
West's N.C.G.S.A. § 90–21.85.

Attorneys and Law Firms

*426 Katherine Lewis Parker, American Civil Liberties Union of North Carolina, Raleigh, NC, Andrew D. Beck, American Civil Liberties Union, Bebe J. Anderson, New York, NY, Helene T. Krasnoff, Planned Parenthood Federation of America, Washington, DC, for Plaintiffs.

Thomas J. Ziko, Isham Faison Hicks, Stephanie A. Brennan, N.C. Department of Justice, Raleigh, NC, William Eric Medlin, Robertson Medlin & Bloss, PLLC, Greensboro, NC, Samuel B. Casey, Jubilee Campaign–Law of Life Project, Steven H. Aden, Alliance Defense Fund, Washington, DC, for Defendants.

Opinion

AMENDED MEMORANDUM OPINION AND ORDER

CATHERINE C. EAGLES, District Judge.

Earlier this year, the North Carolina General Assembly passed the “Woman’s Right to Know Act” (“the Act”), 2011 N.C. Sess. Laws 405 (to be codified at N.C. Gen.Stat. §§ 90–21.80 through 90–21.92). The Act is slated to become effective on October 26, 2011. The Plaintiffs—several North Carolina physicians and health care providers—brought this action on behalf of themselves and their patients challenging the constitutionality of parts of the Act.

Before the Court is the Plaintiffs’ motion asking that a preliminary injunction enjoining the Defendants from enforcing parts of the Act be granted before the effective date of the statute and remain in place until the constitutional challenges are *427 resolved. The Plaintiffs contend the Act is unconstitutional on a number of grounds but limit their arguments at this stage to a First Amendment challenge, a void-for-vagueness challenge, and a substantive due process challenge.¹

In support of their motion, the Plaintiffs submitted four affidavits. (Docs. 10, 11, 12, and 13.) The Defendants submitted no evidence. Each party submitted briefs and the Court heard the arguments of counsel on October 17.

Based on the record before it, the Court finds that the Plaintiffs are likely to succeed on the merits of the First Amendment challenge to N.C. Gen.Stat. § 90–21.85. Given the ruling on the First Amendment issue, the Court finds it unnecessary to address the substantive due process claim and the vagueness claims directed toward that same

section. The Plaintiffs have not shown a likelihood of success on the merits as to the remaining vagueness claims.

THE ACT

The Act by its terms is directed toward the informed consent requirements for a woman seeking an abortion. It has two major components. First, it requires physicians or others listed in the statute (hereinafter “providers”) to make certain information available to a woman seeking an abortion at least 24 hours in advance of the procedure. These provisions are set forth in section 90–21.82 and are not challenged in large part. Second, it requires providers to perform an ultrasound at least four hours in advance of the procedure, during which time the provider must make the images produced from the ultrasound visible to the patient and must describe to the patient the images seen on the ultrasound. These requirements are set forth in section 90–21.85 and will be referred to as the “speech-and-display requirements.”

DISCUSSION

I. PRELIMINARY INJUNCTION STANDARD

^[1] ^[2] A preliminary injunction is “an extraordinary remedy ... which is to be applied only in limited circumstances which clearly demand it.” *Direx Isr., Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir.1991) (internal quotation marks omitted). Historically, the purpose of the preliminary injunction has been “to protect the status quo and to prevent irreparable harm during the pendency of the litigation to preserve the court’s ability in the end to render a meaningful judgment on the merits.” *Sun Microsystems, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)*, 333 F.3d 517, 526 (4th Cir.2003). Before a preliminary injunction can be granted, the Plaintiffs must establish that: (1) they are “likely to succeed on the merits”; (2) they are “likely to suffer irreparable harm in the absence of preliminary relief”; (3) “the balance of equities tip in [their] favor”; and (4) “an injunction is in the public interest.” *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); accord *WV Ass’n of Club Owners and Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir.2009); *Rebel Debutante LLC v. Forsythe Cosmetic Grp., Ltd.*, 799 F.Supp.2d 558, 568 (M.D.N.C.2011).

^[3] The Court will focus its evaluation on whether the Plaintiffs have established a likelihood of success on the merits. If they have, the threatened constitutional violations unquestionably represent irreparable *428 harm. See *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Similarly, the threatened constitutional violations would also outweigh whatever burden the injunction would impose because the Defendants are “in no way harmed by the issuance of an injunction that prevents the state from enforcing unconstitutional restrictions.” *Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir.2011). “[U]pholding constitutional rights is in the public interest.” *Id.*; accord *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F.Supp.2d 942, 956–57 (W.D.Tex.2011).

II. FIRST AMENDMENT

A. Likelihood of Success on the Merits

^[4] Section 90–21.85 of the Act setting forth the “speech-and-display requirements” first requires that a woman undergo an ultrasound at least four hours before an abortion.² The statute also mandates that the physician or qualified technician working with the physician shall display the images produced from the ultrasound “so that the [patient] may view them.” N.C. Gen.Stat. § 90–21.85(a)(3). It further requires the providers to give “a simultaneous explanation of what the display is depicting, which shall include the presence, location, and dimensions of the unborn child within the uterus,” N.C. Gen.Stat. § 90–21.85(a)(2), and “a medical description of the images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable.” N.C. Gen.Stat. § 90–21.85(a)(5).³ The Plaintiffs contend these speech-and-display requirements violate the First Amendment by compelling unwilling speakers to deliver the state’s message discouraging abortion.

The Plaintiffs argue that the compelled speech required by the Act should be viewed under a strict scrutiny standard. The Defendants argue that strict scrutiny is the wrong standard to apply; they contend in the alternative that even applying strict scrutiny, the state has three compelling state interests: protecting the psychological health of the patient, preventing coercive abortions, and expressing its preference for the life of the unborn.

^[5] ^[6] The First Amendment generally includes the right to refuse to engage in speech compelled by the government. *E.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*

of *Boston, Inc.*, 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). “[T]he First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what not to say.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–797, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (emphasis omitted). Both compelled statements of opinions and compelled statements of fact burden protected speech. *Id.* at 797–98, 108 S.Ct. 2667.

[7] The Supreme Court has historically taken a dim view of content-based speech *429 compelled by the government, finding it to violate the First Amendment in the absence of a compelling state interest in a wide variety of circumstances. *E.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (striking down law that compelled students to salute the flag and recite the pledge of allegiance); *Wooley v. Maynard*, 430 U.S. 705, 713, 715, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (holding that a New Hampshire law could not mandate that citizens “use their private property as a ‘mobile billboard’ for the State’s ideological message”). “Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech,” and laws which mandate speech are generally considered content-based regulations of speech. *Riley*, 487 U.S. at 795, 108 S.Ct. 2667.

[8] [9] “[C]ontent-based regulations of speech are presumptively invalid.” *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007). Even when the state has a compelling interest, “any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S.Ct. 1125, 1132, 172 L.Ed.2d 853 (2009); *see, e.g.*, *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000).

It is undisputed that the Act compels content-based speech by providers; it requires providers to orally and visually convey specified material⁴ about the fetus to their patients. The message is compelled regardless of a patient’s individual circumstances or condition and regardless of the provider’s medical opinion. The message is required even when the provider does not want to deliver the message and even when the patients affirmatively do not wish to see it or hear it. It is further undisputed that this implicates the First Amendment rights of providers such as the Plaintiffs.⁵ *See Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 884, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion) (citing *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428,

51 L.Ed.2d 752 (1977) (applying strict scrutiny to compelled ideological speech)). Thus, strict scrutiny would ordinarily apply.

*430 The Defendants contend that the compelled speech here should instead be evaluated under an undue burden standard, relying on the Supreme Court’s decision in *Casey*. *Casey* concerned a Pennsylvania law that required, among other things, that providers give a woman seeking an abortion certain written materials concerning her decision. In ruling on a claim that the provision violated the liberty interests of women protected by *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the Court held that a state could require physicians to provide patients with information that is “truthful and non-misleading” and related to a woman’s decision to have an abortion. In determining which regulations may be permitted, the Court adopted the undue burden standard.

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. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

Casey, 505 U.S. at 877–78, 112 S.Ct. 2791 (plurality opinion) (citation omitted). The Defendants argue that the North Carolina statute does not create an undue burden on a woman’s right to get an abortion, and as such the compelled speech mandated by the Act is permitted.

The Court in *Casey* did not, however, combine the due process/liberty interest analysis with the First Amendment analysis. Rather, the Supreme Court applied the undue burden standard only in evaluating the Pennsylvania statute’s limits on a woman’s liberty interest under the Due Process Clause. *Id.* at 874, 112 S.Ct. 2791 (plurality

opinion).

The Supreme Court's brief discussion of the First Amendment challenges to the Pennsylvania statute was undertaken separately and without substantial detail. *See id.* It seems unlikely that the Supreme Court decided by implication that long-established First Amendment law was irrelevant when speech about abortion is at issue,⁶ and this Court declines to so find. *See Lakey*, 806 F.Supp.2d at 972–73.

In the alternative, the Defendants contend that the speech at issue is “professional” or “commercial” and thus “the Act’s regulation of physicians’ speech is not subject to strict scrutiny.” (Doc. 29 at 11.) The Defendants do not clearly state what a non-strict-scrutiny standard would be or explain how it would apply here.

*431 ^[10] Commercial speech is “expression related solely to the economic interests of the speaker and its audience.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). When regulated speech is purely commercial, it is often entitled to less protection under the First Amendment, though the degree of that protection is not always easy to discern. *See, e.g. Milavetz, Gallop & Milavetz, P.A. v. United States*, — U.S. —, 130 S.Ct. 1324, 1339, 176 L.Ed.2d 79 (2010) (distinguishing intermediate scrutiny and rational basis); *see also Sorrell v. IMS Health Inc.*, — U.S. —, 131 S.Ct. 2653, 2664, 180 L.Ed.2d 544 (2011) (discussing when “heightened scrutiny” applies). Just what “professional speech” means and the degree of protection it receives is even less clear; the phrase has been used by Supreme Court justices only in passing. *E.g., Garcetti v. Ceballos*, 547 U.S. 410, 446–47, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006) (Breyer, J., dissenting); *Edenfield v. Fane*, 507 U.S. 761, 779, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (O’Connor, J., dissenting); *Lowe v. SEC*, 472 U.S. 181, 232, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) (White, J., concurring); *Riley*, 487 U.S. at 795, 108 S.Ct. 2667 (“It is not clear that a professional’s speech is necessarily commercial whenever it relates to that person’s financial motivation for speaking.”); *see generally* Daniel Halberstam, Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions, 147 U. Pa. L.Rev. 771, 834–49 (1999).

^[11] The Defendants’ contention that this speech is “commercial” and thus subject to a lower degree of scrutiny is not persuasive. Where the speech at issue blends commercial with noncommercial elements, strict scrutiny ordinarily applies. *Riley*, 487 U.S. at 796, 108 S.Ct. 2667 (holding that where commercial speech and

fully protected speech are “inextricably intertwined, ... we apply our test for fully protected expression”). To the extent there is some commercial or professional speech involved here, it is intertwined with non-commercial speech and thus entitled to the full protection of the First Amendment. *See Lakey*, 806 F.Supp.2d at 969–70.

It is unlikely that a rational basis standard would be found to apply here, given the Supreme Court’s deeply entrenched precedent that “[t]he law is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.” *Hurley*, 515 U.S. at 579, 115 S.Ct. 2338. As the Court stated in *Hurley*, outside the context of commercial speech, the government “may not compel affirmance of a belief with which the speaker disagrees.” *Id.* at 573, 115 S.Ct. 2338.

It is possible that the Supreme Court would apply some intermediate standard to compelled speech in the ordinary informed-consent context, given the historical interest the state has in regulating certain aspects of medical care. *See Whalen v. Roe*, 429 U.S. 589, 603 n. 30, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). That is not, however, this case. The Act goes well beyond requiring disclosure of those items traditionally a part of the informed consent process, which include in this context the nature and risks of the procedure and the gestational age of the fetus. *See generally Acuna v. Turkish*, 192 N.J. 399, 930 A.2d 416, 427–28 (2007). The Act also goes well beyond the provision approved in *Casey*, which only required providers to “make available” state-generated written materials which contained a viewpoint. *432 *Casey*, 505 U.S. at 884, 112 S.Ct. 2791 (plurality opinion). In this case, the state compels the provider to physically speak and show the state’s non-medical message to patients unwilling to hear or see.⁷ Other courts have applied strict scrutiny in similar circumstances. *See, e.g., Lakey*, 806 F.Supp.2d at 969–70; *Planned Parenthood Minn., N.D., S.D. v. Daugaard*, 799 F.Supp.2d 1048, 1070–71, 1072 (D.S.D.2011).

^[12] The Court finds that the speech-and-display requirements of the Act are subject to strict scrutiny under traditional and longstanding First Amendment principles. Thus, the Defendants must establish that the compelled speech required of the providers furthers a compelling state interest and that the requirements are narrowly tailored to achieve that interest. The Defendants have not established either element.

The Defendants first assert that the state has an interest in protecting abortion patients from psychological and

emotional distress and that this interest justifies the speech-and-display requirements. (Doc. 29 at 12.) Even if this is a compelling interest,⁸ there is no evidence in the record supporting the state's claim that the speech-and-display requirements further this interest. Indeed, the undisputed evidence offered by the Plaintiffs establishes that these provisions are likely to harm the psychological health of the very group the state purports to protect. (Doc. 10 ¶ 18 (Lylerly Decl.); Doc. 11 ¶ 19 (Stuart Decl.); Doc. 12 ¶¶ 23–24 (Dingfelder Decl.).)

The Defendants next put forth the state's interest in preventing women from being coerced into having abortions. (Doc. 29 at 13.) Assuming without deciding that this is a compelling interest, the Defendants have not articulated how the speech-and-display requirements address the stated concern in reducing compelled abortions, and none is immediately apparent.

At oral argument, the Defendants added the state's interest in promoting life and discouraging abortion as a compelling interest justifying the compelled speech. This interest might well be present after viability, *Roe*, 410 U.S. at 163, 93 S.Ct. 705, but nowhere does *Casey* characterize the state's interest in potential life as

"compelling" during the entire term of a woman's pregnancy. *See Lakey*, 806 F.Supp.2d at 971–72.

In any event, even if the state has a compelling interest, the state has provided no evidence that alternatives more in proportion to the resulting burdens placed on speech would not suffice. These alternatives might include making the information at issue available to the patient in written form, as in *Casey*, 505 U.S. at 884, 112 S.Ct. 2791 (plurality opinion); *see also Riley*, 487 U.S. at 800, 108 S.Ct. 2667 (noting that state publication of information "would communicate the desired information to the public without burdening a speaker with unwanted speech"), or possibly offering to provide the verbal or visual *433 information to the patient but respecting the patient's rejection of hearing or seeing the information.⁹

The speech-and-display requirements in section 90–21.85 thus do not survive strict scrutiny. The Court concludes that the Plaintiffs are likely to prevail on their First Amendment claim as to the compelled speech required by section 90–21.85.

Footnotes

- ¹ In their complaint, the Plaintiffs assert other constitutional claims related to the Act, including claims that the Act is an undue burden on a woman's liberty interests.
- ² By administrative regulation, North Carolina law has required an ultrasound before an abortion for a number of years. 10A N.C. Admin. Code § 14E.0305(d) (2011). The requirement was not statutory, however, and the regulation includes neither the time-delay nor the speech-and-display requirements.
- ³ The patient must also sign a "written certification" that these requirements have been met and state whether she "availed herself of the opportunity to view the image." N.C. Gen.Stat. § 90–21.85(a)(5)–(6). Subsection (b) provides that "[n]othing in this section shall be construed to prevent a pregnant woman from averting her eyes from the displayed images or from refusing to hear the simultaneous explanation and medical description." N.C. Gen.Stat. § 90–21.85(b).
- ⁴ There may be a question over whether the material the statute requires to be spoken and shown is factual and informative concerning medical issues or whether it is ideological or judgmental speech concerning philosophical, spiritual, or moral issues. The Defendants seemed to agree at oral argument that one purpose of the speech-and-display requirements was to persuade women not to have abortions by presenting "compelling" visual and personal information. The undisputed evidence establishes that the information is not generally medically necessary. *See infra* note 7. To the extent this issue is important to the ultimate resolution of the case, it is left for another day. *See Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."); *Wooley*, 430 U.S. at 717, 97 S.Ct. 1428 ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").
- ⁵ The evidence before the Court establishes without dispute or contradiction that the Plaintiffs would not communicate the message required by the speech-and-display requirement in the absence of the statute or patient request. (*See* Doc. 10 ¶¶ 15–16 (Lylerly Decl.); Doc. 11 ¶ 18 (Stuart Decl.); Doc. 12 ¶ 17 (Dingfelder Decl.).)
- ⁶ In any event, the speech in *Casey* that the speech-and-display provision here most resembles is the requirement that the physician "inform the woman of the availability of printed materials published by the State describing the fetus." 505 U.S. at 881, 112 S.Ct. 2791 (plurality opinion). What the state can say itself is very different from what the state can compel individuals to say. *Cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (stating that

when the government speaks for itself, it “may make content-based choices” but that “in the realm of private speech or expression, government regulation may not favor one speaker over another”). Requiring a private speaker to deliver the state’s message also has the potential to mislead the patient as to the source of the message, which has been disapproved in other contexts. *See id.* at 833, 115 S.Ct. 2510.

7 The uncontradicted evidence establishes that there is no medical purpose for requiring the speaking or showing of this material to an unwilling listener. (Doc. 10 ¶¶ 7–16 (Lylerly Decl.); Doc. 11 ¶¶ 17–20 (Stuart Decl.); Doc. 12 ¶ 17 (Dingfelder Decl.)) The statute does not allow providers any discretion, requiring compliance regardless of a patient’s medical or individual situation.

8 *Cf. Riley*, 487 U.S. at 804, 108 S.Ct. 2667 (“[I]t is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them.”) (Scalia, J., concurring).

9 At oral argument, the Defendants suggested that this is in fact what the Act allows because women can turn their heads or use some sort of technological device if they do not wish to see or hear the compelled message. It is not clear that this is so as to the “compelled listening.” The statute requires the woman to certify in writing that the speech-and-display requirements have been met. N.C. Gen.Stat. § 90–21.85(a)(5). It is hard to understand how she could do this if she “refuse[s] to hear.” Assuming this is possible, it results in compelling an unwilling speaker to deliver visual and spoken messages to a listener who is not listening or looking. The Defendants have not shown how this requirement is reasonably tailored to meet the state’s interests.

10 At oral argument, the Defendants asked for an additional opportunity to present evidence if the Court granted the motion for preliminary injunction. Even though the Defendants did not state what kind of evidence they want to present nor did they explain why they were unable to present any evidence before the October 17 hearing, the Court recognizes that the motion was set for hearing on short notice soon after it was filed. A separate Scheduling Order is entered concomitantly herewith giving the Defendants this opportunity and allowing the parties to address in more detail some of the more nuanced legal questions presented by this case.

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806 F.Supp.2d 942
United States District Court,
W.D. Texas,
Austin Division.

TEXAS MEDICAL PROVIDERS PERFORMING
ABORTION SERVICES, et al., Plaintiffs,
v.
David LAKEY, M.D., et al., Defendants.

Case No. A-11-CA-486-SS. | Aug. 30, 2011.

Synopsis

Background: Medical providers who perform abortion services in Texas brought putative class action against Commissioner of the Texas Department of State Health Services, Executive Director of the Texas Medical Board, and County Attorney, in his official capacity and as a representative of proposed class of all county and district attorneys, alleging legislation relating to informed consent to abortion was unconstitutional. Plaintiffs moved to certify class and for preliminary injunction, and defendants moved to strike.

Holdings: The District Court, Sam Sparks, District Judge, held that:

[1] named plaintiffs satisfied adequacy requirement for certification;

[2] juridical link exception to general standing rule in class actions applied;

[3] defendants' consent was not required prior to certification of defendant class;

[4] legislation did not violate equal protection;

[5] legislation did not violate First and Fourteenth Amendments did not violate First and Fourteenth Amendments based on claim that women would be subject to unwanted speech;

[6] phrase "the physician who is to perform the abortion" was unconstitutionally vague;

[7] provision requiring physician or physician's agent to provide information about paternity and child support to women who chose not to have an abortion, was

unconstitutionally vague; and

[8] legislation violated the First Amendment by compelling physicians and patients to engage in government-mandated speech and expression.

Plaintiffs' motions granted in part and denied in part, and defendants' motions denied.

West Codenotes

Held Unconstitutional

V.T.C.A., Health & Safety Code §§ 171.012(a)(1-6), 171.0122, 171.0123

Attorneys and Law Firms

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Arthur C. D'Andrea, Assistant Solicitor General Office of the Solicitor General of Texas, Daniel C. Perkins, Assistant Attorney General Texas Attorney General's Office, Jonathan Franklin Mitchell, William T. Deane, Office of the Attorney General, Elaine A. Casas, Jennifer Kraber, Sherine Elizabeth Thomas, Austin, TX, for Defendants.

Opinion

ORDER

SAM SPARKS, District Judge.

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Plaintiffs' Motions to Certify Classes [# 10, 42], Defendants' responses [# 20, 46, 47] thereto, and Plaintiffs' replies [# 23, 58]; Plaintiffs' Amended Motion for Preliminary Injunction [# 18], Defendants' response [# 29] thereto, and the parties' supplemental memoranda [# 39, 41, 52]; Defendant David Escamilla's Motions to Dismiss [# 22, 49], Plaintiffs' responses [# 32, 59] thereto, and Escamilla's reply [# 62]; and Defendants' Motions to Strike [# 26, 27, 28], and Plaintiffs' responses [# 36, 37, 38] thereto. Having reviewed the documents, the relevant law, and the file as a whole, the Court now

enters the following opinion and orders.

As an initial matter, the Court notes some of the motions listed as pending are now moot. Specifically, Plaintiffs' filing of an amended complaint on July 21, 2011, technically mooted Defendant Escamilla's original motion to dismiss [# 22], a fact he appears to have acknowledged with the filing of his second motion. Additionally, Defendants' Motion to Continue the Preliminary Injunction Hearing [# 25] is still listed as pending but, as that hearing was held as scheduled on July 6, 2011, Defendants' motion is clearly no longer relevant. Accordingly, these stale motions [# 22, 25] are DISMISSED WITHOUT PREJUDICE as moot.

Background

Plaintiffs, who seek to represent the class of all Texas medical providers performing abortions and the patients of such providers, challenge the constitutionality of Texas House Bill Number 15, an Act "relating to informed consent to an abortion." H.B. 15, 82nd Leg., Reg. Sess. (Tex.2011) ("H.B. 15"). For the following reasons, the Court finds several portions of the Act are unconstitutionally vague; and further finds the Act violates the First Amendment by compelling physicians and patients to engage in government-mandated ***948 speech and expression**. Accordingly, the Court GRANTS IN PART and DENIES IN PART Plaintiffs' Motion for Preliminary Injunction [# 18].

In part and in summary, the Act amends Chapter 171 of the Texas Health and Safety Code to require the following as prerequisites for a woman's informed and voluntary consent to an abortion: (1) the physician who is to perform the abortion, or a certified sonographer agent thereof, must perform a sonogram on the pregnant woman; (2) the physician must display the sonogram images "in a quality consistent with current medical practice" such that the pregnant woman may view them; (3) the physician must provide, "in a manner understandable to a layperson," a verbal explanation of the results of the sonogram images, including a variety of detailed descriptions of the fetus or embryo; and (4) the physician or certified sonographer agent must "make [ ] audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provide [ ], in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation." H.B. 15, Sec. 2 (amending TEX. HEALTH & SAFETY CODE ANN. § 171.012).

Under the Act, the timing of the sonogram and the accompanying displays and descriptions varies, depending on how far away a woman lives from an abortion provider, as that term is defined under the Act. If a woman certifies she lives 100 or more miles away from an abortion provider, she may satisfy the informed consent prerequisites two hours prior to an abortion; otherwise, the Act requires they be satisfied twenty-four hours in advance.

The Act further amends the Texas Health and Safety Code by adding section 171.0122, which, in part and in summary, allows women to "opt out" of viewing the sonogram images or hearing the heart auscultation required by amended section 171.012, but requires all women to receive the detailed verbal description of the sonogram images mandated by that section, except in cases of sexual assault, incest, or under other limited, enumerated circumstances. Section 171.0122 further provides neither the physician nor the pregnant woman are subject to a penalty under Chapter 171 "solely because the pregnant woman chooses not to view the printed materials or the sonogram images, hear the heart auscultation, or receive the verbal explanation," if a proper waiver is executed. Amended section 171.012(a)(5) specifies a particular election form a pregnant woman must sign before receiving an abortion, and newly-added section 171.0121 requires both that the form be placed in the woman's medical records, and that it be retained by the facility performing the abortion for at least seven years.

Both the Act and current Texas law contain severe compliance, enforcement, and penalty provisions relating to informed consent. First, the Act amends Texas Health and Safety Code section 245.006, mandating inspection of abortion facilities "at random, unannounced, and reasonable times as necessary to ensure compliance" with the informed consent provisions of Chapter 171. Second, the Act amends Texas Occupations Code section 164.055 to require mandatory disciplinary action, refusal to issue a medical license, and non-renewal of a medical license, for failure to comply with Chapter 171 of the Health and Safety Code. Finally, existing Texas law makes it a misdemeanor offense for a physician to intentionally perform an abortion in violation of the informed consent provisions of Chapter 171, an offense punishable by a fine of up to \$10,000. TEX. HEALTH & SAFETY CODE ANN. § 171.018.

*949 Plaintiffs bring eight claims in their amended complaint: (1) the Act is unconstitutionally vague; (2) the Act compels physicians to engage in

government-mandated speech, in violation of the First and Fourteenth Amendments; (3) the Act violates the First and Fourteenth Amendments by requiring patients to submit to such speech, regardless of whether it is wanted or medically necessary; (4) the Act unconstitutionally discriminates on the basis of sex, in violation of the Equal Protection Clause of the Fourteenth Amendment; (5) the Act unconstitutionally discriminates between abortion providers and other medical facilities, in violation of the Equal Protection Clause; (6) the Act unconstitutionally discriminates between women who live within 100 miles of an abortion provider, and those who live 100 or more miles away from an abortion provider, in violation of the Equal Protection Clause; (7) the Act violates women's Fourteenth Amendment right to bodily integrity by requiring them to submit to ultrasounds procedures which are neither typical nor medically necessary; and (8) the Act violates the Fourth and Fourteenth Amendments by subjecting abortion facilities to random, unannounced, and warrantless searches. *See* Am. Compl. [# 40] at ¶¶ 125–40.

Plaintiffs name as defendants David Lakey, M.D., the Commissioner of the Texas Department of State Health Services; Mari Robinson, the Executive Director of the Texas Medical Board; and David Escamilla, the County Attorney for Travis County, in his official capacity and as a representative of the proposed class of all county and district attorneys in the State of Texas with authority to prosecute misdemeanors.

D. Compelled Speech

^[30] Plaintiffs argue certain provisions of the Act are unconstitutional because they compel physicians to engage in speech, in violation of the First Amendment. In their slightly more colorful words:

The Act violates the plaintiff physicians' right of free speech by using them as puppets to convey government-mandated speech (visual, verbal, and auditory) to a patient who does not wish to receive that information and who does not believe it material to her decision. This mandated speech falls outside accepted medical practice for informed consent and requires physicians to violate basic tenets of medical ethics. This unprecedented intrusion on a physician's relationship with a patient in a private medical setting violates the First Amendment.

Pls.' Mot. [# 18] at 5–6.

In response, Defendants argue Plaintiffs' argument is foreclosed by the Supreme Court's decision in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), and the issue of whether the Act violates medical ethics "has no legal relevance." Defs.' Resp. [# 29] at 8.

For the following reasons, the Court disagrees with Defendants, and finds the Act compels speech in violation of the First Amendment.

1. Legal Standard

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance...." *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).

Outside the commercial context, "content-based regulations of speech are presumptively invalid." *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 188, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007). "[A]ny restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S.Ct. 1125, 1132, 172 L.Ed.2d 853 (2009). Likewise, where commercial and fully protected speech is mixed, and the component parts are "inextricably intertwined, ... we apply our test for fully protected expression." *Riley*, 487 U.S. at 796, 108 S.Ct. 2667. Similarly, where a statute compels speech, the nature of the compelled speech determines the standard of review a court must apply: "Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as *970 a whole and the effect of the compelled statement thereon." *Id.*

2. Analysis

The Court finds the provisions of the Act that compel speech by physicians are subject to strict scrutiny. Defendants do not suggest the speech at issue here is purely commercial, nor could they do so in good faith.⁵ Although physicians often have a commercial interest in a

woman's decision to get an abortion, the Act compels speech that is, at best, unrelated to a physician's commercial motivations, and that is, in reality, likely to be adverse to those motivations. Moreover, in the context of abortion, the speech between physician and patient, taken as a whole, implicates a variety of medical, ethical, legal, practical, and commercial concerns. Because these concerns are all closely related, the Court finds any commercial speech involved is "inextricably intertwined" with the non-commercial components, such that strict scrutiny is appropriate.

Consequently, Defendants must prove that the compelled speech portions of the Act further a compelling government interest and are narrowly tailored to achieve that interest. *See Citizens United v. Federal Election Comm'n*, —U.S.—, 130 S.Ct. 876, 898, 175 L.Ed.2d 753 (2010). Defendants make no attempt to meet this burden. Instead, as noted above, they argue Plaintiffs' entire compelled speech challenge is foreclosed by *Casey*, *supra*. Because Defendants have neither identified a compelling government interest, nor explained how the Act is narrowly tailored to advance that interest, Plaintiffs will prevail if *Casey* does not foreclose their First Amendment claim. Accordingly, an examination of that case is warranted.

a. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)

In *Casey*, the Supreme Court considered constitutional challenges to five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. 505 U.S. at 844, 112 S.Ct. 2791. The provision relevant to the case currently before this Court is the informed consent provision, which the Supreme Court summarized as follows:

Except in a medical emergency, the statute requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child." The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.

Id. at 881, 112 S.Ct. 2791. Current Texas law contains substantially similar requirements. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.011–171.016.

The Supreme Court began its discussion of the Pennsylvania provision by noting, "as with any medical procedure, the *971 State may require a woman to give her written informed consent to an abortion." *Id.* However, the Court acknowledged, "[t]he conclusions reached by a majority of the Justices in the separate opinions filed today and the undue burden standard adopted in this opinion require us to overrule in part some of the Court's past decisions" regarding informed consent, including both *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (*Akron I*), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986). *Id.* at 881–82, 112 S.Ct. 2791. With respect to these cases, the Court stated:

To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)]'s acknowledgment of an important interest in potential life, and are overruled. This is clear even on the very terms of *Akron I* and *Thornburgh*. Those decisions, along with [*Planned Parenthood of Cent. Mo. v.*] *Danforth*, [428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976)] recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth. It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure

that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.

Id. at 882, 112 S.Ct. 2791 (citations omitted).

The *Casey* Court went on to say: "We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health." *Id.*

Summarizing its undue burden analysis, the Court said:

[W]e depart from the holdings of *Akron I* and *Thornburgh* to the extent that we 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. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.

Id. at 883, 112 S.Ct. 2791.

b. *Casey's* Undue Burden Analysis

This Court quotes substantial portions of *Casey* because Defendants rely heavily *972 on the above language in arguing Plaintiffs' First Amendment challenge lacks merit. However, three points cut against Defendants' argument. First, as the last quotation makes clear, the Supreme Court's discussion is in the context of a constitutional challenge based upon a woman's Fourteenth Amendment Due Process right to an abortion, not a First Amendment challenge. Accordingly, while the Court's statements may be instructive on the First Amendment issue, they are not dispositive.

Second, while *Casey* refers to the government's interest in potential life as "important," "substantial," and "legitimate," it stops short of characterizing it as "compelling." Indeed, one of the holdings of *Roe v. Wade*, and one this Court does not interpret *Casey* as having overruled, was that "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability." 410 U.S. at 163, 93 S.Ct. 705; see *Casey*, 505 U.S. at 846, 112 S.Ct. 2791 (reaffirming *Roe's* three-part "essential holding," including "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State," and "a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health").

Similarly, *Casey* indicates "[i]f the information the State requires to be *made available* to the woman is truthful and not misleading, the requirement *may* be permissible." *Casey*, 505 U.S. at 882, 112 S.Ct. 2791 (emphasis added). *Casey* thus approved of some state regulations under which physicians are required to give pregnant women the option of receiving certain kinds of information; it did not, however, give governments *carte blanche* to force physicians to deliver, and force women to consider, whatever information the government deems appropriate.

Finally, and perhaps most importantly, the Supreme Court's summary of the Pennsylvania informed consent provision reveals that, while that provision is similar to current Texas law in many respects, its requirements are far less burdensome than the Act's. Indeed, even ignoring the Act's additional mandates, Texas' current informed consent requirements are more far-reaching than those in *Casey*. See generally TEX. HEALTH & SAFETY CODE ANN. §§ 171.011–171.018.

The Act imposes requirements that are both more onerous, and less medically relevant, than those in *Casey*. In particular, whereas the Pennsylvania statute only required a physician to inform a pregnant woman of the

"probable gestational age" of the fetus (which, as noted, is already required by existing Texas law, *see* TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(1)(C)), the Act additionally requires, at an absolute minimum, a detailed description of the embryo or fetus.

Accordingly, for the foregoing reasons, the Court thinks *Casey's* approval of the Pennsylvania informed consent provision is not necessarily dispositive of the issues in this case.

c. *Casey's* Compelled Speech Analysis

To be fair, however, Defendants do not rely solely on the language quoted above. *Casey* also addressed a First Amendment compelled speech challenge to the Pennsylvania statute, and summarily dismissed it, saying:

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, *973 but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

Casey, 505 U.S. at 884, 112 S.Ct. 2791 (internal citations omitted).

Defendants contend this language entirely forecloses Plaintiffs' First Amendment compelled speech challenge. However, they ignore the final words of the quoted paragraph, to say nothing of the obvious jurisprudential fact the Supreme Court was only ruling—indeed, *could* only rule—on challenges to the particular statute with which it was presented.

d. Analysis and Application

The Court agrees, the speech compelled by the Pennsylvania statute is not constitutionally impermissible, because it satisfies strict scrutiny. The government has a compelling interest in ensuring patients are accurately informed about the nature of medical procedures they are

considering, the health risks attendant to those procedures, and the risks and benefits of any alternatives. Information about the probable gestational age of the embryo or fetus, being directly indicative of how advanced the woman's pregnancy is, is relevant to not only the health risks associated with an abortion, but also the particular procedure the physician may employ.

Further, the Court sees nothing constitutionally impermissible about the Pennsylvania statute's additional requirements that a physician or qualified nonphysician: (1) inform a pregnant woman about the availability of materials describing the fetus or embryo; (2) give her information about medical assistance for childbirth and child support; and (3) provide her with a list of agencies which provide adoption and other services as alternatives to abortion. To the extent the pregnant woman feels this information is pertinent to her decision, she may review it; to the extent she does not, she need not. Requiring a physician to inform a pregnant woman about her various medical options, and further requiring the physician to facilitate the woman's access to additional truthful information about those options at her request, does not violate the First Amendment. *Casey* says as much, and even if this Court had the authority to depart from this precedent, it would not.

As *Casey* further notes, the practice of medicine is "subject to reasonable licensing and regulation by the State." *Id.* However, while the government's power to license and regulate a profession may be a factor in a court's First Amendment compelled speech analysis, Defendants are incorrect in suggesting this power forecloses any challenge to compelled speech in a professional setting. Indeed, *Casey* acknowledges the physician's First Amendment rights are implicated by the Pennsylvania statute. The Supreme Court rejected the petitioners' compelled speech argument because physicians are, in a professional setting, subject to "reasonable" regulation by the state, and the Court correctly concluded the information mandated by the state in the Pennsylvania statute is reasonable.

Two final notes undercut Defendants' argument that *Casey* forecloses Plaintiffs' challenge here. First, the Supreme Court described the petitioners' argument as asserting a purported "First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State." *Id.* As noted above, there is no question the government has a compelling interest in making sure patients are accurately informed about the risks of any medical procedure they are considering, including *974 those associated with both abortion and childbirth.

Second, and related, is the fact the Supreme Court barely discussed the petitioners' First Amendment argument. Nor is the reason for the *Casey* Court's summary dismissal a mystery: the petitioners' First Amendment challenge was meritless, if not frivolous, under the facts of that case.

Not so here. As discussed above, the Pennsylvania statute in *Casey* simply required physicians to inform pregnant women about the risks of an abortion, the potential alternatives thereto, and the availability of additional informational materials related to those alternatives. By contrast, the Act under consideration here requires physicians to provide, in addition to those legitimate disclosures, additional information such as descriptions of "the presence of cardiac activity," and "the presence of external members and internal organs" in the fetus or embryo. The Court does not think the disclosures required by the Act are particularly relevant to any compelling government interest, but whatever relevance they may have is greatly diminished by the disclosures already required under Texas law, which are more directly pertinent to those interests.

Nor are physicians' forced statements to their patients the only speech compelled by the Act. Section 171.012(a)(5) requires a pregnant woman to complete and sign a specified election form that certifies her understanding of many of the Act's various requirements. The most troubling aspect of the required certification is paragraph (6),⁶ which reads:

(6) I UNDERSTAND THAT I AM REQUIRED BY LAW TO HEAR AN EXPLANATION OF THE SONOGRAM IMAGES UNLESS I CERTIFY IN WRITING TO ONE OF THE FOLLOWING:

____ I AM PREGNANT AS A RESULT OF A SEXUAL ASSAULT, INCEST, OR OTHER VIOLATION OF THE TEXAS PENAL CODE THAT HAS BEEN REPORTED TO LAW ENFORCEMENT AUTHORITIES OR THAT HAS NOT BEEN REPORTED BECAUSE I REASONABLY BELIEVE THAT DOING SO WOULD PUT ME AT RISK OF RETALIATION RESULTING IN SERIOUS BODILY INJURY.

____ I AM A MINOR AND OBTAINING AN ABORTION IN ACCORDANCE WITH JUDICIAL BYPASS PROCEDURES UNDER CHAPTER 33, TEXAS FAMILY CODE.

____ MY FETUS HAS AN IRREVERSIBLE

MEDICAL CONDITION OR ABNORMALITY, AS IDENTIFIED BY RELIABLE DIAGNOSTIC PROCEDURES AND DOCUMENTED IN MY MEDICAL FILE.

H.B. 15, Sec. 2 (amending TEX. HEALTH & SAFETY CODE ANN. § 171.012).

The Court need not belabor the obvious by explaining why, for instance, women who are pregnant as a result of sexual assault or incest may not wish to certify that fact in writing, particularly if they are too afraid of retaliation to even report the matter to police. There is no sufficiently powerful government interest to justify compelling speech of this sort, nor is the Act sufficiently tailored to advance such an interest.

Compounding this problem is newly-added section 171.0121, which requires both that a copy of the above certification *975 be placed in the pregnant woman's medical records (presumably permanently), and that the facility that performs the abortion retain a copy for at least seven years. *See* H.B. 15, Sec. 3 (adding TEX. HEALTH & SAFETY CODE ANN. § 171.0121). Given the nature of the certification and the Act's retention requirements, it is difficult to avoid the troubling conclusion the Texas Legislature either wants to permanently brand women who choose to get abortions, or views these certifications as potential evidence to be used against physicians and women.

The net result of these provisions is: (1) a physician is required to say things and take expressive actions with which the physician may not ideologically agree, and which the physician may feel are medically unnecessary; (2) the pregnant woman must not only passively receive this potentially unwanted speech and expression, but must also actively participate—in the best case by simply signing an election form, and in the worst case by disclosing in writing extremely personal, medically irrelevant facts; and (3) the entire experience must be memorialized in records that are, at best, semi-private.⁷ In the absence of a sufficiently weighty government interest, and a sufficiently narrow statute advancing that interest, neither of which have been argued by Defendants, the Constitution does not permit such compulsion.

3. Conclusion

The Act does not compel physicians to apprise women of the risks inherent in abortion, inform the women of available alternatives, and facilitate access to additional information if the women wish to review it before making their decisions; existing Texas law already compels such speech by physicians, in conformity with *Casey*. Instead,

the Act compels physicians to advance an ideological agenda with which they may not agree, regardless of any medical necessity, and irrespective of whether the pregnant women wish to listen. These factual differences persuade the Court that *Casey* does not foreclose Plaintiffs' First Amendment challenge to the Act.

and specifically the requirements contained in Texas Health and Safety Code sections 171.012(a)(4)(B), (C), and (D), and section 171.012(a)(5), are unconstitutional violations of the First Amendment right to be free from compelled speech.⁸

As noted above, Defendants have failed to prove the Act furthers a compelling government interest, or that it is narrowly tailored to advance that interest. Accordingly, the Court finds the Act's compelled speech requirements,

Footnotes

- ¹ Although Plaintiffs did not include an Equal Protection argument in their motion for preliminary injunction, they did raise the issue in their supplemental memorandum, and Defendants responded to it without objection. Accordingly, the Court addresses Plaintiffs' Equal Protection arguments.
- ² It is ironic that many of the same people who zealously defend the state's righteous duty to become intimately involved in a woman's decision to get an abortion are also positively scandalized at the government's gross overreaching in the area of health care.
- ³ The exact nature of the injunctive relief, and the effect of the Act's severability clause, are discussed after the resolution of Plaintiffs' challenges to the Act.
- ⁴ The relevant sections of the Act read as follows:
(4) before any sedative or anesthesia is administered to the pregnant woman and at least 24 hours before the abortion or at least two hours before the abortion if the pregnant woman waives this requirement by certifying that she currently lives 100 miles or more from the nearest abortion provider that is a facility licensed under Chapter 245 or a facility that performs more than 50 abortions in any 12-month period:
(A) the physician who is to perform the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers performs a sonogram on the pregnant woman on whom the abortion is to be performed;
(B) the physician who is to perform the abortion displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them;
...
(D) the physician who is to perform the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers makes audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provides, in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation.
H.B. 15, Sec. 2 (amending TEX. HEALTH & SAFETY CODE ANN. § 171.012).
- ⁵ In fact, Defendants do not meaningfully address the First Amendment issues in this case at all, instead arguing Plaintiffs' arguments are categorically foreclosed by the Supreme Court's decision in *Casey*.
- ⁶ A close second is the almost perverse paragraph (7), which requires a woman to certify she is making her government-mandated election "of [her] own free will and without coercion." H.B. 15, Sec. 2 (amending TEX. HEALTH & SAFETY CODE ANN. § 171.012).
- ⁷ It does not require a tremendous creative leap to imagine a lawsuit in which such a certification would be not only discoverable, but also probably admissible at trial.
- ⁸ Although sections 171.012(a)(4)(B) and (D) require a physician to display images and a heart auscultation, respectively, rather than speech, the Court finds these sections are both attempts to compel content-based expression by physicians. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). Because of the constitutional equivalence between restrictions on speech and compelled speech, articulated by *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), the Court concludes the government can no more compel such content-based expression than it could restrict such expression.

667 F.3d 570
United States Court of Appeals,
Fifth Circuit.

TEXAS MEDICAL PROVIDERS PERFORMING
ABORTION SERVICES, a class represented by
Metropolitan OBGYN, P.A.; on behalf of itself and
its patients seeking abortions, doing business as
Reproductive Services of San Antonio; Alan Braid,
on behalf of himself and his patients seeking
abortions, Plaintiffs–Appellees,

v.

David LAKEY, Commissioner of the Texas
Department of State Health Services, in his official
capacity; Mari Robinson, Executive Director of the
Texas Medical Board, in her official capacity,
Defendants–Appellants.

No. 11–50814. | Jan. 10, 2012.

Synopsis

Background: Physicians and abortion providers brought putative class action under § 1983, challenging constitutionality of statute “relating to informed consent to an abortion.” The United States District Court for the Western District of Texas, Sam Sparks, District Judge, 806 F.Supp.2d 942, 2011 WL 3818879, granted preliminary injunction. State appealed.

Holdings: The Court of Appeals, Edith H. Jones, Chief Judge, held that:

- [1] provisions requiring disclosures and written consent did not violate First Amendment;
- [2] phrase “the physician who is to perform the abortion” was not vague;
- [3] two provisions were not in conflict, in violation of due process; and
- [4] provision requiring physician, if woman ultimately chose not to receive abortion, to provide her with publication discussing how to establish paternity and secure child support, was not vague.

Vacated and remanded.

Patrick E. Higginbotham, Circuit Judge, filed concurring opinion.

Attorneys and Law Firms

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Appeal from the United States District Court for the Western District of Texas.

Before JONES, Chief Judge, and HIGGINBOTHAM and SMITH, Circuit Judges.

Opinion

EDITH H. JONES, Chief Judge:

Physicians and abortion providers—collectively representing all similarly situated Texas Medical Providers Performing Abortion Services (“TMPPAS”)—sued the Commissioner of the Texas Department of State Health Services and the Executive Director of the Texas Medical Board (collectively “the State”) under 42 U.S.C. § 1983 for declaratory and injunctive relief against alleged constitutional violations resulting from the newly-enacted Texas House Bill 15 (“the Act”), an Act “relating to informed consent to an abortion.” H.B. 15, 82nd Leg. Reg. Sess. (Tex.2011). The district court granted a preliminary injunction against four provisions for violating the First Amendment and three others for unconstitutional vagueness. We conclude,

contrary to the district court, that Appellees failed to establish a substantial likelihood of success on any of the claims on which the injunction was granted, and therefore VACATE the preliminary injunction. For the sake of judicial efficiency, any further appeals in this matter will be heard by this panel.

***573 Background**

H.B. 15, passed in May 2011, substantially amended the 2003 Texas Woman's Right to Know Act ("WRKA"). The amendments challenged here are intended to strengthen the informed consent of women who choose to undergo abortions. The amendments require the physician "who is to perform an abortion" to perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus for the woman to hear, and explain to her the results of each procedure and to wait 24 hours, in most cases, between these disclosures and performing the abortion. TEX. HEALTH & SAFETY CODE § 171.012(a)(4). A woman may decline to view the images or hear the heartbeat, § 171.0122(b), (c), but she may decline to receive an explanation of the sonogram images only on certification that her pregnancy falls into one of three statutory exceptions. *Id.* at § 171.0122(d).

Any woman seeking an abortion must also complete a form indicating that she has received the required materials, understands her right to view the requisite images and hear the heart auscultation, and chooses to receive an abortion. § 171.012(a)(5). The physician who is to perform the abortion must maintain a copy of this form, generally for seven years. *Id.* at § 171.0121(b)(1)-(2).

If a woman ultimately chooses not to receive an abortion, the physician must provide her with a publication discussing how to establish paternity and secure child support. § 171.0123.

Finally, the Act amended the Texas Occupations Code to deny or revoke a physician's license for violating these provisions. TEX. OCC.CODE § 164.055(a). The Act went into effect on September 1, 2011, and was scheduled to apply to abortions after October 1, 2011.

Appellees filed suit on June 13, requesting a preliminary injunction shortly thereafter. Following extensive briefing, the district court preliminarily enjoined the disclosure provisions of the Act described above on the ground that they "compel speech" in violation of the First Amendment. The district court partially enjoined three

other sections of the Act as void for vagueness: the phrase "the physician who is to perform the abortion," certain situations in which the district court viewed the obligations of the physician and the rights of the pregnant woman as conflicting, and enforcement of the Act against physicians for failing to provide informational materials when they do not know that a woman elected not to have an abortion.

The State promptly appealed and sought a stay pending appeal, which the district court denied. A motions panel of this court carried with the case the motion to stay enforcement of the preliminary injunction, but also ordered expedited briefing and oral argument.

Stay of Appellate Review

[1] Appellees urge this court to defer ruling on the preliminary injunction because the district court has, notwithstanding this appeal, proceeded apace toward consideration of summary judgment. It is contended that our ruling on this interlocutory matter would become moot if the district court enters final judgment first, and that the district court will resolve issues not raised or decided at the preliminary phase. We decline to defer. First, this ruling will offer guidance to the district court, which is particularly important given our different view of the case. Second, the unresolved issues below are of secondary importance. Third, Appellees do not assert that fact issues pertinent to our ruling remain insufficiently developed.

****574 Standard of Review***

[2] [3] [4] "To be entitled to a preliminary injunction, the applicant [s] must show (1) a substantial likelihood that [they] will prevail on the merits, (2) a substantial threat that [they] will suffer irreparable injury if the injunction is not granted, (3) [their] substantial injury outweighs the threatened harm to the party whom [they] seek to enjoin, and (4) granting the preliminary injunction will not disserve the public interest." *Bluefield Water Ass'n, Inc. v. City of Starkville, Miss.*, 577 F.3d 250, 252-53 (5th Cir.2009) (internal citation omitted). "We have cautioned repeatedly that a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has 'clearly carried the burden of persuasion on all four requirements.' " *Id.* (quoting *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192,

195–96 (5th Cir.2003)). An “absence of likelihood of success on the merits is sufficient to make the district court’s grant of a preliminary injunction improvident as a matter of law.” *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 203 (5th Cir.2003). We review legal conclusions made with respect to a preliminary injunction grant *de novo*. *Bluefield Water Ass’n*, 577 F.3d at 253.

Discussion

I. First Amendment

^[5] Appellees contend that H.B. 15 abridges their First Amendment rights by compelling the physician to take and display to the woman sonogram images of her fetus, make audible its heartbeat, and explain to her the results of both exams. This information, they contend, is the state’s “ideological message” concerning the fetal life that serves no medical purpose, and indeed no other purpose than to discourage the abortion. Requiring the woman to certify the physician’s compliance with these procedures also allegedly violates her right “not to speak.” In fashioning their First Amendment compelled speech arguments, which the district court largely accepted, Appellees must confront the Supreme Court’s holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), that reaffirmed a woman’s substantive due process right to terminate a pregnancy but also upheld an informed-consent statute over precisely the same “compelled speech” challenges made here. Following *Casey*, an en banc decision of the Eighth Circuit has also upheld against a compelled speech attack another informed consent provision regulating abortion providers. *Planned Parenthood Minnesota, et al. v. Rounds*, 653 F.3d 662 (8th Cir.2011).¹ We begin this analysis with *Casey*.

The law at issue in *Casey* required an abortion provider to inform the mother of the relevant health risks to her and the “probable gestational age of the unborn child.” *Casey*, 505 U.S. at 881, 112 S.Ct. at 2822. The woman also had to certify in writing that she had received this information *575 and had been informed by the doctor of the availability of various printed materials “describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion.”² *Id.* Planned Parenthood contended that all of these disclosures operate to discourage abortion and, by compelling the doctor to deliver them, violated the physician’s First Amendment

free-speech rights. Planned Parenthood urged application of the strict scrutiny test governing certain First Amendment speech rights. *See* Brief of Petitioners, 1992 WL 551419, at *54.

The *Casey* plurality’s opinion concluded that such provisions, entailing “the giving of truthful, nonmisleading information” which is “relevant ... to the decision,” did not impose an undue burden on the woman’s right to an abortion and were thus permitted by the Fourteenth Amendment. *Id.* at 882, 112 S.Ct. at 2823. The requirement that the physician relay the probable age of the fetus furthered the legitimate end of “ensur[ing] that a woman apprehend the full consequences of her decision.” *Id.* In other words, “informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant.” *Id.* at 883, 112 S.Ct. at 2824. As the Court noted, such information “further[s] the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.” *Id.* at 882, 112 S.Ct. 2791. States may further the “legitimate goal of protecting the life of the unborn” through “legislation aimed at ensuring a decision that is mature and informed, even when in doing so the State expresses a preference for childbirth over abortion.” *Id.*

The plurality then turned to the petitioners’

asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the state. To be sure, the physician’s First Amendment rights not to speak are implicated, *see Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428 [51 L.Ed.2d 752] (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, *cf. Whalen v. Roe*, 429 U.S. 589, 603, 97 S.Ct. 869, 878 [51 L.Ed.2d 64] (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the state here.

Id. at 884, 112 S.Ct. at 2824.

The plurality response to the compelled speech claim is clearly not a strict scrutiny analysis. It inquires into

neither compelling interests nor narrow tailoring. The three sentences with which the Court disposed of the First Amendment claims are, if anything, the antithesis of strict scrutiny. Indeed, the plurality references *Whalen v. Roe*, in which the Court had upheld a regulation of medical practice against a right to privacy challenge. 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). The only reasonable reading of *Casey*'s passage is that physicians' rights not to speak are, when "part of the practice of medicine, subject to reasonable licensing and regulation by the State[.]" This applies to information that is "truthful," "nonmisleading," and "relevant ... to the decision" to undergo an abortion. *Casey*, 505 U.S. at 882, 112 S.Ct. at 2823.

The Court's decision in *Gonzales v. Carhart*, 550 U.S. 124, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007), reaffirmed *Casey*, as it *576 upheld a state's "significant role ... in regulating the medical profession" and added that "[t]he government may use its voice and regulatory authority to show its profound respect for the life within the woman." 550 U.S. at 128, 127 S.Ct. at 1633. The Court addressed in detail the justification for state regulations consistent with *Casey*'s reaffirming the right to abortion:

Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude that some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here at issue [partial-birth abortions].

.... The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.

Id. at 157–59, 1633–34 (citations omitted).

¹⁶ ^[7] The import of these cases is clear. First, informed consent laws that do not impose an undue burden on the

woman's right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures. Second, such laws are part of the state's reasonable regulation of medical practice and do not fall under the rubric of compelling "ideological" speech that triggers First Amendment strict scrutiny.³ Third, "relevant" informed consent may entail not only the physical and psychological risks to the expectant mother facing this "difficult moral decision," but also the state's legitimate interests in "protecting the potential life within her." 505 U.S. at 871, 112 S.Ct. at 2791. *See also Casey*, 505 U.S. at 882, 112 S.Ct. at 2823 ("Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehends the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.") Finally, the possibility that such information "might cause the woman to choose childbirth over abortion" does not render the provisions unconstitutional. *Id.* at 889, 112 S.Ct. at 2791.

Fortifying this reading, the Eighth Circuit sitting en banc construed *Casey* and *Gonzales* in the same way:

... [W]hile the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information *577 relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.

Planned Parenthood Minn. v. Rounds, 530 F.3d 724, 735 (8th Cir.2008) (en banc) (emphasis added). Significantly, the *Rounds* dissent agreed that the state's reasonable medical regulation of abortion includes its assertion of "legitimate interests in the health of the mother and in protecting the potential life within her." " *Rounds*, 530 F.3d at 741 (Murphy, J., dissenting) (quoting *Casey*, 505 U.S. at 871, 112 S.Ct. 2791). *Rounds* upheld, against compelled speech challenges, an informed consent provision, and associated compliance certifications by both the physician and pregnant woman, requiring, *inter alia*, a disclosure that the abortion "will terminate the life of a whole, separate, unique, living human being" with whom the woman "has an existing relationship" entitled to legal protection. *Rounds*, 530 F.3d at 726.

In contrast to the disclosures discussed in *Rounds*, H.B. 15 requires the taking and displaying of a sonogram, the heart auscultation of the pregnant woman's fetus, and a description by the doctor of the exams' results. That these medically accurate depictions are inherently truthful and non-misleading is not disputed by Appellees, nor by any reasoned analysis by the district court.⁴ (We consider later the Appellees' argument that the disclosures are not medically necessary, and are therefore "irrelevant" to procuring the woman's informed consent under *Casey*). Unlike the plaintiffs in *Casey* and *Rounds*, the Appellees here do not contend that the H.B. 15 disclosures inflict an unconstitutional undue burden on a woman's substantive due process right to obtain an abortion. These omissions, together, are significant. If the disclosures are truthful and non-misleading, and if they would not violate the woman's privacy right under the *Casey* plurality opinion, then Appellees would, by means of their First Amendment claim, essentially trump the balance *Casey* struck between women's rights and the states' prerogatives. *Casey*, however, rejected any such clash of rights in the informed consent context.

Applying to H.B. 15 the principles of *Casey*'s plurality, the most reasonable conclusion is to uphold the provisions declared as unconstitutional compelled speech by the district court. To belabor the obvious and conceded point, the required disclosures *578 of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information. They are not different in kind, although more graphic and scientifically up-to-date, than the disclosures discussed in *Casey*—probable gestational age of the fetus and printed material showing a baby's general prenatal development stages. Likewise, the relevance of these disclosures to securing informed consent is sustained by *Casey* and *Gonzales*, because both cases allow the state to regulate medical practice by deciding that information about fetal development is "relevant" to a woman's decision-making.⁵

As for the woman's consent form, that, too, is governed by *Casey*, which approves the practice of obtaining written consent "as with any medical procedure." 505 U.S. at 883, 112 S.Ct. at 2823. H.B. 15, § 171.012(a)(5), requires that a pregnant woman certify in writing her understanding that (1) Texas law requires an ultrasound prior to obtaining an abortion, (2) she has the option to view the sonogram images, (3) she has the option to hear the fetal heartbeat, and (4) she is required to hear the medical explanation of the sonogram unless she falls under the narrow exceptions to this requirement.⁶

To invalidate the written consent form as compelled speech would potentially subject to strict scrutiny a host of other medical informed-consent requirements. Appellees have offered no theory how the H.B. 15 informed-consent certification differs constitutionally from informed-consent certifications in general.

Nevertheless, the district court was especially troubled by the requirement that, to avoid the description of the sonogram images, a victim of rape or incest might have to certify her status as a victim, despite fearing (by the very terms of the certification) physical reprisal if she makes her status known. This system of certified exceptions may be a debatable choice of policy, but it does not transgress the First Amendment. If the State could properly decline to grant any exceptions to the informed-consent requirement, it cannot create an inappropriate burden on free speech rights where it simply conditions an exception on a woman's admission that she falls within it. Indeed, such an infirmity could just as well be cured by striking down the exceptions alone as by striking down the requirement of written certification. Because the general requirement is valid, we see no constitutional objection to the certification required for an exception.

Notwithstanding the facial application of *Casey* to H.B. 15, Appellees characterize its disclosure requirements as "qualitatively different" in two ways. First, the disclosure of the sonogram and fetal heartbeat are "medically unnecessary" to the woman and therefore beyond the standard practice of medicine within the state's regulatory powers. Appellees refer to currently required disclosures of health risks to the mother alone and apparently would limit information about the fetus in these *579 circumstances to its "probable gestational age," as specifically approved in *Casey*. Requiring any more information about the fetus amounts to advocacy by the state. Second, whereas *Casey* only required the physician to make certain materials about childbirth and the fetus "available" to the woman, the physician here is required to explain the results of sonogram and fetal heart auscultation, and the woman is required to listen to the sonogram results. This interchange makes the physician the "mouthpiece" of the state, again for medically unnecessary reasons.⁷ Appellees' position seems to assume that the facts of *Casey* represent a constitutional ceiling for regulation of informed consent to abortion, not a set of principles to be applied to the states' legislative decisions. On this broad level, however, the Court has admonished that federal courts are not the repository for regulation of the practice of medicine. *See Gonzales*, 550 U.S. at 157–58, 127 S.Ct. at 1633.

Turning to Appellees' specific objections, the provision of

sonograms and the fetal heartbeat are routine measures in pregnancy medicine today. They are viewed as “medically necessary” for the mother and fetus. Only if one assumes the conclusion of Appellees’ argument, that pregnancy is a condition to be terminated, can one assume that such information about the fetus is medically irrelevant. The point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances. Denying her up to date medical information is more of an abuse to her ability to decide than providing the information. In any event, the Appellees’ argument ignores that *Casey* and *Gonzales*, as noted above, emphasize that the gravity of the decision may be the subject of informed consent through factual, medical detail, that the condition of the fetus is relevant, and that discouraging abortion is an acceptable effect of mandated disclosures.⁸

More to the point, perhaps, is Appellees’ concern that H.B. 15 requires a doctor, at a minimum, to converse with the patient about the sonogram as a predicate to securing informed consent, rather than show her the way to obtain a brochure or similar written information. Certainly, the statute’s method of delivering this information is direct and powerful, but the mode of delivery does not make a constitutionally significant difference from the “availability” provision in *Casey*. The *Casey* plurality opinion places this issue squarely in the context of the regulation of medical practice:

Our prior decisions establish that as with any medical procedure, the State may require a woman to give her written informed consent to an abortion. [citation omitted] In this respect, this statute is unexceptional. Petitioners challenge the statute’s definition of informed consent because it includes *the provision of specific information by the doctor ...*

We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences *580 to the fetus.... [analogizing to informed consent bearing on the donor as well as recipient of a kidney transplant.]

Casey, 505 U.S. at 881, 112 S.Ct. at 2823 (emphasis added). *Casey* did not analyze the doctor’s status based on how he provided “specific information.” Similarly, in *Wooley*, the font of Appellees’ compelled speech argument, the New Hampshire auto owner was not required to speak “Live Free or Die,” he was merely required to display the phrase on his license plate. The mode of compelled expression is not by itself constitutionally relevant, although the context is. Here, the context is the regulation of informed consent to a medical procedure. The constitutional irrelevance of the verbal nature of this description is even clearer given the facts of *Casey*; the law upheld there required doctors to describe verbally the fetus’s gestational age, a description which the *Casey* plurality acknowledged was relevant to “informed consent” only in a sense broad enough to include the potential impact on the fetus. *Casey*, 505 U.S. at 883, 112 S.Ct. at 2823.

For all these reasons, we conclude that the enumerated provisions of H.B. 15 requiring disclosures and written consent are sustainable under *Casey*, are within the State’s power to regulate the practice of medicine, and therefore do not violate the First Amendment.⁹ Appellees have not demonstrated a likelihood of success on the merits justifying the preliminary injunction.

Footnotes

¹ See *Planned Parenthood Minn. v. Rounds*, 375 F.Supp.2d 881 (D.S.D.2005) (granting preliminary injunction) (vacated); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir.2008) (en banc) (vacating grant of preliminary injunction and remanding); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 650 F.Supp.2d 972 (D.S.D.2009) (granting partial summary judgment in favor of plaintiffs and partial summary judgment in favor of defendants) (affirmed in part, reversed in part); *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662 (8th Cir.2011) (reversing grant of summary judgment in favor of plaintiffs on all but one claim and remanding) (vacated in part); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 662 F.3d 1072 (8th Cir.2011) (vacating panel’s affirmance of partial summary judgment in favor of plaintiffs and granting rehearing en banc on that issue).

² The description included a month by month explanation of prenatal fetal development.

³ But see *Casey*, 505 U.S. at 872, 112 S.Ct. 2791 (“Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term[.]”).

⁴ At times, the district court characterizes these disclosures as “ideological,” but the court misunderstands the term. Speech is

ideological when it is “relating to or concerned with ideas” or “of, relating to, or based on ideology.” See “ideological,” www.merriam-webster.com/dictionary/ideological. Of course, any fact may “relate” to ideas in some sense so loose as to be useless, but in the sense in which *Wooley* discusses it, “ideological” speech is speech which conveys a “point of view.” See *Wooley*, 430 U.S. at 715, 97 S.Ct. at 1435 (“Here ... we are faced with a state measure which forces an individual ... to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”). The speech in *Wooley* was the statement of a point of view that the plaintiff found “morally, ethically, religiously and politically abhorrent.” *Id.* at 713, 97 S.Ct. at 1434. The distinction the Court there sought to employ was between factual information and moral positions or arguments. Though there may be questions at the margins, surely a photograph and description of its features constitute the purest conceivable expression of “factual information.” If the sonogram changes a woman’s mind about whether to have an abortion—a possibility which *Gonzales* says may be the effect of permissible conveyance of knowledge, *Gonzales*, 550 U.S. at 160, 127 S.Ct. at 1634—that is a function of the combination of her new knowledge and her own “ideology” (“values” is a better term), not of any “ideology” inherent in the information she has learned about the fetus.

- 5 At oral argument, Appellees’ counsel conceded that Appellees have no objection to the requirements that a doctor perform and make available sonogram images of the fetus. Their objection is to requiring a “display” and an oral explanation of the images.
- 6 The three exceptions are (1) pregnancy as a result of rape or incest which has been reported or, if it has not been reported, was not reported because the woman reasonably risks retaliation resulting in serious bodily injury, (2) a minor taking advantage of judicial bypass procedures to avoid parental notification, or (3) a fetus with an irreversible medical condition or abnormality. If seeking to avoid the description of the sonogram images, the woman must indicate within which exception she falls.
- 7 Appellees and the district court also question why H.B. 15 had to add these disclosures to the existing *Casey*-like requirements of the WRKA. The necessity or wisdom of legislation, of course, is a decision committed to the peoples’ elected representatives and thus beyond the purview of the courts—apart from the constitutionality of the law.
- 8 Another perspective on this point is to note that under *Casey* and *Gonzales*, what Appellees think is medically necessary does not cabin, under the state’s legitimate power, the regulation of medicine, as *Casey* holds.
- 9 That *Casey* and *Gonzales* state principles broad enough to encompass the H.B. 15 disclosures and informed consent certificate eliminates any necessity to rule on the Appellees’ earlier argument, adopted by the district court, that compelled speech is only constitutionally permissible in the context of “pure commercial speech.” The statement is clearly overbroad, but we need not analyze it further.

V. Targeted Regulation of Abortion Providers

Most of the laws challenged in the cases presented in this supplement directly impact the doctor-patient relationship in the abortion context. Increasingly in the past decade, legislatures have also passed laws directly regulating abortion facilities, known as “targeted regulations of abortion providers,” or “TRAP” laws. Plaintiffs have challenged these laws under the undue burden framework, arguing that they will impose undue burdens by significantly increasing the cost of providing and obtaining abortions and/or by causing abortion clinics to close and that their purpose is to close abortion clinics and thus prevent abortions. Defendants counter that the laws serve to ensure the health and safety of patients.

The Sixth Circuit in *Women’s Medical Professional Corp v. Baird* found that a law resulting in the closure of one abortion facility did not constitute an undue burden because women could travel to other abortion facilities within the state. The District Court for the Southern District of Mississippi in *Jackson Women’s Health Org. Inc. v. Amy*, however, granted a preliminary injunction blocking enforcement of a licensure scheme that would have shut down an abortion facility. The Court found that if the law were upheld, the facility would likely be unable to comply with the regulations and would have to close, thus making abortions after the first trimester unavailable to women in that state. The court found this would be an undue burden on women seeking abortions.

Plaintiffs have also challenged TRAP laws by arguing that they discriminate against women and single out abortion providers in violation of the Fourteenth Amendment’s Equal Protection Clause. Consider how such laws might fare under an equal protection claim rather than a due process claim. The Ninth Circuit in *Tucson Women’s Clinic v. Eden* found that the TRAP law did not violate equal protection rights of doctors or patients. It determined that the TRAP law in question was facially gender-neutral and related to health and safety issues; posing no equal protection violations. However, the court alluded that the holding might have been different were there evidence of animus in the law’s purpose: “[T]he law is facially related to health and safety issues, and no evidence has been presented that is sufficient to create an issue of material fact as to whether there is a stigmatizing or animus based purpose to the law.” What evidence might plaintiffs put forward to sufficiently suggest animus? How would this compare to, or differ from, the purpose prong of the undue burden analysis?

330 F.Supp.2d 820
United States District Court,
S.D. Mississippi,
Jackson Division.

**JACKSON WOMEN'S HEALTH ORGANIZATION
INC., on Behalf of Itself and Its Patients Seeking
Abortions Plaintiff**

v.

**Brian W. AMY, in His Official Capacity as State
Health Officer for the Mississippi State
Department of Health and His Agents and
Successors; S. Malcolm O. Harrison, in His
Official Capacity as Hinds County Attorney and
His Agents and Successors; and Haley Barbour, in
His Official Capacity as Governor for the State of
Mississippi Defendants**

No. CIV.A. 3:04CV495LN. | July 22, 2004.

Synopsis

Background: Women's health organization brought action challenging constitutionality of amendment to state statute that eliminated organization's ability to perform abortions early in second trimester. Organization moved for preliminary injunction.

Holdings: The District Court, Tom S. Lee, J., held that:

[1] organization established likelihood of success on merits of claim that state had effectively barred it from performing early second-trimester abortions for reasons wholly unrelated to any actual safety or health concerns;

[2] organization established likelihood of success on merits of claim that statute, as applied by state, imposed undue burden on women seeking abortions; and

[3] organization satisfied other requirements for preliminary injunction.

Motion granted.

West Codenotes

Validity Called into Doubt

Mississippi Code Annotated § 41-75-1

Attorneys and Law Firms

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Opinion

MEMORANDUM OPINION AND ORDER

TOM S. LEE, District Judge.

This cause is before the court on the motion of plaintiff Jackson Women's *822 Health Organization, Inc. for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. Defendant Brian Amy, in his official capacity as State Health Officer for the Mississippi State Department of Health has responded in opposition to the motion, and the court, having reviewed and considered the parties' arguments and evidentiary submissions, concludes that plaintiff's motion is well taken and should be granted.

Jackson Women's Health Organization (JWHO) filed this action challenging an amendment to Mississippi Code Annotated § 41-75-1. That statute, which previously provided that abortions "on a fetus aged sixteen weeks or more" were required to be performed in licensed hospitals or ambulatory surgical facilities, as amended effective July 1, 2004, now provides that "abortion procedures after the first-trimester shall be performed only at an ambulatory surgical facility or hospitals licensed to perform that service, and for related purposes." JWHO points out that because is not licensed as a hospital or ambulatory surgical facility, then under the amended statute, it no longer may perform abortions from weeks thirteen through fifteen despite the fact that it has been safely performing such abortions for the many years of its existence and despite the fact that it actually meets all the substantive criteria for licensure as an ambulatory surgical facility. JWHO therefore filed this suit alleging that the statute violates the Fourteenth Amendment of the United States Constitution, and by the present motion, seeks a preliminary injunction to maintain the status quo until such time as the court may rule on the merits. For the

reasons that follow, the court concludes that the requested injunction should issue.

^[1] To prove entitlement to an injunction, plaintiff must establish each of the following elements: "(1) substantial likelihood of success on the merits; (2) substantial threat that plaintiff will suffer irreparable injury; (3) injury outweighs any harm the injunction might cause the defendant; and (4) injunction is in the public interest." *Women's Medical Center of Northwest Houston v. Bell*, 248 F.3d 411, 419 (5th Cir.2001). The principal, and in fact, only element in dispute between the parties, is whether plaintiff has sustained its burden to prove a substantial likelihood of success on the merits, for the State seems to agree, if only implicitly, that in the event such a showing is made, the remaining elements will also have been met. In the court's opinion, plaintiff has sustained its burden.

^[2] ^[3] While "[t]he Fourteenth Amendment protects a woman's right to choose to terminate her pregnancy prior to viability[,][g]overnment regulation of abortions is allowed so long as it does not impose an undue burden on a woman's ability to choose." *Victoria W. v. Larperner*, 369 F.3d 475, 483 (5th Cir.2004)(citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 878, 112 S.Ct. 2791, 2821, 120 L.Ed.2d 674 (1992) ("Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.")). "A state regulation constitutes an undue burden if it 'has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" ^[4] *Id.*

In *Casey*, the Court made it clear that, "[a]s with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an *823 abortion, but may not impose unnecessary health regulations that present a substantial obstacle to a woman seeking an abortion." 505 U.S. at 837, 112 S.Ct. at 2799. Plaintiff herein does not appear to dispute that the State, in furtherance of its putative interest in protecting the health and safety of women seeking abortions, may validly require that second-trimester abortions be performed in clinics that meet the minimum health and safety standards prescribed for ambulatory surgical facilities in the state. Plaintiff contends, however, that the State here has effectively barred it from performing early second-trimester abortions for reasons wholly unrelated to any actual safety or health concerns, and asserts, moreover, that regardless of whether the amended statute, as interpreted and applied by the State, could fairly be said to further the State's legitimate interest in protecting the health and safety of women seeking abortions, the

statute imposes an undue burden on these women. In the court's opinion, plaintiff appears likely correct on both counts and thus has sustained its burden to demonstrate a likelihood of success on the merits of its claims in this cause.

In *Simopoulos v. Virginia*, 462 U.S. 506, 516-518, 103 S.Ct. 2532, 2539-2540, 76 L.Ed.2d 755 (1983), the Supreme Court observed that "[i]n view of its interest in protecting the health of its citizens, [a] State necessarily has considerable discretion in determining standards for the licensing of medical facilities," and while this discretion "does not permit [a state] to adopt abortion regulations that depart from accepted medical practice, it does have a legitimate interest in regulating second-trimester abortions and setting forth the standards for facilities in which such abortions are performed." *Simopoulos*, 462 U.S. at 516-518, 103 S.Ct. at 2539-2540.

The Court in *Simopoulos* reiterated its observation in *Roe v. Wade* that " '[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient,' " *id.* at 511, 103 S.Ct. at 2536 (quoting *Roe v. Wade*, 410 U.S. 113, 163, 93 S.Ct. 705, 731, 35 L.Ed.2d 147 (1973)), and concluded that "Virginia's requirement that second-trimester abortions be performed in licensed clinics is not an unreasonable means of furthering the State's compelling interest in 'protecting the woman's own health and safety,' " *id.* at 519, 103 S.Ct. at 2540 (quoting *Roe*, 410 U.S. at 150, 93 S.Ct. at 725). In the words of the Court, "the State's requirement that second-trimester abortions be performed in licensed clinics appears to comport with accepted medical practice, and leaves the method and timing of the abortion precisely where they belong—with the physician and the patient." *Id.*, 103 S.Ct. at 2540.²

^[4] ^[5] From this, it is apparent that the State of Mississippi has a legitimate interest *824 from the outset of pregnancy in protecting the health of women seeking abortions, and that this interest is sufficiently important to allow the state to regulate such matters as the facilities in which abortions are performed. However, "health regulations which are unnecessary, i.e., not reasonably related to maternal health or which depart from accepted medical practice, cannot withstand constitutional scrutiny and must be invalidated." *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 198 (2000) (Hamilton, J., dissenting) (citing *Casey*, 505 U.S. at 878, 112 S.Ct. 2791, 120 L.Ed.2d 674, and *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 434-39, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983)).

^{16]} Unlike the case at bar, the Court in *Simopoulos* "[saw] no reason to doubt that an adequately equipped clinic could, upon proper application, obtain an outpatient hospital license permitting the performance of second-trimester abortions." *Simopoulos*, 462 U.S. at 519, 103 S.Ct. at 2540. Here, in contrast, it appears from the record that plaintiff does meet all the substantive standards for licensure that could have had any bearing on the State's putative interest in promoting the health and safety of women who would choose to have an abortion in the earliest weeks of the second trimester, and yet the State has made it plain that this plaintiff cannot obtain the necessary license for reasons wholly unrelated to any such legitimate motivation by the State.

The State Department of Health has taken the position, both in its dealings with JWHO and in its submissions and arguments to the court, that a facility seeking certification as an "ambulatory surgical facility," as contemplated by the amendment to Mississippi Code Annotated § 41-75-1, must first obtain a certificate of need from the Department of Health before it may apply for licensing as an ambulatory surgical facility. However, since JWHO performs only abortions and no other surgical procedures, it would be considered a single-specialty ambulatory surgical facility which is not covered by the certificate of need application process. It therefore cannot obtain a certificate of need; and since it cannot obtain a certificate of need, then it cannot be licensed as an ambulatory surgical facility within the meaning of § 41-75-1.³ In other words, since plaintiff's *825 singular specialty is abortions, then regardless of whether it meets the substantive health and safety criteria established by the State for licensed ambulatory surgical facilities—and the proof to date is to the effect that it does—it cannot be licensed as an ambulatory surgical facility and hence, under the amendment to § 41-75-1, is prohibited from performing abortions beyond the first trimester.

While in theory, the State's requirement that second-trimester abortions be performed in licensed ambulatory surgical facilities would not be an unreasonable means of furthering the State's interest in protecting the health and safety of women seeking such abortions, in practice, and in practical effect, Mississippi's implementation of this requirement does nothing to further this putative interest. That is to say, assuming that the court is correct in its understanding of the State's interpretation of the applicable statute and Department of Health regulations, it would hardly be reasonable to conclude that the State's effective decision to ban early second-trimester abortions by this plaintiff, without reference to whether it meets the relevant health and

safety criteria, does anything to further the State's professed desire to protect the health and safety of women who choose abortion.⁴ See *Akron v. Akron Center for Reproductive Health*, 462 U.S. at 431, 103 S.Ct. at 2481 (the "[s]tate's discretion to regulate on [the basis of maternal health] does not ... permit it to adopt abortion regulations that depart from accepted medical practice.... If a State requires licensing or undertakes to regulate the performance of abortions during this period, the health standards adopted must be legitimately related to the objective the State seeks to accomplish.") (citation and internal quotation marks omitted).

^{17]} Having said that, even assuming this were an appropriate regulation of abortions by the State, plaintiff has established a substantial likelihood of success on the merits of its claim that this regulation places an undue burden on the exercise of women's right to choose abortion. The parties herein agree that no regular provider of abortion services in Mississippi is currently licensed as a hospital or ambulatory surgery facility.⁵ They also agree that no licensed ambulatory surgery facility or private hospital in the state currently performs abortions. And they agree that public hospitals in Mississippi are prohibited by law from performing abortions except in extremely limited circumstances, namely, where necessary to prevent the woman's death, where the pregnancy is the result of rape or incest or in cases of fatal fetal anomalies; see Miss.Code Ann. § 41-41-91. It follows that as matters currently *826 stand, abortions are unavailable in the state of Mississippi beyond the first trimester, except in those limited circumstances in which public hospitals may perform abortions.

As the *Casey* plurality noted:

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. 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 to hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of

serving its legitimate ends.

Casey, 505 U.S. at 877, 112 S.Ct. at 2820.

In *Casey*, the Supreme Court held that while "a State can require that second-trimester abortions be performed in outpatient clinics, see *Simopoulos*, 462 U.S. 506, 103 S.Ct. 2532, 76 L.Ed.2d 755 (1983)," reiterated its holding in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 438-439, 103 S.Ct. 2481, 2497, 76 L.Ed.2d 687 (1983), that a State "[cannot] require that such abortions be performed only in hospitals." *Casey*, 505 U.S. at 949, 112 S.Ct. at 2857. The Court has reasoned in *Akron* that a hospitalization requirement for all second-trimester abortions significantly increased the expense and inconvenience to the woman without contributing to the safety of the procedure, and that it therefore unreasonably infringed upon a woman's constitutional right to obtain an abortion. *Akron*, 462 U.S. at 438-439, 103 S.Ct. at 2497; see also *Casey*, 505 U.S. at 949, 112 S.Ct. at 2857 (explaining its *Akron* holding, stating, "[d]espite the fact that *Roe* expressly allowed regulation after the first trimester in furtherance of maternal health, 'present medical knowledge,' in our view, could not justify such a hospitalization requirement under the trimester framework.").

Here, the State has not affirmatively imposed a hospitalization requirement, but it is nonetheless clear that irrespective of the State's purpose, the effect of the amendment at issue is to make abortions following the first trimester unavailable to women in this State. Cf. *Planned Parenthood of Minnesota/South Dakota v. Rounds*, 372 F.3d 969, 2004 WL 1373322, *4 (8th Cir.2004) (where proof showed that the only hospital in South Dakota that performed abortions did so only under very limited circumstances, i.e., when the woman's life or health would be significantly endangered by continuing the pregnancy, or when the fetus appears to have serious and uncorrectable medical conditions or genetic disorder, it followed that "hospitals are for all practical purposes unavailable for abortions in South Dakota").

In response to plaintiff's motion, the State points out that it has not prohibited ambulatory surgical facilities from performing abortions and that it cannot force these facilities to perform abortions; so the fact that early second-trimester abortions may be unavailable in Mississippi cannot be attributed to action by the State but rather to the voluntary election of these facilities not to perform abortions. Further, noting that "[n]ot all burdens on the right to decide whether to terminate a pregnancy [are] undue," *Casey*, 505 U.S. 833, 876, 112 S.Ct. at 2820, 120 L.Ed.2d 674; the State argues that the burden

here is slight and permissible. More to the point, it argues that while early second-trimester abortions may not be available in *827 Mississippi, there is no "undue burden" since women who want them may travel out of state to get them. It submits that while this could in some cases result in an increase in the cost of obtaining the procedure and perhaps also cause somewhat of a delay, these "burdens" are not "undue" and hence would not be a sufficient basis for invalidating the amendment.

Although the State obviously has not prohibited existing ambulatory surgical facilities from performing abortions, it was aware when this amendment was adopted that none of the existing ambulatory surgical facilities performs abortions, and thus knew that the effect (if not the intent) of the amendment would be to make second-trimester abortions unavailable in Mississippi. Under applicable authorities, a regulation that has the effect of unduly burdening a woman's right to choose an abortion is constitutionally infirm. Moreover, the court is not persuaded that this burden is adequately ameliorated by the possible availability of abortions in surrounding states. Though neither party has undertaken to show whether, where and in what circumstances abortions may be available in states with reasonably close proximity to Mississippi, the court need not assess whether such abortions would in fact be available, for plaintiff has persuaded the court that the complete unavailability of early second-trimester abortions in Mississippi serves as a substantial obstacle to a woman's choice whether to seek such an abortion.

¹⁸¹ For the reasons given, the court concludes that plaintiff has sustained its burden to establish a likelihood of success on the merits, and likewise concludes that the remaining requisites for issuance of a preliminary injunction are met. Irreparable harm exists in the fact that the amendment to the statute, if interpreted and applied in the manner of the State's choosing, would infringe the Fourteenth Amendment right of women who would choose abortion early in the second trimester. Cf. *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 795 (5th Cir.1989) (concluding that any denial of a clinic's right to perform abortions would be an irreparable harm). Moreover, given that it is undisputed that plaintiff has been safely performing early second-trimester abortions for years, and at this time appears to meet the substantive criteria that the State has determined will serve to protect the health and safety of women seeking abortions, it cannot reasonably be questioned that the harm that would result from denial of the requested injunction outweighs any harm the injunction might cause the State, and that the injunction is in the public interest.

Accordingly, it is ordered that plaintiff's motion for preliminary injunction is granted.

Footnotes

- ¹ Prior to the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 878, 112 S.Ct. 2791, 2821, 120 L.Ed.2d 674 (1992), abortion cases considered a woman's right to an abortion in the context of the trimester framework. In *Casey*, the Court moved away from that and toward a point of reference based on a fetus's nonviability or viability. *Id.* at 846, 112 S.Ct. at 2804.
- ² The Court stated:
On their face, the Virginia regulations appear to be generally compatible with accepted medical standards governing outpatient second-trimester abortions. The American Public Health Association (APHA), although recognizing "that greater use of the dilatation and evacuation procedure make[s] it possible to perform the vast majority of second trimester abortions during or prior to the 16th [w]eek after the last menstrual period," still "[u]rges endorsement of the provision of second trimester abortion in free-standing qualified clinics that meet the state standards required for certification." APHA, *The Right to Second Trimester Abortion* 1, 2 (1979). The medical profession has not thought that a State's standards need be relaxed merely because the facility performs abortions: "Ambulatory care facilities providing abortion services should meet the same standards of care as those recommended for other surgical procedures performed in the physician's office and outpatient clinic or the free-standing and hospital-based ambulatory setting." American College of Obstetricians and Gynecologists (ACOG), *Standards for Obstetric-Gynecologic Services* 54 (5th ed.1982). See also *id.*, at 52 ("Free-standing or hospital-based ambulatory surgical facilities should be licensed to conform to requirements of state or federal legislation."). Indeed, the medical profession's standards for outpatient surgical facilities are stringent: "Such facilities should maintain the same surgical, anesthetic, and personnel standards as recommended for hospitals." *Ibid.*
Simopoulos v. Virginia, 462 U.S. at 517, 103 S.Ct. at 2539.
- ³ As of the date of the hearing on plaintiff's motion, the court understood that while plaintiff's application for licensure as an ambulatory surgical facility was pending, the application would not be granted. Following the hearing, plaintiff forwarded to the court a letter generated by the State Department of Health dated July 14, 2004 denying the application for a license, stating:
[JHWO] currently has a valid license as an abortion facility, and the State Department of Health cannot issue a different license for reasons set forth herein.
Your letter states that you are "only seeking approval to perform abortion services." By statutory definition found in Section 41-75-1 of the Mississippi Code of 1972, a facility that operates substantially for the purpose of performing abortions is an "abortion facility."
A Certificate of Need is a prerequisite to licensure for ambulatory surgical facilities, as set forth in Section 41-7-191 of the Code. In addition, the establishment of a new health care facility requires Certificate of Need review.
- ⁴ Indeed, it strikes the court as odd to suggest, as does the State, that plaintiff should be deemed ineligible for consideration for licensure as an ambulatory surgical facility that can perform second-trimester abortions solely because its specialty, by practice and experience, is abortions, while other facilities, merely because they perform a broad range of surgical services, can be licensed as ambulatory surgical facilities and hence authorized to perform an occasional abortion, despite their lack of specific training and expertise. Assuming that both meet the minimum health and safety standards established by the State for ambulatory surgical facilities, it makes little sense to license the latter to perform abortions while denying such licensure to the former.
- ⁵ There are, in fact, only two regular providers of abortion services in the state—plaintiff and one other—neither of which is licensed as an ambulatory surgery facility.

438 F.3d 595
(Cite as: 438 F.3d 595)



United States Court of Appeals,
Sixth Circuit.
WOMEN'S MEDICAL PROFESSIONAL COR-
PORATION; Martin Haskell, M.D., Plain-
tiffs-Appellees,

v.

J. Nick BAIRD, M.D., Director of Ohio Department
of Health, Defendant-Appellant.
Nos. 03-4249, 04-3060.

Argued and Submitted: Feb. 3, 2005.
Decided and Filed: Feb. 17, 2006.

Background: Abortion clinic brought action against Ohio Department of Health (ODH), which had denied its request for a waiver of transfer agreement requirement for licensure of ambulatory surgical facilities (ASF), and issued a cease-and-desist order requiring the clinic to close immediately. The United States District Court for the Southern District of Ohio, Algenon L. Marbley, J., 277 F.Supp.2d 862, granted clinic's application for a permanent injunction, and ODH appealed.

Holdings: The Court of Appeals, Julia Smith Gibbons, Circuit Judge, held that:

- (1) application of transfer agreement requirement did not create an undue burden on the right to an abortion as applied to abortion clinic;
- (2) transfer agreement requirement was not an unconstitutional delegation of licensing authority to private hospitals;
- (3) clinic had a property interest in the continued operation of its business and ODH denied it procedural due process when it failed to offer a pre-deprivation hearing before ordering the clinic closed; and
- (4) clinic was entitled to attorney fees and costs, but not a permanent injunction.

Affirmed in part, vacated in part, and remanded.

Sutton, Circuit Judge, filed opinion concurring in part and dissenting in part.

West Headnotes

[1] Injunction 212 9

212 Injunction

212I Nature and Grounds in General

212I(B) Grounds of Relief

212k9 k. Nature and existence of right requiring protection. Most Cited Cases

A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer continuing irreparable injury for which there is no adequate remedy at law.

[2] Constitutional Law 92 4452

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)22 Privacy and Sexual Matters

92k4451 Abortion, Contraception, and Birth Control

92k4452 k. In general. Most Cited Cases

(Formerly 92k274(5))

Fundamental right to privacy contained in the Due Process Clause of the Fourteenth Amendment includes the right to choose to have an abortion, subject to certain limitations. U.S.C.A. Const.Amend. 14.

[3] Abortion and Birth Control 4 108

4 Abortion and Birth Control

4k108 k. Health and safety of patient. Most Cited Cases

(Formerly 4k0.5)

Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden; however, 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. U.S.C.A. Const.Amend. 14.

[4] Abortion and Birth Control 4 110

4 Abortion and Birth Control

4k110 k. Clinics, facilities, and practitioners. Most

Cited Cases

(Formerly 4k0.5)

Undue burden framework enunciated in *Casey* applied in determining whether neutral regulation of general applicability was constitutional as applied to abortion clinic. U.S.C.A. Const.Amend. 14; Ohio R.C. § 3702.30(E)(1); OAC 3701-83-19(E).

[5] Abortion and Birth Control 4 ⚡110

4 Abortion and Birth Control

4k110 k. Clinics, facilities, and practitioners. Most Cited Cases

(Formerly 4k0.5)

Application of Ohio's transfer agreement requirement for licensure of ambulatory surgical facilities (ASF) did not create an undue burden on the right to an abortion as applied to only abortion clinic in southern Ohio providing late second trimester abortion services where Ohio Department of Health (ODH) did not act with an unconstitutional purpose to burden the right of women to choose an abortion; the resulting closing of the abortion clinic, requiring its approximately 3,000 patients per year to travel to another clinic for late second trimester abortions, did not constitute an undue burden because the women could still obtain such abortions in Cleveland or at other clinics. U.S.C.A. Const.Amend. 14; Ohio R.C. § 3702.30(E)(1); OAC 3701-83-19(E).

[6] Abortion and Birth Control 4 ⚡110

4 Abortion and Birth Control

4k110 k. Clinics, facilities, and practitioners. Most Cited Cases

(Formerly 4k0.5)

Constitutional Law 92 ⚡2626

92 Constitutional Law

92XX Separation of Powers

92XX(D) Executive Powers and Functions

92k2626 k. Delegation of powers by executive. Most Cited Cases
(Formerly 92k76)

As applied to abortion clinic, Ohio's transfer agreement requirement for licensure of ambulatory surgical facilities (ASF) was not an unconstitutional delegation of licensing authority to private hospitals since the regulation gave abortion clinics the right to seek a

waiver from transfer agreement requirement, thus allowing the state to make the final decision about whether ASFs obtain a license. U.S.C.A. Const.Amend. 14; Ohio R.C. § 3702.30(E)(1); OAC 3701-83-19(E).

[7] Abortion and Birth Control 4 ⚡110

4 Abortion and Birth Control

4k110 k. Clinics, facilities, and practitioners. Most Cited Cases

(Formerly 4k0.5)

Constitutional Law 92 ⚡4329

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)14 Environment and Health

92k4329 k. Health care; hospitals and nursing homes. Most Cited Cases
(Formerly 92k287.2(1), 92k277(1))

Health 198H ⚡250

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk247 Discipline and Revocation of License, Permit, or Certificate; Closure

198Hk250 k. Proceedings in general.

Most Cited Cases

(Formerly 4k0.5)

Although abortion clinic had no property or liberty interest in a license for its operation because it was a first-time applicant for the ambulatory surgery facility (ASF) license, it did have a property interest in the continued operation of its business and Ohio Department of Health (ODH) denied it procedural due process when it failed to offer a pre-deprivation hearing before ordering the clinic closed; post-deprivation remedy of a hearing on the proposed license denial did not satisfy procedural due process. U.S.C.A. Const.Amend. 14; Ohio R.C. § 3702.30(E)(1); OAC 3701-83-19(E).

[8] Constitutional Law 92 ⚡3873

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3868 Rights, Interests, Benefits, or Privileges Involved in General

92k3873 k. Liberties and liberty interests. Most Cited Cases
(Formerly 92k254.1)

Constitutional Law 92 ↪ 3874(3)

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3868 Rights, Interests, Benefits, or Privileges Involved in General

92k3874 Property Rights and Interests

92k3874(3) k. Benefits, rights and interests in. Most Cited Cases
(Formerly 92k277(1))

Where an official has unconstrained discretion to deny a benefit, a prospective recipient of that benefit can establish no more than a unilateral expectation to it, and therefore prospective recipient has no property or liberty interest subject to due process protection. U.S.C.A. Const.Amend. 14.

[9] Abortion and Birth Control 4 ↪ 110

4 Abortion and Birth Control

4k110 k. Clinics, facilities, and practitioners. Most Cited Cases
(Formerly 4k0.5)

Constitutional Law 92 ↪ 4329

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)14 Environment and Health

92k4329 k. Health care; hospitals and nursing homes. Most Cited Cases

(Formerly 92k287.2(1), 92k277(1))

Abortion clinic had no property interest in discretionary waiver of Ohio's transfer agreement requirement for licensure of ambulatory surgical facilities (ASF), and no right to due process before the waiver was denied. U.S.C.A. Const.Amend. 14; Ohio R.C. §

3702.30(E)(1); OAC 3701-83-19(E).

[10] Civil Rights 78 ↪ 1482

78 Civil Rights

78III Federal Remedies in General

78k1477 Attorney Fees

78k1482 k. Results of litigation; prevailing parties. Most Cited Cases

A civil rights plaintiff may be considered a prevailing party entitled to attorney fees if the plaintiff succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit; plaintiff does not need to prevail on all claims asserted in the complaint to be awarded attorney fees. 42 U.S.C.A. § 1988.

[11] Civil Rights 78 ↪ 1482

78 Civil Rights

78III Federal Remedies in General

78k1477 Attorney Fees

78k1482 k. Results of litigation; prevailing parties. Most Cited Cases

Although appellate court reversed district court's ruling holding that application of Ohio's transfer agreement requirement for licensure of ambulatory surgical facilities (ASF) was unconstitutional as applied to abortion clinic, the clinic remained a prevailing party entitled to attorney fees and costs because court concluded that its procedural due process rights were violated when Ohio Department of Health (ODH) issued a cease-and-desist letter requiring the clinic to close before it could obtain a hearing on the proposed denial of its license application. 42 U.S.C.A. § 1988.

[12] Civil Rights 78 ↪ 1456

78 Civil Rights

78III Federal Remedies in General

78k1449 Injunction

78k1456 k. Other particular cases and contexts. Most Cited Cases

Because procedural due process violation could be remedied by allowing abortion clinic to have a hearing on the proposed denial of its license application, clinic was not entitled to a permanent injunction preventing its closure. U.S.C.A. Const.Amend. 14.

*597 ARGUED: Diane R. Brey, Office of the Attorney General, Columbus, Ohio, for Appellant. Al-

phonse A. Gerhardstein, Laufman & Gerhardstein, Cincinnati, Ohio, for Appellees. **ON BRIEF:** Diane R. Brey, Douglas R. Cole, Stephen P. Carney, *598Dennis G. Nealon, Winston M. Ford, Office of the Attorney General, Columbus, Ohio, for Appellant. Alphonse A. Gerhardstein, Jennifer L. Branch, Laufman & Gerhardstein, Cincinnati, Ohio, David C. Greer, Bieser, Greer & Landis, Dayton, Ohio, for Appellees.

Before: GIBBONS and SUTTON, Circuit Judges; EDGAR, District Judge. ^{FN*}

FN* The Honorable R. Allan Edgar, United States District Judge for the Eastern District of Tennessee, sitting by designation.

GIBBONS, J., delivered the opinion of the court, in which EDGAR, D.J., joined.

SUTTON, J. (pp. 616 - 20), delivered a separate opinion concurring in part and dissenting in part.

OPINION

JULIA SMITH GIBBONS, Circuit Judge.

Plaintiff-appellee Women's Medical Professional Corporation ("WMPC") operates an abortion clinic in Dayton, Ohio. Under Ohio law, the Dayton clinic is required to be licensed. The clinic attempted to enter into a written transfer agreement with a Dayton-area hospital in order to meet the requirements necessary to obtain a license. No hospital would enter into a transfer agreement with the clinic. WMPC therefore sought a waiver of the transfer agreement requirement; in its application, it stated that it had a back-up group of physicians that would provide care in the event of an emergency, and it also provided a letter from Miami Valley Hospital, stating that the hospital would accept patients in the event of an emergency. Defendant-appellant Director J. Nick Baird, M.D., of the Ohio Department of Health ("ODH") denied WMPC's request for a waiver, proposed to issue an order denying its license application, and issued a cease-and-desist order requiring the clinic to close immediately. WMPC filed a complaint in the United States District Court for the Southern District of Ohio seeking a temporary restraining order ("TRO") and injunction against enforcement of the cease-and-desist

order. WMPC argued that the written transfer agreement requirement was unconstitutional as applied to the Dayton clinic. United States District Judge Susan J. Dlott granted the TRO. The case was then transferred to United States District Judge Algenon Marbley. Judge Marbley conducted a nonjury trial and granted WMPC's motion for a permanent injunction, preventing Director Baird from enforcing the written transfer agreement requirement against the Dayton clinic. He also awarded WMPC attorneys' fees and expenses.

Director Baird now appeals the district court's grant of a permanent injunction and award of attorneys' fees and expenses. For the following reasons, we affirm the district court with respect to its conclusion that WMPC's procedural due process rights were violated, but vacate the grant of a permanent injunction and remand the case for a hearing on the proposed denial of the license application. We affirm the award of attorneys' fees and expenses.

I.

Under Ohio law, ambulatory surgical facilities ("ASF") must be licensed. ^{FN1} *599Ohio Rev.Code § 3702.30(E)(1). ODH regulates ASFs. Its director is authorized to establish quality standards. *Id.* § 3702.30(B). As part of these quality standards, the director promulgated a requirement that ASFs have a written transfer agreement with a local hospital. Ohio Admin. Code § 3701-83-19(E). The transfer agreement requirement ensures that the ASF can transfer patients "in the event of medical complications, emergency situations, and for other needs as they arise." *Id.*

^{FN1} ASFs are free-standing facilities where outpatient surgery is routinely performed. Ohio Rev.Code § 3702.30(A)(1). ASFs include facilities providing medical care and services in areas including, but not limited to, cosmetic and laser surgery, plastic surgery, abortion, dermatology, digestive endoscopy, gastroenterology, lithotripsy, urology, and orthopedics.

In order to obtain a license, an ASF must meet the licensing requirements or apply for a waiver or variance of the requirement. The director can grant a waiver only if "the director determines that the strict

application of the license requirement would cause an undue hardship to the [health care facility] and that granting the waiver would not jeopardize the health and safety of any patient.” Ohio Admin. Code § 3701-83-14(B)(2). The director can approve a variance if “the director determines that the requirement has been met in an alternative manner.” *Id.* § 3701-83-14(B)(1). It is solely within the director’s discretion as to whether a variance or waiver should be granted. *Id.* § 3701-83-14(D). The director’s refusal to grant a variance or waiver does not create any rights to a hearing under Ohio law. *Id.* § 3701-83-14(E).

WMPC is owned by Dr. Martin Haskell. WMPC operates abortion clinics in Dayton (the subject of this lawsuit), Cincinnati, and Indianapolis. Dr. Haskell performs abortions at all three clinics.

The Dayton clinic is approximately forty-five to fifty-five miles away from the next closest abortion clinic in Cincinnati. It is also the only clinic in southern Ohio providing abortion services up to twenty-four weeks. According to Dr. Haskell, he is the “only provider in southern Ohio that goes past 18 or 19 weeks through the 24th week of pregnancy.” Evidence in the record suggests that the only other clinics in Ohio also offering late second trimester abortions are located in Cleveland.

The Dayton clinic opened in 1983. It was not required to have an ASF license for many years; after the ASF licensure requirements were enacted, it operated without a license. In 1999, the director of ODH visited this clinic and advised that it must apply for a license. Along with other facilities, the Dayton clinic argued that it was not an ASF; however, an Ohio court ruled that it was an ASF. Founder’s Women’s Health Ctr. v. Ohio State Dep’t of Health, Nos. 01AP-872, 01AP-873, 2002 WL 1933886 (Ohio Ct.App. Aug. 15, 2002).

In October 2002, the Dayton clinic applied for a license.^{FN2} In order to meet the transfer agreement requirement, it asked two Dayton hospitals to sign such an agreement. Grandview Hospital declined. Miami Valley Hospital initially agreed to enter into a transfer agreement. However, on November 19, 2002, it notified Dr. Haskell that it would be terminating the agreement within thirty days.^{FN3}

^{FN2}. At this same time, WMPC’s Cincinnati

clinic applied for a license. It met all the requirements for licensure and was duly licensed on December 6, 2002.

^{FN3}. Dr. William Stalter, a pro-life advocate and member of the Board of Trustees of Miami Valley, objected to the written transfer agreement. He called the head of Premier Health Care, the owner of Miami Valley, to voice his concerns. Within four days, Miami Valley rescinded its written transfer agreement with the Dayton clinic, offering no explanation for its decision.

Unable to find another hospital that would enter into a written transfer agreement, WMPC requested a waiver of this requirement for the Dayton clinic on December 20, 2002. In support of the waiver application, WMPC included a letter from Miami Valley Hospital, which stated that “the Miami Valley Hospital Emergency and Trauma Center will be available to any of your patients that have an emergency medical condition.” WMPC also stated that it had an oral agreement with an unnamed, five-member obstetrics and gynecology group to provide back-up care.^{FN4} WMPC did not name the physicians associated with the group in its waiver request because the group requested that its identity and association with the abortion clinic be kept confidential for security reasons. WMPC concluded its waiver request with a statement offering to provide ODH with further information if needed.

^{FN4}. This original group withdrew from its agreement with Dr. Haskell during the pendency of this litigation and was replaced by another group.

During the time that WMPC was seeking a license, the Ohio governor’s office, ODH, and Director Baird received numerous letters urging Director Baird to close the Dayton clinic. Approximately 378 letters asked ODH to close the clinic, 365 letters asked ODH not to grant a waiver, and 300 letters asked ODH to “enforce the law against Dr. Haskell.” Director Baird also received letters from the Mayor of the City of Kettering, where the clinic is located, and State Senator Jim Jordan asking him to deny the waiver application. The Mayor of the City of Kettering wrote a letter to Director Baird, stating that “Kettering is not proud to be the location of an acknowledged ‘late-term

abortion' clinic" and asking Director Baird to "enforce the state law" and have the "Ohio Department of health [sic] ... be our protectors." Senator Jordan's letter asked Director Baird to "grant no exceptions or waivers to the center, especially in regards to the transfer agreement." Director Baird responded to Senator Jordan in a letter stating that "we have confirmed that the transfer agreement was rescinded by the hospital effective December 20th ... and are conferring with legal counsel to determine the options available to us subsequent to December 20th."

Also during this time period, Jodi Govern, Chief Counsel for ODH, communicated on a regular basis with representatives of right-to-life groups regarding the status of the license application. Before Miami Valley rescinded its transfer agreement, Govern communicated with a member of Ohio Right to Life to tell her of two deficiencies in the Dayton clinic's application. She told the Ohio Right to Life member that she "would appreciate it if [she] could share this information with [her] colleagues in Dayton." After Miami Valley rescinded the transfer agreement, representatives of Dayton Right to Life and Ohio Right to Life asked Govern for another update. Govern responded that the agreement would no longer be in effect after December 20, 2002 and that "[w]e are exploring options that we can exercise subsequent to that date, and will keep you apprised." A Dayton Right to Life member then asked for more detailed information on what could be expected. Govern e-mailed her and the Ohio Right to Life representative stating that "we have no intention of letting this drag out." ^{FN5}

^{FN5}. Govern later sent e-mails to these groups updating them on litigation filed in the district court in this case.

On January 9, 2003, Director Baird denied the waiver request, citing the lack of a written transfer agreement. In a letter, he stated, "It is my belief that the tacit agreement made between the Women's Medical Center Medical Director and unnamed members of an area Obstetrics-Gynecology practice is not a sufficient protection" for patients. That same day, Director Baird ordered Dr. Haskell to cease operating the Dayton clinic.

WMPC filed suit against Director Baird on January 9, 2003, challenging the proposed denial of the ASF

license. It also challenged the constitutionality of Ohio Administrative Code § 3701-83-19(E) (the transfer agreement requirement) as applied to its license application. WMPC sought a temporary restraining order and injunction against enforcement of the order to cease operations and against the enforcement of the transfer agreement requirement. It also sought a permanent injunction.

United States District Judge Susan J. Dlott entered a TRO on January 9, 2003. The parties later agreed to an extension of the TRO for an additional ten days. On February 12, 2003, the parties agreed to consolidate the hearing on the request for the preliminary injunction with a trial on the merits. The case was then transferred to United States District Judge Algenon Marbley, who held a bench trial to evaluate the propriety of a permanent injunction.

At trial, Dr. Haskell testified that he performs 3,000 abortions per year at the clinic. No other facility or hospital in Dayton performs elective abortions. The vast majority of patients using the Dayton clinic come from within a fifty to sixty mile radius of the Dayton area.

Dr. Haskell testified that, in his experience, patients rarely need to be hospitalized. If they do need to be hospitalized, it is usually for problems that "are not truly immediately life-threatening" but require observation and care in a hospital. Approximately once every two years, a patient at either the Cincinnati or Dayton clinic needs an urgent transfer to the hospital. Only on one or two occasions in twenty-five years did the clinic need to call 911 for an immediate hospital transfer, because the patient was suffering life-threatening complications. Not once have patients requiring medical attention been denied admission to Dayton hospitals.

Dr. Haskell further testified that his clinic has a written protocol that the staff follows in medical emergencies. The clinic also has a back-up medical group that its staff can call for assistance and to ensure a transfer to a local emergency room. The clinic has used the back-up group approximately four times over the last twenty years.

A Miami Valley emergency room physician testified that the Miami Valley emergency room would triage, screen, and stabilize any patient presenting at its hos-

pital, including WMPC's patients. Another physician testified that he was not personally aware of a single instance in which the presence of a transfer agreement made a difference in the care a patient received. Expert witnesses agreed that written transfer agreements do not ensure optimum patient care.

There was also testimony presented regarding WMPC's application for a waiver with the ODH. Dr. Haskell's attorney sent the waiver request to ODH and asked ODH to contact her for "any further information" that it might need. ODH never sought additional information from WMPC nor indicated that information in support of the waiver application was inadequate. Russ Roeder, acting Chief of the Bureau of Regulatory Compliance at ODH, testified that, although he was usually involved with waiver applications, he had no role in reviewing or recommending an outcome with regard to the Dayton clinic application. Rather, WMPC's application was routed through Jodi Govern, Chief Counsel *602 for ODH, because (ODH claimed) the application cited case law.

Director Baird testified that the numerous communications he received from people urging him to close the clinic did not influence his decision to deny the waiver. Rather, he denied the waiver because he did not feel that he had the proper documentation to grant a waiver. He stated that he needed information about the names of the back-up physicians, their credentials, and admitting privileges at Dayton hospitals in order to grant a waiver.

The district court also had evidence before it that Director Baird had granted waivers and variances to abortion clinics in the past. He granted a variance from the transfer agreement requirement to a now-defunct Dayton abortion clinic based on the fact that a "staff physician has admitting privileges at Miami Valley Hospital." He granted a variance to a Cincinnati clinic based on "admitting privileges by the facility medical director at a hospital in Hamilton [C]ounty." He also granted variances to abortion clinics in Columbus and Akron.

After the bench trial concluded, Judge Marbley granted the plaintiffs' motion for a permanent injunction. He concluded the following: (1) the denial of the ASF license would cause irreparable injury to Dr. Haskell due to a loss of business; (2) the denial of the license and waiver and the order requiring WMPC to

close would cause irreparable injury to women in Dayton who seek abortions; (3) the written transfer agreement creates "an undue burden and a substantial obstacle for women seeking abortions"; and (4) the requirements as applied violate plaintiffs' right to procedural due process. As a result of Judge Marbley's ruling, ODH was permanently enjoined from enforcing the written transfer agreement requirement with regard to the Dayton clinic.

Director Baird filed a timely notice of appeal.

II.

[1] A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer "continuing irreparable injury" for which there is no adequate remedy at law. Kallstrom v. City of Columbus, 136 F.3d 1055, 1067 (6th Cir.1998). In evaluating a district court's grant of a permanent injunction, this court reviews its factual findings under a clearly erroneous standard and its legal conclusions *de novo*. Worldwide Basketball & Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, 388 F.3d 955, 958 (6th Cir.2004). The scope of injunctive relief is reviewed under an abuse of discretion standard. *Id.*

Director Baird appeals the district court's determination that WMPC and Dr. Haskell suffered a constitutional violation. He does not challenge the district court's conclusion that the plaintiffs will suffer irreparable harm if the injunction is not granted.

III.

[2] The fundamental right to privacy contained in the Due Process Clause of the Fourteenth Amendment includes the right to choose to have an abortion, subject to certain limitations. See Roe v. Wade, 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 869, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). *Casey* confirmed that a woman has the right to choose to have an abortion prior to viability and to obtain an abortion without "undue interference from the State." 505 U.S. at 846, 112 S.Ct. 2791. It also underscored the state's power to restrict abortions after fetal viability and the state's *603 "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus." *Id.*

[3] The plurality in *Casey* set forth the undue burden analysis for evaluating regulation of pre-viability abortions. *Id.* at 876, 112 S.Ct. 2791. “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.” *Id.* at 877, 112 S.Ct. 2791. As relevant to this case, “[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.” *Id.* at 878, 112 S.Ct. 2791. However, “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” *Id.*

On appeal, Director Baird argues that the district court should not have applied *Casey* when it evaluated the transfer agreement requirement, because the regulation is one of general applicability and is not abortion-specific. He further contends that the district court erred in concluding that the transfer agreement requirement as applied to the Dayton clinic creates an undue burden on women seeking abortions. We evaluate each of these arguments in turn.

A.

[4] Director Baird argues that *Casey* 's undue burden framework should not apply to this case, because “this is not an abortion case[, but] ... an as-applied challenge to a neutral regulation of general applicability.” Further, Director Baird argues that *Casey* is only applicable to facial challenges to abortion regulations. He contends that because the Ohio regulation is neutral towards abortion, rational or intermediate basis review should apply.

It is true that this court's cases applying *Casey* have done so in the context of abortion-specific laws. See, e.g., *Women's Med. Profl Corp. v. Taft*, 353 F.3d 436 (6th Cir.2003) (Ohio statute regulating partial birth abortions); *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456 (6th Cir.1999) (Tennessee law requiring parental notification); *Women's Med. Profl Corp. v. Voinovich*, 130 F.3d 187 (6th Cir.1997) (ban on post-viability abortions and “dilation and extraction” abortions). However, “the constitutional inquiry in an as-applied challenge is limited to the plaintiff's particular situation,” *Voinovich*, 130 F.3d at 193, and therefore, we must consider the context in

which the challenge to the regulation arises.

The generally applicable and neutral regulation in this case (the transfer agreement requirement) affects an abortion clinic, which is unable to satisfy the regulation's requirements. Therefore, *Casey* and other relevant case law regarding state restrictions on abortion apply. See *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1048-49 (8th Cir.1997) (applying *Casey* to evaluate state's requirement that an abortion clinic undergo certificate of need review process pursuant to a generally applicable Iowa law); see also *Birth Control Ctrs., Inc. v. Reizen*, 743 F.2d 352, 361-62 (6th Cir.1984) (observing that Michigan regulation applies to “all freestanding surgical outpatient facilities” and applying governing, pre-*Casey* Supreme Court law on abortions to determine if the regulations impact a woman's right to choose an abortion). Accordingly, we evaluate the written transfer agreement requirement as applied to the Dayton clinic under the undue burden framework enunciated in *Casey*.

*604 B.

[5] Director Baird next challenges the district court's conclusion that the transfer agreement requirement creates an undue burden for women in the Dayton area seeking abortions. A regulation creates an undue burden when it places a “substantial obstacle” in the path of a woman seeking an abortion. As the *Casey* plurality recognized:

Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. 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. Only where the 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.

505 U.S. at 874, 112 S.Ct. 2791.

The district court found that the written transfer agreement requirement as applied to the Dayton clinic “creates a substantial obstacle to the ability of women

in the Dayton area to choose an abortion ... [because it] would serve to shut down completely Dr. Haskell's Dayton clinic, which serves 3,000 women each year."

On appeal, both sides point to evidence in the record supporting their argument as to why the transfer agreement requirement as applied does or does not constitute an undue burden. WMPC contends that 3,000 women per year have abortions at the clinic and that each of these patients will be "without a local abortion provider if the cease and desist order becomes effective." It also argues that for those women who seek late second trimester services, there may be no alternative facility, because the Dayton clinic is the only facility offering these services in southern Ohio. Director Baird contends that no undue burden exists because "the undisputed record evidence shows a dozen other abortion facilities in Ohio, five within 85 miles of the Dayton clinic [,] ... includ[ing] WMPC's own Cincinnati clinic, located 55 miles away."

A central issue in this case is thus whether the closing of an abortion clinic, requiring its approximately 3,000 patients per year to travel to another clinic for abortion services, constitutes an undue burden on a woman's right to choose to have an abortion. In order to be an undue burden, the closing of the Dayton clinic for failure to obtain a transfer agreement must place a substantial obstacle before women seeking abortions.

Very few courts have addressed whether requiring women to travel further for an abortion constitutes an undue burden. The Fourth Circuit, in ruling that the costs incurred by abortion clinics in complying with a South Carolina regulation did not constitute an undue burden, observed that even though a clinic in Beaufort might have to close, "no evidence suggests that women in Beaufort could not go to the clinic in Charleston, some 70 miles away." Greenville Women's Clinic v. Bryant, 222 F.3d 157, 170 (4th Cir.2000). Similarly, the Eighth Circuit suggested that long distances did not constitute an undue burden in evaluating the constitutionality of requiring abortion providers to give certain information to patients twenty-four hours before obtaining an abortion. Fargo Women's Health Org. v. Schafer, 18 F.3d 526 (8th Cir.1994). It stated, "Although the distance a woman must travel to obtain an abortion may be a factor in obtaining an abortion, it is not a result of the state regulation. We do not believe a telephone *605 call and a single trip, whatever the distance to the medical

facility, create an undue burden." *Id.* at 533. However, the Supreme Court in Mazurek v. Armstrong intimated that the distance a woman must travel to obtain an abortion factors into the analysis of whether a law imposes a undue burden on a woman's right to choose an abortion. 520 U.S. 968, 974, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997). In holding that a Montana law prohibiting non-physicians from performing abortions was constitutional, the Court bolstered its conclusion by noting that "no woman seeking an abortion would be required by the new law to travel to a different facility than was previously available." *Id.*

Thus, the binding and persuasive authority of other courts does not firmly establish when distance becomes an undue burden on a woman's right to choose to have an abortion. *Casey* instructs that "[t]he fact that a law ... has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." 505 U.S. at 874, 112 S.Ct. 2791. *Casey* found that a 24-hour waiting period did not constitute a substantial obstacle, even though it would be "particularly burdensome" for "women who have the fewest financial resources, [or] those who must travel long distances." *Id.* at 886, 112 S.Ct. 2791. Under *Casey*, "[a] particular burden is not of necessity a substantial obstacle." *Id.* at 887, 112 S.Ct. 2791.

We conclude that, while closing the Dayton clinic may be burdensome for some of its potential patients, the fact that these women may have to travel farther to obtain an abortion does not constitute a substantial obstacle. *See id.* at 874, 112 S.Ct. 2791 (stating that an "incidental effect of making it more difficult or more expensive to procure an abortion" is not an undue burden). Evidence in the record establishes that there are abortion clinics in Cincinnati, Columbus, Cleveland, and Akron. WMPC itself operates an abortion clinic in Cincinnati, which is approximately forty-five to fifty-five miles from the Dayton clinic. Thus, potential patients of the Dayton clinic could still obtain an abortion in Ohio and, more significantly, could obtain an abortion at a WMPC-owned clinic within a reasonable distance from the Dayton clinic. Based on these facts, we cannot say that closing the Dayton clinic constitutes an undue burden on a woman's right to choose to have an abortion simply because potential patients might have to travel somewhat farther to obtain an abortion. Like the waiting period requirement at issue in *Casey*, the fact that women may have

to travel farther to obtain abortion services may be burdensome but it is not a substantial obstacle. *Id.* at 886-87, 112 S.Ct. 2791.

The district court also rested its decision that application of the transfer agreement requirement to the Dayton clinic is an undue burden on the fact that the regulation would serve to shut down a clinic that serves 3,000 women per year. However, the fact that the clinic serves 3,000 women per year is insufficient in and of itself to establish that applying the transfer agreement requirement to the clinic constitutes an undue burden. Ninety percent of those women come from within fifty to sixty miles of Dayton.^{FN6} However, there is no evidence suggesting that a large fraction of these women would be unable to travel to other Ohio cities for an abortion.^{FN7} There *606 is also no evidence in the record showing that closing the Dayton clinic would operate as a substantial obstacle in choosing to have an abortion for a majority of these women. Thus, although denial of the ASF license would serve to close a clinic that provided abortions to 3,000 women per year, there is no indication that the closing of the clinic would create a substantial obstacle for Dayton-area women seeking an abortion in light of the availability of another clinic less than fifty-five miles away from the Dayton clinic.

^{FN6}. The other ten percent of patients come from across Ohio and from other states. Presumably, the closing of the Dayton clinic would not impose an undue burden on this population because they already are traveling to seek abortion services.

^{FN7}. WMPC points to evidence in the record that very few of the Cincinnati clinic's patients come from Montgomery County, where Dayton is located. This fact, however, does not establish that Dayton-area patients would not travel to the Cincinnati clinic or other clinics if the Dayton clinic closed. Rather, it only tends to establish that Dayton-area women prefer to use the abortion clinic located in their community.

WMPC also argues that application of the transfer agreement requirement to the Dayton clinic operates to close the only clinic in southern Ohio offering abortions after the eighteenth or nineteenth week of pregnancy. While Dr. Haskell admitted that theoretic-

cally he could perform these abortions at his Cincinnati clinic, he stated that "[i]n practical terms it would be difficult." Director Baird's denial of the waiver application and license could eliminate the possibility that women in southern Ohio could obtain an abortion in the late second trimester.

In *Voinovich*, this court held that an Ohio statute that banned the D & E abortion procedure, the most commonly used abortion procedure in the second trimester, constituted an undue burden on a woman's right to choose. 130 F.3d at 201. The court stated, "An abortion regulation that inhibits the vast majority of second trimester abortions would clearly have the effect of placing a substantial obstacle in the path of a woman" wanting an abortion. *Id.* Similarly, in this case, ODH's action in applying the transfer agreement requirement to the Dayton clinic effectively prevents women who are over eighteen weeks pregnant from obtaining an abortion in southern Ohio. These women would face difficulties in choosing to have an abortion because the desired abortion services would no longer be available in their area. Thus, the application of the requirement to this clinic could arguably be seen as an undue burden on women seeking late second trimester abortions.

Nevertheless, women seeking a late second trimester abortion could travel to Cleveland to obtain such an abortion, as clinics in that city provide similar services to the Dayton clinic. The record does not provide any evidence regarding what percentage of patients seeking second trimester abortions could not travel to Cleveland to have this procedure performed. Thus, there is no evidence that a "large fraction" of women seeking late second trimester abortions could not still have one by traveling to another clinic. See *Casey*, 505 U.S. at 895, 112 S.Ct. 2791 (holding that a regulation is an undue burden if "in a large fraction of the cases in which [the regulation] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion"). This differentiates the facts of this case from those present in *Voinovich*. In *Voinovich*, the regulation barred statewide the most commonly used procedure for performing second trimester abortions, rendering it nearly impossible for women to choose to have an abortion during this stage of pregnancy. 130 F.3d at 201. By contrast, the transfer agreement requirement as applied to the Dayton clinic would prevent that clinic from performing late second trimester abortions, but would not prevent any other duly li-

censed clinic from performing those procedures. Further, it would not prevent *607 women seeking late second trimester abortions from traveling to a clinic in Cleveland to obtain these services. While in *Voinovich*, the regulation effectively barred second trimester abortions, *id.*, in this case, the transfer agreement requirement would not bar late second trimester abortions except at the Dayton clinic. For these reasons, *Voinovich* is distinguishable. The application of the transfer agreement requirement to the Dayton clinic does not constitute an undue burden on a woman's right to choose an abortion even though it would close, the only clinic providing late second trimester abortion services in southern Ohio, because women could still obtain this type of abortion in Cleveland or at other clinics providing this type of service.

Precedent also requires us to evaluate the purpose behind the governmental action in determining whether the application of the transfer agreement requirement to the Dayton clinic is an undue burden. "An undue burden exists ... if its *purpose* or effect... is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." See *Casey*, 505 U.S. at 878, 112 S.Ct. 2791 (emphasis added). In *Casey*, the plurality suggested that governmental action that "serve[d] no purpose other than to make abortions more difficult" might be unconstitutional. *Id.* at 901, 112 S.Ct. 2791. This court has further clarified that under the undue burden test, a state may not take action "simply to make it more difficult for [a woman] to obtain an abortion." *Memphis Planned Parenthood*, 175 F.3d at 461. However, when a statute has a valid purpose and only has an "incidental effect of making it more difficult or more expensive to procure an abortion[, such an incidental effect] cannot be enough to invalidate it." *Casey*, 505 U.S. at 874, 112 S.Ct. 2791.

The regulation requiring ASFs to be licensed is a facially neutral regulation. See *Ohio Rev.Code* § 3702.30(E)(1). It provides that "[n]o health care facility shall operate without a license issued under this section." *Id.* Further, the transfer agreement requirement, which must be fulfilled or waived to obtain a license, is facially neutral. See *Ohio Admin. Code* § 3701-83-19(E). It states that ASFs "shall have a written transfer agreement requirement with a hospital for transfer of patients in the event of medical complications, emergency situations, and for other needs

as they arise." *Id.* These regulations affect all medical facilities equally, whether they provide abortions or other types of outpatient surgery in medical specialties such as dermatology or urology. See *Ohio Rev.Code* § 3702.30(A)(1) (defining ASFs as places where outpatient surgery is routinely performed). The regulations also serve a valid purpose; they ensure that any ASF, and not just those providing abortion services, has a license to operate and meets certain minimum standards. Thus, on their face, the regulations are "not designed to strike at the right [to an abortion] itself," which weighs against finding that the purpose of the regulations was to prevent women from choosing to have an abortion. *Casey*, 505 U.S. at 874, 112 S.Ct. 2791.

However, because this is an as applied challenge, we also must consider how ODH applied the regulation with respect to the Dayton clinic. The district court found that the Dayton clinic's waiver application was treated differently from those of similarly situated ASFs and that ODH was influenced by political pressure to deny its waiver application and license application. While most applications for an exemption are reviewed by the Bureau of Regulatory Compliance, the Dayton clinic's application was reviewed by the Legal Department. Russ Roeder, acting Chief of the Bureau *608 of Regulatory Compliance at ODH, testified that he was usually involved with waiver applications but had no role in reviewing or recommending an outcome with regard to the Dayton clinic application. Rather, WMPC's application was routed through Jodi Govern, Chief Counsel for ODH, because the application cited case law. Additionally, during the application process, ODH received many letters regarding the Dayton clinic and urging it to deny a license to the facility. Most notably, Govern had communications with representatives of the Ohio and Dayton Right to Life groups regarding the status of the license application.

The district court further found that "[t]here is no evidence that Director Baird ever seriously considered whether Dr. Haskell had alternative procedures in place that would provide the same level of safety and care to his patients" as the written transfer agreement and as the procedures set in place by the other clinics that were granted a waiver. Dr. Haskell did procure the services of a back-up physician group to provide care in case of an emergency. He also had a letter from the Miami Valley Hospital Emergency and Trauma Cen-

ter that stated the facility "will be available to any of your patients that have an emergency medical condition."

The district court thus had evidence before it that the Dayton clinic's application was treated differently from other applications received at ODH and that Director Baird never seriously evaluated the back-up procedures set into place by Dr. Haskell. From this evidence, it concluded that "Director Baird and ODH were affected by political pressure from constituents and politicians to find a way to shut down" the clinic.

While the district court found that Director Baird was affected by political pressure, it never made a finding that Director Baird acted with an unconstitutional purpose. Indeed, it could not have made such a finding. There was no evidence before the district court that Director Baird's purpose was to prevent women from obtaining an abortion; rather, Director Baird's application of the transfer agreement requirement only affected one abortion clinic that could not comply with the requirements set forth by the state to obtain a license. In addition to the absence of a finding that Director Baird acted with an unconstitutional purpose, ample evidence in the record establishes that he has granted waivers and variances to other abortion clinics in the past.^{FN8} For example, *609 he granted a variance from the transfer agreement requirement to a now-defunct Dayton abortion clinic based on the fact that a "staff physician has admitting privileges at Miami Valley Hospital." He also granted a variance to a Cincinnati clinic based on "admitting privileges by the facility medical director at a hospital in Hamilton [C]ounty," and granted variances to abortion clinics in Columbus and Akron. Given this evidence, it cannot be said that the purpose of Director Baird's application of the transfer agreement requirement, which is a legitimate measure put into place to protect the health of patients, was to "place a substantial obstacle in the path of a woman seeking an abortion." *Casey*, 505 U.S. at 878, 112 S.Ct. 2791.

FN8. This evidence also distinguishes this case from the facts present in the Eighth Circuit's *Atchison* decision, 126 F.3d at 1042. *Atchison* involved an appeal from a district court decision enjoining the Iowa Department of Health from requiring an abortion clinic to comply with state certificate of need requirements. The certificate of need re-

quirements were generally applicable rules to assist in the development of new institutional health services facilities. *Id.* at 1044. The Eighth Circuit held that the Department of Health's requirement that the clinic undergo the certificate of need process was an unconstitutional burden on the right to choose an abortion because the "requirement serve[d] no purpose other than to make abortions more difficult." *Id.* at 1049 (citing *Casey*, 505 U.S. at 878, 112 S.Ct. 2791). Weighing heavily in the court's decision was the fact that similarly situated clinics that did not provide abortions across the state had been exempted from undergoing the certificate of need process. *Id.* Additionally, the court found that "Department officials could not explain the Department's deviation from its past practice" of exempting these otherwise similar clinics. *Id.*

In contrast, in this case, it is undisputed that Director Baird granted waivers to other abortion clinics in the past when those clinics were able to provide the information necessary to grant the waiver. Thus, it cannot be said, as it was in *Atchison*, that the outcome of the waiver process with respect to the Dayton clinic was reached solely because the Dayton clinic provided abortions. *See id.* ("In light of the facts and circumstances surrounding the Department's decision to apply the [certificate of need] requirements to [the abortion clinic], we can not say the district court clearly erred in finding the defendant would not have subjected the plaintiff to [certificate of need] review if the plaintiff had not intended to provide pregnancy termination services.").

We hold that the application of the written transfer agreement requirement to the Dayton clinic is not an undue burden under *Casey*. While ODH may have been affected by political pressures to deny the waiver application, the district court made no factual finding that ODH acted with an unconstitutional purpose to burden the right of women to choose an abortion. Further, while the application of the written transfer agreement requirement may serve to close the Dayton clinic, WMPC presents no evidence that a majority of

the Dayton clinic's prospective patients would not be able to receive an abortion at another clinic. For these reasons, we conclude that the transfer agreement requirement as applied to the Dayton clinic does not constitute an undue burden.

IV.

[6] The district court also concluded that the written transfer agreement requirement as applied to the Dayton clinic is unconstitutional under the Due Process Clause because the state impermissibly delegated to private parties, in this case hospitals, the authority to essentially grant a license to an abortion clinic by entering into a written transfer agreement with the clinic. Under the Ohio regulation at issue, ASFs must obtain a written transfer agreement with a hospital in order to obtain a license. Ohio Admin. Code § 3701-83-19(E). Hospitals have the unfettered power to decide whether or not to enter into an agreement. Director Baird admitted that Ohio has no power over hospitals to direct them as to how to respond to requests for written transfer agreements and that hospitals could deny such a request for business, religious, personal, or political reasons.

The Supreme Court, in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, was faced with a zoning ordinance that permitted the building of a home for the elderly in a certain neighborhood only upon approval of two-thirds of the neighbors of the proposed home. 278 U.S. 116, 117-18, 49 S.Ct. 50, 73 L.Ed. 210 (1928). It found that the ordinance conditioning the grant of a permit on third party approval was "repugnant to the due process clause of the Fourteenth Amendment" because the owners were "free to withhold consent for selfish reasons or arbitrarily." *Id.* at 122, 49 S.Ct. 50. Further, there was no provision for review of the neighbors' decision. *Id.* See also *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 555 (9th Cir.2004) ("When a State delegates its licensing authority to a third party, the delegated authority*610 must satisfy the requirements of due process.").

At least two district courts have addressed this issue in the context of abortion clinics. In *Hallmark Clinic v. North Carolina Department of Human Resources*, a three-judge panel held unconstitutional a written transfer agreement requirement that "placed no limits on the hospital's decision to grant or withhold a transfer agreement." 380 F.Supp. 1153, 1158

(E.D.N.C.1974). In reaching this decision, it stated, "The Supreme Court long ago held that due process cannot tolerate a licensing system that makes the privilege of doing business dependent on official whim." *Id.* (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)). Similarly, in *Reizen*, a court in the Eastern District of Michigan held unconstitutional a written transfer agreement requirement because it delegated "unguided power to a private entity." *Birth Control Ctrs., Inc. v. Reizen*, 508 F.Supp. 1366, 1375 (E.D.Mich.1981), *aff'd in part and vacated in part on other grounds*, 743 F.2d 352 (6th Cir.1984).

We need not decide today whether *Hallmark Clinic* and *Reizen* were correctly decided because this licensing scheme contains an important feature that the laws at issue in those cases did not. In this case, unlike those, Director Baird retains authority to grant a waiver of the transfer agreement requirement. His ability to grant a waiver of this requirement means that the area hospitals do not necessarily have the final veto on whether an abortion clinic is licensed. In *Greenville Women's Clinic v. Commissioner, South Carolina Department of Health & Environmental Control*, the Fourth Circuit evaluated a facial challenge to a regulation that required abortion clinic providers to maintain admitting privileges at local hospitals. 317 F.3d 357, 359-60 (4th Cir.2002). The court concluded that this regulation was not an unconstitutional delegation of licensing authority to a third party, because "the possibility that the requirements will amount to a third-party veto power is so remote that, on a facial challenge, we cannot conclude" that it violates due process.^{FN9} *Id.* at 363. Seemingly reinforcing its decision was the fact that the regulation gave abortion clinics the right to seek a waiver from its requirements. *Id.*

FN9. Also important to the court's decision was South Carolina's requirement that "public hospitals not act unreasonably, arbitrarily, capriciously, or discriminatorily in granting or denying admitting privileges." *Id.* at 362.

We agree with Director Baird's argument and hold that his ability to grant a waiver from the transfer agreement requirement prevented the hospitals from having an unconstitutional third-party veto over WMPC's license application. Because the waiver procedure allows the state to make the final decision about

whether ASFs obtain a license, there was no impermissible delegation of authority to a third party.

V.

[7] The district court held that the plaintiffs were denied procedural due process “when Director Baird denied Dr. Haskell’s request for a waiver, failed to provide him with an opportunity for a hearing on his request, and failed to provide an opportunity to appeal the denial of the waiver.” It also held that the written transfer agreement requirement as applied to the Dayton clinic violated the plaintiffs’ right to procedural due process.

On appeal, Director Baird argues that the district court erred, because WMPC had no property interest in the license or waiver and received all the process that *611 was due under the circumstances. Additionally, he contends that he did not deny WMPC full and fair consideration of its waiver request. While we agree that WMPC did not have a property interest in the license or the waiver, we conclude that it did have a property interest in the continued operation of its business and that Director Baird denied it procedural due process when he failed to offer a pre-deprivation hearing before ordering the clinic closed.

A.

Procedural due process protects those life, liberty, or property interests that fall within the Due Process Clause of the Fourteenth Amendment. Property interests “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Liberty interests include “the right of the individual to contract, to engage in any of the common occupations of life ... and generally to enjoy those privileges long recognized ... as essential to the ordinary pursuit of happiness by free men.” *Id.* at 572, 92 S.Ct. 2701 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)). In order to establish a procedural due process claim, a plaintiff must show that (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him

adequate procedural rights prior to depriving him of the property interest. See *Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir.1999).

The district court concluded that Dr. Haskell had a property right in the ongoing operation of his clinic and that he would be deprived of his property interest if Director Baird’s order to cease operating the clinic remained in effect. It further determined that Dr. Haskell was not afforded adequate procedural rights prior to the issuance of the cease-and-desist letter. It specifically referenced that: the written transfer agreement requirement permitted hospitals to arbitrarily deny Dr. Haskell the ability to operate his clinic; the denial of the waiver or variance is not appealable; Director Baird failed to give WMPC’s request for a waiver full and fair consideration; and Director Baird failed to consider fully whether granting the waiver would jeopardize the health and safety of the Dayton clinic’s patients.

Director Baird first contests the district court’s conclusion that WMPC had a property interest in the continued operation of the Dayton clinic. He argues that because the Dayton clinic never had a license, it does not have a property interest in one.

This court has held that first-time applicants for liquor or entertainment licenses do not have a protected property interest. See *Wojcik v. City of Romulus*, 257 F.3d 600, 609-10 (6th Cir.2001). New applicants for these types of licenses do “not have a property interest so as to entitle them to procedural or substantive due process rights in the same way that an existing permit holder might demand.” *Id.* at 610. Based on this precedent, WMPC has no property or liberty interest in a license for its operation because it was a first-time applicant for the ASF license.

Nonetheless, due process protects an interest in the continued operation of an existing business. The Dayton clinic has been in operation since 1983. The requirement that it obtain a license to operate as an ASF did not arise until later. Thus, if *612 the Dayton clinic cannot obtain a license, it will be closed permanently despite having a long history of operation.

This court has recognized that the Constitution protects a person’s choice of careers and occupations. See *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir.1983) (“Liberty and property interests are intri-

cately related in our system of political economy, a system based on free choice of careers and occupations, private property, and the right to compete.”). In *Sanderson v. Village of Greenhills*, a case similar to the current case, Sanderson opened a billiards establishment, which the local government promptly closed because it did not have an “amusement device” license. 726 F.2d 284, 285 (6th Cir.1984). Sanderson applied for the amusement license; the city denied his request, because it did not want a billiards hall in the town.^{FN10} *Id.* at 287. This court stated,

FN10. In *Sanderson*, the court agreed that Sanderson “was not entitled to a license and thus he suffered no constitutional injury upon its deprivation.” *Id.* at 286.

Although the defendants, and the court below, are quite correct in asserting that there can be no *unfettered* freedom to engage in a business which may be properly regulated pursuant to a municipality’s general police power, such an assertion does not resolve the issue of whether the clear freedom, or liberty, to engage in even a potentially regulated business was *properly* circumscribed in this case. *Id.* at 286-87. Based on this precedent, Dr. Haskell and WMPC have a protected property interest in the continued operation of the Dayton clinic.^{FN11}

FN11. Other courts have also held that a person has a property interest in continued operation of a business. See *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir.1969) (“The right to pursue a lawful business ... has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution.”); *Small v. United States*, 333 F.2d 702, 704 (3d Cir.1964) (“The right to pursue a lawful business or occupation is a right of property which the law protects against intentional and unjustifiable interference.”).

Next, Dr. Haskell must show that the government’s actions operated to deprive him of his protected interest. Director Baird’s action in proposing to issue an order denying the Dayton clinic a license resulted in the issuance of a cease-and-desist order. This order deprived Dr. Haskell of his protected interest in operating his business, as it demanded that he immediately stop operating the Dayton clinic.

Finally, Dr. Haskell must show that the state did not afford him adequate process prior to depriving him of his protected interest. Director Baird argues that WMPC could have obtained an administrative hearing and judicial review of the proposed license denial, but chose not to do so. The record contains the letter from Director Baird to Dr. Haskell proposing to issue an order denying WMPC’s license application and denying WMPC’s request for a waiver. The letter specifically states that Dr. Haskell could “request a hearing before [Director Baird] or my duly authorized representative regarding [his] proposal to deny the license to operate.” WMPC did not request a hearing, but rather proceeded to federal court.

It is true that Ohio law provides several procedural protections after initial denial of a license application. The denial of a license application entitles the clinic to an administrative hearing, Ohio Rev.Code § 119.06, a hearing complete with a right to notice as well as the opportunity to be represented by counsel, to present evidence and to examine witnesses appearing *613 for and against the clinic, *id.* § 119.07; see also *id.* § 119.09. An adverse outcome in the administrative hearing may be appealed to the state courts. *Id.* § 119.12. In addition to these administrative and judicial appeals, a facility denied a license may apply to the Director (either before or after the appeals) for a waiver of the license requirements. See Ohio Admin. Code § 3701-83-14. In a typical license application situation, where the license is sought prior to operation of the business, these provisions offer ample procedural protections.

Here, however, the same day ODH issued its letter proposing to deny WMPC a license (and offering it a hearing under the aforementioned Ohio laws), it also issued a cease-and-desist order requiring the Dayton clinic to close. If the Dayton clinic did not close, ODH threatened to impose a civil penalty for operating without a license as well as additional penalties for each day that the clinic continued operating. The cease-and-desist order operated to prevent WMPC from obtaining a hearing prior to deprivation of its property interest in its ongoing business. In *Hahn*, this court stated that plaintiffs can establish a procedural due process violation if “the state did not afford them adequate procedural rights prior to depriving them of their protected interest.” 190 F.3d at 716. Similarly, in *Zinnermon v. Burch*, the Supreme Court stated:

In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking. Conversely, in situations where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake, or where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest, postdeprivation remedies might satisfy due process.

494 U.S. 113, 132, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) (citations omitted) (also stating that there is no valid reason to distinguish between property and liberty interests in assessing need for pre-deprivation hearing). In this case, a pre-deprivation hearing would not have been unduly burdensome, especially given the property interest at stake, namely continued operation of business. Further, Ohio cannot argue that it was “truly unable to anticipate and prevent a random deprivation of a liberty interest” given that it issued a cease-and-desist letter that served to close the Dayton clinic. Under the reasoning in *Zinermon*, the post-deprivation remedy of a hearing on the proposed license denial does not satisfy procedural due process.

We conclude that Director Baird violated WMPC's procedural due process rights when he ordered the Dayton clinic closed. Because he issued a cease-and-desist order that required the clinic to immediately cease operations, he effectively prevented WMPC from obtaining a pre-deprivation hearing on the proposed license denial.

Judge Sutton's dissenting opinion on this issue focuses on both the pre-deprivation history of WMPC's licensing application process and the post-deprivation remedies available to WMPC. Turning first to the pre-deprivation history, the rather protracted pre-deprivation activities bear no relation to the ultimate denial of a waiver and the state's basis for this decision. From my perspective, it is simply irrelevant to the procedural due process issue before us that WMPC previously litigated in state court the question of whether it was an ambulatory surgery facility to which the licensing requirement applied. Similarly, inspections conducted as a matter of course during the licensing process do not properly affect our analysis.

*614 Nor can WMPC's request for a waiver be ap-

propriately characterized as an opportunity to be heard or respond. To be sure, its letter to ODH describes the arrangements made by Dr. Haskell for emergency treatment of his patients, concedes the impossibility of obtaining a transfer agreement for the Dayton facility, makes a legal argument that denying the license under the circumstances would violate the clinic's substantive due process rights, and refers to a waiver granted to another clinic that could not obtain a transfer agreement. It does not address, however, the basis for Director Baird's decision to deny the waiver—that the arrangement with the practice group was not a sufficient protection for patients. Indeed, since it preceded the decision, it can hardly be characterized as a “pre-termination opportunity to respond.” See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The case law contemplates at a minimum some chance to react to proposed governmental action before deprivation occurs. See, e.g., *Loudermill*, 470 U.S. at 542, 105 S.Ct. 1487 (“An essential principle of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’” (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)) (emphasis added)); *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (“[A]n individual [must] be given an opportunity for a hearing *before* he is deprived of any significant property interest.” (alterations added)).

As previously noted in this opinion and in the dissent, an array of state post-deprivation remedies were available to WMPC. Yet, this is not a situation in which a post-deprivation remedy alone will suffice to meet the requirements of due process. See *Leary v. Daeschner*, 228 F.3d 729, 743 (6th Cir.2000) (“In some cases, postdeprivation review may possibly be sufficient, and no predeprivation process is required.”). The state has not argued that granting a pre-deprivation opportunity to be heard would impose any burden or that any public policy reason existed for shutting down the clinic's operations simultaneously with the denial of the license, and WMPC's interest in continuing to operate its business is strong.

Finally, the dissent takes the position that no hearing is required, either pre-deprivation or post-deprivation, because there is no material fact for resolution at a hearing. In my judgment, there is a fact issue for

hearing, that is, whether Dr. Haskell's alternative arrangements for emergency treatment for his patients will adequately protect them. Director Baird's ability to exercise discretion in acting on a waiver means that he can deny the waiver after hearing, but it also means that he could grant the waiver without departing from any regulation or any legal requirements. The decision is properly his, not ours.

B.

The district court also concluded that Director Baird denied WMPC its procedural due process rights, because the waiver decision was not appealable and the process through which the waiver was denied did not appear to fully and fairly consider the alternative procedures proposed by Dr. Haskell. The district court found that Director Baird "failed to give [WMPC's] request for a waiver full and fair consideration." It also found that "Director Baird denied Dr. Haskell's request for a waiver principally because he failed to obtain a written transfer agreement from a local hospital" and that Director Baird did not consider whether the alternative⁶¹⁵ procedures proposed by Dr. Haskell would ensure the same level of care as that provided by a written transfer agreement. Finally, it concluded that "Director Baird and ODH were affected by political pressure from constituents and politicians to find a way to shut down Dr. Haskell's Dayton Clinic."

As a preliminary matter, the district court's reasons for determining that WMPC was not afforded adequate procedural rights with respect to the waiver application were misplaced. Its criticisms impermissibly focus on the outcome of the waiver request and the balancing of the issues involved in it, rather than whether there was a lack of process in the denial of the waiver.

[8][9] More importantly, even if Director Baird did view the application in a slanted fashion, Ohio law grants him absolute discretion when he is deciding whether to approve a waiver request. Ohio Admin. Code § 3701-83-14(D). This court has held that "a party cannot possess a property interest in the receipt of a benefit when the state's decision to award or withhold the benefit is wholly discretionary." Med Corp., Inc. v. City of Lima, 296 F.3d 404, 409 (6th Cir.2002). Where "an official has unconstrained discretion to deny the benefit, a prospective recipient of

that benefit can establish no more than a 'unilateral expectation' to it." *Id.* at 409-10 (quoting Roth, 408 U.S. at 577, 92 S.Ct. 2701). Thus, WMPC had no property interest in the waiver and no right to due process before the waiver was denied. The district court erred in concluding that the denial of the waiver violated WMPC's right to procedural due process.

VI.

Director Baird also appeals the award of attorneys' fees and expenses to WMPC. After the district court granted a permanent injunction to WMPC, WMPC moved for attorneys' fees and expenses under 42 U.S.C. § 1983. The district court determined that WMPC was a prevailing party and ordered Director Baird to pay attorneys' fees and expenses in the amount of \$147,617.66. Director Baird does not dispute the amount of fees awarded to WMPC; rather, he argues that if this court reverses the district court's decision, WMPC would no longer be the prevailing party as required to receive attorneys' fees and expenses.

[10] The district court, "in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. Thus, in order for a plaintiff to receive attorneys' fees, the plaintiff must be the prevailing party. A plaintiff may be considered a prevailing party if the plaintiff "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties," Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792-93, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), such that "the defendant's behavior [is modified] in a way that directly benefits the plaintiff," Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). A plaintiff does not need to prevail on all claims asserted in the complaint to be awarded attorneys' fees. Berger v. City of Mayfield Heights, 265 F.3d 399, 406 (6th Cir.2001).

[11] WMPC remains a prevailing party because we conclude that Director Baird violated its procedural due process rights when he issued a cease-and-desist letter requiring the Dayton clinic to close before ⁶¹⁶ WMPC could obtain a hearing on the proposed denial

of its license application. Thus, we affirm the grant of attorneys' fees and expenses.

VII.

In sum, we reverse the district court's decision with respect to its conclusions that the application of the transfer agreement requirement (and license requirement) to the Dayton clinic constituted an undue burden under *Casey* and that the Dayton-area hospitals had an unconstitutional third-party veto over the Dayton clinic's license. We affirm the district court's conclusion that Director Baird violated the plaintiffs' procedural due process rights when he ordered the clinic closed before a hearing could be held on the proposed denial of the license application. We also affirm the award of attorneys' fees and expenses.

[12] Under well-settled law, a party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer "continuing irreparable injury" for which there is no adequate remedy at law. *Kallstrom*, 136 F.3d at 1067. Because, in this case, the procedural due process violation can be remedied by allowing WMPC and Dr. Haskell to have a hearing, we vacate the district court's grant of a permanent injunction. We remand the case for further proceedings not inconsistent with this opinion. WMPC and Dr. Haskell are entitled to have a hearing on the proposed denial of their license application for the Dayton clinic prior to ODH taking any action to close the clinic, such as issuing a cease-and-desist order. We question what the result of a hearing might be, since Director Baird can validly apply the written transfer agreement requirement to WMPC and Dr. Haskell. Moreover, we realize that the parties are at an impasse because Director Baird states that he would grant the waiver to the transfer agreement requirement if he received information about the back-up physicians and Dr. Haskell will not provide those names absent a promise that the names will be kept confidential. Nevertheless, since we are not the state decisionmakers, it would be inappropriate for us to presume what decision might be reached during the hearing, particularly considering that the position of the parties might change before the hearing. For this reason, a remand is appropriate.

SUTTON, Circuit Judge, concurring in part and dissenting in part.

In *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 196-97 (6th Cir.1997), the Sixth Circuit

invalidated an Ohio law prohibiting a late-term abortion procedure on the ground that it imposed an "undue burden" on a woman's right to obtain an abortion because it failed to contain a "maternal health exception." Three years later, the Supreme Court effectively upheld that ruling when it invalidated a similar Nebraska law on the ground that it did not contain a maternal-health exception. See *Stenberg v. Carhart*, 530 U.S. 914, 930-31, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) ("[R]equir[ing] an exception where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother.") (internal quotation marks omitted); *id.* ("[A] State may promote but not endanger a woman's health when it regulates the methods of abortion."); *id.* ("[A] State cannot subject women's health to significant risks.").

At issue in today's case is a generally applicable licensing provision that contains a maternal-health requirement and that is being applied to a facility that performs the late-term abortion procedure addressed in *Women's Medical Professional Corporation* and *Carhart*. Even if the *617 implementation of a generally applicable law designed to protect maternal health could establish an "undue burden," I agree with Judge Gibbons' well-reasoned opinion that this requirement does not. I agree with the majority that the Women's Medical Professional Corporation (WMPC) does not have a cognizable due process claim that the State impermissibly delegated its licensing authority to private third parties. And I agree that WMPC does not have a cognizable due process claim with respect to Director Baird's discretionary decision to deny the facility a waiver. Because I additionally believe that the three years of process provided by the State to WMPC before denying this license application did not violate the predeprivation requirements of the Due Process Clause, I respectfully dissent from that portion of the majority's decision to the contrary.

To understand why the State did not violate WMPC's rights to a predeprivation hearing, it helps to put the State's handling of this case in context-to consider all of the process that the WMPC received *before* the licensing decision and all of the procedural options available to it *after* the licensing decision. On November 10, 1999, Dr. Baird informed WMPC and other abortion facilities that they needed to obtain an ambulatory-surgical-facility license if they wished to continue in operation. After receiving this notice, WMPC filed an action in state court contending that

abortion clinics did not fall within the definition of an ambulatory surgery facility under state law and therefore did not have to satisfy the licensing requirement. In bringing this state-court action, WMPC sought and received a stay of the licensing requirement, permitting its facilities to continue performing abortions throughout the state-court litigation. In August 2002, an Ohio court of appeals concluded that abortion clinics must satisfy this licensing requirement. See *Founder's Women's Health Ctr. v. Ohio State Dep't of Health*, Nos. 01AP-872, 01AP-873, 2002 WL 1933886, 2002 Ohio App. LEXIS 4345 (Ohio Ct.App. Aug 15, 2002).

In October 2002, WMPC applied for a license for its Dayton facility. In response, the State conducted two inspections, one to inform the clinic of any licensing shortfalls, the other to check that all necessary corrections had been made. In December 2002, shortly after Miami Valley Hospital rescinded the written transfer agreement it had previously signed with WMPC, the clinic applied to the State for a waiver of the transfer-agreement requirement, setting out the facility's legal and factual arguments, including its submission that an anonymous group of OB/GYN doctors with admitting privileges at area hospitals had orally agreed to serve as back-up physicians for the clinic.

On January 9, 2003, after reviewing WMPC's license application, after conducting two inspections of the facility, after communicating at considerable length back and forth about the license requirement and after waiting until the end of the state-court litigation commenced in 1999 regarding the applicability of the license requirement to abortion providers, Dr. Baird issued a letter to Dr. Haskell "propos[ing] to issue an order denying" the license application. JA 328. The letter explained that the facility had failed to meet Ohio's generally applicable written-transfer-agreement requirement for ambulatory surgical facilities and "notified" Dr. Haskell that he "may request a hearing ... regarding [the] proposal to deny the license to operate." *Id.* "At any hearing," it added, "you may appear in person or be represented by your attorney, you may present evidence, and you may examine witnesses appearing for and against you." *Id.* It then added, in underscored language, that "[a] request for hearing must be made *618 within thirty (30) days of the date of mailing of this notice." *Id.* at 329. Under Ohio law, Dr. Baird's proposed de-

nial of the license would have become final after 30 days (if WMPC had opted not to appeal) or after the end of the hearing (if WMPC had appealed). See Ohio Rev.Code § 119.06-07; § 3702.30(e)(1). Once the administrative decision became final, Ohio law gave WMPC the right to appeal any adverse decision to the Ohio court of common pleas. See *id.* § 119.12.

On January 9, 2003, Dr. Baird also issued two related letters to Dr. Haskell and WMPC. In one, he denied WMPC's request for a waiver from the written-transfer-agreement requirement "because I am not able to find that granting your waiver request would not jeopardize the health and safety of any patient as provided in OAC 3701-83-14(B)." JA 327: "It is my belief," he reasoned, "that the tacit agreement made between the Women's Medical Center Director and unnamed members of an area Obstetrics-Gynecology practice is not a sufficient protection for the health and safety of an ambulatory surgical facility patient who may face a serious medical complication or other emergency situation arising from a surgical procedure performed in an ambulatory surgical environment." *Id.* In the other letter, Dr. Baird issued a cease-and-desist order preventing the facility from continuing to operate without a license.

Up to this point, the State had provided WMPC with a little more than three years of predeprivation process regarding the license requirement. Even then, WMPC still had a right to seek an administrative hearing on the "proposed" denial of its license application as well as state-court review of the agency's decision. It still had a right to seek a stay of enforcement of the licensing requirement (and the cease-and-desist order). And it still had a right to file another waiver request at the end of the administrative and appeals process based on any information learned during that process or based on any developments in the interim (including the possibility that back-up doctors for WMPC would be willing to disclose their names to Dr. Baird).

Having received these opportunities to protect its property interest in its business, having chosen to pretermite the remaining procedural options available to it and having chosen instead to file this action in federal court, WMPC cannot tenably claim that the process provided by the State between the original notice to WMPC in November 1999 and the final proposed notice in January 2003 failed to comply with due process. In reaching a contrary conclusion, the

majority focuses on the fact that Dr. Baird issued a cease-and-desist order on the same day that he issued his "proposed" denial of the licensing application.

In one sense, I share the majority's bewilderment that the director simultaneously "proposed" the denial of a license and issued a cease-and-desist order that (from the perspective of the recipient) seemed to be anything but a "proposal." Why he did not propose the denial of a license and communicate that a cease-and-desist order would issue once his proposed decision became final—either at the end of 30 days (if no hearing was requested) or at the end of any hearing (if a hearing was requested)—is a mystery that neither the record nor state law appears to resolve. But this bureaucratic curiosity does not transform this sequence of events into a cognizable due process claim for three reasons.

One, as WMPC well knew, it had an opportunity to seek a stay of the cease-and-desist order from the director during further administrative proceedings and, *619 failing that, it had an opportunity to seek a stay of the order in state court. See *Franklin County Sheriff's Dept. v. State Employment Relations Bd.*, 63 Ohio St.3d 498, 589 N.E.2d 24, 33 (1992); *Franklin County Sheriff's Dept. v. State*, No. 89AP-792, 1990 WL 124637, 1990 Ohio App. LEXIS 3814 (Ohio Ct.App. Aug. 28, 1990); *Commercial Motor Freight, Inc. v. Pub. Utils. Com'n*, 46 Ohio St.2d 195, 348 N.E.2d 132 (1976); see also *State v. Nihiser*, No. 03CA21, 2004 WL 1737862, at *4, 2004 Ohio App. LEXIS 3709, at *10-11 (Ohio Ct.App. Aug. 2, 2004); *Boland v. Hammond*, 144 Ohio App.3d 89, 759 N.E.2d 789 (Ohio App. 4 Dist.2001); *Ohio Univ. v. Ohio Civ. Rights Comm'n*, No. 96CA1721, 1996 WL 577140, 1996 Ohio App. LEXIS 4532 (Ohio Ct.App. Oct. 4, 1996); *City of Ironton v. Bd. of Tr. of the Lawrence County Gen. Hosp.*, No. 1772, 1986 WL 14462, 1986 Ohio App. LEXIS 9944 (Ohio Ct.App. Dec. 18, 1986). I say that WMPC "well knew" that it had this opportunity because it had previously sought-and obtained-a stay of the licensing requirement after it was first informed by Dr. Baird in November 1999 that it needed a license. The record does not contain any indication that the State would have opposed a stay of the cease-and-desist order had WMPC sought one in connection with a request for an administrative hearing and appeal.

Two, before the State issued the cease-and-desist order, it had provided over three years of process,

which included notice of the licensing requirements, state-court litigation over the applicability of the licensing requirement to WMPC, notice of failings in WMPC's license application, the opportunity to correct those failings, two visits by the State to WMPC's Dayton facility, numerous opportunities for WMPC to express its position on the licensing requirement and for the State to respond, and a waiver application designed to meet the one requirement of the license that WMPC had been unable to satisfy. These procedures—and above all these numerous opportunities for WMPC to present its position on the license application—assuredly satisfy the predeprivation requirements of due process. As this requirement demands only "some pretermination opportunity to respond, coupled with post-termination administrative procedures," *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547-48, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), the process that the State provided before issuing the cease-and-desist order assuredly was all the process that was due. See also *Leary v. Daeschner*, 228 F.3d 729, 741 (6th Cir.2000) (interpreting the pretermination requirement as "an opportunity to be heard"). Indeed, the opportunity to present one's case in writing—which happened here as a matter of opportunity and fact—by itself would have sufficed to meet the predeprivation-hearing requirement. See *Loudermill*, 470 U.S. at 546, 105 S.Ct. 1487; *Leary*, 228 F.3d at 743; see also *Am. Towers, Inc. v. Williams*, 50 Fed.Appx. 448, 450, No. 01-7141, 2002 U.S.App. LEXIS 22845, at *4 (D.C.Cir.2002); *Radtich v. United States*, 929 F.2d 478, 480 (9th Cir.1991). And the cases cited by the majority that involve government action not requiring a predeprivation hearing, see *Zinerman v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), and *Hahn v. Star Bank*, 190 F.3d 708 (6th Cir.1999), plainly do not mandate a predeprivation hearing here. To my knowledge, no case has ever held that such a lengthy set of opportunities to be heard, as WMPC had in this instance, violates the predeprivation requirements of due process.

Nor has WMPC identified a single issue of material fact that remains to be resolved or could be resolved through further administrative hearings. All of which *620 prompts the question of what this judicially ordered predeprivation hearing will accomplish. From where I sit, I cannot understand what WMPC still wishes to ascertain or advocate in an administrative hearing. Indeed, the stay of the cease-and-desist order in federal court has given WMPC an additional two years to seek an administrative hearing or file a

state-court appeal regarding the license application, but it still has not chosen to seek one.

That leads to the third defect in this constitutional claim. Due process does not mandate a hearing (whether predeprivation or postdeprivation) when the claimant does not raise an issue of material fact that a hearing could resolve. See Dixon v. Love, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); Elsener v. Health Care Fin. Admin., 85 Fed.Appx. 405, 409 (6th Cir.2003); Pennsylvania v. Riley, 84 F.3d 125, 130 (3d Cir.1996); Puerto Rico Aqueduct and Sewer Auth. v. EPA, 35 F.3d 600, 606 (1st Cir.1994); Moreau v. FERC, 982 F.2d 556 (D.C.Cir.1993); Altenheim German Home v. Turnock, 902 F.2d 582, 585 (7th Cir.1990). Where the law constrains a government decision and where the parties agree that a legal requirement has not been met, an individual does not have the right to an appearance before the decisionmaker solely for the sake of making an appearance before the decisionmaker. See Dixon, 431 U.S. at 113-14, 97 S.Ct. 1723 ("Since appellee does not dispute the factual basis for the Secretary's decision, he is really asserting the right to appear in person only to argue that the Secretary should show leniency and depart from his own regulations. Such an appearance might make the licensee feel that he has received more personal attention, but it would not serve to protect any substantive rights. We conclude that requiring additional procedures would be unlikely to have significant value.").

Dixon, to use one example, held that due process did not entitle drivers to a hearing before the revocation of their licenses if they objectively did not meet one of the legal requirements for obtaining a license. *Id.* What is true for the license required in Dixon, it seems to me, is equally true of the license required here. Ohio has established licensing requirements for operating an ambulatory surgical facility, and both sides agree that the Dayton facility will not receive a license unless it satisfies one of two legal requirements-either obtains a written transfer agreement or identifies back-up doctors with privileges at area hospitals. WMPC may not invoke the Due Process Clause to obtain further hearings solely to "argue that the decisionmaker should be lenient and depart from legal requirements." Loudermill, 470 U.S. at 543 n. 8, 105 S.Ct. 1487. Yet such leniency is all that WMPC seeks here. No one disputes that Dr. Baird has consistently required back-up doctors to be identified in order for

WMPC (and other regulated facilities) to obtain a waiver. And it escapes me how a hearing could be held about whether *anonymous* back-up doctors will adequately protect the clinic's patients in the event of a medical emergency-particularly when the waiver decision, all agree, remains discretionary. On this record, in short, WMPC has no more right to a hearing than a litigant against whom summary judgment was properly granted has a right to a jury trial. The majority having concluded otherwise, I respectfully dissent from that portion of its decision.

C.A.6 (Ohio),2006.

Women's Medical Professional Corp. v. Baird
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379 F.3d 531, 04 Cal. Daily Op. Serv. 7750, 2004 Daily Journal D.A.R. 10,485
(Cite as: 379 F.3d 531)

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United States Court of Appeals,
Ninth Circuit.

TUCSON WOMAN'S CLINIC, on behalf of themselves and their patients seeking abortions; Damon Raphael, M.D.; Robert H. Tamis, M.D.; Old Pueblo Family Planning; William Richardson, M.D.; Simat Corp. dba Abortion Services of Phoenix, Plaintiffs-Appellants,

v.

Catherine EDEN, in her capacity as the Director of Arizona Department of Health Services; Richard M. Romley, in his capacity as Maricopa County Attorney; Terry Goddard, Defendants-Appellees.

Tucson Woman's Clinic, on behalf of themselves and their patients seeking abortions; Damon Raphael, M.D.; Robert H. Tamis, M.D.; Old Pueblo Family Planning; William Richardson, M.D.; Simat Corp. dba Abortion Services of Phoenix, Plaintiffs-Appellees,

v.

Catherine Eden, in her capacity as the Director of Arizona Department of Health Services; Terry Goddard, Defendants-Appellants,
and

Richard M. Romley, in his capacity as Maricopa County Attorney, Defendant.

Tucson Woman's Clinic, on behalf of themselves and their patients seeking abortions; Damon Raphael, M.D.; Robert H. Tamis, M.D.; Old Pueblo Family Planning; William Richardson, M.D.; Simat Corp. dba Abortion Services of Phoenix, Plaintiffs-Appellees,

Catherine Eden, in her capacity as the Director of Arizona Department of Health Services; Terry Goddard, Defendants,
and

Richard M. Romley, in his capacity as Maricopa County Attorney, Defendant-Appellant.

Nos. 02-17375, 02-17381 and 02-17382.

Argued and Submitted Dec. 4, 2003.

Filed June 18, 2004.

Amended Aug. 23, 2004.

Background: Physicians providing abortions in their private medical practices sued state, claiming that statutory and regulatory scheme covering abortion clinics violated their Fourth and Fourteenth Amend-

ment rights. The United States District Court for the District of Arizona, Raner Collins, J., granted partial summary judgment to physicians and state, and physicians appealed.

Holdings: The Court of Appeals, Thomas, Circuit Judge, held that:

- (1) statutory and regulatory scheme was not facially unconstitutional;
- (2) fact issues precluded summary judgment as to whether scheme imposed undue burden on women's abortion rights, in violation of due process;
- (3) equal protection rights of physicians were not violated;
- (4) whether scheme violated patients' equal protection rights was fact issue;
- (5) provision for warrantless searches of clinics violated Fourth Amendment;
- (6) informational rights of patients were violated by provisions requiring disclosure of unredacted medical records, ultrasound pictures, and incident reports;
- (7) regulation, requiring that patients be treated with consideration, respect, and full recognition of their dignity and individuality, was unconstitutionally vague; and
- (8) there was no unconstitutional delegation of abortion approval through requirement that there be hospital-admitted physicians on hand during abortions.

Affirmed in part, reversed in part, and remanded, and petitions for rehearing and rehearing en banc denied.

Opinion, 371 F.3d 1173, amended.

West Headnotes

[5] Abortion and Birth Control 4 ⚙️ 109

4 Abortion and Birth Control

4k109 k. Methods, modes and procedures. Most Cited Cases

(Formerly 4k1.30)

Abortion and Birth Control 4 ⚙️ 110

4 Abortion and Birth Control

4k110 k. Clinics, facilities, and practitioners. Most

Cited Cases

(Formerly 4k1.30)

Constitutional Law 92 4187

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)7 Labor, Employment, and Public Officials

92k4187 k. Employment of physicians; hospital staff privileges. Most Cited Cases
(Formerly 92k296(1))

Substantive due process rights of physicians were not facially violated by regulation requiring physician with hospital admitting privileges to be present on premises during performance of abortions and until patients were stabilized, alleged to be unconstitutional delegation to hospitals of authority to perform abortions; there was no evidence presented that any hospitals denied or would deny admitting privileges to physicians because of their willingness to perform abortions, precluding necessary showing that there were no set of circumstances in which delegation of abortion approval to hospitals would be unconstitutional. U.S.C.A. Const. Amend. 14; Ariz. Admin. Code R 9-10-1506(B)(2).

West Codenotes

Held Unconstitutional Ariz. Rev. Stat. § 32-1402 A.R.S. § 32-1403 Ariz. Rev. Stat. § 36-424(D) Ariz. Rev. Stat. § 36-2301.02(B), (C) *535 Bonnie Scott Jones, Center for Reproductive Rights, New York, NY, for the plaintiffs-appellants and cross-appellees.

*536 Kevin D. Ray and Lynne C. Adams, Office of the Arizona Attorney General, Phoenix, AZ, for defendants-appellees and cross-appellants. Catherine Eden and Terry Goddard.

Denise M. Burke, Special Deputy Maricopa County Attorneys, San Antonio, Texas; Nicholas T. Nikas, Deputy Maricopa County Attorney, Phoenix, AZ, for defendant-appellee and cross-appellant Richard M. Romley.

Appeal from the United States District Court for the District of Arizona; Raner C. Collins, District Judge,

Presiding. D.C. No. CV-00-00141-RCC.

Before: TASHIMA, THOMAS, and SILVERMAN,
Circuit Judges.

ORDER

The opinion filed June 18, 2004, 371 F.3d 1173, is hereby amended as follows:

"We affirm, and also find that the fourth requirement violates informational privacy rights," 371 F.3d at 1193, is replaced by, "We affirm, and also hold that the fourth requirement does not violate informational privacy rights."

With the amendment, the Petitions for Rehearing are denied. The full court has been advised of the Petitions for Rehearing En Banc and no judge of the court has requested a vote on the Petitions for Rehearing En Banc. Fed. R. App. P. 35. Therefore, the Petitions for Rehearing En Banc are denied. No further petition for rehearing or rehearing en banc will be accepted in these cases.

OPINION

THOMAS, Circuit Judge.

Plaintiffs in this case are physicians who provide abortions in their private medical practices in Arizona. They challenge the constitutionality of a statutory and regulatory scheme which requires the licensing and regulation of any medical facility in which five or more first trimester abortions in any month or any second or third trimester abortions are performed. The district court granted summary judgment in part to plaintiffs, and in part to defendants. We affirm in part, reverse in part, and remand for further proceedings on plaintiffs' claim that the scheme poses an undue burden on the right to abortion.

I. Factual and Procedural Background ^{FN1}

^{FN1}. Some of the evidence of record in this case is contested, as plaintiffs made two motions in district court to strike numerous factual statements and submissions of evidence by defendants. They state that they are appealing "the denial of those motions to the

extent that the inadmissible evidence submitted by defendants is relied upon by defendants to support the district court's grant of partial summary judgment to defendants." The district court below stated it would only rule on the motions to the extent necessary to rule on the summary judgment motions. It then never addressed the merits of the motions, presumably because it did not rely on any of the contested evidence or factual statements. We also have no need to rely on any contested evidence, and do not cite any of it here. We therefore do not reach the question of how the district court should rule on these motions on remand.

Prior to the promulgation of the statutory and regulatory scheme at issue in this case, the Arizona Department of Health Services (DHS) was explicitly denied authority to regulate any private physician office or clinic of a licensed health care provider unless patients were kept overnight or administered general anesthesia. The state alleges that the statutory scheme, passed in 1999, was implemented in response to the highly publicized death of Lou Anne Herron, a patient who bled to death while recovering in an abortion clinic *537 following an extremely substandard abortion provided by Dr. John Biskind, but plaintiffs contest this characterization of the State's motivation. The statute singles out abortion providers who provide five or more first trimester abortions, or any second or third trimester abortions, in a month, and it subjects all such providers to the licensing requirements imposed on health care institutions. It also directs DHS to promulgate regulations regarding facilities that perform abortions. The regulations that DHS has issued set mandatory standards in many areas of practice: administration, personnel, staffing requirements, the abortion procedure itself, patient transfer and discharge, medications, medical records, equipment, and physical facilities. The regulations also require the providers to submit to warrantless, unbounded inspections of their offices, and provide DHS inspectors access to unredacted medical records. Amendments to the scheme passed in 2000 additionally require physicians who perform abortions after the first trimester to submit ultrasound prints to a DHS contractor for review. Violations of the scheme result in criminal and civil penalties, but enforcement of the entire set of statutes and regulations has been enjoined during district court proceedings and the outcome of all appeals pursuant to stipulation.

Plaintiffs claim the regulation of their practices is unconstitutional in the following eight ways: (1) It poses an undue burden on the right to abortion; (2) It violates the equal protection rights of physicians and their patients by distinguishing between those who provide abortions and those who provide other comparably risky medical services; (3) It violates the equal protection rights of physicians by distinguishing between those who provide fewer than five first trimester abortions a month and those who provide five or more, or any second or third trimester abortions; (4) It violates the equal protection rights of women by distinguishing between medical services sought by women and comparably risky procedures sought by men; (5) It violates physicians' Fourth Amendment rights by permitting warrantless searches of their offices; (6) It violates patients' informational privacy rights by requiring DHS access to unredacted records, disclosure of ultrasound prints with patient identifying information to a private contractor, allowing unannounced searches by DHS when patients may be in the facility, and by requiring physicians to release sensitive patient information including patient name to a licensing board when there is an "incident" with the patient; (7) One of its provisions is unconstitutionally vague; and (8) It violates the due process rights of physicians and their patients by requiring a physician with hospital admitting privileges to be on premises until all patients are discharged, and thereby unlawfully delegating to hospitals the licensing of abortion providers. Plaintiffs also claim the unconstitutional portions of the scheme are not severable.

The parties filed cross-motions for summary judgment, but plaintiffs never moved for summary judgment on their undue burden claim, which they believe requires a trial. Plaintiffs were granted summary judgment on most of the Fourth Amendment, informational privacy, and vagueness challenges described above. Defendants were granted summary judgment on the undue burden and equal protection claims, and the district court found the unconstitutional portions of the scheme were severable from the constitutional ones. Plaintiffs and defendants cross-appeal from all grants of summary judgment to the opposing parties, and with the exception of the undue burden claim, they each argue that summary judgment should have been granted in their favor. With *538 respect to the undue burden claim, plaintiffs do not argue that summary judgment was warranted in their favor, but

instead argue that a bench trial was warranted. Plaintiffs further appeal the finding of severability.

We reverse and remand on plaintiffs' undue burden claim. Plaintiffs have submitted sufficient evidence to create an issue of material fact as to whether the scheme creates an undue burden on the right to seek an abortion in violation of the United States Constitution.

We affirm the district court's grant of summary judgment to defendants on all equal protection claims. The scheme does not violate the equal protection clause in a judicially cognizable manner by distinguishing between doctors who perform less rather than more abortions, by distinguishing between abortion providers and other physicians, or by distinguishing between abortion, sought only by women, and comparably risky medical procedures sought by men.

We also affirm the district court's grants of partial summary judgment to plaintiffs on their Fourth Amendment, informational privacy, and vagueness claims. The scheme's authorization of boundless, warrantless searches of physicians' offices violates the Fourth Amendment. The scheme's requirement that clinics submit, upon request made by DHS in its absolute discretion, unredacted patient files containing name, address, and other patient identifying information violates patients' informational privacy rights. The scheme's requirement that doctors send ultrasound prints to a private contractor also violates patients' informational privacy rights. The scheme's requirement that patient identifying information be released to a professional licensing board after an "incident" also violates patients' informational privacy rights. None of these release requirements is mitigated by sufficient safeguards against unnecessary access or wider release of the information. Last, the regulation requiring physicians to "ensure that a patient is ... treated with consideration, respect, and full recognition of the patient's dignity and individuality," Ariz. Admin. Code R9-10-1507(1), is unconstitutionally vague. Because we remand on the undue burden claim, we do not reach the issue of severability at this time.

II. Jurisdiction and Standard of Review

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 (2000) because this case arises under

the Fourteenth Amendment to the Constitution, and state officials can be sued for constitutional violations under 42 U.S.C. § 1983. We have jurisdiction under 28 U.S.C. § 1291.

Appeals from the grant or denial of summary judgment are reviewed *de novo*, Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1175 (9th Cir.2002), as are constitutional questions, Servin-Espinoza v. Ashcroft, 309 F.3d 1193, 1196 (9th Cir.2002). In reviewing a grant of summary judgment, we must view the evidence in the light most favorable to the non-moving party. If there are any genuine issues of material fact, summary judgment is not warranted. Balint v. Carson City, Nev., 180 F.3d 1047, 1050 (9th Cir.1999) (en banc).

[1] In United States v. Salerno, the Supreme Court held that one facially challenging a statute "must establish that no set of circumstances exists under which the Act would be valid. ... [W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *539481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). In Planned Parenthood v. Casey, however, the Court held that an abortion law is unconstitutional on its face if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." 505 U.S. 833, 895, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

[2] With respect to plaintiffs' undue burden claim, we follow the *Casey* standard. Planned Parenthood v. Lawall, 180 F.3d 1022, 1027 (9th Cir.1999) (*Lawall I*). With respect to other facial constitutional challenges, we generally follow the *Salerno* standard. S.D. Myers, Inc. v. City & County of San Francisco, 253 F.3d 461, 467 (9th Cir.2001). That abortion rights are involved does not alter this rule. Indeed, it is difficult to even articulate what application of the *Casey* standard to claims other than the undue burden claims would entail. Therefore, we apply the *Salerno* standard to all of plaintiffs' claims except their undue burden claim.

III. Undue Burden Claim

a. When the Undue Burden Standard is Triggered

[3][4] Women have a fundamental liberty interest, protected by the due process clause of the Fourteenth

Amendment, in obtaining an abortion. Casey, 505 U.S. at 845-46, 112 S.Ct. 2791. In Casey, the Supreme Court reaffirmed this central holding of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Casey, 505 U.S. at 845-46, 112 S.Ct. 2791. The Court also explained that the right to obtain an abortion is not absolute and that state interests in maternal health and protecting fetal life can, in some circumstances, justify regulations of abortion. Id. at 846, 112 S.Ct. 2791. However, a plurality of the Court abandoned both traditional equal protection scrutiny analysis and the accompanying trimester framework of Roe for determining when state regulation of abortion to promote these two important interests is justified and when it is not. Id. at 872-76, 112 S.Ct. 2791. The trimester framework and the traditional equal protection scrutiny analysis for laws impacting fundamental rights were replaced with an "undue burden" standard in cases where regulation of abortion is used to promote maternal health or fetal life. Id. at 876, 112 S.Ct. 2791.

[5] This standard had been applied in inconsistent ways in prior abortion rights cases by various Supreme Court Justices. Id. (citing numerous cases). Therefore, the Casey opinion clarified the meaning of "undue burden" by defining it as "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." Id. at 877, 112 S.Ct. 2791. In its "summary" of the essential holdings of the case, Casey made clear that the undue burden standard applies to health regulations:

As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

Id. at 878, 112 S.Ct. 2791. But because Casey largely dealt with a law aimed at promoting fetal life, its application of the "undue burden" standard is often not extendable in obvious ways to the context of a law purporting to promote maternal health. See, e.g., A Woman's Choice-East Side Women's Clinic v. Newman, 305 F.3d 684 (7th Cir.2002) (majority and dissenting opinions representing very different views *540 of the role of the record); Greenville Women's Clinic v. Bryant, 222 F.3d 157 (4th Cir.2000) (major-

ity and dissenting opinions representing very different views of the standard in assessing a licensure scheme similar to the one challenged here).

In the context of a law purporting to promote fetal life, whatever obstacles that law places in the way of women seeking abortions logically serve the interest the law purports to promote fetal life because they will prevent some women from obtaining abortions. By contrast, in the context of a law purporting to promote maternal health, a law that is poorly drafted or which is a pretext for anti-abortion regulation can both place obstacles in the way of women seeking abortions and fail to serve the purported interest very closely, or at all. Indeed, in his concurring opinion in Casey, Justice Stevens indicated that a burden need not be onerous to be undue, if it is not supported by a legitimate state interest. 505 U.S. at 920-21, 112 S.Ct. 2791 (Stevens, J., concurring in part and dissenting in part). Moreover, where Casey did entertain the possibility that the Pennsylvania law at issue promoted maternal health, it took care to verify that the law could be reasonably understood to promote, in some legitimate fashion, the interest in maternal mental health:

To the extent Akron I and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986)] find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with Roe's acknowledgment of an important interest in potential life, and are overruled.... It cannot be questioned that psychological well-being is a facet of health.... In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.

Id. at 882, 112 S.Ct. 2791 (emphasis added).

Thus, the undue burden standard is not triggered at all if a purported health regulation fails to rationally promote an interest in maternal health on its face, as would be the case where the state required physicians to provide false or misleading information to women seeking abortions. Plaintiffs in this case argue that the entire licensing scheme at issue does not even rationally promote an interest in maternal health, and that the statutes and regulations therefore clearly infringe the right to abortion and violate the Constitution, since the undue burden standard is not triggered.

Mazurek v. Armstrong, 520 U.S. 968, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997), provides an example of how laws that purport to promote health, but may in fact fail to do so, should be analyzed. The Court in *Mazurek* was faced with such a law but still applied the undue burden standard. *Id.* 520 U.S. at 973, 117 S.Ct. 1865 (“[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 *541 by others.”) (quoting *Casey*, 505 U.S. at 885, 112 S.Ct. 2791). The physician-only abortion provision at issue in *Mazurek* was subject to the undue burden standard, even in the face of evidence that it was objectively unnecessary, and could therefore only potentially injure maternal health by reducing the number of abortion providers. *Id.* Thus, *Mazurek* compels us to hold that where a health regulation of abortion is not facially pretextual or irrational with respect to the interest it purports to assert, it is subject to the “substantial obstacle” test in *Casey*.

Although plaintiffs have presented a great deal of evidence supporting the inference that the statutory and regulatory scheme will actually worsen maternal health and safety, as a facial matter, the scheme as a whole is a typical set of health and safety standards, unusual primarily because it singles out abortion clinics. Moreover, the legislative history indicates that at least one of the triggers for enacting the scheme was the death of a patient at an abortion clinic engaging in atrociously substandard practices. In the face of this clear history, plaintiffs have not presented evidence sufficient to create an issue of material fact as to whether this licensing scheme is a pretext for restricting the right to abortion. See *infra* note 2. Thus, their claim that the scheme infringes abortion rights must be analyzed under *Casey*’s undue burden stand-

ard.

b. The Summary Judgment Standard

Casey made clear that the “substantial obstacle” standard for determining when a law poses an undue burden on the right to obtain an abortion is record-dependent. 505 U.S. at 901, 112 S.Ct. 2791 (“While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.”).

In *Greenville Women’s Clinic*, the Fourth Circuit overturned a district court’s finding that plaintiffs had demonstrated that a very similar regulatory scheme amounted to an 11877 undue burden on abortion rights. 222 F.3d at 159. The Fourth Circuit determined that as a matter of law, plaintiffs had not shown that the regulatory scheme at issue amounted to an undue burden on abortion rights. The dissent summarized the numerous findings of fact the district court had made after a six-day bench trial which it felt compelled the opposite result. 222 F.3d at 175-76. (Hamilton, J., dissenting).

[6] We depart from the Fourth Circuit’s holding in *Greenville Women’s Clinic* to the extent it neglects that “[a] significant increase in the cost of obtaining an abortion alone can constitute an undue burden on the right to have an abortion.” 222 F.3d at 201 (Hamilton, J., dissenting) (citing *Casey*, 505 U.S. at 901, 112 S.Ct. 2791). A significant increase in the cost of abortion or the supply of abortion providers and clinics can, at some point, constitute a substantial obstacle to a significant number of women choosing an abortion. Plaintiffs in this case have raised an issue of material fact as to whether the Arizona scheme creates such an obstacle. We note that in *Greenville*, the district court did not grant summary judgment in favor of the state. Rather, the district court held a bench trial, facilitating findings of fact far more specific than the conclusory finding the court below made.

[7] To survive a motion by the state for summary judgment on an undue burden claim, specific allegations of the dollar amount by which abortion costs will rise are not required. Rather, the usual summary judgment standards apply, and all inferences from the evidence must be made in favor of the nonmoving party. See *542 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

A grant of summary judgment to defendants is inappropriate if plaintiffs have submitted evidence sufficient to create an issue of material fact as to whether a health regulation is unnecessary and has the purpose or effect of imposing a substantial obstacle to women seeking an abortion. *See, e.g., Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1093-94 (9th Cir.1999) (en banc). Here, a reasonable fact-finder could find that the challenged set of statutes and regulations is unnecessary and has the effect of imposing a substantial obstacle on women seeking an abortion.

The district court's characterization of plaintiffs' evidence as "undetermined fee increases predicted by abortion providers, but not supported by specific credible estimates" is incomplete and fails to draw all inferences in favor of the plaintiffs. *See Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (9th Cir.2003). Plaintiffs have presented evidence and testimony that individual providers will incur tens of thousands of dollars in expenses complying with the scheme. These estimates are based on specific costs, such as purchasing a camera for an ultrasound machine, investing time in complying with the heavy administrative burdens of the law, hiring nurses where previously medical assistants were used, and paying employees overtime so that follow-up calls can be made on weekends. Plaintiffs have presented testimony that one provider may be forced to stop practicing medicine altogether, and that a Planned Parenthood clinic will see an approximately two-thirds drop in the number of its physicians. Plaintiffs have placed into evidence expert testimony concerning the fact that increased monetary cost delays and deters patients obtaining abortions, and that delay in abortion increases health risks. They have also presented evidence tending to show that abortion is a very low-risk procedure most of the time, that it entails equal or even less risk than many other procedures not similarly regulated in Arizona, and that the regulations are therefore unnecessary as a matter of public health. Therefore, a reasonable factfinder could certainly conclude, from the evidence presented, that the licensing scheme at issue is unnecessary and that, by increasing the cost of abortion and limiting the supply of abortion providers and hours during which they can provide abortions, it imposes a substantial obstacle to women seeking abortions at those practices and clinics.

As in any case, there must be more than a "scintilla" of

evidence favoring the nonmoving party to create an issue of material fact, *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir.1997) (citing *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505), but plaintiffs in this case have presented far more than a scintilla of such evidence. They are therefore entitled to a bench trial and specific findings of fact by the district court as to the impact these burdens will have on women seeking abortions.

[8] The district court noted in its order that it would not weigh, in assessing the undue burden claim, certain of the burdens imposed on providers and patients. With respect to most of these requirements, it made sense for the district court to discount these burdens, as it had already determined that those provisions were unconstitutional and severable from the rest of the law, and would enjoin their enforcement. However, with respect to the admitting privileges requirement, the district court erred in discounting the burdens imposed by this requirement. The district court found this requirement enforceable, as do we, *see infra* Part VIII. We therefore direct the district court to *543 take account of the evidence plaintiffs have submitted concerning the burdens this requirement imposes, such as the onerousness of applying for privileges, attending staff meetings, and taking one's share of emergency on-call time.

The district court stated that the scheme's stigmatizing of abortion practice and usurping of providers' ability to exercise medical judgment were "not appropriate questions" for it to consider. Whether or not these burdens are strong enough to alter the ultimate outcome in this case, there is no indication in *Casey* or any other case that such burdens are somehow irrelevant to the analysis of whether a law imposes a substantial obstacle to seeking an abortion. Plaintiffs presented expert testimony concerning the effects of stigmatization of abortion on the supply of abortion providers, and the district court is therefore directed, in its role as factfinder, to give these burdens their appropriate weight on remand.

IV. Equal Protection Claims

Plaintiffs argue that the scheme violates the Equal Protection Clause of the Fourteenth Amendment in three ways: (1) violating the equal protection rights of both patients and physicians by discriminating between doctors who provide abortions and those who

provide comparably risky medical procedures; (2) violating the equal protection rights of physicians by discriminating between doctors who provide more abortions and those who provide fewer abortions; and (3) violating the equal protection rights of women by discriminating between abortion, a procedure sought only by women, and comparably risky procedures sought by men.

Laws alleged to violate the equal protection clause are generally subject to one of three levels of "scrutiny" by courts: strict scrutiny, intermediate scrutiny, or rational basis review. Laws are subject to strict scrutiny when they discriminate against a suspect class, such as a racial group, *e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), or when they discriminate based on any classification but impact a fundamental right, such as the right to vote. *E.g.*, Reynolds v. Sims, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Laws are subject to intermediate scrutiny when they discriminate based on certain other suspect classifications, such as gender. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). With respect to laws discriminating on the basis of gender, the particular history of sex discrimination has led to judicial recognition that certain forms of purported state interest are illegitimate as justifications for sex discrimination, such as interests stemming from romantic paternalism toward women or sex stereotyping. *See* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 152-53, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); Miss. Univ. for Women, 458 U.S. at 728-29, 102 S.Ct. 3331; Frontiero v. Richardson, 411 U.S. 677, 684, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973).

All other laws are subject to rational basis review. Fitzgerald v. Racing Ass'n, 539 U.S. 103, 106-07, 123 S.Ct. 2156, 156 L.Ed.2d 97 (2003). A law will survive rational basis review "so long as it bears a rational relation to some legitimate end." Romer v. Evans, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Although it is difficult to show that a law violates the equal protection clause under rational basis review, it is not impossible, since some laws are so irrational or absurd on their face it is clear they can be motivated by nothing other than animus or prejudice against a group. *See, e.g.*, Romer, 517 U.S. at 632, 116 S.Ct. 1620; *see also* *544 City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 448-49, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

a. Singling out Doctors who Provide Abortions

Plaintiffs argue that discrimination between abortion and comparable medical procedures should be subject to strict scrutiny because it impacts abortion rights as well as informational privacy rights, and both of these are fundamental rights protected by the due process clause. They argue that this claim is not the same as a claim that the scheme unconstitutionally infringes the abortion liberty interest, because the test for when a law is subject to strict scrutiny is when that law *impacts* a fundamental right, not when it infringes it. *See* Shapiro v. Thompson, 394 U.S. 618, 638, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (holding that because a "classification of welfare applicants according to whether they have lived in the State for one year ... touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest"), *overruled in part on other grounds by* Edelman v. Jordan, 415 U.S. 651, 670-71, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

[9] The right to abortion is a fundamental constitutional right. *Casey* explicitly reaffirmed *Roe's* holding in this regard, stating that "[e]ven on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty." 505 U.S. at 858, 112 S.Ct. 2791. *See also* Stenberg v. Carhart, 530 U.S. 914, 921, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000). However, *Casey* defined a new standard of judicial review for determining when courts can recognize burdens on that right as unconstitutional, and when they cannot, replacing the traditional scrutiny analysis with the undue burden test:

As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote.

Casey, 505 U.S. at 873-74, 112 S.Ct. 2791 (citing

Anderson v. Celebrezze, 460 U.S. 780, 788, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983); Norman v. Reed, 502 U.S. 279, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)). There can be no doubt that voting is a fundamental right, but the ballot access cases cited in *Casey* intimated that strict scrutiny was nevertheless not warranted for all laws impacting the right to vote, and *Burdick v. Takushi*, another ballot access case, made that crystal clear: "Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold." 504 U.S. 428, 432, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992).

By citing the ballot access cases, *Casey* directly replaced strict scrutiny review of laws that do not directly burden abortion and purportedly promote maternal health with the undue burden standard, just as the ballot access cases replaced strict scrutiny with a less stringent standard of review for reasonable laws regulating ballot access rather than infringing the core voting right. Thus, with respect to burdens on patients' abortion rights, this equal protection*545 claim collapses with the undue burden claim, which we have addressed above.

Plaintiffs also point out that the scheme burdens patients' fundamental rights to informational privacy. Like burdens on the right to abortion, burdens on informational privacy that the state justifies via public health or other such interests are assessed under a specific, detailed test that balances informational privacy and governmental interests. *See infra* Part VI; Planned Parenthood v. Lawall, 307 F.3d 783, 790 (9th Cir.2002) (*Lawall II*). Like the *Casey* undue burden standard, that test replaces any strict scrutiny test, and therefore, it must govern. Thus, to the extent the law infringes on informational privacy, this claim collapses with the informational privacy claim, discussed separately below.

However, doctors who perform abortions have rights, separate and apart from the rights of their patients, to be free from discrimination, and we must determine whether the law, in singling them out, violates their rights under the equal protection clause.

We must first determine whether any heightened level of scrutiny should be afforded doctors who perform abortions, as a suspect class under the equal protection clause. Discrimination against a class is more likely to

be deemed suspect under the equal protection clause when the class has experienced a "history of purposeful unequal treatment." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). However, the basic purpose of employing strict scrutiny is to recognize that certain "factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." Cleburne, 473 U.S. at 440, 105 S.Ct. 3249. Thus, even when a class has experienced a history of discrimination and prejudice, it is not appropriate to afford that class suspect status under the equal protection clause where there are also many legitimate reasons that the state might single out the class for regulation. *Id.* at 442-45, 105 S.Ct. 3249. There are many such reasons here.

For instance, a State might find or presume that women who obtain abortion services are less likely to report irresponsible practices or less likely to litigate medical malpractice claims, due to the fact that obtaining an abortion is an exercise of a private choice. A State might look to the history of illegal, unsafe abortions in this country and determine that women seeking abortions are particularly vulnerable to exploitation. States must be permitted to take account of that history and respond to it in the exercise of their legislative judgment. We do not endorse the particular legislative response in this case, or any other. There is clear room for disagreement about the effects of treating abortion differently than other services. Such differential treatment might backfire by stigmatizing the practice of abortion. However, legislatures are more properly suited than courts to predicting these effects, and we do not believe that the legislative response to a history of marginalization is *per se* subject to strict scrutiny in all situations. *Cf. Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

We nevertheless recognize that abortion providers can be a politically unpopular group. *Cleburne* employed rational basis review for laws classifying the mentally retarded, but acknowledged that "[d]oubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and *546 that are properly subject to judicial correction under constitutional norms." 473 U.S. at 446, 105 S.Ct. 3249. Although *Cleburne* employed

rational basis review, it invalidated the law at issue, explaining that "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* In *Romer v. Evans*, a law discriminating on the basis of sexual orientation was struck down under rational basis review, because the "sheer breadth[of the law was] so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class it affect[ed]." 517 U.S. at 632, 116 S.Ct. 1620.

[10] Applying this standard to the case here, we find that the scheme survives rational basis review. Plaintiffs have alleged that most, if not all, of the scheme is unnecessary and stigmatizes abortion providers. However, the law is facially related to health and safety issues, and no evidence has been presented that is sufficient to create an issue of material fact as to whether there is a stigmatizing or animus based purpose to the law.^{FN2} In contrast, *547 the law at issue in *Romer* was breathtaking in its sweep and the most basic human rights at which it directly struck, excluding non-heterosexuals even from securing equal rights with respect to common carriers and public accommodations. *Id.* at 628-30, 116 S.Ct. 1620. Thus, the classification in this case survives rational basis review.

FN2. The Senate fact sheet's Background section on the scheme at issue begins with the following description:

Events in 1998 at a Phoenix abortion clinic raised several questions about the responsibility of state agencies to ensure the public health and safety regarding abortion and other outpatient medical procedures. House Bill 2152 was introduced in 1998 to establish regulation of abortion clinics, but was held in committee primarily due to concerns that the regulations infringed on the rights of and would have a negative fiscal impact on doctors in private practice.... Currently there are ten states that regulate abortion clinics through separate licensure classification procedures. There are less than 20 abortion clinics in Arizona, about half of which are already licensed through the Department of Health Services (DHS). The proposed legislation would

require the remaining clinics to become licensed. It would also require DHS to adopt rules for licensure and medical emergency measures. According to the Joint Legislative Study Committee, the three main issues are establishing the gestational age of the fetus, codifying the standards for obstetric gynecologic services, and monitoring compliance without infringing upon constitutional rights to practice.

The House Abstract contains similar language.

Some doctors in deposition testimony indicated that they felt Lou Anne Herron's death was merely an "excuse" for the law, which anti-abortion proponents had wanted for a long time. In light of the legislative history, however, plaintiffs must submit something more than the suspicion of doctors that there is an illegitimate purpose to the scheme.

The president of Planned Parenthood Central and Northern Arizona indicated that they had been promised the law would not single out abortion, and would apply to all comparable medical procedures, but had been betrayed, after cooperating to some extent with drafting. However, that the purpose of the Joint Committee was narrowed from investigating regulation of all outpatient medical services solely to abortion clinics cannot establish an illegitimate purpose to subordinate those clinics and their providers. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."). Thus, this testimony is not sufficient to create a material issue of fact regarding animus in light of the legislative history.

Finally, Bryan Howard of Planned Parenthood, who participated in the drafting of the legislation and worked with the

legislative committee, indicated in deposition testimony that the purpose of the provision requiring hospital admitting privileges "has nothing to do with women's health." Howard indicated that Susan Gerard, "the representative who inserted it in the bill," did so because of a concern that "BOMEX [Arizona's physician licensing board] ... was not strong enough in its oversight of physicians, and that hospital credentialing processes ... [were] actually more stringent than BOMEX was; ... It was a roundabout way of addressing the perception that BOMEX was too weak." But even when we make all inferences in favor of the plaintiffs, this cannot be understood as an attempt to limit the number of abortion providers based on bare animus, but rather a somewhat blunt attempt to limit the number based on qualifications and credentials.

b. Singling Out Doctors Who Provide More, Rather than Fewer, Abortions

[11] With respect to this classification, plaintiffs do not assert the fundamental liberty interests of their patients. Because the right to perform abortions is derivative of the right of patients to seek abortions, it is not the sort of fundamental right that, apart from the rights of patients, would trigger strict scrutiny review. See *Casey*, 505 U.S. at 884, 112 S.Ct. 2791 (giving both the doctor-patient relation and abortion providers' First Amendment rights the same constitutional review they receive in contexts having nothing to do with abortion).

For the same reasons that abortion providers are not a suspect class, we hold that those who provide larger numbers of abortions are not a suspect class, because a legislature might believe that a doctor with shoddy practices can engender more harm if he or she is performing many rather than a few abortions. Thus, this classification is subject only to rational basis review.

[12] The State has asserted the rationale that the classification here attempts to "balance the additional requirements that licensing would impose upon abortion providers with the desire to protect the health and welfare of women seeking abortions." Generally, such line drawing survives rational basis review because it

"account[s] for limitations on the practical ability of the State to remedy every ill." *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). See also *Women's Med. Ctr. v. Bell*, 248 F.3d 411, 419 (5th Cir.2001) (making this point in denying a similar claim that an abortion regulation limiting its scope to those providing 300 or more abortions a year violated the equal protection clause); *Greenville Women's Clinic*, 222 F.3d at 174, (upholding a similar classification of clinics providing five first trimester abortions or more per month and making analogies to federal employment discrimination law exempting small employers).

Of course, the fact that a classification rests in part on a numerical determination does not insulate it from any level of scrutiny whatsoever. The district court in *Women's Med. Ctr. of N.W. Houston v. Archer* struck down the classification at issue there because it found that the place the legislature had drawn its line was absurd, 159 F.Supp.2d 414, 465 n. 30 (S.D.Tex.1999).

However, the State's asserted rationale in this case—that smaller practices would be unduly burdened by the comprehensive legislation—is legitimate as a general matter, since the requirements are quite burdensome, especially for smaller private practices. While we might imagine more precise ways to estimate practice size than the raw number of abortions a doctor provides per month, we cannot say that the classification chosen by the Arizona legislature as a proxy for relative administrative burden is so absurd as to be irrational on its face.

c. Singling Out Abortion, Which is Sought only by Women

[13] If a challenged law discriminates on the basis of gender, then it must normally be subject to intermediate scrutiny:

*548 When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is [...] appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.

Personnel Adm'r v. Feeney, 442 U.S. 256, 274, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (citation omitted).

The statutory scheme plaintiffs challenge is gender neutral on its face. As discussed above, plaintiffs have not presented any evidence sufficient to show that the disparate impact of the challenged scheme on women reflects invidious discrimination. Thus, plaintiffs' claim that the law violates the equal protection rights of women must fail unless the statutory classification of abortion providers is not in fact neutral, but rather a "gender-based" classification, by virtue of the fact that only women seek abortion services. If so, then the scheme would normally be subject to intermediate scrutiny.

In Geduldig v. Aiello, the Supreme Court held that the denial of disability benefits for pregnant persons only was not equivalent to a gender classification under the equal protection clause, even though only women become pregnant. 417 U.S. 484, 496 n. 20, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974). However, imposing a disability on pregnant women might nevertheless amount to sex discrimination under the equal protection clause. Indeed, the Supreme Court recently implied that laws which facially discriminate on the basis of pregnancy, even those that facially appear to benefit pregnant persons, can still be unconstitutional if the medical or biological facts that distinguish pregnancy do not reasonably explain the discrimination at hand:

The dissent asserts that four of these schemes ... concern pregnancy disability leave only. But Louisiana provided women with four months of such leave, which far exceeds the medically recommended pregnancy disability leave period of six weeks. This gender-discriminatory policy is not attributable to any different physical needs of men and women, but rather to the invalid stereotypes that Congress sought to counter through the FMLA.

New Dep't of Human Resources v. Hibbs, 538 U.S. 721, 733 n. 6, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (citations and internal quotation marks omitted) (identifying various instances of unconstitutional state discrimination on the basis of gender, which provided Congress with the authority to respond with FMLA, remedial and prophylactic legislation passed under section 5 of the Fourteenth Amendment). *Hibbs* strongly supports plaintiffs' argument that singling out

abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender.

However, Congress, in enacting section 5 legislation, can respond to state action that is unconstitutional regardless of whether a court would be capable of adjudicating that unconstitutionality. See, e.g., Katzenbach v. Morgan, 384 U.S. 641, 649-50, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). Thus, *Hibbs* does not compel the conclusion that this is the sort of discrimination a court can remedy, given the nature of judicial deference to legislative distinctions embodied in equal protection and undue burden jurisprudence.

On the other hand, courts have taken notice of the fact that the right to obtain *549 an abortion is tied to the right to be free from sex discrimination in a manner unlike any other medical service that only one gender seeks. Abortion is unique in that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Casey*, 505 U.S. at 856, 112 S.Ct. 2791. However, even if laws singling out abortion can be judicially recognized as not gender-neutral, where such laws facially promote maternal health or fetal life, *Casey* replaces the intermediate scrutiny such a law would normally receive under the equal protection clause with the undue burden standard.

In fact, elements of intermediate scrutiny review particular to sex-based classifications, such as the rules against paternalism and sex-stereotyping, *J.E.B.*, 511 U.S. at 132, 114 S.Ct. 1419; *Frontiero*, 411 U.S. at 684, 93 S.Ct. 1764, are evident in the *Casey* opinion, and should be considered by courts assessing the legitimacy of abortion regulation under the undue burden standard. See *Casey*, 505 U.S. at 882, 112 S.Ct. 2791 (approving only of information provided to a woman seeking an abortion that is "truthful and not misleading"); *id.* at 898, 112 S.Ct. 2791 ("A State may not give to a man the kind of dominion over his wife that parents exercise over their children. Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution.").

[14] But given that *Casey* reaffirms the state's interest

in regulating to serve maternal health and promote fetal life, these interests would generally be significant enough to justify sex discrimination under the intermediate scrutiny standard. Therefore, we hold that when the state interest asserted to support a law singling out abortion from comparably risky procedures sought by men is maternal health, it is not necessary to determine whether the classification should be deemed gender-neutral, because the interests at stake should be balanced by simply applying the *Casey* undue burden standard. This is particularly appropriate because the burden on women engendered by the classification arises entirely out of the burden on abortion, as a service only women seek.

[15] Since maternal health is asserted as the state interest justifying the regulation, and since no material issue of fact regarding an invidious purpose behind the regulatory scheme has been created, this claim is not judicially cognizable separately from the undue burden claim, which we have addressed above.

V. Warrantless Searches

A provision of the regulatory scheme requires that licensees "[e]nsure that the Department's director or director's designee is allowed immediate access to the abortion clinic during the hours of operation." *Ariz. Admin. Code R9-10-1503(B)(4)*. No limit to this permission for a warrantless search appears in the regulation, so on its face, the regulation requires that licensees give DHS officials access to the entire abortion clinic. *Ariz. Rev. Stat. § 36-424(D)* also permits DHS officials broad discretion in entering health care institutions for the purpose of investigating alleged violations. *Section 36-424(B)* also authorizes DHS to inspect health care institutions, "to ascertain whether the applicant and the health care institution are in substantial compliance with the requirements of this chapter and the rules established pursuant to this chapter," and no limitation of this discretion appears on the face of the statute. The district court held that the regulation *550 was unconstitutional, but did not mention the statute specifically in its injunction. We affirm, and also find that the statute itself violates plaintiffs' Fourth Amendment rights.

[16][17] "The Fourth Amendment applies to commercial premises as well as to private homes." *United States v. Argent Chem. Labs., Inc.*, 93 F.3d 572, 575 (9th Cir.1996) (citing *See Camara v. City of Seattle*,

387 U.S. 541, 546, 87 S.Ct. 1741, 18 L.Ed.2d 930 (1967)). Thus, the state may not normally engage in warrantless searches of a private business. However, the state may engage in warrantless searches of a business when the business is closely regulated, under the administrative search exception to the Fourth Amendment's warrant requirement. *See United States v. Biswell*, 406 U.S. 311, 315, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972). Whether a business is closely regulated is "essentially defined by 'the pervasiveness and regularity of the [ ] regulation,' and the effect of such regulation upon an owner's expectation of privacy." *New York v. Burger*, 482 U.S. 691, 701, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (quoting *Donovan v. Dewey*, 452 U.S. 594, 600, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981)). In addition, the "duration of a particular regulatory scheme" is an "important factor." *Id.* In *Argent*, however, we downplayed the importance of the "duration" factor to this analysis. *Argent*, 93 F.3d at 576.

[18] The following sorts of industries are examples of those deemed closely regulated by either the Supreme Court or the Ninth Circuit: the vehicle dismantling industry, *Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601; firearms dealers, *Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87; the liquor industry, *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970); veterinary drug manufacturers, *Argent*, 93 F.3d 572; and liquefied propane gas retailers, *United States v. V-1 Oil Co.*, 63 F.3d 909 (9th Cir.1995).

With respect to the industry of abortion provision or the industry of private physicians, Arizona did not pervasively regulate the industry until passage of the legislation at issue in the case. *Ariz. Rev. Stat. §§ 32-1402, -1403* (providing for physician monitoring by a Board of Medical Examiners comprised of health professionals and members of the public). Moreover, the history of abortion jurisprudence limited close regulation of the industry by subjecting it to strict scrutiny. Thus, the duration element speaks against finding that abortion providers are a closely regulated industry.

The challenged scheme itself would regulate abortion providers quite closely, and defendants argue that this brings abortion providers within the closely regulated industry exception. However, while the Arizona regulatory scheme seems to be quite pervasive, in that

many aspects of practice are regulated, the "regularity" of regulation is yet to be shown.

Moreover, the theory behind the closely regulated industry exception is that persons engaging in such industries, and persons present in those workplaces, have a diminished expectation of privacy. *Burger*, 482 U.S. at 701, 107 S.Ct. 2636. That theory clearly does not apply to abortion clinics, where the expectation of privacy is *heightened*, given the fact that the clinic provides a service grounded in a fundamental constitutional liberty, and that all provision of medical services in private physicians' offices carries with it a high expectation of privacy for both physician and patient. Thus, a proper balancing of the factors, especially in the context of the purpose behind the closely regulated industry exception, indicates that abortion clinics are not a closely regulated industry. *551 The other federal courts to examine this question have reached the same conclusion. *Margaret S. v. Edwards*, 488 F.Supp. 181, 215-17 (E.D.La.1980); *Akron Ctr. for Reprod. Health v. City of Akron*, 479 F.Supp. 1172, 1205 (N.D. Ohio 1979), *aff'd in part and rev'd in part on other grounds*, 651 F.2d 1198 (6th Cir.1981), 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983).

Because abortion clinics are not a closely regulated industry, the scheme's authorization of warrantless searches of the clinics is unconstitutional under the Fourth Amendment, and we affirm the district court's grant of summary judgment to plaintiffs on this claim.

VI. Informational Privacy

Below, plaintiffs asserted that the scheme violates their patients' informational privacy rights under the Constitution by allowing DHS to access unredacted patient medical records and retain copies in their offices. *Ariz. Admin. Code* R9-10-1511(A)(4)(b), (c), requiring providers to submit to a private contractor copies of fetal ultrasound prints, *Ariz. Rev. Stat. §* 36-2301.02(B), (C), and allowing the warrantless searches described above. For the first time on appeal, plaintiffs argue that there is a fourth way in which the scheme violates informational privacy: requiring incident reports to the medical licensing board that identify patients by name, without any requirement of non-disclosure by the licensing board, *Ariz. Admin. Code* R9-10-1504(B), (C). The district court held that the first two requirements violated informational privacy rights. We affirm, and also hold that the fourth

requirement does not violate informational privacy rights.^{FN3} Because we have held that the scheme's authorization of warrantless searches violates the Fourth Amendment, we need not reach the third claim of an informational privacy violation.

FN3. For the reasons set forth, *infra*, we exercise our discretion to reach this claim raised for the first time on appeal.

[19] Individuals have a constitutionally protected interest in avoiding "disclosure of personal matters," including medical information. *See Whalen v. Roe*, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). "Like the right to decide whether to terminate a pregnancy, the right to informational privacy is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest." *Lawall II*, 307 F.3d at 790 (internal quotation marks omitted).

[20] We balance the following factors to determine whether the governmental interest in obtaining information outweighs the individual's privacy interest: (1) the type of information requested, (2) the potential for harm in any subsequent non-consensual disclosure, (3) the adequacy of safeguards to prevent unauthorized disclosure, (4) the degree of need for access, and (5) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access. *Id.*

[21] In *Lawall II*, we held that the right to informational privacy "applies both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public." *Id.* at 789-90. Even if a law adequately protects against public disclosure of a patient's private information, it may still violate informational privacy rights if an unbounded, large number of government employees have access to the *552 information. If information that a woman has had an abortion is made available to all DHS employees, the fact that they are government employees is no solace to the numerous neighbors, relatives, and friends of DHS employees, as well as to the employees themselves.

a. DHS Employee Access to Records

Ariz. Admin. Code R9-10-1511(A)(4)(b), (c) requires

providers to give DHS employees access to unredacted medical records.

The type of information that may be requested under the regulation is extremely broad, and includes patient identifying information such as names and full medical histories. Defendants maintain that DHS could only review and copy patient records as part of sampling them during a licensing survey or as part of a complaint investigation, but these limits are still very broad, especially as the scheme permits anonymous complaints. Moreover, while statutes giving DHS access to records limit the purpose for which access can be sought, the challenged regulation has no such limitations on its face.

The potential for harm in any subsequent non-consensual disclosure is obviously tremendous, and defendants do not dispute this, yet the safeguards to prevent unauthorized disclosure to members of the public are inadequate. Although the act prohibits DHS from publicly releasing specific, identifiable patient information, Ariz.Rev.Stat. §§ 36-449.03(I), 36-2301.02(G); it is unclear whether the statute provides for any criminal or civil penalties for such disclosure by DHS employees. *Cf. Lawall II*, 307 F.3d at 787 (noting the criminalization of an employee's disclosure of information); *see also Whalen*, 429 U.S. at 594-95, 97 S.Ct. 869 (same). The civil and criminal penalties to which defendants cite, Ariz.Rev.Stat. §§ 36-431, 36-431.01, appear to refer primarily to the health providers, and may not apply to DHS employees. DHS argues that it trains its employees in the need for patient confidentiality, but the only evidence of such training it has submitted is vague deposition testimony by DHS personnel stating that certain employees are required to keep information confidential, and that some staff are trained in confidentiality, without explaining which employees are trained, whether those with primary access to the records are the ones trained in confidentiality, or what that training entails.

Furthermore, even if the safeguards against public disclosure were adequate, there are no safeguards at all against release of information to government employees who have no need for the information, as there were in *Lawall II*. In *Whalen*, access to the files was confined to a very limited number of health department and investigatory personnel: seventeen Department of Health employees and twenty-four investi-

gators who only had access in cases of overdispensing investigations. 429 U.S. at 595, 97 S.Ct. 869. Also in *Whalen*, older files were kept in a locked vault, and the receiving room for the information was "surrounded by a locked wire fence and protected by an alarm system." *Id.* at 594, 97 S.Ct. 869.

Weighing even further against the medical record access is the fact that there is little, if any, need for much of this information, such as the names and addresses of patients. Defendants assert that they need access to patient identifying information because they need to ensure that providers are complying with the scheme's requirement that they document such information, but ensuring compliance with this administrative requirement is tenuously related to health interests, and DHS could ensure such compliance simply by *553 checking whether the required fields are present in a patient's chart, even if the content of those fields were marked out. Other monitoring goals could easily be satisfied using a coding system to track records without the release of patient identifying information.

Finally, while the public interest involved-promoting health and safety-is of course a strong one, we fail to see how insisting on unredacted materials promotes this need. We therefore hold that the regulation giving DHS unbounded access to unredacted patient records violates the informational privacy rights of patients.

b. Release of Ultrasound Prints to APEX Employees

[22] Ariz.Rev.Stat. § 36-2301.02(B), (C) requires licensees to submit ultrasound prints with patient identifying information on them to a private contractor, APEX, for review. DHS maintains that it "intends" to implement an anonymous coding system to eliminate the identifying information, but no binding policy exists yet in this regard.

The Scope of Work Solicitation describing APEX's contractual duties to DHS is alarmingly brief and lacking in safeguards to protect patients' private information. It requires APEX to store the prints for seven years; but only mandates even minimally secure storage for the first two years: "The storage will be secure, for at least two years that shall be in the Apex offices where there is always a person on duty." After the first two years the prints may be stored "off-site." No contractual terms limit the access of APEX em-

employees, and there is no mandate that APEX employees with access be screened or trained in confidentiality procedures. Thus, a host of private APEX employees may presumably access the ultra-sound prints.

An analysis of section 36-2301.02(B), (C) under the five factors relevant to informational privacy burdens demonstrates that these statutory provisions violate informational privacy rights as well. The type of information requested is obviously very sensitive, and the potential for harm in any subsequent non-consensual disclosure is tremendous. However, the safeguards to prevent unauthorized disclosure are limited to a single provision, which simply states that "[p]ersonally identifiable patient information shall not be released by the department or its contractor," and as explained above, the contract between APEX and DHS does not demonstrate that there are any more adequate and specific safeguards. While the need for access is high if the State is to stringently enforce the express statutory mandate that ultrasounds be taken after twelve weeks, the need for ultrasound prints to be trackable to the patient level is hard to fathom. Moreover, there is clearly no need for all APEX employees to have this sort of access in order to enforce the ultrasound requirement.

Because an assessment of these five factors indicates that section 36-2301.02(B), (C) violates patients' information privacy rights and is unconstitutional, we affirm the district court's grant of summary judgment to plaintiffs on this claim.

c. Release of Patient Identifying Information to the Licensing Board After an "Incident"

[23] Ariz. Admin. Code R9-10-1504(B), (C) requires licensees to release information, including the name of a patient, to a professional licensing board if there is an "incident" with the patient. An incident is defined as "an abortion related patient death or serious injury to a patient or viable fetus." *Id.* R9-10-1501(20). Plaintiffs do not appear to have raised this *554 informational privacy claim below. We normally do not reach claims raised for the first time on appeal, but we may exercise discretion to do so where manifest injustice would otherwise result. Alexopoulos v. Alexopoulos v. Riles, 784 F.2d 1408, 1411 (9th Cir.1986). Because the informational privacy rights of patients, who are not parties to the suit but are being represented by their physicians, are at issue, we exercise

our discretion to reach this claim and prevent an invasion of their privacy rights.

Although professional licensing boards are not subject to the scheme's prohibitions on information disclosure, Ariz. Rev. Stat. §§ 36-449.03(T), 36-2301.02(G) (stating that the department and its contractor will not release patient identifying information); other established safeguards prohibit release of patient information to the public when any incident is reported to either the Arizona Medical Board or the Board of Osteopathic Examiners in Medicine and Surgery. Ariz. Rev. Stat. §§ 32-1451.01(C), 32-1855.03(D).

Assessing this regulation under the required five factors, we find that the type of information requested is narrow (a description of the incident, the name of the patient involved, and any follow up actions taken), and it is only requested when there is death or serious injury involved. Moreover, the potential for harm in any subsequent non-consensual disclosure is minimized by the existing safeguards to prevent unauthorized disclosure. We recognize that the state interest in having the professional physician licensing board follow up on serious incidents is strong, so that substandard physician practice can be disciplined, and that there is an express statutory mandate militating toward access. Therefore, we hold that Ariz. Admin. Code R9-10-1504(C) does not violate patients' informational privacy rights and is constitutional.

VII. Unconstitutionally Vague Provisions

[24] The Fourteenth Amendment is violated by laws so vague that persons "of common intelligence must necessarily guess at their meaning and differ as to their application." Planned Parenthood v. Arizona, 718 F.2d 938, 947 (9th Cir.1983); see also Forbes v. Napolitano, 236 F.3d 1009, 1011 (9th Cir.2000). A law is unconstitutionally vague if it fails to provide a reasonable opportunity to know what conduct is prohibited, *id.* (citing Giaccio v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966)), or is so indefinite as to allow arbitrary and discriminatory enforcement, *id.* (citing City of Chicago v. Morales, 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999)). On the other hand, "we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

[25] Given the potential for harassment of abortion providers, it is particularly important that enforcement of any unconstitutionally vague provisions of the scheme be enjoined. See *Women's Med. Ctr.*, 248 F.3d at 422 (making a similar point). Also, "[i]f a statute subjects transgressors to criminal penalties, as this one does, vagueness review is even more exacting." *Forbes*, 236 F.3d at 1011.

The district found unconstitutionally vague a provision of the statutory scheme requiring a licensee to "ensure that a patient is afforded the following rights, and is informed of these rights: [ ] To be treated with consideration, respect, and full recognition of the patient's dignity and individuality." *Ariz. Admin. Code* R9-10-1507. We affirm the district court's holding that this provision is unconstitutionally vague.

*555 In *Women's Med. Ctr. of N.W. Houston*, the Fifth Circuit struck down a similar provision because it subjected "physicians to sanctions based not on their own objective behavior, but on the subjective viewpoints of others." 248 F.3d at 422. In *Forbes*, this circuit struck down as unconstitutional provisions including the ambiguous words "experimentation," "investigation," and "routine." 236 F.3d at 1010. *Forbes* found these words, which were not defined in the statute, ambiguous, especially in view of the fact that the "distinction between experimentation and treatment changes over time." *Id.* at 1012.

Similarly here, understandings of what "consideration," "respect," "dignity," and "individuality" mean are widely variable, and they are not medical terms of art. This is especially problematic since the provision requires "full recognition" of dignity and individuality. This provision is too vague and subjective for providers to know how they should behave in order to comply, as well as too vague to limit arbitrary enforcement. Thus, we agree with the district court that it is unconstitutionally vague and cannot be enforced. By failing to brief them, plaintiffs have abandoned their vagueness challenges to other parts of the statute, so we do not reach these claims. See *Kline v. Johns-Manville*, 745 F.2d 1217, 1221 (9th Cir.1984).

VIII. Unconstitutional Delegation

The regulatory scheme requires that when abortions are performed in an abortion clinic, a physician with admitting privileges at a hospital in Arizona be present

until all patients are stable and ready to leave the recovery room. *Ariz. Admin. Code* R9-10-1506(B)(2). Although this regulation does not formally require physicians to have admitting privileges in order to perform abortions, it has the effect of requiring them for physicians at all but the largest clinics because it requires someone with admitting privileges to be physically present in an abortion clinic when the abortion is performed. Plaintiffs challenge the regulation as an unconstitutional delegation of authority to private hospital boards.

a. Procedural Due Process

[26] When a State delegates its licensing authority to a third party, the delegated authority must satisfy the requirements of due process. See *Wash. ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121-22, 49 S.Ct. 50, 73 L.Ed. 210 (1928) ("The section purports to give the owners ... authority-uncontrolled by any standard or rule prescribed by legislative action.... They are ... free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment.") (citation omitted); see also *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

[27] Arizona law requires hospitals to refrain from arbitrary provision of admitting privileges and requires them to exercise their discretion based on reasons related to the hospital's interests. See *Holmes v. Hoemako Hosp.*, 117 Ariz. 403, 573 P.2d 477, 479 (1978) (explaining that "the standard for determining whether a hospital regulation [is] reasonable or arbitrary" is whether it "pertain[s] to the orderly management of the hospital" and whether "in most instances [it was] made for the protection of patients") (internal quotation marks omitted). Arizona law also requires hospital procedures to "comport with due process, i.e., notice and hearing." *Id.* However, judicial review of exclusionary hospital policies "must be narrow." *Id.* at 478. "If the hospital has *556 refused staff privileges on the basis of factual findings supported by substantial evidence and reached its decision by the application of a reasonable standard, i.e., one that comports with the legitimate goals of the hospital and the rights of the individual and the public, then the judicial inquiry should end." *Peterson v. Tucson Gen. Hosp., Inc.*, 114 Ariz. 66, 559 P.2d 186,

191 (App.1976) (citing *Blende v. Maricopa County Med. Soc'y*, 96 Ariz. 240, 393 P.2d 926 (1964)).

Given the Arizona caselaw cited above, we agree that Arizona law prohibits hospitals from violating procedural due process, and therefore, the delegation scheme does not violate physicians' procedural due process rights. See *Douglas v. Noble*, 261 U.S. 165, 168-69, 43 S.Ct. 303, 67 L.Ed. 590 (1923) (upholding a delegation of licensing authority to a licensing board because the highest court of the State had provided for judicial review and construed the statute to not confer arbitrary power on the board).

b. Substantive Due Process

However, although judicial review of hospital regulations in Arizona stems from their "quasigovernmental" nature, *Blende*, 393 P.2d at 929, Arizona law does allocate to hospitals the authority to make substantive exclusions in the hospital's interest. E.g., *Peterson*, 559 P.2d at 191 (allowing exclusions based on rules that "comport[] with the legitimate goals of the hospital and the rights of the individual and the public"). Moreover, Arizona explicitly gives all hospitals the right to refuse to allow abortions to be performed at the hospital, Ariz.Rev.Stat. § 36-2151, and has prohibited all abortions in public university hospitals except those necessary to save the life of the woman having the abortion, Ariz.Rev.Stat. § 15-1630.

[28] Arizona itself does not have the power to prohibit any providers from performing abortions merely because it disapproves of abortion and would like to place obstacles in the way of women seeking abortions. *Casey*, 505 U.S. at 877, 112 S.Ct. 2791 (holding that laws with the "purpose" of placing an obstacle in the path of a woman seeking an abortion are invalid). Thus, Arizona may not delegate such a power to hospitals. See *Hallmark Clinic v. N.C. Dep't of Human Res.*, 380 F.Supp. 1153, 1158-59 (E.D.N.C.1974) ("The state cannot grant hospitals power it does not have itself."), *affirmed on other grounds*, 519 F.2d 1315 (4th Cir.1975).

[29] Because this is a facial constitutional challenge, plaintiffs must show that there are no circumstances under which the delegation could be applied constitutionally. *Salerno*, 481 U.S. at 745, 107 S.Ct. 2095. Plaintiffs have not submitted any evidence tending to show that any hospitals in Arizona will or do deny

admitting privileges to physicians based on their status as abortion providers, or based on any other policies seeking to restrict the right to abortion. Nor has it been shown that this would be legal under Arizona law. Since they have submitted no evidence that any hospitals will exercise the authority delegated to them by Arizona in an unconstitutional manner, plaintiffs cannot show on this record that there is "no set of circumstances" in which the delegation will be constitutional, and we affirm the district court's grant of summary judgment to defendants on this facial challenge.

IX. Severability

Plaintiffs challenge the severability of the unconstitutional portions of the scheme from the constitutional portions of the scheme. Severability is an issue of state law. *557 *Dep't of Treas. v. Fabe*, 508 U.S. 491, 509 n.8, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993). Because we remand to the district court on plaintiffs' undue burden claim, we will not address the question of severability, since it is not yet clear if further portions of the scheme are unconstitutional.

CONCLUSION

We reverse the district court's grant of summary judgment to defendants on plaintiffs' undue burden claim. We affirm the district court's grant of summary judgment to defendants on the equal protection claims and the standardless delegation claim. We affirm the grant of summary judgment to plaintiffs on their Fourth Amendment and informational privacy claims. We also affirm the partial grant of summary judgment to plaintiffs on their vagueness claims, and the partial grant of summary judgment to defendants on these claims. We remand to the district court for further proceedings on the undue burden claim. Each party shall bear its own costs on appeal.

**AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.**

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