No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,
Petitioners,

v.

KIRK COLE, M.D., Commissioner of the Texas Department of State Health Services, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF CONSTITUTIONAL LAW SCHOLARS ASHUTOSH BHAGWAT, LEE BOLLINGER, ERWIN CHEMERINSKY, WALTER E. DELLINGER III, MICHAEL C. DORF, DANIEL FARBER, BARRY FRIEDMAN, PAMELA S. KARLAN, GILLIAN E. METZGER, FRANK MICHELMAN, JANE S. SCHACTER, SUZANNA SHERRY, REVA SIEGEL, GEOFFREY R. STONE, DAVID A. STRAUSS, AND LAURENCE TRIBE, *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*

The issue in this case is whether the Texas regulations at issue impermissibly burden a woman's constitutionally-protected decision whether to bear a child. *Amici* are constitutional law scholars who teach and/or write in the field, including as it relates to regulation of abortion, and who have a shared interest in identifying the proper standards of review. This brief sets forth *Amici*'s considered understanding of the framework governing abortion regulation, as established by the decisions of this Court.

Amici are the following scholars:[1]

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SUMMARY OF ARGUMENT

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a majority of this Court reaffirmed the central holding of *Roe v. Wade*, that a woman has a right "to choose to have an abortion before viability and to obtain it without undue interference from the State." 505 U.S. 833, 846 (1992) (opinion of the Court); *id.* at 870 (joint opinion); *see also id.* at 912 (Stevens, J., concurring in part and dissenting in part); *id.* at 923 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). The controlling joint opinion in *Casey* also identified two legitimate state interests that may justify regulation of abortion: an interest in promoting potential life and an interest in protecting the health of the woman. *Id.* at 878 (joint opinion).

Casey balanced these competing interests through an undue burden framework. That framework has governed the analysis of government regulation of abortion for nearly a quarter-century, and this Court has repeatedly relied upon *Casey*'s central premises in subsequent decisions. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 327–28 (2006); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

This challenge centers on determining whether two regulations adopted by Texas in the name of protecting women's health constitute undue burdens on women's access to abortion.[2]

Answering that question requires understanding a central distinction *Casey* drew between the State's interests in potential life and women's health—and the permissible means by which the State may advance those respective interests. Prior to viability, a woman has a right to decide to terminate her pregnancy, and the State cannot prohibit her from doing so. A regulation that has the purpose or effect of creating a substantial obstacle to women's access to pre-viability abortion is an undue burden and unconstitutional. Pre-viability, the State may promote its interest in respecting potential life *only* through measures designed to inform and persuade. The State may also regulate abortion to protect women's health, and here it is not limited to measures that inform and persuade. But health

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[2] The regulations require that all physicians performing abortions must have admitting privileges at a hospital within thirty miles of where an abortion is performed, and that abortions must be performed in an ambulatory surgical center (ASC). These requirements were imposed by statute and implemented through administrative regulations, and for ease of reference we refer to them here as the admitting privileges and ASC "regulations." *See* House Bill 2, 2013 Tex. Gen. Laws 5013 (codified as amended at Tex. Health & Safety Code §171.0031 (2013) (admitting privileges) and *id.* §245.010(a) (2014) (ASC requirements)); 25 Tex. Admin. Code §§139.53(c)(1), 139.56(a)(1) (2014) (admitting privileges regulations); *id.* § 139.40 (2014) (ASC regulations).

regulations that are unnecessary, or have either the purpose or effect of substantially obstructing abortion access, are unconstitutional.

The restriction on the means by which the State may further its interest in respecting potential life, pre-viability, is critical to *Casey*'s balance. Limiting the State to informative measures respects women's dignity and autonomy by leaving the ultimate decision in their hands. *Casey* is far from anomalous in this regard. This same emphasis on individual dignity and personal autonomy permeates the Court's recent substantive due process decisions.

Casey requires that courts meaningfully review health-justified abortion regulations to ensure that they are not designed to evade these limits. Because the public continues to be deeply and fiercely divided over whether a woman should have the right to end her pregnancy, legislators may attempt to evade *Casey*'s restrictions on the permissible means of promoting potential life by imposing unnecessary and burdensome regulations in the name of women's health. To guard against this risk, courts must subject health-justified regulations to careful scrutiny. In this case, the Fifth Circuit erred by applying only rationality review.

Casey's framework requires courts to assess whether asserted health regulations are actually designed to advance the State's interest in women's health and whether they actually achieve that result in practice. The Court's abortion jurisprudence, like prevailing doctrine in other areas of constitutional law, identifies two techniques that are particularly useful in undertaking this assessment. One is to scrutinize means–ends fit by examining the extent to which the means employed by the State actually

further the asserted health interest. The other is to weigh the health benefits achieved by the measure against the burdens it imposes on women's access to abortion, to ensure that those burdens are not excessive or undue. Under this approach, which is required by *Casey* and subsequent decisions, Texas's admitting-privileges and ASC regulations are plainly unconstitutional.

ARGUMENT

I. *CASEY* ESTABLISHED A CAREFUL BALANCE THAT RESTRICTS BOTH THE INTERESTS A STATE MAY PURSUE IN REGULATING ABORTION AND THE MEANS IT MAY USE TO DO SO

The *Casey* joint opinion constructed a constitutional framework that carefully balanced the competing interests involved in the abortion context: a woman's right to choose whether and when to bear a child, and the State's interests in expressing respect for potential life and protecting women's health. Restrictions on the means the State may use to advance its interests in respecting potential life and women's health are the key to *Casey*'s balance. While the State may regulate to protect potential life throughout pregnancy, prior to viability it may promote that interest *only* through means that seek to inform and persuade. The State may also regulate to protect women's health throughout pregnancy, and in doing so it is not limited to informative or persuasive means; but it may not enact asserted health regulations that are unnecessary or undue. And, fundamentally, the State may not attempt to advance its interests

through means that are designed to strike at the right itself.

A. The *Casey* Balance

Women have a fundamental liberty interest, protected by the Due Process Clause, to decide whether to carry a pregnancy to term. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–47 (1992) (opinion of the Court). *Casey* reaffirmed this principle, established in *Roe v. Wade*, 410 U.S. 113 (1973). But *Casey* also reaffirmed another principle it deemed central to *Roe*: that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child," and that these interests may justify some regulation of abortion. 505 U.S. at 846 (opinion of the Court).

"*Casey* … struck a balance" among these competing interests. *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (*Carhart*). This balance includes the following propositions: First, "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" Second, the State "also may not impose upon this right an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" Third, "'regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.'" *Id.* (quoting *Casey*, 505 U.S. at 877–79 (joint opinion)).

B. Dignity Is Central to *Casey*'s Balance and to Contemporary Substantive Due Process

Casey's careful balance of competing interests, embodied in the undue burden test, has now governed constitutional analysis of abortion restrictions for almost a quarter-century. *Casey* reflects and reinforces the fundamental respect for individual dignity that animates this Court's substantive due process jurisprudence.

At the heart of *Casey* is recognition that the ability to decide whether and when to have a child—like decisions about whom to marry and how to raise one's children—is among "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Casey*, 505 U.S. at 851 (opinion of the Court). Such decisions lie at the core of "personhood" and of "the right to define one's own concept of existence." *Id.* In the powerful words of the Court in *Casey*, "[t]he destiny of the woman must be shaped to large extent on her own conception of her spiritual imperatives and her place in society." *Id.* at 852 (opinion of the Court).

In the quarter-century since *Casey* was decided, its understanding of liberty, framed in terms of individual dignity, personal autonomy, and self-definition, has become the signal feature of this Court's substantive due process analysis.[3] Just last

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[3] *See, e.g.,* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 Yale L.J. 1694, 1791–93 (2008); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare*

term in *Obergefell v. Hodges*, this Court held that the liberties protected by the Due Process Clause "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." 135 S. Ct. 2584, 2598 (2015). In holding that the Constitution protects the right of same-sex couples to marry, the Court emphasized—in words closely echoing *Casey*—that choices about marriage "shape an individual's destiny" and "are among the most intimate that an individual can make." *Id.* at 2599.

Similarly, in striking down laws criminalizing private homosexual conduct, this Court expressly invoked *Casey*'s definition of liberty as "'the right to define one's own concept of existence'" and to "control [one's] destiny." *Lawrence v. Texas*, 539 U.S. 558, 574, 578 (2003) (quoting *Casey*, 505 U.S. at 851 (opinion of the Court)). *See also United States v. Windsor*, 133 S. Ct. 2675, 2693, 2695 (2013) (invalidating the Defense of Marriage Act for "demean[ing]" and denying the "equal dignity" of same-sex individuals who are lawfully married).

Not Speak Its Name, 117 Harv. L. Rev. 1893, 1895, 1898 (2004); Laurence H. Tribe, *Equal Dignity: Speaking Its Name,* 129 Harv. L. Rev. F. 16, 20–23 (2015); *see also* Kenji Yoshino, *A New Birth of Freedom:* Obergefell v. Hodges, 129 Harv. L. Rev. 147, 170 (2015) (emphasizing *Obergefell*'s close connection to recent substantive due process jurisprudence despite speaking more in terms of "liberty" than "dignity").

C. *Casey*'s Balance Imposes Limits on the Means by which the State May Advance Its Important Interests in Promoting Potential Life and Protecting Women's Health

Casey's careful balance protects women's dignity and personal autonomy by delineating the State's interests in regulating abortion and the means by which the State may advance those interests. The joint opinion identified two important and legitimate State interests: the State's interest in "express[ing] profound respect for the life of the unborn" and the State's interest in "foster[ing] the health of a woman seeking an abortion." 505 U.S. at 877–78 (joint opinion). Both interests exist from the onset of pregnancy. *See id.* at 846 (opinion of the Court). But *Casey* imposed important limits on the means by which the State may pursue these interests.

With respect to the State's interest in potential life, *Casey* reaffirmed that, post-viability, a State may prohibit abortion, so long as the law includes "exceptions for pregnancies which endanger the woman's life and health." *Id.* The joint opinion also specified, however, that, prior to viability, "the means chosen by the State to further the interest in potential life *must be calculated to inform the woman's free choice, not hinder it.*" *Id.* at 877 (joint opinion) (emphasis added). Thus, to protect its interest in potential life, the State may not enact a regulation that is designed to limit a woman's access to pre-viability abortion, though it may adopt measures designed to inform her choice and persuade her to continue her pregnancy.

Moreover, even when the State is pursuing its legitimate interest in respecting potential life through regulations designed to inform or persuade, it may not do so in a manner that substantially obstructs a woman's ultimate decision. Accordingly, a regulation imposes an unconstitutional "undue burden" if it has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking [a pre-viability] abortion." *Casey*, 505 U.S. at 877 (joint opinion).

The decision to limit the means by which the State may pursue its interest in protecting potential life to measures "calculated to inform the woman's free choice," *id.*, is central to *Casey*. *See* Linda Greenhouse & Reva Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 Yale L.J. (forthcoming 2016). This limitation ensures that the woman will "retain the ultimate control over her destiny and her body." *Casey,* 505 U.S. at 869 (joint opinion).

The joint opinion concluded, for example, that a State may require that the woman be given "truthful, nonmisleading information," including information "relating to fetal development" and assistance for carrying to term, because such information would help ensure that the woman's decision was fully informed. 505 U.S. at 882–83 (joint opinion).

Similarly, *Casey* upheld (against a facial challenge) a twenty-four hour waiting period as a permissible means of advancing the State's interest in protecting potential life because "[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection" was not unreasonable, and, the joint opinion

determined, the twenty-four hour waiting period did not create a substantial obstacle to the exercise of the right. *Id.* at 885–87 (joint opinion). Tellingly, the joint opinion did not suggest that a waiting period could be justified simply as a way to impede a woman's choice. To the contrary, it expressly forbade any measures designed or intended to "hinder" the woman's constitutional right to decide for herself whether to terminate a pregnancy pre-viability. *See id.* at 877 (joint opinion).

Casey also established that the State may enact regulations that advance its interest in protecting the woman's health throughout pregnancy. Here, the State is not limited to means designed to inform or persuade the woman. In upholding recordkeeping requirements, for example, the joint opinion concluded that such requirements are constitutional even though they "do not relate to the State's interest in informing the woman's choice." *Id.* at 900 (plurality opinion). *Casey* emphasized, however, that "[*u*]*nnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden" on the exercise of the right and are therefore unconstitutional. *Id.* at 878 (joint opinion) (emphasis added).

Recognizing the central distinction between the means by which a State may advance its interest in potential life and those it may use to further women's health is critical to resolving this case. The admitting-privileges and ASC regulations adopted by Texas are not informative or persuasive in character. As a result, these regulations can be upheld *only* if the Court finds them to be genuine health regulations and *only* if it finds that, as

genuine health regulations, they do not impose an "undue burden" on the exercise of the right.

Thus, for purposes of this case, Texas's legitimate interest in protecting potential life must be put aside completely. The regulations at issue here apply only to pre-viability abortions and they do not endeavor to inform or persuade. They are therefore impermissible unless they are justified by the State's interest in protecting women's health.[4]

II. FAITHFUL APPLICATION OF *CASEY*'S BALANCE REQUIRES CAREFUL REVIEW OF BOTH THE PURPOSE AND EFFECTS OF HEALTH REGULATIONS

Political, social, and moral opposition to abortion is significant and strongly felt in our society, and the risk of improper purpose—of restrictions enacted not for the purpose of protecting women's health or ensuring that a woman is fully informed, but for the impermissible purpose of impeding the exercise of the underlying right—is undeniable. There is, in short, a significant risk of pretextual invocation of women's health to justify regulations that are actually designed to impede access to abortion, and

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[4] Indeed, as the case comes to the Court, Texas has abandoned any effort to defend its requirements as measures designed to promote its interest in protecting potential life. *See* Br. in Opp. pp. 3, 15–21; *cf.* Pamela S. Karlan, *Old Reasons, New Reasons, No Reasons*, 27 Ga. St. U. L. Rev. 873, 883–84 (2011) (arguing that, even under deferential rationality review, courts should not uphold legislation on a basis disavowed by the legislature).

the existence of this risk must inform the care with which asserted health regulations are assessed.

Indeed, when a State invokes women's health in a manner that evades *Casey*'s limitations and protections—whether intentionally or unintentionally—it "strikes at the right itself." *Casey*, 505 U.S. at 874 (joint opinion). And a State's disingenuous invocation of women's health is a direct assault on the dignity and autonomy interests that were so central to *Casey*.

Casey guards against this risk through the undue burden standard—a form of careful scrutiny that calls for searching judicial examination of both the purpose and effect of a health-justified abortion regulation, in order to identify pretext and to ensure that the burdens imposed by any such regulation are not disproportionate as compared to their health benefits. As the Court has noted, it has familiar tools at its disposal for conducting the searching inquiry *Casey* requires.

A. The Undue Burden Test Demands Careful Scrutiny of Purported "Health" Regulations, Both To Address the Risk of Pretext and To Protect Against Undue Burdens on the Constitutional Right

The undue burden framework requires careful judicial scrutiny of purported health-related restrictions on abortion. In crafting the undue burden standard, *Casey* necessarily, and squarely, rejected rational basis review. 505 U.S. at 845 (opinion of the Court) (explaining that the dissenters "would overrule the central holding of *Roe* and adopt the rational relationship test as the sole criterion of

constitutionality."); *id.* at 851 (distinguishing matters that do not "intrude upon a protected liberty" from "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment"); *id.* at 966 (Rehnquist, C.J., dissenting) (arguing "States may regulate abortion procedures in ways rationally related to a legitimate state interest.").

Casey's holding that judicial examination of *purpose* is necessary reflects a recognition that regulations purporting to promote women's health may fail to promote that interest—either because they are poorly drafted or because the health justification is mere pretext for a restriction designed to "strike at the right itself." *Id.* at 874 (joint opinion).

Casey's insistence on judicial scrutiny of purpose is central to the balance it struck. This insistence is also consistent with the Court's later abortion decisions, including *Gonzales v. Carhart*, in which the Court described "a law which serves a *valid purpose*" as "one *not designed to strike at the right itself*." 550 U.S. at 157–58 (emphasis added). "Health" regulations that do not genuinely and materially further the State's claimed interest in maternal health, but instead aim only to make it more difficult for a woman to exercise her right, do not further a legitimate purpose, and thus "strike at the right itself." In other words, such laws impose a burden that is "undue" by definition. *See Casey*, 505 U.S. at 920–21 (Stevens, J., concurring in part and dissenting in part).

Casey also demands scrutiny of the effects of an abortion regulation. Even regulations genuinely aimed at protecting women's health are unconstitutional if they impose an undue burden on a woman's choice. A health regulation that imposes an obstacle disproportionate to its actual or predictable benefits is an undue burden. A court thus need not conclude that a purported health regulation was motivated by an illegitimate purpose in order to find it unconstitutional.

Casey undertook such a purpose and effects inquiry in upholding Pennsylvania's recordkeeping requirements as health regulations. Emphasizing that the requirements imposed, at most, a slightly increased cost, and that "[t]he collection of information … is a vital element of medical research," the controlling joint opinion rejected the suggestion that the requirements "serve[d] no purpose other than to make abortions more difficult." 505 U.S. at 900–01.

Contrary to the Fifth Circuit's view, nothing in this Court's subsequent abortion-rights decisions has rolled back or in any way undermined the undue burden framework established in *Casey* or the meaningful judicial scrutiny of purpose *and* effects that necessarily follows from that framework.

In fact, the Court undertook an examination of actual purpose, as well as effects, in *Gonzales v. Carhart*. There, the Court examined and upheld the federal Partial-Birth Abortion Ban Act, determining that Congress's purpose was to express "respect for the dignity of human life." 550 U.S. at 157. Critical to the Court's decision was its conclusion that the law had essentially no negative impact on either access to abortion or women's health, because

although it forbade a particular procedure, it "allow[ed], among other means, a commonly used and generally accepted" safe alternative procedure. *Id.* at 165. And the Court emphasized that an as-applied challenge remained open "if it can be shown that in discrete and well-defined instances" the banned procedure is necessary "to protect the health of the woman." *Id.* at 167.

Similarly, in *Mazurek v. Armstrong*, 520 U.S. 969, 976 (1997) (per curiam), the Court underscored the lack of "any evidence suggesting an unlawful motive on the part of Montana's Legislature" in enacting a requirement that abortions must be performed by licensed physicians. In reaching this conclusion, the Court emphasized both that enforcement of the requirement would not adversely affect women's access to abortion providers and the wide acceptance of such physician-only requirements, which had been enacted by forty other states. *Id.* at 973–74. The Court concluded that the constitutionality of Montana's requirement followed *a fortiori* from *Casey* and other decisions upholding ubiquitous physician-only requirements. *Id.* at 974–75.

Carhart and *Mazurek* are thus consistent with numerous decisions in which the Court has undertaken an assessment of whether a health-justified restriction on abortion is "compatible with accepted medical standards." *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983) (upholding Virginia's hospital or licensed clinic requirement for second-trimester abortions on this ground); *see also Carhart*, 550 U.S. at 164–65; *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 77–79 (1976) (ban on saline amniocentesis abortions was

"unreasonable or arbitrary" when that method was the "most commonly used nationally" after first trimester, and safer than alternatives).

The Court's emphasis on accepted medical practice again demonstrates its commitment to ensuring that health-justified regulation of abortion is not pretextual and meaningfully advances the State's asserted interest in protecting women's health. The fact that a purported health regulation deviates from accepted medical practice is powerful evidence that protecting women's health is not its actual purpose or effect.

B. *Casey* Requires Courts To Consider Whether Purported Health Regulations Are Actually Designed To Advance Women's Health and Whether the Health Benefits of the Regulations Justify the Burdens Imposed

Casey and other decisions dealing with women's right to abortion thus require courts to engage in meaningful review of health-justified abortion regulations. They must consider whether the regulations are actually designed to advance women's health, whether the health benefits derived from the regulations are sufficient to justify any burdens imposed on women's access to abortion, and whether these burdens amount to a substantial obstacle. When all is said and done, in order to uphold a purported health regulation, courts must determine whether the regulation actually furthers a permissible state purpose and whether it "unduly burdens" the woman's right to abortion. Courts are equipped with several analytic techniques for undertaking such review.

1. Courts Regularly Examine Whether Regulations Are Designed To Achieve Their Purported Goals

In a wide array of constitutional contexts, the Court examines legislative and regulatory measures to determine whether they in fact serve a permissible purpose. As the Court has observed, "governmental purpose is a key element of a good deal of constitutional doctrine." *McCreary Cty. v. ACLU*, 545 U.S. 844, 861 (2005); *see* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 297, 301–02 (1997); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. Rev. 1784, 1785–86, 1790–93 (2008).[5] The Court has made clear that measures that ostensibly serve a valid purpose nonetheless may be unconstitutionally motivated. The concern with illegitimate purpose is important not only in its own right, but also because of the critical way it informs the larger constitutional inquiry. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993); *Hunt v. Wash. State Apple*

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[5] Concerns about improper governmental purpose trigger heightened scrutiny in contexts as diverse as the First Amendment's speech and religion clauses, the Fourteenth Amendment's Equal Protection Clause and Due Process Clause, and the dormant Commerce Clause. *See, e.g.*, *McCreary Cty.*, 545 U.S. at 859–63 (establishment of religion); *Church of the Lukumi*, 508 U.S. at 534 (free exercise); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (free speech); *Hunt*, 432 U.S. at 352–353 (dormant Commerce Clause); *Davis*, 426 U.S. at 239 (equal protection).

Advert. Comm'n, 432 U.S. 333, 352–353 (1977); *Washington v. Davis*, 426 U.S. 229, 241 (1976).

The Court has developed methods for identifying illegitimate purpose in other contexts that should guide judicial review of health-justified abortion regulations. The Court looks closely at the legislative and regulatory history of a measure and the background against which it was enacted, for evidence of pretext. *See, e.g., Windsor*, 133 S. Ct. at 2692–93; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308–309 (2000); *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977). It also looks at the measure's actual or predictable effects and at other circumstantial evidence that might be objectively indicative of a possible illegitimate purpose. *See Church of the Lukumi*, 508 U.S. at 535 ("[T]he effect of a law in its real operation is strong evidence of its object."); *Davis*, 426 U.S. at 241.

Of particular importance, this Court also examines the extent to which a measure's means fit its asserted ends. As the Court has noted, such means–ends scrutiny is a particularly useful mechanism for "'smok[ing] out'" a potentially illegitimate purpose. *Johnson v. California*, 543 U.S. 499, 506 (2005) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 414, 443–56 (1996) (viewpoint and content-based means for regulating speech are subjected to greater scrutiny to "ferret[] out impermissible governmental motives"). A lack of fit between a measure's requirements and its stated ends strongly suggests that the measure is not in

fact designed to serve the purpose claimed. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2669 (2011) (measure's failure to "advance State's asserted interest in physician confidentiality . . . reflects the State's impermissible purpose to burden disfavored speech"); *Church of the Lukumi*, 508 U.S. at 543–45 (underinclusivity of ban on animal sacrifice demonstrated that the challenged law was animated by hostility to specific religion).

In assessing means–ends fit, the Court pays special heed to measures that deviate from established practices or "singl[e] out" protected activities for restrictions. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). As the Court recently emphasized in *Windsor*, "'[d]iscriminations of an unusual character' especially require careful consideration" to ensure that they are legitimately motivated. 133 S. Ct. at 2693 (alternation in original) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996). Similarly, singling out may indicate that an improper effort to target disfavored activity is afoot, at least when activities presenting similar risks and concerns are left unregulated. *See Church of the Lukumi,* 508 U.S. at 542–43; *City of Cleburne*, 473 U.S. at 449–50; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 386, 390 (1992) (even if government can proscribe a particular category of speech, it cannot single out speech that it disfavors within that category for prohibition).

Romer v. Evans is an example of the Court's attention to means–ends fit and singling out as indications of improper purpose. In *Romer*, the Court invalidated a state constitutional amendment prohibiting any governmental action designed to

protect homosexuals or bisexuals from discrimination. The Court emphasized the measure's profound lack of fit with its ostensible purposes: "The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them." 517 U.S. at 635. At the same time, the Court also underscored the amendment's targeted character, condemning it for "imposing a broad and undifferentiated disability on a single named group." *Id.* at 632. The combination of these characteristics led the Court to conclude that "the amendment seems inexplicable by anything but animus toward the class it affects." *Id.* at 632–33.[6]

As several lower courts have recognized, purported health-justified abortion regulations often have at best an attenuated relationship to women's

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[6] To be sure, careful means–ends scrutiny often serves purposes other than guarding against possible impermissible purpose. It also reflects the Court's determination that, because of their substantive importance, the protection of particular constitutional rights necessitates more closely tailored means than might otherwise be required. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938). Thus, for example, the Court has stated that even when legislative "ends are legitimate . . . when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741–42 (2011). But *Casey* makes clear that searching constitutional scrutiny of abortion regulations through the undue burden standard similarly reflects the substantive importance of a woman's right to decide whether to bear a child. *See* Part I.A, *supra*.

health. Such regulations frequently single out abortion despite overwhelming evidence of its medical safety and despite leaving similar and often more medically risky procedures either unregulated or substantially less regulated. The only reason to single out abortion in this fashion is the interest in potential life that abortion implicates. *See Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 173–74 (4th Cir. 2000). But that interest, however important, cannot constitutionally be invoked to justify "health" regulations under *Casey*. As the Seventh Circuit has recognized, health regulations targeting abortion that "do little or nothing for health, but ... strew impediments to abortion" represent an effort by abortion opponents to limit abortions "indirectly" and are therefore plainly unconstitutional. *Planned Parenthood of Wisc., Inc. v. Schimel*, 806 F.3d 908, 920–21 (7th Cir. 2015); *see also Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014) (health regulations "'must be calculated' to advance women's health, 'not hinder it'" (quoting *Casey*, 505 U.S. at 877 (joint opinion))).

2. Courts Must Also Scrutinize the Extent to which the Health Benefits of Health Regulations of Abortion Justify the Burdens They Impose

Independent of any concerns about the risk of improper purpose, the undue burden framework also requires courts to balance the burdens imposed by an abortion health regulation against any demonstrated health benefits it yields. Such a balancing inquiry follows from *Casey*'s prohibition on "[u]nnecessary health regulations," 505 U.S. at

878 (joint opinion), and from the very nature of the "undue burden" inquiry.

Inherent in the concept of an "undue" burden is a burden that is excessive in relation to any benefits it might legitimately achieve. In the words of the Seventh Circuit, "[t]he feebler the medical grounds … , the likelier is the burden on the right to abortion to be disproportionate to the benefits and therefore excessive." *Schimel*, 806 F.3d at 920. Approached from the opposite angle, "[t]he more substantial the burden, the stronger the state's justification for the law must be to satisfy the undue burden test. … If a burden significantly exceeds what is necessary to advance the state's interests, it is 'undue.'" *Humble*, 753 F.3d. at 912–13; *see also Planned Parenthood of the Heartland, Inc. v. Iowa Bd. Of Med.*, 865 N.W. 2d. 252, 264 (Iowa 2015).

Undue burden standards in other areas of constitutional jurisprudence entail just such a balancing of harms and benefits. In the procedural due process context, for example, the Court identifies the individual and government interests at stake and balances the probable benefits of additional procedures against their costs in order to determine whether a challenged procedural arrangement fails "due" process. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Similarly, in the dormant Commerce Clause context—applying an "undue burden" analysis, *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 365 (2008) (Kennedy, J., dissenting)—the Court examines whether "'the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Id.* at 338–39 (alteration in original) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

This concept of balancing is familiar throughout constitutional law. *See* T. Alexander Aleinikoff, *Constitutional Analysis in the Age of Balancing*, 96 Yale L.J., no. 5, Apr. 1987, at 943, 963–72 (describing the widespread use of balancing in constitutional rights analysis). A particularly relevant comparison comes from the election context, to which *Casey* itself drew an analogy. *Casey*, 505 U.S. at 874 (joint opinion). Restrictions on the right to vote and access to the ballot are subject to a "balancing approach" under which "[h]owever slight th[e] burden . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 190–91 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)). Yet another example comes from the First Amendment context, where even content-neutral restrictions on speech are routinely subjected to a form of balancing to determine whether the benefits of the restriction outweigh the harm to those seeking to exercise their freedom of speech. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 529–34 (2001); *City of Ladue v. Gilleo*, 512 U.S. 43, 54–58 (1994); *Kovacs v. Cooper*, 336 U.S. 77, 88–89 (1949).

Casey undertook this balancing with respect to the health regulations it considered, upholding Pennsylvania's reporting requirement after concluding that it was "a vital element of medical research" and "[a]t most" might cause a "slight" increase in costs. 505 U.S. at 901 (plurality opinion); *see also Doe v. Bolton*, 410 U.S. 179, 195 (1973) (invalidating hospitalization requirement on grounds that the State failed to present "persuasive data" to justify the requirement and "the State must show

more … to prove that only … a licensed hospital … satisf[ies] these health interests"; cited with approval in *Casey*, 505 U.S. at 874–75).[7]

More recently, courts that have engaged in this type of balancing analysis of health-justified abortion regulations have found them wanting. Not only is pre-viability abortion an extremely safe medical procedure, so that any health gains are minimal or nonexistent, but the regulations

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[7] Some debate exists over the extent to which *Casey* itself assessed the benefits of particular measures against the burdens they imposed. *See* Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 Colum. L. Rev. 2025, 2033–34 (1994). But *Casey* engaged in more balancing than might at first appear. In addition to the recordkeeping requirement discussed above, *Casey*'s approval of Pennsylvania's parental notification requirement while rejecting the spousal notification requirement—despite the fact the provisions imposed similar obstacles to abortion access—reflected the plurality's different views of the strengths of the state's justifications for each. *See Humble*, 753 F.3d at 913 (explaining that *Casey*'s evaluation of both provisions rested on the strength of the State's justifications for each provision); *Planned Parenthood Se., Inc. v. Strange*, 9 F. Supp. 3d 1272, 1287 (M.D. Ala. 2014) ("*Casey*'s treatment of the parental-consent and spousal-notification requirements" demonstrates that a "court must also consider the strength of the justifications that support a regulation.").

Moreover, most of the abortion regulations in *Casey* sought to express the State's respect for potential life. Communicative and expressive measures of this sort do not depend on independent effects to achieve their goals in the way that health regulations do.

themselves often have a deleterious effect on women's health. *See Schimel*, 806 F.3d at 920; *Humble*, 753 F.3d at 908; *Planned Parenthood Se. Inc. v. Strange*, 33 F. Supp. 3d 1330, 1377 (M.D. Ala. 2014). Such regulations often compel abortion clinics to close, leading to delays that force women into later, riskier, and even unlawful abortions. *See Humble*, 753 F.3d at 916.

Indeed, the lack of any meaningful health benefits, combined with the real possibility of harming women's health, means that many purported health regulations not only unduly burden the constitutional right, but also lack any reasonable relationship to the State's legitimate interest in women's health. *See Schimel*, 806 F.3d at 916 (Wisconsin's admitting-privileges requirement "does not 'further[] the legitimate interest' of the state in advancing women's health, and it was not 'reasonable for [the legislature] to think that [they] would." (alteration in original) (quoting *Carhart*, 550 U.S. at 160)).

3. Courts Must Also Assess Whether a Health-Justified Abortion Regulation Creates a Substantial Obstacle to Abortion Access

Finally, courts must scrutinize the effect of pre-viability health regulations to determine whether they create a substantial obstacle to abortion access. *Casey* leaves no doubt that any abortion regulation that imposes a substantial obstacle on women's ability to obtain a pre-viability abortion is unconstitutional. *Casey*, 505 U.S. at 878 (joint opinion). *Casey* also makes clear that this assessment of effects must be done contextually and

not categorically, as the Fifth Circuit did below. *See Whole Woman's Health v. Cole*, 790 F.3d 563, 588 (5th Cir. 2015) (stating additional travel of 150 miles to obtain an abortion categorically cannot be an undue burden). In *Casey* itself, this Court examined how much of an obstacle each provision was likely to create for women seeking an abortion in Pennsylvania. *See* 505 U.S. at 879–81, 887–99 (opinion of the court); *id.* at 900–01 (plurality opinion); *id.* at 881–87, 899–900 (joint opinion). The Court adopted a similar approach in *Gonzales v. Carhart*; in determining the constitutionality of the Partial-Birth Abortion Ban Act, the Court emphasized the availability of alternative, commonly used, and safe abortion techniques and underscored the availability of as-applied relief. 550 U.S. at 164, 168.

Health-justified regulation of abortion can have a particularly dramatic impact on abortion access. *See, e.g., Planned Parenthood of Wisc., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 990 (W.D. Wis. 2015) (finding an admitting-privileges law would force at least one of the four existing clinics in Wisconsin to close, leading to wait times of eight to ten weeks, creating "obvious ripple effects on the availability for all abortions"). Careful assessment of the actual effects of health-justified abortion regulations is essential to ensure that States do not surreptitiously create substantial obstacles to abortion.[8]

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[8] Indeed, conventional estimates of the burdensome effects of abortion restrictions may be systematically low, because such restrictions may have a significant "chilling effect" on doctors, who, out of fear of prosecution, refrain

III. PROPERLY SCRUTINIZED, TEXAS'S REGULATIONS PLAINLY IMPOSE AN UNDUE BURDEN ON A WOMAN'S ACCESS TO A PRE-VIABILITY ABORTION

Applying the scrutiny that *Casey* requires, it is plain that Texas's admitting-privileges and ASC regulations impose an undue burden on abortion access and are unconstitutional. Again, these regulations cannot be justified as measures designed to promote the State's interest in potential life, because the regulations are not informative or persuasive in character, and Texas has abandoned any effort to defend them on this ground. *See supra* Part I.C.

The challenged restrictions thus must be justified, if at all, as advancing the State's interest in women's health. But, as the District Court found, the regulations are plainly not designed to achieve that goal. *See Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 685 (W.D. Tex. 2014)*, aff'd in part, vacated in part, rev'd in part, Cole,* 790 F.3d 563 (5th Cir. 2015).

The means Texas has chosen bear little connection to its health goals. Abortion is a very safe medical procedure, and hospitalizations for complications are extremely rare—so rare that abortion providers have difficulty obtaining

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from performing some constitutionally protected abortions. *See* Brandice Canes-Wrone & Michael C. Dorf, *Measuring the Chilling Effect*, 90 N.Y.U. L. Rev. 1095 (2015) (reporting results of a multi-year, multi-state study finding such a chilling effect).

privileges because they are unable to satisfy minimum annual admission requirements. Admitting privileges thus do little to ensure either continuity of care or provider competency. *See id.*

Moreover, the ASC standards contain rigorous construction and operation requirements that are appropriate for surgical procedures requiring incisions, or perhaps general anesthesia. But these standards are of little relevance to abortion, particularly to early-term abortions, which are often performed by medication rather than surgery. *See id.* at 684–85. And even more damning, Texas clearly singled out abortion in these regulations, leaving medical procedures presenting similar or greater medical risks unaffected and denying abortion providers grandfathering and waivers that it routinely offers to other types of ASCs. *See id.* at 685.

The documented safety of abortion means that any health gains derived from these regulations would be minimal, at best—but they are extraordinarily burdensome, leading to the closure of more than seventy-five percent of all abortion clinics in the State. *See id.* at 681–82; Petr's Br. at 23–25. Indeed, these regulations are likely to *increase* women's health risks because the dramatic reduction in abortion providers will lead to delays and an increase in later-term abortions, which are riskier. Worse, as the District Court found, the barriers erected by these regulations to safe and legal abortions may lead women to turn to self-induced abortions or other illegal means, with obvious and often disastrous dangers to their health. *See Lakey*, 46 F. Supp. 3d at 684; *Planned Parenthood Se., Inc.*, 33 F. Supp. 3d at 1362–63.

In short, the regulations at issue are not a serious effort to advance women's health. Under the controlling framework established in *Casey*, Texas cannot deny its female citizens their dignity and autonomy by intruding on their ability to make this profound and constitutionally-protected decision through subterfuge. And, even assuming the regulations were genuinely enacted for the purpose of advancing the State's legitimate interests, Texas may not constitutionally impose such significant burdens on access to pre-viability abortions for so little gain to women's health.

CONCLUSION

The judgment of the court of appeals should be reversed.

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