Missouri Law Review

Volume 85
Issue 4 *Fall 2020*

Article 10

Fall 2020

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NOTE

The Smokescreen Problem in Abortion Jurisprudence: How the Undue Burden Standard and Long-Term Legislative Tactics Allow Courts to Turn a Blind Eye to True Legislative Intent

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I. INTRODUCTION

The issue of abortion has been passionately debated in this country for many years. For decades, our legal system has recognized that legitimate interests in the subject lie with both women and the State.[1] From the time the right of free choice was found to be granted by our Constitution in *Roe v. Wade*, however, the legal standard with which to assess these competing interests has been a source of debate and confusion.[2] Abortion is undoubtedly an issue that implicates deeply rooted moral considerations for many people, but the United States Supreme Court has carefully undertaken the responsibility of formulating rules that insulate certain moral beliefs from legal analyses of abortion.[3]

In *Roe*, the Court articulated the first standard used to assess abortion regulations: the trimester framework.[4] In short, this standard defined when within a woman's pregnancy a state may act and which purpose it may further while doing so.[5] Due to the rigidity of the trimester framework, the Court articulated a new standard almost twenty years later in *Planned Parenthood*

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

2. Brendan T. Beery, Tiered Balancing and the Fate of Roe v. Wade: How the New Supreme Court Majority Could Turn the Undue-Burden Standard into a Deferential Pike Test, 28 KAN. J.L. & PUB. POL'Y 395, 402–406 (2019).

3. *See Roe*, 410 U.S. at 153.

4. *Id.* at 164–65.

5. *Id*.

of Southeastern Pennsylvania v. Casey: the undue burden standard.[6] This standard remains today and allows state regulation at any point in pregnancy, so long as the regulation is not unduly burdensome to women seeking an abortion.

The abortion debate has become more polarized since *Roe*, and state legislatures have taken increasingly aggressive measures in limiting abortion to the greatest extent possible under the existing legal framework.[7] Further, the undue burden standard set out in *Planned Parenthood of Southeastern Pennsylvania v. Casey* is unclear in many ways, specifically on how courts should assess the burden of anti-abortion legislation when it offers no true purpose other than to incrementally put an end to the abortion right.[8] Indeed, the standard has allowed many of these laws to pass constitutional muster. Such a law may, under *Casey*, satisfy the undue burden test merely because those challenging the law cannot prove definitively that it will actually unduly burden women's access before taking effect. In this way, the standard essentially mandates that every law be challenged as applied, assuring that there is no coherent framework or precedential value when the Supreme Court strikes down a given restriction.[9]

This problem is compounded by the increase in discretionary state agency action motivated by hostility toward the abortion right because the undue burden standard fails to account for such behavior, no matter how prevalent it may be in some states. District courts are in a position to tease out improper legislative motives behind abortion restrictions, but the undue burden standard allows courts of appeals to willfully ignore district court findings that show improper legislative purpose and instead argue about whether the law will impose an undue burden on access in effect. The delegation of authority and discretion to state agencies, like the Missouri Department of Health and Senior Services, for example, provides an additional smokescreen that enables the courts to feign ignorance about the true motivations behind certain restrictive and arbitrary laws.

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6. 505 U.S. 833, 878 (1992).

7. *See* Anna North, *How Abortion Became a Partisan Issue in America*, VOX MEDIA (Apr. 10, 2019, 7:30 AM), https://www.vox.com/2019/4/10/18295513/abortion-2020-roe-joe-biden-democrats-republicans.

8. *See* Casey, 505 U.S. at 874, 878.

9. When assessing abortion regulations, courts differentiate between facial and as-applied challenges. A facial challenge is "a claim that a statute is unconstitutional on its face, [meaning] that it always operates unconstitutionally." *Facial Challenge*, BLACK'S LAW DICTIONARY (11th ed. 2019). Thus, a facial challenge to an abortion regulation may be brought before the regulation takes effect. An as-applied challenge is a claim that a statute, though constitutional on its face, is unconstitutional in effect because of "the facts of a particular case or [] its application to a particular party." *As-Applied Challenge*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Some restrictive measures are motivated by legislatures' legally recognized and legitimate interests in protecting women's health or protecting potential life, but many measures are instead motivated by legislators' moral beliefs about abortion.[10] The ability of courts to tease out the real motivation behind a law restricting abortion depends on the effectiveness and propriety of the legal standard used. Legal standards – in their formulation or interpretation – can be skewed to value one side's interests over the other's, to turn a blind eye to improper motivations behind restrictive laws, or to disregard substantial burdens or benefits faced by one side. Indeed, these have been complaints lodged against the legal standards that have been used to review abortion cases.

With two newly appointed conservative justices, the Supreme Court recently struck down another restrictive state abortion law, reiterating that the undue burden standard is the proper test.[11] This Note discusses how the undue burden standard fails to meaningfully protect the abortion right in the current polarized political climate. Part II outlines the relevant history of the legal standards used in abortion cases. Part III illustrates a problematic interpretation of the undue burden standard as it relates to the Supreme Court's most recent abortion-related decision in *June Medical Services v. Russo*. Part IV then discusses how discretionary state agency action in states like Missouri exacerbate the problems associated with the legal standard. Part V concludes by reiterating how the undue burden standard has allowed for the gradual destruction of the abortion right to near-nonexistence in states like Missouri.

II. RELEVANT ABORTION JURISPRUDENCE LEADING UP TO THE UNDUE BURDEN STANDARD

While the United States Supreme Court has decided many abortion-related cases, this section outlines two major decisions that impact the standard courts use to assess abortion regulations: *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

A. Roe v. Wade

Roe v. Wade is a foundational decision within the United States Supreme Court's abortion jurisprudence. While courts no longer use the trimester framework established in *Roe*, its essential holding that women have a constitutional right to abortion and its careful examination of the

10. *See* North, *supra* note 7.

11. Amy Howe, *Justices Grant New Cases or Upcoming Term, Will Tackle Louisiana Abortion Dispute*, SCOTUSBLOG (Oct. 4, 2019, 10:55 AM), https://www.scotusblog.com/2019/10/justices-grant-new-cases-for-upcoming-term-will-tackle-louisiana-abortion-dispute [https://perma.cc/N9TU-V4BF].

countervailing interests involved in the abortion debate remain imbedded in the standard used today.[12]

In the landmark 1973 decision, the Supreme Court struck down as unconstitutional a Texas statute that made it a crime to procure or attempt an abortion at any stage in pregnancy, except when necessary to preserve the woman's health.[13] Writing for the majority, Justice Blackmun held that the concept of personal liberty found in the Due Process Clause of the Fourteenth Amendment was broad enough to encompass a woman's decision to terminate her pregnancy.[14] He noted, however, that this fundamental privacy right is "not unqualified and must be considered against important state interests in regulation."[15] The Court held that, at certain points in pregnancy, legitimate state interests become sufficiently compelling to allow for state regulation of the right.[16] Nevertheless, Justice Blackmun emphasized that a regulation limiting a fundamental right may be justified only by a compelling state interest, and regulations "must be narrowly drawn to express only the legitimate state interests at stake."[17]

Justice Blackmun continued by analyzing the different state interests at play in abortion legislation, their legitimacy, and when – if they are legitimate – they may become sufficiently compelling to justify regulation.[18] In evaluating which interests a state may legitimately have in a woman's abortion decision, the Court looked to three historic justifications for the enactment and continued existence of laws criminalizing abortion.[19] First, the Court found that some of these laws were historically meant to "deter illicit sexual conduct."[20] The argument that this could remain an appropriate purpose was quickly dismissed, and Texas did not argue that its criminal statute was enacted with this purpose.[21]

Second, the Court noted that the purpose behind other historic criminal abortion laws was to protect women from the hazards once associated with the abortion procedure.[22] Abortion mortality rates were high when most criminal abortion statutes were enacted, especially prior to the development of antibiotics in the 1940s, so some states criminalized abortion with the purpose of shielding women from the dangers associated with the medical

12. *Casey*, 505 U.S. at 878–79.

13. Roe v. Wade, 410 U.S. 113, 166 (1973).

14. *Id.* at 153.

15. *Id.* at 154.

16. *Id.*

17. *Id.* at 155.

18. *Id.* at 162–63.

19. *Id.* at 147. Specifically, the Court looked into the history of criminal abortion laws because such a law was at issue in the case. The Texas statute at issue made it a crime to "procure" or attempt an abortion, unless the abortion was for the purpose of saving the life of the mother. *Id.* at 117–18.

20. *Id.* at 148.

21. *Id*.

22. *Id.* at 148–49.

procedure.[23] However, Justice Blackmun stated that "modern medical techniques" at the time of the opinion in 1973, rendered abortion procedures at least as safe as childbirth – if not more so – especially when done within the first trimester of pregnancy.[24] Thus, "any interest of the State in protecting the woman from an inherently hazardous procedure . . . [had] largely disappeared" by the 1973 decision.[25] The Court noted, however, that because the risks associated with abortion increase as pregnancy continues, states retain a legitimate interest in protecting women's health and maintaining medical standards in later-stage abortions.[26] Thus, the Court found that a state's interest in women's health becomes sufficiently compelling to justify regulation after the end of the first trimester.[27]

Lastly, the Court examined a state's interest in protecting life as a purpose behind criminal abortion statutes.[28] Some criminal abortion statutes were enacted with the purpose of allowing states to carry out their general interest in protecting the life of their citizens, under the assumption that life begins at conception.[29] However, Justice Blackmun rejected the notion that states have a legitimate interest in protecting life at all stages of pregnancy.[30] Without accepting the notion that life begins at conception, he instead held that, "[i]n assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone."[31] The Court then held that a state's interest in potential life becomes compelling at "viability," meaning the point at which a fetus is capable of surviving outside the womb.[32]

Thus, the *Roe* Court adopted what came to be known as the "trimester framework" because, it argued, this was the best way to reconcile a woman's fundamental right to choose to have an abortion with competing legitimate state interests.[33] Implicit in the trimester framework is the Court's recognition of the notion that a state cannot legitimately further its interests in women's health or potential life when it has no reason to act. For example, the Court looked to the general safety of early stage abortions in 1973 and stated that any state interference purporting to further women's health would not actually be furthering a compelling state interest because abortion during the first

23. *Id.*
24. *Id.* at 149–50.
25. *Id.* at 149.
26. *Id.* at 150.
27. *Id.* at 163.
28. *Id.* at 150.
29. *Id*.
30. *Id*.
31. *Id*.
32. *Id.* at 163.
33. *Id.* at 154.

trimester may already be safer than childbirth.[34] Thus, during this period, the choice belongs solely to the woman and her physician without interference from the state.[35] After this period, a state may regulate pursuant to its interest in women's health, so long as the regulation is reasonably related to health.[36] In pursuing its interest in potential life, a state may regulate only after viability.[37] The Court reasoned that, prior to viability, regulation enacted pursuant to a state's interest in potential life could not actually be furthering that goal because the fetus is not yet capable of surviving outside the womb.[38] After viability, a state may regulate or even ban abortion pursuant to its interest in potential life.[39]

While the Court acknowledged that its trimester framework required weighing state interests against a woman's right to terminate a pregnancy,[40] the framework yielded a test more categorical than balancing in practice.[41] Under the framework, viability determined whose interest prevailed, and any burden on a woman's fundamental right prior to certain compelling points triggered a strict scrutiny approach, "requiring the government to justify any regulation by showing the regulation was narrowly tailored to advance a compelling government interest."[42]

The *Roe* Court's trimester framework, while rigid, created set "categories" for when a state could actually be furthering a legitimate interest for an important reason.[43] While the boundaries of those categories may have been rigid and seemingly arbitrary,[44] the framework in essence created a presumption of improper state purpose if the state legislated to address a problem that did not exist. This standard, while strict, made it difficult for states to legislate unless they had a valid reason to do so.[45] Importantly, the trimester framework laid out by the *Roe* Court acknowledged the presence of hostility toward the abortion right and crafted a framework that attempted to

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34. *Id.* at 149, 164.

35. *Id.* at 164.

36. *Id.*

37. *Id.*

38. *Id.* at 163.

39. *Id.* at 164–65

40. *Id.* at 164.

41. Brendan T. Beery*, Tiered Balancing and the Fate of Roe v. Wade: How the New Supreme Court Majority Could Turn the Undue-Burden Standard into A Deferential Pike Test*, 28 KAN. J.L. & PUB. POL'Y 395, 403–04 (2019).

42. R. Randall Kelso, *The Structure of Planned Parenthood v. Casey Abortion Rights Law: Strict Scrutiny for Substantial Obstacles on Abortion Choice and Otherwise Reasonableness Balancing*, 34 QUINNIPIAC L.R. 75, 80 (2015).

43. *See Roe*, 410 U.S. at 155–56, 164–65.

44. Becca Kendis, *Faute De Mieux: Recognizing and Accepting* Whole Woman's Health *for its Strengths and Weaknesses*, 69 CASE W. RSRV. L.R. 1007, 1031 (Summer 2019).

45. *See, e.g.*, *id*. at 1013.

check such hostility as an impermissible purpose.[46] Nineteen years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a plurality of justices indicated their willingness to adopt a less strict standard of review to state abortion regulations.[47]

B. Planned Parenthood of Southeastern Pennsylvania v. Casey

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a plurality of justices rejected the trimester framework from *Roe*, reasoning that the framework both misconceived the pregnant woman's interest and undervalued the State's interest in potential life.[48] However, the plurality emphasized that, while it was rejecting *Roe*'s trimester framework, it was upholding a central principle of *Roe*: a woman has the constitutional right to choose to have an abortion prior to viability.[49] This privacy right, the Court recognized, requires "particularly careful scrutiny of the state needs asserted to justify its abridgment."[50] However, the plurality found that the trimester framework went too far in deeming all pre-viability state regulation illegitimate.[51] The Court reasoned that the framework's objective – ensuring that the woman's right not be so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact – could still be accomplished with a more lenient standard that would allow the state to advance its legitimate interest in potential life prior to viability, an interest the Court deemed another central principle of *Roe*.[52]

Thus, the plurality identified viability as the key point in which the interests of the state and women shift.[53] In doing so, the Court reiterated what it considered *Roe*'s essential three-part holding: (1) before viability, a woman has the right to choose to have an abortion without undue interference from the State, (2) after viability, the State can restrict abortions if the law contains exceptions for pregnancies that endanger the woman's life or health, and (3) "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."[54] Thus, the *Casey* Court set forth a new "undue burden standard" where a state may regulate pre-viability abortion pursuant to its interests in women's health and potential life from the outset of pregnancy, so long as it

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46. *See Roe*, 410 U.S. at 116.

47. Jon O. Shimabukuro, *Abortion: Judicial History and Legislative Response* 4, CONGRESSIONAL RESEARCH SERVICE (2019).

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

49. *Id.* at 871.

50. *Id.* at 848 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

51. *Id.* at 870, 872.

52. *Id.* at 872.

53. *See id.* at 879.

54. *Id.* at 846.

did not amount to an undue burden.[55] A finding of undue burden, the Court clarified, "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."[56]

In setting forth the new undue burden standard, the *Casey* plurality focused on the test's application to laws furthering the State's interest in potential life, as this was the purpose behind the informed consent, twenty-four-hour waiting period, and spousal notification provisions of the Pennsylvania statute at issue in the case.[57] The Court reasoned that, just because a woman has the right to decide to have an abortion prior to viability, it does not necessarily follow that a state should be prohibited from ensuring that her choice is thoughtful and informed.[58] In promoting its interest in potential life, "throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion."[59] The plurality reiterated that these measures must not, in purpose or effect, impose a substantial obstacle on the woman's right.[60] Thus, under the undue burden standard, ensuring that a woman's choice is properly informed is a reasonable means for states to further their legitimate interest in potential life so long as, the Court emphasized, those means are solely calculated to inform her decision and not hinder it.[61]

It is important to note the inherent contradiction in the *Casey* Court's articulation of its undue burden test. The Court said that the promotion and protection of potential life is an acceptable state purpose, but at the same time that a law should not have the purpose of placing a substantial obstacle in the path of a woman seeking an abortion.[62] When protecting potential life by definition involves trying to prevent abortion, this contradiction grants states a legitimate interest that they may only partially further under the legal standard; states may try to obstacle abortion, but not substantially.[63]

This contradiction motivates legislatures to enact gradual, more insidious legislation designed to chip away at the abortion right until it no

55. *Id.* at 878.

56. *Id.* at 877.

57. Five provisions of a Pennsylvania statute were challenged in *Casey*: an informed consent requirement, a waiting period provision requiring a woman to receive certain information at least twenty-four hours before an abortion, a parental informed consent requirement when a minor seeks an abortion, a spousal notification requirement, and a provision exempting compliance with the other provisions in the case of medical emergency. *Id.* at 844.

58. *Id.* at 872.

59. *Id.* at 878.

60. *Id.*

61. *Id.* at 877–78.

62. *Id.* at 877.

63. *Id*.

longer exists at all.[64] Indeed, anti-abortion legislators and activist groups have used this interpretation of the undue burden standard to justify laws that gradually chip away at the abortion right as part of a long-term strategy solely aimed at ending the right completely.[65] While the *Roe* and *Casey* Courts emphasized the importance of carefully assessing the state purposes asserted to justify abortion legislation, the *Casey* Court's articulation of the test muddies whether lower courts are actually required to conduct a purpose inquiry.[66] These long-term legislative strategies, and the true purpose behind them, go unchecked as seemingly less-threatening individual laws are passed, each making the obstacle imposed gradually more substantial.[67]

Applying the new undue burden test, the *Casey* Court upheld four out of five of the provisions in question in the Pennsylvania law: a twenty-four-hour waiting period requirement, an informed consent provision, a parental consent provision, and the recordkeeping and reporting requirements.[68] The court noted that even though some of these regulations could delay access to an abortion or make procuring one more expensive, the State did not impose an undue burden in effect, and it was entitled to "enact persuasive measures which favor childbirth over abortion."[69]

Interestingly, even though the Court's articulation of the rule appeared to require a law to impose an undue burden neither in effect nor purpose, the Court made relatively little inquiry into the State's purpose behind the provisions in question, and instead focused on whether the provisions created an undue burden in effect.[70] For example, in assessing the State's purpose behind the twenty-four-hour waiting requirement, the Court held the State's purpose to be valid because "in theory, at least, the waiting period [was] a reasonable measure to implement the State's interest in protecting life of the unborn, a measure that [did] not amount to an undue burden."[71] Thus, the Court assumed that because, theoretically, a waiting period requirement could dissuade women from choosing to have an abortion, the State was acting with a legitimate purpose.[72]

In assessing whether the waiting period requirement imposed an undue burden on women's access to abortion in effect, the Court looked at the district

64. Olga Khazan, *Planning the End of Abortion*, THE ATLANTIC (July 16, 2015), https://www.theatlantic.com/politics/archive/2015/07/what-pro-life-activists-really-want/398297 [https://perma.cc/68K9-8EFF].

65. *Id*.

66. Thomas Colby, *The Other Half of the Abortion Right*, 20 U. PA. J. CONST. L. 1043, 1060 (2018)

67. *Id.* at 1045.

68. *Casey*, 505 U.S. at 883, 887, 899–900 (striking down the spousal notification provision).

Id. at 886.

70. *Id.* at 877.

71. *Id.* at 885.

72. *Id*.

court's factual findings relating to the burden imposed by such a law.[73] The district court found 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.'"[74] However, the district court did not make a finding on whether the burden was undue because it never had a chance to address the issue.[75]

Using the trimester framework then still in place, the district court struck down the waiting period requirement based on the state's purpose, finding it to be a regulation designed to promote the State's interest in potential life before viability, which was prohibited under the trimester framework.[76] Thus, the Court, looking at the record before it and the fact that the case involved a facial challenge where burdens were not yet definitively proven, was not convinced that the waiting period requirement imposed an undue burden.[77] In essence, the Court found that the requirement could theoretically further the State's interest in potential life and that there was not enough proof to show that, prior to enforcement, the law would unduly burden women's access.[78]

However, studies have since cast doubt on the accuracy of the Court's conclusions regarding the waiting period requirement.[79] According to a 2009 literature review of scientific studies analyzing the impact of mandatory counseling and waiting period laws, such requirements generally do not succeed in changing the woman's mind as *Casey* assumed, but instead impose additional burdens on women that result in more out-of-state and late-term abortions.[80] The study compared the effects of Mississippi's mandatory counseling and waiting period law, which required an additional in-person clinic visit before the procedure, with waiting period laws that allowed counseling over the phone or Internet to avoid an additional clinic visit.[81] After the Mississippi law took effect, abortion rates in the state fell, but more women began going out-of-state for abortions, and the proportion of second

73. *Id.* at 885–86.

74. *Id.* at 886.

75. *See id.*

76. *Id*.

77. *Id.* at 887.

78. *Id.* at 886–87.

79. *Most Laws Mandating Counseling and Waiting Periods Before Abortion Have Little Impact*, GUTTMACHER INSTITUTE (May 12, 2009), https://www.guttmacher.org/news-release/2009/most-laws-mandating-counseling-and-waiting-periods-abortion-have-little-impact [https://perma.cc/GU56-VP4T].

80. Theodore J. Joyce, et al., *The Impact of State Mandatory Counseling and Waiting Period Laws on Abortion: A Literature Review*, GUTTMACHER INSTITUTE (April 2009), https://www.guttmacher.org/report/impact-state-mandatory-counseling-and-waiting-period-laws-abortion-literature-review [https://perma.cc/7HD4-VAZL].

81. *Id*.

trimester abortions increased.[82] In contrast, abortion rates did not measurably change in states where women were permitted to obtain the information remotely and avoid a second clinic visit.[83] Thus, whether the purpose behind waiting period laws can actually be "calculated to inform the woman's free choice [and] not hinder it" is highly questionable when it has been shown that the change in reproductive outcomes due to waiting period laws is more likely a result of the burden of the requirement to certain women, not women changing their minds after being required to take time to think about their decision.[84]

Moreover, as the district court noted about the situation in *Casey*, studies have shown that requiring that women make two trips to a clinic – one to receive information, and another to complete the procedure at least twenty-four hours later – instead of one imposes additional burdens on some women, forcing them to take more time off from work, arrange child care, or spend additional money to travel.[85] Further, the burden may be compounded by other arbitrary targeted regulations of abortion providers ("TRAP laws") in a given state, such as those that require abortion facilities to meet ambulatory surgical center ("ASC") requirements or those that require physicians to obtain admitting privileges at a local hospital.[86] ASC and admitting privilege requirements have caused many clinics to close in states like Missouri and Texas.[87] Closing clinics forces women to travel greater distances to the nearest clinic.[88] In these states, a requirement of two visits forces some women to even arrange to stay away from home for one or more nights, depending on the length of the waiting requirement, due to the great

82. *Id*.

83. *Id*.

84. *See id.*

85. *Most Laws Mandating Counseling and Waiting Periods Before Abortion Have Little Impact*, GUTTMACHER INSTITUTE (May 12, 2009), https://www.guttmacher.org/news-release/2009/most-laws-mandating-counseling-and-waiting-periods-abortion-have-little-impact [https://perma.cc/CBX8-U249].

86. While abortion providers are already subject to strict evidence-based regulations such as licensing requirements, federal workplace safety requirements, association requirements and medical ethics, many states have imposed additional regulations targeted specifically at abortion clinics that go beyond what is necessary to ensure patient safety. These laws have the primary purpose of limiting access to abortion and are referred to as targeted regulations of abortion providers, or TRAP laws. *See Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INSTITUTE (Jan. 2020), https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws [https://perma.cc/7C2A-QS7M].

87. *See id.*

88. *Id*.

distance.[89] However, the burdensome effects of a given law are difficult to definitively measure until after the restriction takes effect, making facial challenges to laws with a clear purpose of ending the abortion right difficult to bring in courts that focus the undue burden analysis on effect.[90]

In terms of laws furthering the State's legitimate interest in women's health, the *Casey* plurality held that the State may enact regulations to further this interest at any point in pregnancy.[91] However, "[u]nnecessary health restrictions that have the purpose or effect of presenting a substantial obstacle to women impose an undue burden."[92] However, because the Court, in application, did not give meaningful review to the State's purpose of potential life, some lower courts began to apply less scrutiny in the health restriction context, where impermissible purpose is arguably more clear. This illustrates a twofold issue with *Casey's* undue burden test: (1) its analysis sets up acceptable purposes that are in direct conflict with one another and (2) it assumes a case-by-case analysis is necessary, which guarantees endless legal battles because every state is different.

III. HOW THE UNDUE BURDEN STANDARD IS UNCLEAR: A LOOK INTO THE FIFTH CIRCUIT'S INTERPRETATION BEFORE AND AFTER *WHOLE WOMAN'S HEALTH V. HELLERSTEDT*

The United States Court of Appeals for the Fifth Circuit's interpretation of the *Casey* test illustrates the contradictory and confusing nature of the undue burden test and how it can ignore hostile legislative tactics. Further, the Fifth Circuit has interpreted the undue burden test to be a state-specific analysis, rendering any clarification from the Supreme Court on what constitutes an undue burden distinguishable. The Fifth Circuit's recent abortion decisions involving the undue burden standard are of particular relevance here because its articulation of the standard has made its way to the Supreme Court on two separate occasions within the last ten years.

In *June Medical Services v. Kliebert*, a district court within the Fifth Circuit invalidated a Louisiana law requiring physicians to have admitting privileges at a hospital within thirty miles of the facility where they perform abortions, holding that the law posed an undue burden in effect.[93] The Fifth Circuit then reversed, holding that the law was not an undue burden under its

89. *Most Laws Mandating Counseling and Waiting Periods Before Abortion Have Little Impact*, GUTTMACHER INSTITUTE (May 12, 2009), https://www.guttmacher.org/news-release/2009/most-laws-mandating-counseling-and-waiting-periods-abortion-have-little-impact [https://perma.cc/3BW4-9Q8W].

90. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

91. *Id.* at 878.

92. *Id*.

93. 158 F. Supp.3d 473, 573 (M.D. La. 2016).

interpretation of the standard.[94] Later that year, in *Whole Woman's Health v. Hellerstedt*, the Supreme Court reversed the Fifth Circuit and struck down a facially-identical Texas law, holding the admitting privilege requirement in that case was an undue burden because it did nothing to benefit women's health but instead made abortions much less accessible to women.[95]

In light of *Whole Woman's Health*, the Fifth Circuit then remanded *June Medical Services* to the district court for additional factfinding on the admitting privileges law in Louisiana.[96] The district court again invalidated the law as unduly burdensome, finding that the law at issue was facially identical to the Texas law invalidated in *Whole Woman's Health* and similarly furthered no health benefit.[97] On appeal, the Fifth Circuit reversed the district court again and dismissed the case, holding that there was at least a minimal benefit and the burden was not undue, contrary to the district court's extensive findings.[98] The United States Supreme Court granted certiorari and reversed the Fifth Circuit's decision, again taking issue with the Fifth Circuit's analysis.[99] These cases and their implications are more fully discussed below.

A. The Initial District Court Decision: June Medical Services v. Kliebert

The Fifth Circuit's interpretation of *Casey*'s undue burden test further illustrates the problems with the standard.[100] In January 2016, the United States District Court for the Middle District of Louisiana was asked in *June Medical Services v. Kliebert* to invalidate a Louisiana law requiring physicians to have admitting privileges at a hospital within thirty miles of the facility where they perform abortions.[101] With Judge deGravelles writing the majority opinion, the district court applied what the Fifth Circuit had previously deemed to be *Casey's* two-pronged test: (1) the law must be rationally related to a legitimate state interest, and (2) the law must not have

94. June Meds. Servs. L.L.C. v. Gee, 814 F.3d 319, 325, 329 (5th Cir. 2016), *vacated* 136 S. Ct. 1354 (2016).

95. 136 S. Ct. 2292, 2318, 2320 (2016).

96. June Med. Servs., L.L.C. v. Gee, No. 16-30116, 2016 WL 11494731, at *1 (5th Cir. Aug. 24, 2016).

97. June Med. Servs. LLC v. Kliebert, 250 F. Supp. 3d 27, 89 (M.D. La. 2017), *rev'd sub nom.* June Med Servs. L.L.C. v. Gee, 905 F.3d 727 (5th Cir. 2018), *rev'd sub nom.* June Med. Servs. L. L. C.v. Russo, 140 S. Ct. 2103(2020).

98. June Med. Servs. L.L.C. v. Gee, 905 F.3d 787, 815 (5th Cir. 2018), *cert. granted*, 140 S. Ct. 35 (2019), *cert. granted*, 140 S. Ct. 35 (2019), *rev'd sub nom.* June Med. Servs. L.L. C. v. Russo, 140 S. Ct. 2103 (2020) (plurality opinion).

99. June Med. Servs., L.L.C., v. Russo, 140 S. Ct. 2103, 2133 (2020) (plurality opinion).

100. June Med. Servs. v. Kliebert, 158 F.Supp.3d 473, 482–83 (2016).

101. *Id.* at 484.

the purpose *or* effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion.[102]

In assessing the first prong, the district court followed Fifth Circuit precedent that admitting privileges are rationally related to women's health and found the first prong to be satisfied.[103] The district court then assessed the second prong, making a twofold inquiry into both the law's purpose and effect.[104] In examining a law's purpose, the Fifth Circuit's interpretation of the rule assumes a valid purpose unless the regulation serves no purpose other than to make obtaining abortions more difficult.[105] In other words, the purpose prong is satisfied as long as the purpose of the law is not solely to impose an undue burden.[106] The burden is on the plaintiff to show impermissible purpose, and the court noted that district courts within the Fifth Circuit are not allowed to weigh benefits against burdens under the test.[107] Here, the district court found that one purpose of the admitting privileges law was to further women's health, but that another purpose of the law was to make it more difficult for physicians to perform legal abortions and therefore restrict women's access.[108] Because there was at least one permissible purpose behind the law, the district court found the purpose prong to be satisfied.[109]

The district court then found that the law imposed an undue burden under the effects prong of its undue burden analysis.[110] Under the effects prong, the law must not have the effect of placing a substantial obstacle in the path of women seeking pre-viability abortions.[111] Here, the district court made extensive factual findings showing that doctors likely would not be able to obtain admitting privileges, and that this would cause an undue burden on women's access.[112] At the time of the case, five out of the six abortion providers in Louisiana had made good faith efforts to obtain admitting privileges but were unable to do so because hospitals would either ignore their applications until they automatically lapsed or deny applications because of the doctors' statuses as abortion providers.[113] The remaining doctor testified that he would be forced to stop performing legal abortions if he became the sole provider in the state.[114] Logistically, the doctor would not be able to

102. *Id.* at 524.
103. *Id.* at 529–30.
104. *Id.* at 530–31.
105. *Id.* at 526.
106. *Id.* at 530–31.
107. *Id.* at 526.
108. *Id.* at 505.
109. *Id.* at 530–31.
110. *Id.* at 531.
111. *Id.* at 527.
112. *Id.* at 517–22.
113. *Id.* at 506.
114. *Id.* at 499.

accommodate all Louisiana women seeking abortions.[115] Further, that doctor had already received intense threats from activist groups that would worsen if he became the only doctor for groups to focus on.[116] Thus, the district court invalidated the law because it posed an undue burden in effect.[117]

B. The Supreme Court Speaks on the Standard: Whole Woman's Health v. Hellerstedt

Later in 2016, the Supreme Court, in *Whole Woman's Health*, addressed the propriety of the Fifth Circuit's interpretation of the undue burden test and applied it to two Texas laws, an admitting-privileges requirement facially identical to the Louisiana admitting-privileges requirement at issue in *Kleibert* and a surgical center requirement.[118] The Court waited to address the requirements until after they were allowed to go into effect but ultimately invalidated both as violations of the undue burden standard under *Casey*.[119] When the case was first brought, before the law took effect, the Court refused to hear the case on the grounds that it was not ripe – without seeing the impact that the TRAP laws would have, the Court said it could not determine whether there was an undue burden.[120] It was only after the law took effect and half the clinics closed that the Court was willing to take the case back up again.[121]

The admitting-privilege provision at issue required abortion-providing physicians to have admitting privileges at a hospital within thirty miles of the abortion facility, and the surgical-center provision required abortion facilities to meet the minimum standards under Texas law for ambulatory surgical centers.[122] The Court, with Justice Breyer writing for the majority, held that each restriction placed an undue burden on women's access to abortion and invalidated both provisions.[123]

In the majority opinion, Justice Breyer began by clarifying certain aspects of the undue burden test required by *Casey*, specifically by explaining how the standard used by the Fifth Circuit was incorrect.[124] The Fifth Circuit's test found a state law constitutional "if: (1) it [did] not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it [was] reasonably related to (or designed to further) a legitimate state interest."[125] Justice Breyer

115. *Id*.
116. *Id.* at 498–99.
117. *Id.* at 531.
118. Whole Woman's Health v. Hellerstedt, 136 S.Ct. 2292, 2300 (2016).
119. *Id*.
120. *Id.* at 2306.
121. *Id*.
122. *Id.* at 2300.
123. *Id.*
124. *Id.* at 2309.
125. *Id.*

critiqued the first component for its focus on the burden imposed without including the relevant inquiry into whether the law furthers the State interest via a medical benefit, reasoning that "the rule announced in Casey, however, requires that courts consider the burdens a law imposes on abortion access t*ogether with the benefits those laws confer*."[126] The Court also clarified that rational basis review was incorrect: "[It] is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue."[127]

In invalidating the admitting-privileges requirement, Justice Breyer first noted that "there was no significant health-related problem that the new law helped to cure," citing evidence in the record of the particularly low rates of complications and virtually nonexistent deaths in Texas due to abortions.[128] Moreover, there was *no evidence* in the record showing that the new requirement would have helped women obtain better treatment.[129] Because there was no evidence of any health benefit resulting from the new requirement, the Court found that the law did not further the State's legitimate interest in protecting women's health.[130] Moreover, the Court stated that federal district courts have found other states' admitting-privileges requirements to lack health benefits for similar reasons.[131]

Furthermore, Breyer made the second point that, not only does the requirement have virtually no benefit, but "the record evidence indicates that the admitting-privileges requirement places a 'substantial obstacle in the path of a woman's choice,'" citing language from *Casey*.[132] Texas hospitals conditioned admitting privileges on physicians meeting a certain number of admissions per year.[133] However, abortions in Texas were so safe that patients rarely needed a hospital visit related to the procedure, so physicians were almost never able to meet the requirement for admitting privileges.[134] After the requirement went into effect, the number of abortion facilities dropped in half due to the difficulty involved in physicians obtaining admitting privileges.[135] This resulted in "fewer doctors, longer waiting times, and increased crowding."[136] There was also evidence in the record that the closures resulted in increased driving distances for women to procure an abortion, with the restrictions causing the number of women living more than

126. *Id.* (emphasis added).
127. *Id*.
128. *Id.* at 2310.
129. *Id.* at 2310–11.
130. *Id.* at 2311.
131. *Id.* at 2312.
132. *Id.*
133. *Id*.
134. *Id*.
135. *Id.* at 2313.
136. *Id*.

150 miles from an abortion facility to increase by hundreds of thousands.[137] The Court acknowledged that, while increased driving distances do not always rise to the level of placing an undue burden on access, when taken cumulatively with the other burdens and weighed against the complete lack of health benefits, the law created an undue burden.[138]

For similar reasons related to the lack of a health benefit and the extent of the burden imposed, the Court also invalidated the surgical-center requirement.[139] First, the Court, citing the extensive district court findings,[140] found that the restriction provided women with no real health benefit.[141] Because Texas already had extensive safety regulations in place for abortion clinics, the surgical-center requirement made no appreciable difference in safety.[142] Moreover, Texas allowed procedures statistically riskier than abortion, like colonoscopies, liposuctions, and at-home childbirth overseen by a midwife, to take place outside of hospitals without requiring those facilities to be certified as surgical centers.[143] The Court also noted that there was *extensive* evidence in the record to support that the restriction provided no real health benefit, and there was *no evidence* to the contrary.[144] When weighed against the burden of forcing more clinics to close because of the difficulty in surgical-center certification, the Court found the requirement imposed an undue burden on abortion access.[145]

C. The Fifth Circuit's Analysis after Whole Woman's Health

While *Whole Woman's Health* was considered a victory for many pro-choice advocates, its precedential value was limited: the Court treated the challenge to Texas's law as an as-applied challenge.[146] It did not strike down *all* admitting privileges requirements or *all* surgical center certification requirements as unduly burdensome, just those in Texas in light of the number of clinics that had to close and the increased driving distances imposed on

137. *Id.*

138. *Id.*

139. *Id.* at 2316.

140. *Id.* at 2315.

141. *Id*.

142. *Id*.

143. *Id.* (Explaining the total number of deaths in Texas from abortions was five in the period from 2001 to 2012, or about one out of about 120,000 to 144,000 abortions. Nationwide, childbirth is fourteen times more likely than abortion to result in death, but Texas law allows a midwife to oversee childbirth in the patient's own home. Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate ten times higher than an abortion. The mortality rate for liposuction, another outpatient procedure, is twenty-eight times higher than the mortality rate for abortion.).

144. *Id.* at 2316.

145. *Id.* at 2317–18.

146. *Id.* at 2305.

women in that state.[147] The problem with the limited nature of this holding is illustrated by the Fifth Circuit's reconsideration of *Kleibert* in light of the Supreme Court's decision in *Whole Woman's Health*.

On remand, the district court laid out a new test in accordance with *Whole Woman's Health*.[148] Under the new test, a restriction must be shown to actually further its purported interest, and it is constitutional only if its benefits outweigh its burdens, as outlined by *Whole Woman's Health*.[149] The district court, with Judge deGravelles again writing the opinion, granted a permanent injunction on the admitting privileges requirement, finding that any minimal benefit of the law did not outweigh its substantial burdens.[150]

In rendering this decision, the district court made extensive findings of fact showing that the admitting privilege requirement was not relevant to the standard of care provided to patients, it provided no benefits to women's health, and it was an inapt remedy for a problem that did not exist.[151] The district court further found that the requirement would likely cause at least three of the six abortion clinics in Louisiana to close, which would cause all women seeking an abortion in Louisiana to face greater obstacles, with additional burdensome effects for several significant subgroups of women in Louisiana.[152] Thus, after making extensive factual findings and weighing the minimal – if not nonexistent – benefits of the law against its significant burdens, the district court found the burden to be undue and the law facially unconstitutional.[153]

On appeal, the Fifth Circuit again reversed the district court's decision and dismissed the case, with Circuit Judge Smith writing the majority opinion.[154] The court held that the factual situation in Louisiana was different from the situation in Texas contemplated by the Supreme Court in *Whole Woman's Health*.[155] Even though the laws were facially identical, the court found that the law, while declared an undue burden in Texas, would not amount to such a burden in Louisiana.[156] The court interpreted *Casey* and *Whole Woman's Health* to mean that "even regulations with a minimal benefit are unconstitutional only where they present a substantial obstacle to abortion."[157]

147. *Id.* at 2297.

148. June Medical Services LLC v. Kliebert, 250 F.Supp.3d 27, 33 (M.D. La 2017).

149. *Id.* at 32.

150. *Id.* at 88.

151. *Id.* at 64.

152. *Id.* at 82.

153. *Id.* at 88–89.

154. June Med. Srvs., L.L.C. v. Gee, 905 F.3d 787, 815 (5th Cir. 2018).

155. *Id.* at 791.

156. *Id.*

157. *Id.* at 803.

The court found that the law conferred at least a minimal benefit, citing legislative testimony showing that there was a difference in the credentialing function between clinics and hospitals.[158] Unlike in Texas where the requirement yielded no additional benefit because abortion clinics were already under strict safety regulations, the Fifth Circuit found that abortion clinic credentialing in Louisiana was not as rigorous as the process used by hospitals.[159] Specifically, the record showed evidence that Louisiana abortion clinics, apart from requiring physicians to be medically licensed, did not inquire into physician competency or perform background checks, whereas hospitals did.[160] Moreover, evidence also showed that the requirement was not targeting abortion procedures while leaving riskier procedure providers free from the requirement, as was the case in *Whole Woman's Health*.[161] Instead, the court found that the requirement sought to subject abortion providers to the same standards that apply to physicians providing similar types of services in outpatient surgery centers.[162] While the court held that there was evidence that the Louisiana law would yield some benefit, it acknowledged that the benefit was minor.[163]

Thus, the court found that the law was addressing a problem unique to Louisiana and bringing abortion physicians up to a baseline standard required of other physicians.[164] This reasoning is problematic, however, because the court of appeals attached a benefit to fixing the difference in credentialing in the face of the district court's explicit finding that fixing the difference provided no benefit and addressed no real problem.[165] The district court found that abortion procedures were already extremely safe in Louisiana, as they were in Texas in *Whole Woman's Health*, and abortion providers' competency was not an issue in Louisiana.[166] However, the court of appeals disregarded the district court's findings on this point and deferred to legislative statements asserting a need for the law to protect women's health.[167]

The court of appeals further distinguished the situation in Louisiana from Texas in *Whole Woman's Health* by finding the law to be less burdensome in Louisiana than Texas.[168] The court said that it was unclear whether the admitting privileges requirement would actually cause clinics to close in Louisiana because some of the doctors' applications had not yet been

158. *Id.* at 805.
159. *Id.*
160. *Id.*
161. *Id.* at 805–06.
162. *Id.*
163. *Id.* at 807.
164. *Id.* at 805.
165. *Id.* at 807.
166. *Id.* at 808.
167. *Id.* at 791.
168. *Id*.

officially denied, so the doctors could still theoretically obtain privileges.[169] However, the district court explicitly found that hospitals were purposely letting the applications sit without formally denying them because Louisiana allows for automatic denial if a hospital never addresses an application.[170]

In summary, the Fifth Circuit stated that the law would result in a potential increased waiting time of fifty-four minutes for, at most, thirty percent of women.[171] In its holding, the court found that this burden was not "substantial" under *Whole Woman's Health*, and concluded that the statute should be upheld in light of the minimal benefit it would confer.[172]

However, the dissent in the Fifth Circuit case, written by Circuit Judge Higginbotham, found that the court failed to give meaningful review to the burdens and benefits alleged to be conferred by the law due to its disregard of the district court's findings.[173] According to the dissent, the law would confer no real health benefit because, prior to the law's passage, abortion physicians were required to have a written transfer agreement with a physician who did have admitting privileges to a local hospital.[174] Thus, the only "benefit" the law would confer to women is that, if they require hospital care in the event of a complication, which is already a very low percentage of cases, they would be able to have continuity of care with their original abortion physician.[175] However, there was no evidence in the district court record that suggested women would receive a lesser standard of care in the event of such a transfer.[176]

Moreover, the dissent criticized the majority's acceptance of the law's credentialing function as a health benefit, as the district court made no such finding.[177] The majority rested this finding of benefit on the testimony of one doctor who was responsible for hiring physicians at one of the clinics and had previously been on a hospital committee that assessed admitting privilege applications.[178] In his testimony, the doctor described the different hiring procedures the majority discussed.[179] However, the dissent criticized the majority for attaching a benefit to addressing that difference when no evidence of such benefit was on the record.[180] Moreover, there was no evidence on the record that any physician at an abortion facility had been hired with a criminal

169. *Id.*
170. *Id.* at
171. *Id.* at 815.
172. *Id.*
173. *Id.* at 816 (Higginbotham, J., dissenting).
174. *Id.* at 817.
175. *Id.* at 817–18.
176. *Id.* at 818.
177. *Id*.
178. *Id*.
179. *Id.*
180. *Id.* at 818–19.

record or without the proper competency.[181] Thus, the dissent argued that, like in *Whole Woman's Health*, the restriction does not actually further the State's interest in women's health or proper credentialing because these were not issues to begin with.[182]

The dissent also disagreed with the majority's view that the law would not be an undue burden on abortion access.[183] The district court made extensive findings on the likelihood that the six abortion providers in Louisiana would be able to obtain admitting privileges.[184] The court found that only one doctor would be able to obtain admitting privileges, and this would result in the inability of approximately seventy percent of the 9,976 women seeking abortions in Louisiana annually to obtain one.[185] This was the district court's more conservative finding of harm, as it made an alternative finding of more substantial harm in the likely event that the last remaining abortion provider would quit due to fear of being the only abortion provider in the state.[186] Thus, weighing the likelihood of substantial harm against the lack of health benefit using the evidentiary findings of the district court, the dissent found this to be a clear undue burden on abortion access.[187]

In October 2019, the Supreme Court agreed to hear the appeal of *June Medical Services* and address the constitutionality of the Louisiana admitting privileges requirement, its first substantive abortion case since the addition of Justice Gorsuch and Justice Kavanaugh.[188] The future of abortion jurisprudence now substantially depends on the make-up of the Court.[189] Now, three years after *Whole Woman's Health*, Justice Scalia and Justice Kennedy are no longer on the bench, and Justice Gorsuch and Justice Kavanaugh have taken their places, respectively.[190] Prior to Kavanaugh's appointment, some scholars noted the specific importance of Kennedy's position on the Court in terms of *Whole Woman's Health's* power because of the importance of his vote to uphold *Roe's* essential holding in the *Casey* plurality.[191] Indeed, his retirement could place abortion rights in a much more precarious position.[192] Many have speculated about how the new Supreme

181. *Id.*

182. *Id.* at 819.

183. *Id.* at 829.

184. *Id.* at 826–27.

185. *Id.* at 827.

186. *Id*.

187. *Id.* at 829.

188. Adam Liptak, *Supreme Court to Hear Abortion Case from Louisiana*, NEW YORK TIMES (Oct. 4, 2019), http://www.nytimes.com/2019/10/04/us/politics/supreme-court-abortion-louisiana.html [https://perma.cc/JFK3-KGJQ].

189. John A. Robertson, Whole Woman's Health v. Hellerstedt *and the Future of Abortion Regulation*, 7 UC IRVINE L. R. 623, 643–44 (December 2017).

190. Liptak, *supra* note 188.

191. Robertson, *supra* note 189, at 643–44.

192. Robertson, *supra* note 189, at 643–44.

Court composition will impact the future of abortion rights, but a definitive answer is imminent.

D. June Medical Services*: Another Clarification from the Supreme Court*

In *June Medical Services v. Russo*, Justice Breyer wrote the majority opinion, joined by Justices Ginsburg, Sotomayor, and Kagan.[193] In addressing the merits of the case, the majority first reiterated the proper standard for assessing abortion regulations: "a statute which, while furthering a 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."[194] Further, "unnecessary health regulations impose an undue burden if they have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion."[195] Importantly, the Court emphasized, reiterating language from *Whole Woman's Health*, that "courts must consider the burdens a law imposes on abortion access together with the benefits those laws confer."[196]

Noting that the Court of Appeals did not take issue with the legal standard used by the District Court so much as the factual findings it used in reaching its decision, the Court emphasized that "a district court's findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."[197] This standard is highly deferential, and a court of appeals may not reverse a plausible account of the evidence given the record, even if it would have weighed the evidence differently if it had been sitting as the trier of fact.[198]

With that standard in mind, the majority then carefully assessed whether the District Court's findings were sufficient to support its conclusion that the Louisiana admitting privileges law is unconstitutional.[199] In terms of the law's asserted benefits to women's health, the Court pointed to the following district court findings:

- Abortion in Louisiana was already "extremely safe, with particularly low rates of serious complications" prior to the law's passage. Further, testimony of clinic staff and physicians showed that less than one per several thousand patients ever required transfer to a hospital, and "whether or not a patient's treating

193. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020).
194. *Id.* at 2120.
195. *Id.* at 2112.
196. *Id.* at 2120.
197. *Id.* at 2121.
198. *Id*.
199. *Id*.

physician has admitting privileges is not relevant to the patient's care."[200]

- There was no evidence in the record showing a significant health-related problem that the new law would help to cure: there was no evidence of improper treatment of abortion complications or that requiring abortion providers to have admitting privileges would help avoid any negative outcomes.[201]

The Court then looked to the district court's findings on the law's burdensome effects:

- "Approximately 10,000 women obtain abortions in Louisiana every year[,]" and "those women were served by six doctors at five abortion clinics" at the outset of the litigation. By the time the district court rendered its second decision, there were five doctors and three clinics remaining.[202]

- Despite the good faith efforts of the five doctors to obtain admitting privileges in order to comply with the law, they had "very limited success for reasons related to [the law] and not related to their competence."[203]

- The doctors' inability to obtain admitting privileges was caused by the new law "working in concert with existing laws and practices, including hospital bylaws and criteria that preclude or, at least greatly discourage, the granting of privileges to abortion providers."[204]

- It is unlikely that the clinics would be able to recruit new physicians who have or could obtain admitting privileges.[205]

Enforcing the admitting privileges requirement would therefore "reduc[e] the number of clinics to one, or at most two, and leav[e] only one, or at most two, physicians providing abortions in the entire state."[206]

Taken together, the evidence shows that the law "does not advance Louisiana's legitimate interest in protecting the health of women seeking abortions. Instead, [the law] would increase the risk of harm to women's

200. *Id.* at 2114–15.
201. *Id.* at 2115.
202. *Id*.
203. *Id*.
204. *Id.*
205. *Id*.
206. *Id.* at 2115–16.

health by dramatically reducing the availability of safe abortion in Louisiana."[207]

The Court also noted that the district court found no distinction between this case and *Whole Woman's Health* because the Louisiana law was modeled after the Texas admitting privileges requirement and they both operate by imposing "significant obstacles to abortion access with no countervailing benefits."[208]

The Court concluded that, in light of the record, "the District Court's significant factual findings—both as to burdens and as to benefits—have ample evidentiary support" and "none is 'clearly erroneous.'"[209] The majority further concluded that "[t]his case is similar to, nearly identical with, *Whole Woman's Health*. And the law must consequently reach a similar conclusion. Act 620 is unconstitutional."[210]

In both *June Medical Services* and *Whole Woman's Health*, the laws in question were ostensibly enacted out of the States' interest in safeguarding women's health. Thus, these types of laws are commonly referred to as "health restrictions."[211] Indeed, stemming from *Roe* and rearticulated specifically in *Casey*, states have a legitimate interest in preserving women's health from the outset of pregnancy.[212] However, many scholars have noted that *Whole Woman's Health* significantly diminished the validity of health restrictions due to the Court's recognition that abortion is generally a much safer procedure today than it was in the *Roe* era.[213] *June Medical Services* now bolsters that conclusion. It follows, then, that states likely can no longer justify health restrictions "rely[ing] on general claims regarding the dangers of abortion."[214]

In *June Medical Services*, Louisiana seemed to address this issue by citing an existing gap in abortion facility regulations that the health restriction would alleviate.[215] This was successful with the Fifth Circuit majority.[216] The court reasoned that, unlike in *Whole Woman's Health* where the State showed *no* evidence of health benefit, Louisiana had at least provided *some* evidence that "the admitting privileges requirement performs a real, and previously unaddressed, credentialing function that promotes the well-being of women

207. *Id*. at 2116.

208. *Id*.

209. *Id*. at 2132.

210. *Id.* at 2133.

211. John A. Robertson, Whole Woman's Health v. Hellerstedt *and the Future of Abortion Regulation*, 7 UC IRVINE L. R. 623, 645 (December 2017).

212. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992).

213. Robertson, *supra* note 211, at 645; Becca Kendis, *Faute De Mieux: Recognizing and Accepting* Whole Woman's Health *for its Strengths and Weaknesses*, 69 CASE W. RES. L.R. 1007, 1027 (Summer 2019).

214. Kendis, *supra* note 213, at 1025.

215. June Med. Srvs. L.L.C. v. Gee, 905 F.3d 787, 807 (2018).

216. *Id.* at 813.

seeking abortion."[217] However, the court differed from *Casey* and *Whole Woman's Health*, as the dissent noted, in *assuming* the additional regulation would actually provide a benefit to women's health, which the district court specifically found it did not.[218] In *Whole Woman's Health* and *June Medical Services*, the Court emphasized the constitutional duty imposed on courts in reviewing factual findings when constitutional rights are at stake. The Court's thorough analysis of the lower court's findings and records in both cases further supports this duty.[219]

IV. THE CONSEQUENCES OF A STATE-SPECIFIC ANALYSIS: A LOOK INTO MISSOURI

The Missouri Legislature has delegated broad authority to the Department of Health and Senior Services ("DHSS") in regulating abortion facilities. However, Missouri lawmakers have used DHSS to make obtaining an abortion more difficult in Missouri.

A. Adding on to the Smokescreen: Delegations of Authority to Missouri Agencies and Planned Parenthood of Kansas v. Lyskowski

The Supreme Court's state-specific analysis of state TRAP laws becomes even more complicated when a state delegates the authority to regulate abortion to an agency that exercises broad authority.[220] In Missouri, for example, a state that has a codified legislative intent to restrict abortion to the fullest extent possible,[221] the legislature has given broad authority to DHSS in regulating abortion facilities.[222] DHSS is tasked with adopting rules, regulations, and standards by which abortion facilities must abide;[223] issuing

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217. *Id.* at 806.

218. *Id.* at 816 (Higginbotham, J., dissenting).

219. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016).

220. Rosemary Westwood, *How State Health Departments Are Closing Abortion Clinics: Five Key Takeaways*, PACIFIC STANDARD, Jul. 31, 2019, https://psmag.com/news/how-state-health-departments-are-closing-abortion-clinics-five-key-takeaways.

221. MO. ANN. STAT. § 188.010 (West 2019) ("In recognition that Almighty God is the author of life, that all men and women are 'endowed by their Creator with certain unalienable Rights, that among these are Life', and that article I, section 2 of the Constitution of Missouri provides that all persons have a natural right to life, it is the intention of the general assembly of the state of Missouri to: (1) Defend the right to life of all humans, born and unborn; (2) Declare that the state and all of its political subdivisions are a "sanctuary of life" that protects pregnant women and their unborn children; and (3) Regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.").

222. *See* MO. ANN. STAT. §§ 197.225–197.230 (West 2017).

223. MO. ANN. STAT. § 197.225 (West 2017).

licenses, without which abortion facilities may not operate;[224] and conducting on-site inspections and investigations of facilities "as it deems necessary."[225] Additionally, the legislature requires DHSS to conduct unannounced on-site inspections and investigations of abortion facilities at least once a year.[226] While much of the statutory language relating to the licensing of medical treatment facilities refers to both abortion facilities and ambulatory surgical centers, this on-site, unannounced investigation requirement is specific only to abortion facilities.[227]

DHSS's discretionary treatment of abortion facilities has been the subject of several lawsuits within the last five years.[228] In July 2015, the Missouri Senate convened the Interim Committee on the Sanctity of Life to investigate Planned Parenthood's presence in Missouri.[229] The Committee focused on the licensing of Planned Parenthood of Kansas and Mid-Missouri's ("PPKM") Columbia, Missouri facility and the hospital admitting privileges held by the sole physician performing abortions there. Missouri law requires physicians who perform abortions at an abortion facility to obtain admitting privileges at a hospital within fifteen minutes of the facility in order for the facility to receive a license from DHSS.[230] The Committee determined that PPKM's physician held privileges at University of Missouri Health Care under the hospital's "refer and follow" category of privileges.[231]

In August 2015, then-Senator and Chairman of the Committee on Sanctity of Life Kurt Schaefer, sent a letter to the University of Missouri Chancellor reminding him that the University, a publicly funded entity in a state with citizens who "have gone to great lengths to ensure that their taxpayer dollars never enable abortion services," received half of one billion taxpayer dollars from the State of Missouri the previous year.[232] He cautioned that the University's agreement with PPKM's physician was "a matter of substantial public interest and concern."[233] Senator Schaefer, also a member of the Senate Appropriates Committee, further cautioned that the University may be in violation of Missouri law prohibiting the use of public funds for the assistance or promotion of abortion procedures.[234]

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224. *Id.* at § 197.205.)

225. *Id.* at § 197.230 (West 2017).

226. *Id*.

227. *Id*.

228. *See* Planned Parenthood of Kansas v. Lyskowski, 2016 WL 2745873 (W.D. Mo. 2016); Comprehensive Health of Planned Parenthood Great Plains v. Hawley, 903 F.3d 750 (8th Cir. 2018).

229. Planned Parenthood of Kansas v. Lyskowski, 2016 WL 2745873, at *2 (W.D. Mo. 2016).

230. *Id.*

231. *Id*.

232. *Id*.

233. *Id.*

234. *Id.*

In response, the University announced on September 24 that it would eliminate the "refer and follow" category of privileges held by PPKM's physician effective December 1.[235] The following day, DHSS Administrator John Langston sent a letter to PPKM stating that the facility's license would be revoked effective December 1 if the facility's physician did not obtain admitting privileges at a nearby hospital by then.[236] On November 25, Langston sent PPKM another letter stating that DHSS had not received confirmation that PPKM was able to satisfy the admitting privileges requirement essential to its license and that DHSS would now revoke the center's license effective close of business on November 30.[237]

After PPKM obtained a preliminary injunction to prevent DHSS from revoking their facility license in November, the United States District Court for the Western District of Missouri assessed the propriety of a permanent injunction in April 2016 in *Planned Parenthood of Kansas v. Lyskowski*.[238] The District Court granted the permanent injunction, and Judge Laughrey, writing for the majority, found that DHSS, in denying PPKM's license, violated the Equal Protection Clause by treating PPKM more harshly than other similarly situated ASCs.[239]

Missouri law outlines a procedure for DHSS to follow when a facility is found not to be in compliance with licensing requirements. The procedure generally involves DHSS identifying a deficiency, notifying the facility of the deficiency, undergoing a course of communication with the facility that allows the facility time and opportunity to implement a plan of correction to address the deficiency, and then deciding whether license revocation is appropriate.[240] Judge Laughrey noted that PPKM was not given an opportunity to implement a plan of correction before DHSS revoked its license, and "[o]ther than the PPKM revocation that is the subject of this litigation, there is no instance in DHSS records involving an ASC license revocation without a plan of correction being put in place first."[241]

Judge Laughrey further noted that DHSS had rarely revoked ASC licenses, with only one other instance of DHSS attempting to revoke such a license found in the record.[242] In that case, DHSS identified numerous serious deficiencies that posed "significant threats to patient health and safety" at the Surgical Center of Creve Coeur ("SCCC"), including failing to ensure that drugs used at the center were securely maintained, allowing untrained nurses to provide conscious sedation, failing to follow acceptable infection control standards, and failing to ensure that its nursing staff was aware of the location

235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at *3.
239. *Id.* at *1.
240. *Id.* at *7, *10.
241. *Id.* at *7.
242. *Id.*

of the emergency resuscitative equipment.[243] Despite these egregious deficiencies, SCCC was allowed to retain its license during the period of deficiency and submit several plans of correction over the course of two years.[244] DHSS made a "substantial effort with SCCC to remedy the deficiencies, involving numerous back and forth communications with SCCC."[245] After DHSS worked with SCCC for years to try to correct the serious deficiencies with no success, DHSS then made the decision to revoke the center's license.[246]

In contrast, DHSS made the decision to revoke PPKM's license based on a single impending deficiency without soliciting a plan of correction or allowing PPKM time to address the deficiency.[247] Instead, "DHSS informed PPKM that it had made its decision about how to address the deficiency, and planned to revoke the center's license as soon as the deficiency arose."[248] DHSS admitted that, unlike SCCC, PPKM's failure to obtain admitting privileges presented no immediate threat to patient health or welfare because PPKM stopped performing abortions when its physician's hospital privileges expired.[249] The court found DHSS's disparate treatment of SCCC and PPKM irrational because "[t]here is no question that SCCC's safety deficiencies made the center less deserving of DHSS leeway in developing and implementing a plan of correction than does PPKM's single deficiency, which DHSS admits presents no immediate threat to patient welfare."[250] Yet SCCC was given significantly more opportunities to communicate with DHSS than PPKM, and the court found this type of irrational disparate treatment violative of the Equal Protection Clause.[251]

Further, "PPKM had no deficiency at the time DHSS sent its September 25 and November 25 notices," and DHSS had never undertaken a prospective analysis of impending deficiencies prior to PPKM, according to the record.[252] The court found that "such hasty action is not contemplated by the enforcement statute."[253]

Further, Judge Laughrey found that "DHSS's unprecedented hasty actions were likely the result of political pressure being exerted by Missouri legislators and the Department's perception that if it did not act in accordance with the legislature's desires, its budget would be cut."[254] Mr. Langston

243. *Id.* at *7, *11.
244. *Id.* at *11.
245. *Id.* at *7.
246. *Id.*
247. *Id.* at *10.
248. *Id.* at *9.
249. *Id.* at *11.
250. *Id.*
251. *Id.*
252. *Id.* at *10.
253. *Id.*
254. *Id.* at *1.

suggested that DHSS feared financial retaliation from Senator Schaefer, as a member of the Senate Appropriates Committee, if it did not "act in accordance with the senator's goals."[255]

While Mr. Langston, who would normally be in charge of drafting and overseeing plans of corrections, sent the notices to PPKM, they were drafted by higher-ups in this case, which was unlike DHSS's normal practices.[256] All decisions about plans of correction are generally made by "bureau-level" DHSS employees who conduct ASC surveys, such as Mr. Langston, so the court noted that the involvement of the DHSS Director and Office of the Governor in PPKM's case was unusual and indicated that the course of action taken resulted from animus towards PPKM as an abortion facility.[257] Judge Laughrey found that DHSS's disparate treatment of PPKM "[could not] be justified by political pressure or public opposition to PPKM," and that the concept of equal protection dictates that "a bare [legislative] desire to harm a politically unpopular group cannot constitute a legitimate government interest."[258]

B. Illustrating the Problems with a State-Specific Analysis: Comprehensive Health of Planned Parenthood Great Plains v. Hawley

While Judge Laughrey's holding in *Lyskowski* checked improper state agency action motivated by animus towards abortion facilities, the same animus has gone unchecked in other lawsuits involving DHSS due to the application of the undue burden standard.[259] *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, an opinion written by Judge Shepherd of the United States Court of Appeals for the Eighth Circuit, is one example.[260] In that case, Comprehensive Health and Reproductive Health Services of Planned Parenthood of the St. Louis Region ("RHS"), together representing every facility that provided or sought to provide abortions in Missouri,[261] sought declaratory and injunctive relief to enjoin enforcement of the Missouri legislature's 2007 statutory amendment to the definition of ambulatory surgical centers to include abortion facilities.[262]

The amendment resulted in a statutory requirement that all physicians performing abortions have admitting privileges at a hospital within fifteen

255. *Id.* at *12.

256. *Id.*

257. *Id.* at *7.

258. *Id.* at *1.

259. *See* Comprehensive Health of Planned Parenthood Great Plains v. Hawley, 903 F.3d 750, 757 (8th Cir. 2018).

260. See id.

261. *Id.* at 754 ("Comprehensive Health operates facilities in Kansas City and Columbia, and RHS operates a facility in St. Louis and has plans to operate in Springfield and Joplin.").

262. *Id.*

minutes of the facility, the same type of restriction at issue in *Whole Woman's Health* and *June Medical Services*.[263] Additionally, pursuant to its authority to enact health and safety regulations for abortion facilities, DHSS subsequently adopted regulations that specify physical design and layout requirements for abortion facilities performing surgical abortions, known as physical plant regulations.[264] These regulations include a waiver provision allowing facilities to waive the requirements, pending a written request and DHSS approval of the waiver.[265] Comprehensive Health and RHS challenged both the admitting privileges requirement and the physical plant regulations on substantive due process and equal protection grounds, arguing that *Whole Woman's Health* made both laws unconstitutional and unenforceable.[266]

The district court preliminarily enjoined enforcement of the admitting privileges requirement and the physical plant regulations solely on due process grounds, finding that *Whole Woman's Health* controlled its ruling.[267] The district court found the opinion in *Whole Woman's Health* to be so clear on the unconstitutionality of admitting privilege requirements that it went so far as to liken Missouri's advocacy of these TRAP laws to an "attempt to undermine *Brown v. Board of Education*."[268]

In assessing the claims in the Eighth Circuit, Judge Shepherd addressed each requirement separately.[269] Beginning with the physical plant regulations, the court did not agree with the lower court that a facial challenge to the regulations was justiciable at that point in time.[270] The Eighth Circuit, interpreting *Whole Woman's Health* similarly to the Fifth Circuit in *June Medical Services*, focused on the burden component of the undue burden test and emphasized the "fact-intensive nature of the constitutional test."[271] The court found that there was not enough information in the record on how flexible DHSS would be in allowing waivers to show whether the physical plant regulations would actually amount to an undue burden.[272] There was only one previous instance of a request for a waiver in the record, so the court found that a decision on the facial challenge was premature.[273]

The court further held that the district court committed an error of law by making a decision on the facial challenge to the physical plant regulations.[274] Judge Shepherd reasoned that the district court "enjoined the

263. *Id.* at 753.
264. *Id.*
265. *Id.*
266. *Id.* at 754.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at 754–55.
271. *Id.* at 755–56.
272. *Id.* at 756.
273. *Id.* at 755.
274. *Id.* at 756.

regulations on the presumption that a DHSS Director would act less than scrupulously on any waiver application," and emphasized that "the good faith of [state] officers and the validity of their actions are presumed."[275] After *Lyskowski*, the foundation of this presumption seems questionable.

Moving to the next requirement at issue, Judge Shepherd held that the district court also erred in enjoining the admitting privileges requirement because "[it] did not apply the plain language of [*Whole Woman's Health v.*] *Hellerstedt*," which, the court reasoned, requires courts to consider the burdens a law imposes on abortion access together with the benefits those laws confer.[276] Explaining that *Whole Woman's Health* did not find that abortion was inherently safe in all states as a matter of law, Judge Shepherd held that the district court was required to make factual findings on whether the law was medically beneficial in order to adequately weigh benefits against burdens, because that inquiry might yield a different result in Missouri versus Texas.[277] The district court discussed the complete lack of health benefit conferred by the requirement, but the Court of Appeals read *Whole Woman's Health* to require a somehow more in-depth inquiry.[278]

Interestingly, both *Hawley* and *June Medical Services* involve this same issue: the undue burden standard allows appellate courts to disregard the fact-finding of lower courts, which are better suited to make burden determinations. Both the Fifth and Eighth Circuits have taken the view that the legislatures were motivated by something other than the obvious desire to eliminate all access to abortion in their respective states, in the face of codified legislative intents to do just that.

V. CONCLUSION

Even though the Columbia Health Center of PPKM succeeded in keeping its license in the 2016 *Lyskowski* case, it ended up losing its license in October 2018 after failing to meet the admitting privileges requirement.[279] *Lyskowski* addressed the flagrant disparate treatment of PPKM by DHSS, but it was not able to address the constitutionality of the DHSS requirements themselves.[280] Thus, the more insidious, long-term strategy implemented by the Missouri Legislature has gone largely unchecked. While Missouri had

275. *Id.*

276. *Id.* at 757–58.

277. *Id.* at 758.

278. *Id.*

279. Erin Heger, *'They've Moved the Goalpost': How Missouri Lawmakers Are Regulating Legal Abortion Out of Existence*, REWIRE NEWS GROUP (June 3, 2019), https://rewire.news/article/2019/06/03/theyve-moved-the-goalpost-how-missouri-lawmakers-are-regulating-legal-abortion-out-of-existence/ [https://perma.cc/NPM3-PR8R].

280. *See* Planned Parenthood of Kansas v. Lyskowski, 2016 WL 2745873, at *1 (W.D. Mo. 2016).

five abortion clinics in 2008, that number dwindled to one by 2020.[281] As further evidence of the strategy to completely end abortion in Missouri, DHSS was recently involved in litigation over its failed attempt to deny the license of Missouri's sole remaining abortion provider.[282] While the license of its sole clinic remains intact, Missouri narrowly escaped becoming the first state without a single abortion provider since 1974.

Planned Parenthood officials have been warning courts about this result for years. The director of state media campaigns for Planned Parenthood, Bonyen Lee-Gilmore, explained that "[t]his has been several decades' worth of work by politicians who are passing medically unnecessary restrictions and working with their political appointees who enforce regulation. They have picked off health center after health center, pushing care out of reach for far too many people. This has been a slow chipping away, a long-term strategy by anti-abortion forces in the state who have planned a long arc to this day."[283] Surely not having a single abortion facility in Missouri would amount to a substantial obstacle to Missouri women seeking abortions, but the undue burden standard, in its failure to meaningfully review legislative purpose behind a restriction, has allowed for this gradual result while courts have watched it happen.

281. Heger, *supra* note 279.
282. Id.
283. Id.