PLANNED PARENTHOOD V. ABBOTT: EVALUATING THE ADMITTING PRIVILEGES REQUIREMENT UNDER THE UNDUE BURDEN STANDARD

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I. INTRODUCTION

In Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, the United States Court of Appeals for the Fifth Circuit addressed whether a Texas statute imposed an undue burden on women’s right to abortion by requiring physicians who perform or induce abortions to have admitting
privileges. The court reviewed the constitutionality of the statute by applying the undue burden standard for evaluating abortion regulations and concluded that the admitting privileges requirement did not violate appellee's substantive due process rights. The way the court articulated and applied the undue burden test is inconsistent with Supreme Court precedent. If the Supreme Court upholds this diluted application of the undue burden test, ideologically driven legislatures will continue to target abortion providers with the aim of choking out the abortion right. The admitting privileges requirement is yet another misguided restriction aimed at sending women's rights back into the pre-Roe era of back-alley abortions.

Section II of this Note provides a summary of the admitting privileges provision, the grounds for challenging the provision, and the procedural history. Section III provides a brief legal history of abortion jurisprudence and the undue burden standard to contextualize the court's decision. Section III also addresses the confused application of that standard. Section IV examines the court's determination that the admitting privileges requirement of H.B. 2 would not place an undue burden on women seeking abortions. Finally, Section V critiques the court's application of the undue burden standard. This Note concludes by addressing the urgent need to clarify the undue burden standard to halt the spread of disingenuous, medically unfounded restrictions on safe and legal abortions.

II. FACTS AND HOLDING

Abortion providers and facilities (appellees) brought suit for declaratory judgment and injunctive relief on behalf of themselves and their patients against the Attorney General of Texas and other individuals (appellants). Appellees sought to enjoin two provisions of 2013 Texas House Bill No. 2 (H.B. 2) and to have those provisions which regulated surgical abortions and abortion-inducing drugs declared unconstitutional.

2. Id. at 590, 593-94.
3. Id. at 590, 586.
4. Id. at 586-67. H.B. 2 "gained national headlines when Texas State Senator Wendy Davis spoke against it in the Legislature for [eleven] hours." Lawrence Hurley & Lisa Garza, U.S. Supreme Court Declines To Block Texas Abortion Law, WESTLAW J. MED. MALPRACTICE, Nov. 21, 2013, at 6, 6, available at 2013 WL 6118551, at *2. Despite Senator Davis' filibuster, "H.B. 2 was enacted during a July
This Note focuses on the first provision of H.B. 2, which required that physicians “have admitting privileges at a hospital that provides obstetrical or gynecological services within thirty miles of the location of the abortion.” Appellees “filed suit on the grounds that the provision[] violate[d] their Fourteenth Amendment rights by . . . imposing . . . [an] undue burden on access to abortion” and moved for a preliminary injunction. 6

Appellees asserted that the provision, which exposed physicians to criminal liability, would fail constitutional review and should be found unenforceable. 7 Testimony in support of appellees’ position evidenced the “extremely low” risk of complications after an abortion. 8 Additionally, the testimony noted the ability of emergency room physicians to treat abortion-related complications (which are very similar to commonly seen miscarriage symptoms). 9 Testimony also addressed the fact that the admitting privileges requirement would cause the closure of “one-third of the state’s abortion facilities,” preventing nearly “a third of the number of women who seek abortions in the state each year” from obtaining one. 10 Lastly, appellees established the


8. Abbott II, 748 F.3d 583, 590-91 (5th Cir. 2014) (“2.5 percent of women who have a first-trimester surgical abortion undergo minor complications, while fewer than 0.5 percent experience a complication that requires hospitalization.”).

9. Id. at 591 (“ER physicians have experience in treating abortion-related complications . . . .”).

10. Id. (reporting testimony of a sociology professor). Providers furthered
difficulty of “complying with the admitting privileges requirement.”

On the other hand, appellants defended the admitting privileges requirement with continuity of care and credentialing arguments. Appellants asserted that “80% of serious medical errors involve miscommunication” when transferring patients, that abortion providers with admitting privileges have better connections with specialists at the hospitals, and that emergency rooms do not have enough specialist physicians on call. Appellants also argued that admitting privileges are necessary to “screen-out” some abortion providers. Appellants then stated that the study cited by appellees, which detailed the small percentage of abortions that result in complications, was outdated. In an attempt to dispute appellees’ study, appellants cited to another study “indicating that only one-third to one-half of abortion patients return to their clinic for follow up care.” Lastly, appellants disputed appellees’ testimony about clinic closures by stating that clinics unaffected by H.B. 2 could simply perform more abortions “in the face of higher demand” from women forced to travel due to the lack of abortion providers in their area.

To evaluate this testimony, the district court carefully differentiated the rational basis analysis threshold requirement from the purpose and effects prongs of the undue burden test and

testified that at least six of their clinics would close. Id.
11. Abbott II, 748 F.3d 583, 591 (5th Cir. 2014).
12. Id. at 592.
13. Id. Note that appellants’ study was not in reference to abortion, but to complications in general. See id.
14. Id. According to appellants, doctors who cannot obtain admitting privileges are untrained, incompetent, and not qualified to perform abortions. Id. Appellants suggested that the admitting privileges requirement will ensure only “credentialed and board certified doctors” are providing abortions. Id. (quoting testimony of Dr. John Thorp). Appellants’ logic is flawed and intentionally misleading as there are many other reasons a hospital might deny an application for admitting privileges, including physician residency, not meeting a minimum number of surgical procedures, and an insufficient number of annual hospital admissions. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 900-01 (W.D. Tex. 2013), rev’d in part, 748 F.3d 583 (5th Cir. 2014).
15. Abbott II, 748 F.3d at 593.
16. Abbott II, 748 F.3d 583, 593 (5th Cir. 2014). Appellants seemingly implied that medical technology has regressed in the last thirty-eight years and appear to assume without evidence that failure to return to the clinic for follow-up visits is indicative of complications.
17. Id.
assessed the legislature’s “real purpose” for enacting the law.\textsuperscript{18} Ultimately, the district court concluded that the admitting privileges requirement had “no rational relationship to improved patient care” nor did it “rationally relate to the State’s legitimate interest in protecting the unborn.”\textsuperscript{19} Furthermore, even if there was a rational basis, the district court concluded that the admitting privileges requirement would be an undue burden and would fail both the purpose and effect prongs of the test.\textsuperscript{20} Lastly, the district court did not address appellees’ unlawful delegation claims, but expressed “grave reservations about allowing a hodge podge of diverse medical committees and boards to determine, based solely on admitting privileges, which physicians may perform abortions.”\textsuperscript{21}

The state appealed the district court’s decision to the Court of Appeals for the Fifth Circuit, asking the court to stay the injunction pending resolution of the appeal.\textsuperscript{22} The Fifth Circuit granted the stay, effectively allowing the law take effect immediately.\textsuperscript{23} On appeal to the United States Supreme Court, appellees moved for an order to vacate the Fifth Circuit’s stay, which would have reinstated the injunction and halted the state from enforcing the admitting privileges requirement.\textsuperscript{24} The Supreme Court denied appellees’ motion to vacate the stay.\textsuperscript{25} However, Justices Ginsburg, Sotomayor, and Kagan joined Justice Breyer’s dissent, which stated that “at least four Members of the Court” wished to consider the constitutionality of H.B. 2 regardless of the Fifth Circuit’s ultimate decision.\textsuperscript{26}

On appeal to the Fifth Circuit, appellees urged the court to affirm the district court’s holding and strike down the admitting privileges requirement as unconstitutional because it did “not

\begin{itemize}
  \item \textsuperscript{19} \textit{Id.} at 900.
  \item \textsuperscript{20} \textit{Id.} at 901.
  \item \textsuperscript{21} \textit{Id.} at 902. Appellees argued that the admitting privileges requirement “unlawfully delegate[d] authority to hospitals to determine who may perform abortions.” \textit{Id.} at 899.
  \item \textsuperscript{22} Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (\textit{Abbott I}), 734 F.3d 406 (5th Cir.), \textit{cert. denied}, 134 S. Ct. 506 (2013).
  \item \textsuperscript{24} \textit{Id.}.
  \item \textsuperscript{25} \textit{Id.} at 506 (majority opinion).
  \item \textsuperscript{26} \textit{Id.} at 509 (Breyer, J., dissenting).
\end{itemize}
further the state’s interest in women’s health” and it “place[d] a substantial obstacle in the path of women seeking an abortion.”

First, appellees argued that the rational basis standard as defined by appellants was inappropriate for abortion regulations because a woman’s right to “decide whether to continue a pregnancy” is fundamental and warrants a heightened level of scrutiny. Next, appellees asserted that the correct level of scrutiny for abortion regulations calls on courts to “carefully examine[] the extent to which the restriction is actually (as opposed to hypothetically) tailored to advance the purported state interest and whether it is consistent with accepted medical practice.”

Finally, appellees argued that the admitting privileges requirement failed the effect prong of the undue burden test.

Conversely, appellants requested that the Fifth Circuit reverse the district court holding. First, appellants argued that legislative decisions may be based on rational speculation unsupported by evidence or empirical data because “[r]ational-basis review asks only whether it is possible to imagine that hospital admitting privileges could improve patient care.” Second, appellants argued the district court erred in shifting the burden of proving improper purpose to the state and noted appellees failed to even put forward a purpose prong argument. Lastly, appellants argued that appellees failed to show that the admitting privileges requirement had the effect of placing an undue burden on women seeking abortion services.

The Fifth Circuit concluded that the admitting privileges requirement of H.B. 2 did not impose an undue burden on the


28. Id. at 15. “Casey did not overrule Akron and Danforth as they relate to regulations designed to promote women’s health.” Id. at 16.

29. Id. at 15-16.

30. Id. at 22-26. Appellees noted, “[t]he inability of one-third of women to exercise their constitutional right to effectuate their choice is the epitome of a ‘state regulation imposing an undue burden on a woman’s ability to make this decision that reaches into the heart of the Due Process Clause.” Id. at 24 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992)).


32. Id. at 12.

33. Id. at 15-16.

34. Id. at 16.
right to abortion. The court found the requirement was rationally related to the state's claimed interests in maternal health and did not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion. 35

III. LEGAL BACKGROUND

The Supreme Court's landmark decision in Roe v. Wade guaranteed the right to abortion by recognizing that the constitutional right of privacy included "a woman's decision whether or not to terminate her pregnancy." 36 The Court cited a long line of jurisprudence to support its decision in Roe, beginning with the basic right to individual liberty, which evolved to include the freedom to control family life and later the rights to procreation, contraception, and abortion. 37 The Court's decision in Roe was intended to give women "control over their . . . lives and . . . free them from society's expectations of motherhood." 38 However, the Court noted that, "[a]t some point in pregnancy, [state interests in safeguarding health, in maintaining medical standards, and in protecting potential life] become sufficiently compelling to sustain regulation." 39

35. See Abbott II, 748 F.3d 583, 590 (5th Cir. 2014).
37. Id. at 152-53 (citing Eisenstadt v. Baird, 405 U.S. 438, 448-53 (1972)) (holding that "[i]t would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication," and "it is the right of an individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that ban against giving contraceptive advice to married couples violated the right of marital privacy); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (holding that "[m]arriage and procreation are fundamental" and "basic civil rights of man"); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 351, 353-54 (1925) (holding that parents' and guardians' right to decide how their children are educated is a liberty interest protected by the Fourteenth Amendment); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience"); Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) (holding that "no right is held more sacred . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others").

By recognizing abortion as a fundamental right, Roe subjected laws that limit abortion to strict scrutiny review.\(^40\) Under strict scrutiny, abortion regulations were justified only by a compelling state interest, narrowly tailored to express only those legitimate interests in health and potential life.\(^41\) For example, in Planned Parenthood of Central Missouri v. Danforth, the Supreme Court found that “record keeping and reporting requirements [were] reasonably directed toward the preservation of maternal health” so long as the requirements were not administered in an unduly burdensome way.\(^42\) In City of Akron v. Akron Center for Reproductive Health, however, the Supreme Court struck down an Ohio ordinance requiring a woman’s “informed written consent” prior to a physician performing an abortion, where the information was designed to dissuade women from having an abortion.\(^43\) The Court held that such a requirement was beyond the scope of the state’s permitted interest in protecting maternal health.\(^44\)

Akron was later overruled in part by the Supreme Court’s decision in Planned Parenthood v. Casey.\(^45\) The Court in Akron invalidated an ordinance requiring physicians to provide women with information designed to dissuade them from having an abortion.\(^46\) In Casey, however, the Court allowed states to mandate the provision of such information as long as it is truthful and nonmisleading.\(^47\) The Court upheld four provisions of a Pennsylvania statute, which required informed consent twenty-four hours before the procedure, parental consent for

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41. Id. at 155-56 (majority opinion).


44. Akron, 462 U.S. at 444.

45. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992); cf. Tucson Woman’s Clinic v. Eden, 379 F.3d 531, 539-40 (9th Cir. 2004) (noting that because Casey only overruled Akron to a certain extent, the “undue burden standard is not triggered at all if a purported health regulation fails to . . . promote an interest in maternal health on its face”).

46. Akron, 462 U.S. at 442-43.

47. Casey, 505 U.S. at 882.
minors, imposed reporting requirements on providers, and defined a medical emergency exception. The Court invalidated the spousal notice requirement under the newly created undue burden standard.

The Court’s decision in *Casey* shifted the standard from strict scrutiny to undue burden. The Court fashioned undue burden as an independent standard of review, somewhere between rational basis and strict scrutiny. The plurality opinion defined an “undue burden” (i.e., an unconstitutional restriction) as a restriction that places “a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” However, the Court did not clearly articulate an analysis for this new standard. The Court merely stated that a restriction having the purpose or effect of placing a substantial obstacle in a woman’s path toward terminating a pregnancy is an undue burden. The Court did not objectively define the term “substantial obstacle.” This lack of clarity has led to a circuit split.

The Ninth and Seventh Circuits analyze whether a restriction is an undue burden by weighing the severity of the burden against “the strength of the state’s justification.” On the other side of the split, the Fifth and Sixth Circuits merely apply rational basis review and look no further into the state’s justification for the restriction. The latter approach lends itself

49. *Id.* at 895. The Court considered that the prospect of notification itself might deter women from seeking abortions, *id.* at 891-94, as well as the possibility that a husband might use “physical force or psychological pressure or economic coercion” to prevent his wife from obtaining an abortion, *id.* at 897.
50. *Id.* at 876.
52. *Casey*, 505 U.S. at 877.
54. *Cf. id.* at 964-65 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (predicting the difficulty in applying the “undue burden” test).
55. *See* Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 912 (9th Cir.) (citing Tucson Woman’s Health Clinic v. Eden, 379 F.3d 531, 542 (9th Cir. 2004)), *cert. denied*, 135 S. Ct. 870 (2014); Planned Parenthood of Wis., Inc. v. Van Hellen, 738 F.3d 786, 789-91, 797-98 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014).
to watered-down analysis that threatens the ability of women to exercise their constitutional right. At the center of the flawed interpretation in this case is the Fifth Circuit’s holding that abortion regulations need only be supported by “rational speculation.”

As exemplified by the controversy in Planned Parenthood v. Abbott, the undue burden standard’s lack of clarity and lack of objective parameters have led to decisions that erode the constitutional protection afforded by Roe and Casey. The right to abortion is firmly grounded in the reasoning and tradition of precedent dating as far back as 1891. However, if the Supreme Court does not thoughtfully articulate undue burden as Casey intended, the standard will prove insufficient to protect women’s “reproductive autonomy” from “state efforts to police abortion.”

Currently, Casey’s undue burden test is “contested constitutional territory.” This Note navigates through the murky undue burden analysis of Casey by following the leading scholarship in the area, which suggests the undue burden standard is a form of heightened scrutiny consisting of two primary parts, (1) the “nexus analysis” of heightened rationality review, and (2) the “two-pronged purpose and effects test.”

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57. Abbott II, 748 F.3d 583, 594 (5th Cir. 2014). According to the Fifth Circuit, restrictions on the right to abortion need not be supported by “evidence or empirical data.” Id. (quoting FCC v. Beach Commc’ns, 508 U.S. 307, 315 (1993)). Rather, “rational speculation” means the rationale behind the regulation need only be “conceivable.” Id. (citing Beach Commc’ns, 508 U.S. at 313). Thus, the Abbott II court suggests that the proper way to approach the undue burden analysis is by suspending all disbelief, presuming the law valid, and imagining any possible justification. See id. This exercise in judicial imagination seems intended to stretch the meaning of “legitimate” state interest so as to conform to the ideological agenda of the legislature. As the Ninth Circuit pointed out, this approach is “inconsistent with the undue burden test as articulated and applied in Casey and Gonzales.” Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 914 (9th Cir.), cert. denied, 135 S. Ct. 870 (2014).

58. See Priscilla J. Smith, If the Purpose Fits: The Two Functions of Casey’s Purpose Inquiry, 71 WASH. & LEE L. REV. 1135, 1156 (2014) (arguing the Fifth Circuit misinterpreted Casey and applied a standard of review even lower than traditional rational basis).


60. Freeman, supra note 51, at 297-99.

61. Id. at 314.

62. Id. at 290 (arguing that rational basis with bite is most suitable for use in the abortion context); see Gillian E. Metzger, Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence, 94 COLUM. L. REV. 2025, 2081-84.
A. THE THRESHOLD OF UNDUE BURDEN: RATIONAL BASIS REVIEW

“Certain language in Casey implied that rational basis review” was part of “the undue burden test.”63 “When defining the undue burden standard, the plurality repeatedly used terms like ‘legitimate interest’ and ‘reasonable’ or ‘rational relationship’ that traditionally appear in rational basis cases.”64

1. SEARCHING INQUIRY: RATIONAL BASIS REVIEW WITH NEXUS ANALYSIS

Nexus analysis, or “searching inquiry,” requires courts to “truly assess—rather than simply presume—the legitimacy of the state’s interest.”65 Thus, rational basis review with a nexus analysis is the most suitable for effective undue burden analysis of abortion regulations.66 Courts implement this form of heightened rationality review when they are “reluctant to elevate formally the status of a right . . . , but still perceive[] ‘the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment.’”67

However, the Court did not explicitly include a searching inquiry requirement within the vaguely articulated undue burden test; the Court implicitly incorporated it as a part of its undue burden analysis by repeatedly assessing the state’s interest to ensure its validity.68 For example, in Casey, the Court struck down a spousal notification requirement after examining the rationale underlying the legislature’s action and finding that a woman’s liberty and “bodily integrity” outweighed the state’s interest in notifying her husband.69

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63. Freeman, supra note 51, at 292.
64. Id. (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 passim (1992)).
65. Id. at 294.
66. Id.
67. Id. at 302 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 472 (1985) (Marshall, J., concurring in part and dissenting in part)).
68. See Freeman, supra note 51, at 294-95.
Similarly, the Seventh Circuit, in *Planned Parenthood of Wisconsin v. Doyle*, refused to defer to the legislature when it struck down Wisconsin’s ban on intact dilation and extraction procedures without ever having to reach the purpose and effects test.\(^{70}\) The Seventh Circuit analyzed the actual relationship between the statute and the state’s interest in potential life, and found the statute was not “rationally designed to protect fetal life” and seemed “arbitrary to the point of irrationality.”\(^{71}\)

2. **Deferential Inquiry: Rational Basis Review Without Nexus Analysis**

Deferential rational basis review is less suitable for effective undue burden analysis of abortion regulations because it “presume[s] legislative legitimacy and require[s] only a superficial nexus between the state’s regulatory means and ends.”\(^{72}\) In *Gonzales v. Carhart*, the Supreme Court stated that regulations on abortion procedures are constitutional as long as the state has a rational basis to act and the regulation does not impose an undue burden.\(^{73}\) The rational basis review in *Gonzales* purported to assess whether the Partial Birth Abortion Ban Act of 2003 furthered the state’s legitimate interest in protecting fetal life.\(^{74}\) However, as Justice Ginsburg noted in her dissent, the act does not actually further the state interest: “The law saves not a single fetus from destruction, for it targets only a method of performing the abortion.”\(^{75}\)

Fortunately, *Gonzales’s* inadequate level of scrutiny can be cured by an exacting purpose prong analysis of the undue burden test, as evidenced by the Eighth Circuit’s decision in *Planned Parenthood of Greater Iowa, Inc. v. Atchison*.\(^{76}\) *Atchison* involved a regulation which would subject all plans for the construction of abortion clinics to state review through a certificate of need

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70. See Planned Parenthood of Wis. v. Doyle, 162 F.3d 463, 471 (7th Cir. 1998).
71. Id. at 467, 470-71.
72. Freeman, supra note 51, at 285.
74. Id.
75. Id. at 181 (Ginsburg, J., dissenting). Justice Ginsburg criticized the majority for allowing “moral concerns” to control the decision and override fundamental rights, noting, “the concerns expressed are untethered to any ground genuinely serving the Government’s interest in preserving life.” Id. at 182.
76. Planned Parenthood of Greater Iowa, Inc. v. Atchison, 126 F.3d 1042 (8th Cir. 1997).
process. The regulation survived rational basis scrutiny, but was invalidated for having "the intended effect of impeding or preventing access to abortions." The Eighth Circuit was concerned by the response of state authorities to anti-choice lobbying efforts. The district court found that, though the state did not act in outright bad faith, its response to the lobbying efforts sufficiently suggested an improper purpose. The Eighth Circuit concluded that the requirement served "no purpose other than to make abortions more difficult." Atchison illustrates how "a rigorous purpose prong analysis can compensate for inadequate rationality review."

B. THE PRONGS OF UNDUE BURDEN: PURPOSE AND EFFECT

If the statute survives undue burden standard review, the court must then analyze it under both the "purpose" and "effect" prongs of the undue burden standard, which ask whether an abortion regulation has either the purpose or the effect of placing a "substantial obstacle" in the path of a woman who seeks to terminate a pregnancy.

Generally, the state has authority to regulate medical procedures. However, state authority to regulate the abortion procedure is subject to a limitation: the regulation must "further the health or safety" of the woman seeking the procedure. Thus, a regulation on the abortion procedure pre-viability is invalid if it places a substantial obstacle in the path of such women. Thus, when states enact "[u]nnecessary health regulations," obstructing abortion access by forcing women to overcome substantial obstacles to exercise their right to abort an unwanted or unsafe pregnancy, they violate the Constitution. Using health or safety as pretext for the anti-abortion agenda,

77. Planned Parenthood of Greater Iowa, Inc. v. Atchison, 126 F.3d 1044 (8th Cir. 1997); see Freeman, supra note 51 at 312.
78. Atchison, 126 F.3d at 1049.
79. Id.
80. Id.
81. Id.
82. Freeman, supra note 51, at 312.
84. Id. at 878.
85. Id.
86. See id. at 877. "Previable" refers to a fetus that is not yet able to survive outside the uterus.
87. Id. at 878.
aimed at incrementally choking out the abortion right, is unethical and unconstitutional, but not unprecedented in the present political climate.

To prevent further infringement on the right, courts should thoroughly assess "the legislature's real intent" in the purpose prong of the undue burden analysis.\textsuperscript{88} Courts should then employ the effects prong of the analysis to determine whether the burden is "substantial."\textsuperscript{89} The burden does not have to be "absolute" or "severe" to be unconstitutional.\textsuperscript{90} A statute is an "unconstitutional undue burden on the abortion right" if it fails "either the purpose prong or the effects prong."\textsuperscript{91}

Additionally, it is important to distinguish the rationality review, which is concerned with the legitimacy of the state's interest, from the purpose prong, which scrutinizes the legitimacy of the state's purpose.\textsuperscript{92} Deference and speculation have no place in rationality review and purpose prong analysis.\textsuperscript{93}

1. \textbf{PURPOSE PRONG ANALYSIS}

If a statute has the purpose of placing a substantial obstacle before a pregnant woman it is an undue burden on the right to abortion.\textsuperscript{94} In the purpose prong of the undue burden analysis courts are called on to evaluate the state's motive for enacting the restriction.\textsuperscript{95} Purpose prong analysis can serve to ensure that courts "faithfully" apply the searching inquiry the \textit{Casey} court intended when formulating the undue burden test.\textsuperscript{96} However, many courts neglect to apply purpose prong analysis due to the difficulty inherent in evaluating legislative intent.\textsuperscript{97}

When a state attempts to justify an abortion regulation on medical grounds, it must provide evidence showing that these medical interests are legitimate and that the statute does not impose an undue burden on women seeking abortions.\textsuperscript{98} A

\textsuperscript{88} Freeman, supra note 51, at 301 (emphasis added).
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id. (emphasis added).
\textsuperscript{92} Id. at 307.
\textsuperscript{93} Freeman, supra note 51, at 307.
\textsuperscript{95} Freeman, supra note 51, at 295-96.
\textsuperscript{96} Id. at 296.
\textsuperscript{97} See id. at 295-96.
\textsuperscript{98} Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 798 (7th Cir.
rational basis inquiry into the medical grounds may inform purpose prong analysis. As a result, the "feeble" the medical grounds, the greater the likelihood that the burden, "even if slight," imposes an undue burden in the sense of being "disproportionate or gratuitous."

In Planned Parenthood of Wisconsin, Inc. v. Van Hollen, the Seventh Circuit restated dicta from the lower court, which noted that the state's failure to justify its interest in maternal health by providing evidence of a health benefit for an admitting privileges requirement was strong evidence of an improper purpose. In particular, the district court had highlighted "the complete absence of an admitting privileges requirement for all other clinical [i.e. outpatient] procedures including those with greater risk." Although the Seventh Circuit confined itself to an undue burden analysis, it did not reject the lower court's view that the state's failure to "demonstrat[e] a medical benefit for [the] requirement" strongly suggested an improper purpose.

Unlike Van Hollen, Gonzales "misconstrue[d]" the purpose prong as a fleeting assessment of the legitimacy of the state's interest and neglected to inquire whether the state's actual purpose was legitimate. Gonzales deferred to the legislature's fact-findings, even when evidence to support those findings was negligible.

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100. Id. The number of women affected is not relevant. Id.

101. Id. at 790-91 ("[It] is certainly evidence that . . . [the] legislature's only purpose in its enactment was to restrict the availability of safe, legal abortion . . . .") (quoting Planned Parenthood of Wis., Inc. v. Van Hollen, No. 13-cv-465-wmc, 2013 WL 3989238, at *10 n.26 (W.D. Wis. Aug. 2, 2013)); see also id. at 795 (noting that the state produced no "evidence of a health benefit . . . beyond an inconclusive affidavit by one doctor . . . [and failed to] rebut[] . . . plaintiffs' evidence that the statute . . . [would] harm abortion providers and their clients").


104. Freeman, supra note 51, at 317.

2. EFFECT PRONG ANALYSIS

Lastly, a statute that has the effect of placing a substantial obstacle in the path of a woman seeking to terminate her pregnancy results in an unconstitutional undue burden on her right. The effect prong “look[s] . . . to the statute’s concrete consequences. In evaluating effect, courts may look to the logical effects of restrictions as well as the direct effects. For example, “legislation that puts an undue burden on physicians necessarily also creates an undue burden on women seeking abortions.” Legislation requiring admitting privileges directly affects abortion providers, not women seeking abortions, but logically it affects both women and abortion providers. If the legislation discourages and reduces the number of abortion providers then it necessarily has the effect of limiting the availability of the procedure.

In 1999, the Fifth Circuit, in a non-binding decision, invalidated an abortion restriction under the undue burden standard. The court in Okpalobi v. Foster, held that a law forcing all or a “substantial portion” of a state’s abortion providers to stop offering such services placed a substantial obstacle in the path of a women seeking to have a pre-viability abortion. At the center of the dispute in Okpalobi was a Louisiana statute which made “abortion providers strictly liable to their patients for any ‘damages’ caused by the abortion.”

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107. Freeman, supra note 51, at 296.
110. See id. (citing Heineman, 724 F. Supp. 2d at 1046).
111. See Heineman, 724 F. Supp. 2d at 1046 (citing Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1467 (8th Cir. 1995)).
112. Okpalobi v. Foster, 190 F.3d 337, 357 (5th Cir. 1999), rev’d on reh’g en banc on other grounds, 244 F.3d 405 (5th Cir. 2001).
113. Id.
Damages included “harm caused to the ‘unborn child’” and would thus expose abortion providers to “unlimited civil liability” for every procedure.\footnote{Brief of Intervenors-Appellees at 1, Okpalobi v. Foster, 190 F.3d 337 (5th Cir. 1999) (No. 98-30228), 1998 WL 34085335, at *1 (emphasis added). Appellees placed the term “unborn child” in quotations because “mother of the unborn child” is a phrase that appears on the face of the statute. See id. The Louisiana legislature makes minimal attempts to conceal the improper purpose behind such restrictions. For instance, referring to a woman seeking an abortion as the “mother of the unborn child” demonstrates a disregard for her personal autonomy and is indicative of the archaic view that a woman’s primary purpose is to be a mother.} The statute at issue in\footnote{Abbott II, 748 F.3d at 588-89. But cf. Rachel D. King, Comment, A Back Door Solution: Stenberg v. Carhart and the Answer to the Casey/Salerno Dilemma for Facial Challenges to Abortion Statutes, 50 EMORY L.J. 873, 885-86 (2001) (arguing Salerno’s “no set of circumstances” standard is inappropriate for abortion regulations because it “could operate to make almost any restriction on abortion facially constitutional”).} Okpalobi exemplifies the problem with disingenuous restrictions that target abortion providers. The driving agenda behind such restrictions is to reduce the number of abortions by reducing the number of abortion providers. Both the effect and the purpose of these laws are plainly unconstitutional. The judiciary should not pander to the legislature in its review of such restrictions.

\section*{IV. THE FIFTH CIRCUIT’S Decision}

Well aware that the issue lies in contested constitutional territory and will likely be reviewed by the Supreme Court regardless of its decision, the Fifth Circuit applied the undue burden standard of review to the admitting privileges provision of H.B. 2.\footnote{Abbott II, 748 F.3d 588 (5th Cir. 2014); see also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 134 S. Ct. 506, 509 (2013) (Breyer, J., dissenting) (suggesting that at least four Justices are prepared to hear arguments on admitting privileges requirements).} As a preliminary matter, the court elected to apply Casey’s “large fraction” standard for facial invalidation rather than Salerno’s “no set of circumstances” standard, allowing the court to reach the issue of the undue burden standard.\footnote{Abbott II, 748 F.3d at 588-89.} Generally, courts are required to facially invalidate a statute when “no possible application of the challenged law would be constitutional.”\footnote{Id.} However, courts are uncertain whether this general rule applies in abortion cases.\footnote{Id.} In\footnote{Abbott II, 748 F.3d at 588-89.} Casey, the Supreme Court implied that an abortion restriction could be facially invalidated if its application would be unconstitutional in a “large
fraction" of cases.120

To set the stage for its analysis, the court called attention to the shifting precedent in abortion jurisprudence.121 Citing Casey and Gonzales, the court recognized rational basis review as an addition to the undue burden test.122 The court acknowledged appellees' argument that the admitting privileges regulation was outside the scope of Casey's holding, urging for a stricter standard of review.123 However, the court found Akron's application of strict scrutiny to have been entirely replaced by Casey's undue burden balancing test.124 The court added, as additional rationale for this finding, that the state's regulatory interests could not be bifurcated between mothers' and children's health.125 The court cited no authority for its assertion that a mother's health cannot be separated from her existing and future children.126

Ultimately, the court held that the district court applied the wrong legal standards under rational basis review and erred in finding that the admitting privileges requirement amounts to an undue burden for a "large fraction" of the women it affects.127 In reaching this conclusion, the court first applied the rational basis test to review the state's purported interest, and then addressed the purpose and effect prongs of the undue burden test.128

A. THE FIFTH CIRCUIT'S RATIONAL BASIS ANALYSIS

The court evaluated the rationality review threshold requirement of the undue burden test.129 After comparing the testimony of both parties, the court cited to generally applied examples of rational basis review, and concluded the district court applied the rational basis test incorrectly.130

120. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992); see also Abbott II, 748 F.3d 583, 588-89 (5th Cir. 2014) (assuming without deciding that the "large fraction" test is correct).
121. Abbott II, 748 F.3d at 589-90.
122. Id. at 590.
123. Id.
124. Id.
125. Abbott II, 748 F.3d 583, 590 (5th Cir. 2014).
126. Id.
127. Id.
128. Id. at 594-99.
129. Id. at 593-96.
The court accepted appellants' argument that the proper perspective for viewing the state's articulated rational legislative objectives was "rational speculation," which entails deferring to the legislature if there is any "conceivable" interest.131 Thus, the court found the state successfully established that the admitting privileges requirement was based on rational speculation, supported by the fact that about 200 women in Texas annually must be hospitalized after seeking an abortion, and some of these women required treatment from a physician who specialized in obstetrics and gynecology.132

The court then compared and contrasted the case to those involving similar admitting privileges requirements.133 The court noted that its conclusion was consistent with the ruling of the Fourth Circuit in Greenville Women's Clinic v. Commissioner and the ruling of the Eighth Circuit in Women's Health Center v. Webster, which sustained admitting privileges requirements under different facts.134 The court refused to distinguish Greenville based on appellees' argument that it lacked the geographic restriction of H.B. 2, which requires a provider to have privileges within thirty miles of the abortion facility.135 Instead, the court found there was sufficient rational basis for the geographic restriction.136

The court made an effort to distinguish its decision from the Seventh Circuit's ruling in Planned Parenthood v. Van Hollen by noting that the Seventh Circuit decision was only preliminary and because Wisconsin law, unlike H.B. 2, did not afford

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(1993); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)).

131. 

Abbott II, 748 F.3d 583, 594 (5th Cir. 2014); see supra note 57.

132. 

Abbott II, 748 F.3d at 594-95.

133. 

Id. at 595-96.

134. 

Id. at 595 (citing Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control, 317 F.3d 357, 360-62 (4th Cir. 2002) (upholding an admitting privileges requirement where there was a state law regulating the grant of admitting privileges by state hospitals and barring them from discriminating); Women's Health Center of W. Cnty., Inc. v. Webster, 871 F.3d 1377, 1380-81 (8th Cir. 1989) (upholding an admitting privileges requirement with no geographic restriction)).

135. 

Id. at 595-96.

136. 

Abbott II, 748 F.3d 583, 595-96 (5th Cir. 2014). Contra Planned Parenthood of Wis. v. Van Hollen, Inc., 738 F.3d 786, 797-98 (7th Cir. 2013), cert. denied, 134 S. Ct. 2841 (2014) (noting the state's argument that "obtaining admitting privileges operates as a kind of Good Housekeeping Seal of Approval of a physician" is not a benefit that requires a geographic restriction as "[s]everal abortion doctors in Wisconsin who lack admitting privileges at hospitals within 30 miles have them at hospitals beyond that radius").
providers a 100-day grace period.\textsuperscript{137} Aware that its analysis split from that of the Seventh Circuit in \textit{Van Hollen}, the court stated that it found the Seventh Circuit opinion unpersuasive for several reasons.\textsuperscript{138} According to the Seventh Circuit, the state of Wisconsin failed to offer statistical evidence that the admitting privileges requirement would make abortions safer.\textsuperscript{139} Additionally, the Seventh Circuit faulted the State for failing to provide evidence that abortion complications are underreported and proof that these complications require continuity of care more than other outpatient services.\textsuperscript{140} Finally, the Seventh Circuit determined that the State failed to prove that women who have complications from an abortion receive better care if the abortion provider has hospital privileges.\textsuperscript{141} The Fifth Circuit declined to follow the Seventh Circuit's reasoning and cited to \textit{Gonzales} as precedent for applying a lower standard of review.\textsuperscript{142} Thus, the Fifth Circuit and Seventh Circuit are split over the appropriate level of scrutiny to apply when an evaluating admitting privileges restriction.\textsuperscript{143}

**B. THE FIFTH CIRCUIT'S PURPOSE AND EFFECT PRONG ANALYSIS**

Advancing to the final stage of its analysis, the court determined that the district court opinion erred in its application of the purpose and effect prongs of the undue burden test.\textsuperscript{144} The court held that appellees bore the burden of attacking the state's purpose at trial, and cited precedent to show plaintiffs generally bear the burden of proving the unconstitutionality of abortion regulations.\textsuperscript{145} The court then criticized the district court's effect

\begin{footnotesize}
\textsuperscript{137} Abbott II, 748 F.3d 583, 596 (5th Cir. 2014). In March 2015, the U.S. District Court for the Western District of Wisconsin permanently enjoined enforcement of the nearly identical Wisconsin statute. See Planned Parenthood of Wis., Inc. v. Van Hollen, No. 13-CV-465, 2015 WL 1285829, at *42 (W.D. Wis. Mar. 20, 2015), appeal filed sub nom. Planned Parenthood of Wis., Inc. v. Schimel, No. 15-1736 (7th Cir. Apr. 6, 2015).

\textsuperscript{138} Abbott II, 748 F.3d at 596.

\textsuperscript{139} Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 790 (7th Cir. 2013), cert denied, 134 S. Ct. 2841 (2014).

\textsuperscript{140} Id. at 790, 793.

\textsuperscript{141} Id. at 793.

\textsuperscript{142} Abbott II, 748 F.3d 583, 596 (5th Cir. 2014) (citing Gonzales v. Carhart, 550 U.S. 124, 158 (2007)).

\textsuperscript{143} Id.

\textsuperscript{144} Id.

\textsuperscript{145} Id. (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992)).
\end{footnotesize}
prong analysis, finding it to be vague and imprecise.\textsuperscript{146}

The court rejected appellees' argument that the effect of clinic closures would impose an undue burden, stating that an increase in travel of less than 150 miles for some women is not an undue burden under \textit{Casey}.\textsuperscript{147} The court found that clinic closures alone were insufficient to establish an unduly burdensome effect without a baseline finding of precisely how many providers lacked privileges.\textsuperscript{148} Finally, the court concluded its effect prong analysis by finding that appellees did not provide sufficient evidence that physicians would decline to provide abortions in Texas as a direct consequence of H.B. 2, noting that many factors, other than the hospital admitting privileges requirement, affected abortion access.\textsuperscript{149}

The court reiterated its basic argument that the district court misapplied the undue burden test for reviewing abortion regulations.\textsuperscript{150} The court concluded its analysis by stating: "if the admitting privileges requirement burdens abortion access by diminishing the number of doctors who will perform abortions and requiring women to travel farther, the burden... will not affect a significant fraction of [Texas] women."\textsuperscript{151} Speculation such as that has no place in the undue burden analysis. The court's conclusion is so profoundly illogical and inconsistent as to appear willfully misguided.

\section*{V. ANALYSIS}

This section provides an analysis of the Fifth Circuit's decision. Subsection A discusses the three ways the decision weakened the undue burden standard. Subsection A first addresses the decision's failure to truly assess the state's interest. Subsection A next addresses the decision's failure to engage in purpose prong analysis. Subsection A finally discusses the

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146. \textit{Abbott II}, 748 F.3d 583, 596 (5th Cir. 2014).
147. \textit{Id.} at 598. Under the Pennsylvania law at issue in \textit{Casey}, "women in 62 of Pennsylvania's 67 counties were required to 'travel for at least one hour, and sometimes longer than three hours to obtain an abortion from the nearest provider.'" \textit{Id.} (quoting Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990)).
148. \textit{Id.} ("[M]ore than ninety percent of women seeking an abortion in Texas would still be able to obtain the procedure within 100 miles of their respective residences . . . ").
149. \textit{Id.} at 599.
150. \textit{Id.} at 599-600.
151. \textit{Abbott II}, 748 F.3d 583, 600 (5th Cir. 2014).
\end{flushleft}
decision's flawed effect prong analysis. Subsection B discusses the decision's effect on admitting privileges requirements. In particular, Subsection B discusses the effect of the decision in the context of challenges to identical requirements in Mississippi and Louisiana.

A. THE DECISION WEAKENED THE UNDUE BURDEN STANDARD

The Fifth Circuit decision failed to truly assess the state's interest under a searching, rational basis analysis. The Fifth Circuit grounded its analysis in the questionable precedent set by Gonzales, where the Supreme Court was admittedly deferential in its assessment of the state's interest.\(^{152}\) In Casey, the Supreme Court rejected Chief Justice Rehnquist's proposal in dissent to apply rational basis scrutiny to abortion regulations.\(^{153}\) Because the Court outright rejected rational basis scrutiny as inadequate, any argument that the Court left the standard open to interpretation for the lower courts to develop a working doctrine is untenable in this case. The Court certainly did not intend for a standard as weak as the Fifth Circuit's speculative review in Abbott.

The cases cited by the Fifth Circuit to justify its weakened rationality review did not involve abortion regulations.\(^{154}\) The

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152. See Gonzales v. Carhart, 550 U.S. 124, 158, 166 (2007); see also Smith, supra note 58, at 1151-52 ("The main support for the idea that abortion regulations should be subjected only to a rational basis review comes from two references in Gonzales to a 'rational' regulation or 'rational basis' for regulations that are taken out of context. Both references are carefully limited to the facts of the case, which involved barring one procedure and substituting others and where only "marginal safety" considerations separated the two. Even in that context, the Court is careful to note that the regulations must in fact serve a legitimate state interest.... [N]othing in Gonzales sufficed to overturn Casey's requirement that courts conduct an analysis of whether a regulation serves a legitimate state interest." (footnotes omitted)).

153. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874-76 (1992) (adopting the undue burden standard despite Chief Justice Rehnquist's argument in dissent); id. at 966 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (arguing that "the Constitution does not subject state abortion regulations to heightened scrutiny"); see also Smith, supra note 58, at 1157-58 (interpreting the plurality's rejection of rational basis review to mean the undue burden test is a form of heightened scrutiny).

“rational speculation” review applied by the Fifth Circuit, where
the circuit accepted the state’s asserted state interest in women's
health as the purpose of the statute without further inquiry is
radically deferential and even lower than traditional rational
basis review. As a result, the Fifth Circuit decision further
contributed to the disagreement between the circuits over the
appropriate level of scrutiny to apply when assessing a state's
claimed interests in regulating abortion.

Furthermore, the Fifth Circuit failed to engage in purpose
prong analysis. A robust purpose prong analysis can be an
effective substitute for lowered rationality review. In its
decision, however, the Fifth Circuit failed to engage in either of
the analyses that would serve to invalidate the statute.

For the purpose prong to effectively gauge the burden on the
abortion right it must require more than “bald speculation” by
the state that a regulation serves an interest in maternal
health. Thus, the appropriate purpose prong analysis is
whether the state’s purpose was to hinder autonomous
reproductive choice, and not whether the legislation was
reasonably related to any conceivably legitimate state interest.
A state’s generally unobjectionable interest in protecting
maternal health is improper under Casey if the legislature’s
purpose in enacting the statute was to hamper a woman’s ability
to procure an abortion. However, the state can always claim
that it intends to promote women’s health or fetal life to justify a
given restriction.

Courts should thoroughly question the legislature’s actual
motivations rather than simply deferring to disingenuous

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155. Abbott II, 748 F.3d 583, 594 (5th Cir. 2014).
156. Freeman, supra note 51, at 306-07, 312.
157. See Abbott II, 748 F.3d at 594, 597 (applying “rational speculation” review
and finding no basis for a finding of impermissible purpose as the plaintiffs offered
no evidence of improper purpose).
158. Smith, supra note 58, at 1158.
159. Freeman, supra note 51, at 306 (citing Planned Parenthood of Se. Pa. v.
Casey, 505 U.S. 833, 878 (1992)).
160. Id. at 307; see also Irin Carmon, Mississippi’s Last Abortion Clinic to Stay
Open—For Now, MSNBC (July 29, 2014, 11:01 PM), http://www.msnbc.com/msnbc/m
ississippi-last-abortion-clinic-stay-open-now (“Mississippi governor Phil Bryant
declared, while signing [Mississippi’s admitting privileges requirement into law],
that the goal was to “try and end abortion in Mississippi.”).
161. Smith, supra note 58, at 1156.
Conversely, the total absence of a purpose prong analysis in the Fifth Circuit’s decision rendered the undue burden standard weaker than Casey intended and insufficient to protect the right to abortion. The plurality in Casey rejected Chief Justice Rehnquist’s proposal to apply rational basis review to abortion restrictions.163

The standard applied by the Fifth Circuit in Abbott II is rational basis review, or “rational speculation review,” as it has been contemptuously referred to, a lower, imaginary standard invented by the Fifth Circuit in its haste to defer to the legislature.164 Casey did not intend for rational basis review to be applied in the context of abortion restrictions.

Next, the Fifth Circuit weakly implemented the effect prong analysis. In its decision the Fifth Circuit held the statute was not an undue burden because women seeking an abortion would still be able to obtain the procedure within 100 miles of their respective residences.165 The court reached this conclusion despite the fact that the statute would have the effect of closing some clinics, and would result in an increase in travel of nearly 150 miles for some women.166

Strikingly, the Fifth Circuit’s decision is a shadow of the strong stance it took fourteen years earlier in Okpalobi, where the court suggested that a law having the effect of causing all or a substantial portion of a state’s abortion providers to stop offering such procedures would create a substantial obstacle to a woman’s right to have a pre-viability abortion.167 Unfortunately, the

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162. See, e.g., Planned Parenthood of Wis., Inc. v. Van Hollen, No. 13-cv-465-wmc, 2013 WL 3989238, at *10 n.26 (W.D. Wis. Aug. 2, 2013) (“[T]he complete absence of an admitting privileges requirement for clinical procedures including for those with greater risk is certainly evidence that Wisconsin Legislature’s only purpose in its enactment was to restrict the availability of safe, legal abortion in [Wisconsin], particularly given the lack of any demonstrable medical benefit for its requirement . . . .”), aff’d on other grounds, 738 F.3d 786 (7th Cir. 2013), cert. denied, 134 S. Ct. 2841 (2014).


164. See Smith, supra note 58, at 1139 (arguing that the Fifth Circuit misinterpreted Casey and applied a standard "below rational basis review").

165. Abbott II, 748 F.3d 583, 598 (5th Cir. 2014). 166. Id. at 597-98.

167. Okpalobi v. Foster, 190 F.3d 337, 357 (5th Cir. 1999), rev’d on reh’g en banc on other grounds, 244 F.3d 405 (5th Cir. 2001).
decision in Okpalobi did not define "substantial portion," and the Fifth Circuit's analysis of abortion regulations has shifted along with the Circuit's ideological makeup.168

It is undeniable that admitting privileges requirements have the effect of limiting clinic access, and of disproportionately limiting clinic access for the most vulnerable groups of women.169 The majority of women who have abortions live below the poverty line or qualify for public assistance.170 The cost of traveling to a different city and lodging during mandatory wait periods is both expensive and difficult.171 As an Alabama district court deftly noted:

Poor women are less likely to own their own cars and are instead dependent on public transportation, asking friends and relatives for rides, or borrowing cars; they are less likely to have internet access; many already have children, but are unlikely to have regular sources of child care; and they are more likely to work on an hourly basis with an inflexible schedule and without any paid time off or to receive public benefits which require regular attendance at meetings or classes.172

The Fifth Circuit handed down its decisions in Abbott from an ivory tower, willfully ignorant of poverty and reality.173

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168. See Smith, supra note 58, at 1138 n.11 (comparing the court's decision in Okpalobi, in which the court found the state's claimed purpose was "not credible," with the radically deferential decision in Abbott II).


170. Strange, 33 F. Supp. 3d at 1356-57. Though the statistics in Strange are limited to Alabama, they match Van Hollen's Wisconsin statistics. See Van Hollen, 738 F.3d at 796 (reporting that 60% of the clinics' patients live below the poverty line). Therefore, it seems reasonable to assume that the statistics are similar for populations served by other clinics throughout the country.

171. Strange, 33 F. Supp. 3d at 1357.

172. Id.

173. Id. at 1357-58 (noting that the Fifth Circuit misinterpreted the law when it
The clear intent of conservative legislatures in enacting admitting privileges requirements, in reality, is to enforce a misguided moral agenda and to reduce the number of abortions by making it more difficult for underprivileged women to obtain them.\textsuperscript{174} However, the legal system is not well-equipped to discover the intent behind a statute.\textsuperscript{175} The purpose and effect prongs of the undue burden test are designed to probe into legislative intent. Evidence that a statute does not serve its stated purpose (i.e., fails rationality review) \textit{and} has the effect of impeding abortion access is highly probative of an improper purpose.\textsuperscript{176} Courts should not allow conservative legislatures to target vulnerable women by repeatedly enacting restrictions to limit the availability of abortion providers and drive up the cost of the procedure.

The Fifth Circuit erroneously applied the undue burden test by deferring to the legislature rather than evaluating the right to abortion under the heightened standard designed specifically to protect the abortion right. The Fifth Circuit left the right unprotected by failing to assess the state’s interest under heightened rationality review, omitting purpose prong analysis, and emasculating the effect prong. This threatens the ability of women to make decisions about their health and parental roles, particularly those women whose circumstances are aggravated by poverty. The state’s intent need not be indicated on the face of the bill for it to be glaringly obvious when scrutinized under the appropriately rigorous review of the undue burden standard.


\textsuperscript{175} Planned Parenthood of Wis. v. Van Hollen, 738 F.3d 786, 791 (7th Cir. 2013) (“The plaintiffs argue that such laws, which are advocated by the right to life movement, are intended to hamstring abortion. The defendants deny this. We needn’t take sides. Discovering the intent behind a statute is difficult at best because of the collective character of a legislature, and may be impossible with regard to the admitting privileges statutes.”), \textit{cert. denied}, 134 S. Ct. 2841 (2014).

\textsuperscript{176} See supra note 162.
B. THE ADMITTING PRIVILEGES REQUIREMENT AFTER ABBOTT

The Fifth Circuit’s opinion will be most influential on the identical admitting privileges requirements enacted by Mississippi and Louisiana, as both states are bound by the Fifth Circuit’s decision. The Fifth Circuit has held that admitting privileges requirements further the states’ legitimate interest in maternal health and, in general, do not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.\(^{177}\) To distinguish subsequent cases from Abbott, district courts in the Fifth Circuit will have to pay close attention to the particular facts of each case (e.g., number of clinics, distance, travel time, etc.), and plaintiffs must argue that their circumstances are exceptional.

In Jackson Women’s Health v. Currier, the sole Mississippi abortion provider challenged a Mississippi admitting privileges requirement virtually identical to the one in Abbott.\(^{178}\) Mississippi governor Phil Bryant declared, while signing the law, that the goal was to “try and end abortion in Mississippi.”\(^{179}\) The Fifth Circuit did not acknowledge this outright admission of illegitimate purpose. However, the court did establish a somewhat objective parameter for the undue burden standard. The court emphasized that the Texas law at issue in Abbott did not impose an undue burden because “an increase in travel of less than 150 miles for some women is not an undue burden under Casey.”\(^{180}\) Because the rational basis analysis in Abbott was not state-specific, the Fifth Circuit held it would be equally applicable in other cases.\(^{181}\) As in Abbott, the Fifth Circuit avoided the purpose prong and limited its analysis to the statute’s effect.\(^{182}\) Ultimately, the court held that an admitting privileges requirement which would close the only clinic in a state, forcing women to leave the state to exercise their constitutional right, had the effect of placing a substantial obstacle in the path of women seeking abortions and was thus unconstitutional undue burden.\(^{183}\) In this case, the court viewed the fact that a

\(^{177}\) Abbott II, 748 F.3d 583, 590 (5th Cir. 2014).
\(^{179}\) Carmon, supra note 160.
\(^{180}\) Currier, 760 F.3d at 453 (quoting Abbott II, 748 F.3d at 598).
\(^{181}\) Id. at 454.
\(^{182}\) Id. at 455.
\(^{183}\) Jackson Women’s Health Org. v. Currier, 760 F.3d 448, 457-58 (5th Cir. 2014).
A woman would be forced to leave the state to terminate her pregnancy as an exceptional circumstance that distinguished Currier from Abbott.

Currier demonstrates that the Fifth Circuit has limited constitutional review of admitting privileges requirements to looking solely at the effect of the law. Plaintiffs challenging future abortion restrictions in the Fifth Circuit’s jurisdiction should tailor their argument towards the court’s preference for effect prong analysis. Challengers likely cannot win on the threshold application of rationality review because the Fifth Circuit does not look at whether the restriction actually advances the state’s claimed interest. Similarly, purpose prong arguments are all but certain to fail, as the Fifth Circuit will not find an improper purpose unless it is explicitly indicated on the face of the statute itself. Subsequent challengers should adapt their arguments accordingly by stressing the effect prong of the undue burden analysis.

Louisiana’s admitting privileges requirement is temporarily on hold until the Middle District Court of Louisiana renders a decision in June Medical Services v. Caldwell. The statute which contains the Louisiana admitting privileges requirement, 2014 Louisiana House Bill No. 388 (H.B. 388), will likely have the effect of closing the only two clinics in New Orleans and the only clinic in Baton Rouge, leaving just two clinics left: one in Shreveport, and one in Bossier City, each over 300 miles and nearly five hours from New Orleans. However, this assumes a doctor would even be available to perform abortions at the remaining clinics. Of the four doctors challenging the restriction, only one has admitting privileges at a hospital within thirty miles of where he performs abortions. He claims that if the other doctors’ applications for admitting privileges are denied then he will discontinue performing abortions out of fear for his personal safety. This would potentially leave Louisiana no abortion providers.
In challenging H.B. 388, petitioners must confront the Fifth Circuit’s lax application of the undue burden standard.\textsuperscript{189} As evidenced by the court’s analysis in \textit{Abbott} and \textit{Currier}, the decision will turn on the effect prong of the undue burden test.\textsuperscript{190} Plaintiffs could argue that the effect of shutting down three of the state’s five clinics, all three of which are in communities that, collectively, represent and serve well over 60\% of the state’s population, would place a substantial obstacle in the path of women who wish to exercise the right to terminate their pregnancy. Only two clinics in the very northwest corner of the state, in communities that represent less than 10\% of the population, would remain. Closing down these three clinics would therefore affect a “substantial portion” of the state’s abortion providers. This should satisfy the “large fraction” requirement for a facial attack under \textit{Casey}. The outcome of \textit{June Medical Center} will depend on the rigor of the Fifth Circuit’s effect prong analysis as it decides whether the effect is closer to that in \textit{Abbott} or in \textit{Currier}.

\textbf{VI. CONCLUSION}

Though the court’s decision weakened the undue burden standard, its speculative analysis stands in stark contrast to cases where the standard was properly applied. Ultimately, the Supreme Court will have to clarify the undue burden test to resolve disagreement in the circuits over how to apply the standard. Until then, the Texas legislature may continue to target abortion providers and infringe on the liberty of women by limiting their ability to exercise their right to terminate their pregnancy. Laws such as the admitting privileges requirement are not designed to strike at the right itself, but to incrementally choke the right to abortion out of existence. The Fifth Circuit failed to afford the right to abortion the requisite level of protection from the Texas legislature’s ideological agenda.

Hope A. Phelps

\textsuperscript{189} See supra Section V, Subsection A
\textsuperscript{190} Jackson Women's Health Org. v. Currier, 760 F.3d 448, 455 (5th Cir. 2014); Abbott II, 748 F.3d 583, 597-600 (5th Cir. 2014).
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