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JUDGE POSNER GOT IT RIGHT: REQUIRING ABORTION DOCTORS TO HAVE HOSPITAL ADMITTING PRIVILEGES PLACES AN UNDUE BURDEN ON A WOMAN SEEKING AN ABORTION

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INTRODUCTION

When the Supreme Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992,¹ it replaced *Roe v. Wade*'s strict scrutiny analysis² with a looser standard,³ the undue burden test.⁴ *Casey* demarcated a monumental paradigm shift and opened the door to more abortion regulation than was permitted under

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¹ See generally 505 U.S. 833 (1992).

² *Roe v. Wade*, 410 U.S. 113, 154–56 (1986).

³ John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 329 (2011) (explaining “Casey opened the door to more regulation than had been acceptable under *Roe*.”).

⁴ *Casey*, 505 U.S. at 874–79.

Roe.⁵ State legislatures began to promulgate new laws⁶ and as momentum grew to increasingly regulate abortion in the United States, the federal government passed the federal Partial-Birth Abortion Ban Act in 2003.⁷

In 2007, the constitutionality of the Partial-Birth Abortion Ban Act was challenged in *Gonzales v. Carhart*⁸ because the Act prohibited abortion doctors from performing the “most common type of second trimester abortion in the United States.”⁹ Writing for the *Carhart* Court, Justice Kennedy informally began to reshape the undue burden test by allowing inklings of rational basis review to seep into the Court’s analysis.¹⁰ The Court’s decision to uphold the law opened the floodgates to increased abortion regulation.¹¹ “The holding was seen as a victory by anti-abortion forces, who saw an opportunity to “chip away” at the abortion doctrine established by *Roe*.”¹²

Although the *Casey* and *Carhart* opinions did not overturn *Roe*, “anti-abortion lawmakers interpreted the rulings . . . as an indication to reverse *Roe*’s main principles.”¹³ Pro-life members of state legislatures began testing the boundaries of the undue burden test.¹⁴ Legislators began passing new laws, designed to chip away at a woman’s fundamental right to choose to terminate a pregnancy.¹⁵ These laws have taken an array of forms. The Targeted Regulation of Abortion

⁵ Sybil Shainwald, *Reproductive Injustice in the New Millennium*, 20 WM. & MARY J. WOMEN & L. 123, 153 (2013) (citation omitted).

⁶ *Id.* at 154.

⁷ *See id.* at 153–54 (citing Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 1, 117 Stat. 1201, 1201 (2003) (codified at 18 U.S.C. § 1531 (2003)).

⁸ 550 U.S. 124 (2007).

⁹ Shainwald, *supra* note 5, at 153.

¹⁰ *Carhart*, 550 U.S. at 158.

¹¹ Shainwald, *supra* note 5, at 153.

¹² *Id.*

¹³ *Id.* at 154.

¹⁴ *Id.*

¹⁵ *Id.*

Providers (TRAP) laws are particularly common;¹⁶ these laws are typically designed to restrict abortion services to licensed clinics or hospitals, and require abortion providers to acquire additional licenses.¹⁷ Forty-five states have passed TRAP laws that subject physicians performing abortion to stringent regulations, which are “not placed on comparable healthcare providers.”¹⁸

This Comment focuses on one specific type of TRAP law: state statutes that require a doctor who performs abortions to have admitting privileges at a hospital within a certain radius of an abortion clinic.¹⁹ More specifically, this Comment focuses on a Wisconsin statute signed into law in July 2013 that requires abortion doctors to have admitting privileges at a hospital within a thirty-mile radius of a clinic where abortions are performed.²⁰

Although the scope of the question presented to the Seventh Circuit in *Planned Parenthood of Wisconsin, Inc. v. Van Hollen* was limited to the appropriateness of the district court’s issuance of a preliminary injunction, the majority opinion, written by Judge Posner, addressed the constitutional questions surrounding this statute.²¹ Judge Posner suggested that the Wisconsin admitting privileges statute placed an undue burden on a woman seeking an abortion and that the statute bears no rational relation to furthering its stated purpose of

¹⁶ *Id.* at 155.

¹⁷ Linda J. Wharton & Kathryn Kolbert, *Preserving Roe v. Wade . . . When You Win Only Half the Loaf*, 24 STAN. L. & POL’Y REV. 143, 157 n.90 (2013).

¹⁸ *Id.* at 157.

¹⁹ *See id.* at 165 (“The recent imposition of unnecessary and burdensome regulations targeting abortion providers over other medical professionals is an obvious attempt to increase costs, prevent ease of access to abortion care, and drive these physicians out of practice”) (citing Lisa M. Brown, *The TRAP: Targeted Regulations of Abortion Providers*, NAT’; ABORTION FED’N, http://www.prochoice.org/about_abortion/facts/trap_laws.html).

²⁰ Wis. Stat. § 253.095(2) (2013). In the state of Wisconsin 97 percent of abortions are performed in clinics. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 789 (7th Cir. 2013).

²¹ *See generally Van Hollen*, 738 F.3d 786.

protecting maternal health.²² Additionally, he observed that the statute singles-out abortion doctors and subjects them to additional oversight not required for similarly situated physicians, which violates equal protections of the law.²³ This Comment argues that Judge Posner accurately assessed the constitutionality of Wisconsin's admitting privilege statute. Furthermore, it argues that when the Supreme Court evaluates the constitutionality of admitting privileges TRAP laws, it should use Judge Posner's reasoning as a guide to strike down those laws.²⁴

First, this Comment provides a brief overview of the transformation of the constitutional analysis of abortion regulation from a strict scrutiny analysis to the undue burden test and briefly describes TRAP laws. It also describes the facts, procedural posture, and holding of *Van Hollen*. Then, it briefly describes the Fifth Circuit case, *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, where a similar statute was at issue, yet the court came to a radically different conclusion.²⁵ Second, this Comment argues that when the Supreme Court has the opportunity to evaluate the constitutionality of these admitting privileges statutes, it should use Judge Posner's reasoning in *Van Hollen* as a guide to strike down the laws. Universally, these laws (1) place an undue burden on a woman seeking an abortion; (2) bear no rational relation to their stated goal of protecting the health of the mother; and (3) violate equal protections of the law by discriminating against physicians who perform abortions.

²² *Id.* at 789, 798.

²³ *Id.* at 790.

²⁴ *See generally id.*

²⁵ *See generally* *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406 (5th Cir. 2013).

BACKGROUND

First, this background section provides a very brief overview of three Supreme Court cases that have critically shaped abortion jurisprudence in the United States. Second, it describes TRAP laws and the effect these laws have on the regulatory framework for abortion in the United States. Third, this section provides relevant information about both the Seventh Circuit's *Van Hollen* case and the Fifth Circuit's *Abbott* case.

A. Summary of Abortion Jurisprudence in the United States

The Court first recognized a woman's fundamental right to terminate her pregnancy in its 1973 decision in *Roe v. Wade*.²⁶ The Court struck down a Texas statute that criminalized abortion except in cases where a mother's life was at risk.²⁷ The *Roe* Court held that the liberty clause of the Fourteenth Amendment guaranteed a right to privacy that included a woman's right to choose to terminate a pregnancy.²⁸ However, the Court also concluded that a woman's fundamental right to an abortion was not absolute.²⁹

Using strict scrutiny to define the outer limits of this fundamental right to abortion, the Court found that a state has a compelling interest in protecting the health of the mother and potential life.³⁰ It held that a state could promulgate "narrowly tailored" regulations to protect these interests³¹ and established guidelines for permissible abortion regulations in each trimester of pregnancy.³² In the first trimester (weeks 1–12), only basic medical safety regulations were permissible;

²⁶ See generally 410 U.S. 113 (1986).

²⁷ *Id.* at 164.

²⁸ *Id.* at 152–53.

²⁹ *Id.* at 154.

³⁰ *Id.* at 154–55.

³¹ *Id.*

³² *Id.* at 163–65.

state regulations could not interfere with a woman's choice to have an abortion.³³ In the second trimester (weeks 13–27), the Court held there was a compelling state interest in the health of the mother and states could limit the availability of abortion in this trimester as a means to protect this interest.³⁴ In the third trimester (weeks 28–40), the Court held that the state had a compelling interest in both the health of the mother and in protecting the life of the unborn.³⁵ Thus, states could proscribe abortions in the third trimester as long as applicable regulations contained a health exception to protect the life of the mother.³⁶

Fast-forward nineteen years later: in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court tossed out *Roe's* trimester guidelines but upheld its basic holdings.³⁷ The *Casey* Court made three key holdings. First, a state has a compelling interest in protecting maternal health.³⁸ Second, state regulations cannot have the effect of placing an undue burden on a woman's right to an abortion until the point of fetal viability.³⁹ Third, post-viability, the state has a compelling interest in potential life and can proscribe post-viability abortion.⁴⁰ These three key holdings transformed how courts evaluate a governmental interest in regulating abortions. *Casey* gave states the ability to regulate abortion throughout a woman's entire pregnancy based on compelling state interests in protecting maternal health and protecting the potential life of the unborn.⁴¹

Although *Casey* limited a state's ability to regulate pre-viability abortions, the Court did *not* define what types of regulations would

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 505 U.S. 833, 871–73 (1992).

³⁸ *Id.* at 869–70.

³⁹ *Id.* at 876–78.

⁴⁰ *Id.* at 869–72.

⁴¹ *Id.* at 872.

create an undue burden for a woman seeking an abortion.⁴² The Court merely stated that a regulation creates an unconstitutional undue burden if it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”⁴³ The Court’s failure to define the terms “undue burden” and “substantial obstacle” created ambiguity and opened the door to increased abortion regulation.⁴⁴

However, while *Casey* may have opened the door to increased abortion regulation, the Court’s 2007 decision in *Gonzales v. Carhart* opened the floodgates.⁴⁵ The *Carhart* Court upheld the federal Partial Birth Abortion Ban Act of 2003, which prohibited doctors from performing “intact D&E” second trimester abortions.⁴⁶ The Court held that on its face, the prohibition of “intact D&E” late-term pre-viability abortions did not place a “substantial obstacle” in the path of a woman seeking an abortion because of the availability of other late-term abortion procedures.⁴⁷ Thus, the Court allowed the federal government to establish a blanket prohibition on one specific type of abortion procedure.

Moreover, while writing for the majority in *Carhart*, Justice Kennedy began to unofficially reshape *Casey*’s undue burden test.⁴⁸ He noted that where the regulation “does not impose an undue burden,” the State “can use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interest in regulating the medical profession [and] . . . to promote respect for life.”⁴⁹ Justice Kennedy stated that when an abortion regulation does not have the effect of creating an undue burden, then a

⁴² See generally *id.*

⁴³ *Id.* at 877.

⁴⁴ Shainwald, *supra* note 5, at 153.

⁴⁵ See generally *Gonzales v. Carhart*, 550 U.S. 124 (2007).

⁴⁶ *Id.* at 132, 168.

⁴⁷ *Id.* at 154–56, 164.

⁴⁸ See *id.* at 158.

⁴⁹ *Id.*

regulation must stand if the regulation has a rational relationship to furthering a legitimate government interest.⁵⁰ The Court then upheld the Partial Birth Abortion Ban Act of 2003.⁵¹ The Court held the government had a “substantial” interest in protecting the ethics and integrity of the medical profession and in protecting potential life,⁵² and held that the law was rationally related to furthering these interests.⁵³

However, most notably, the Act was upheld even though it lacked a provision permitting doctors to perform the “intact D&E” abortion procedure if a doctor believed it was necessary to protect the life of the mother.⁵⁴ The Court reasoned that prohibiting this procedure did not create a significant health risk to women because of uncertainty about whether it was ever medically necessary for a physician to perform the intact D&E procedure.⁵⁵ Justice Kennedy noted, that the Court has “given state and federal legislatures wide discretion to pass legislation in areas where there are medical and scientific uncertainty.”⁵⁶ Hence, the Court allowed the Act to stand despite the fact that it did not contain the once required medical exception provision, which would permit an otherwise prohibited abortion procedure to be performed when maternal life was at risk.

Thus, post-*Carhart*, it appears that a state may regulate a pre-viability abortion as long as these regulations do not place an undue burden on a woman seeking an abortion and they have a rational relationship to the asserted governmental interest.⁵⁷ So, “[i]f *Casey* ‘opened the door to more regulation than had been acceptable under

⁵⁰ *See id.* at 156–60.

⁵¹ *Id.* at 156–59.

⁵² *Id.*

⁵³ *Id.* at 156–63.

⁵⁴ *Id.* at 161.

⁵⁵ *Id.* at 161–66.

⁵⁶ *Id.* at 163.

⁵⁷ *See id.* at 156–60.

Roe, . . . *Carhart* blew the door off its hinges.”⁵⁸ Anti-abortion activists saw *Carhart*’s holding as an opportunity to continue to “chip away” at a woman’s right to terminate her pregnancy.⁵⁹ Ever since the decisions in *Casey* and *Carhart*, anti-abortion activists have advocated for abortion regulations that “systematically test the boundaries of what the Court meant by ‘undue burden’ and ‘substantial obstacle.’”⁶⁰

B. The Increased Prevalence of TRAP Laws in the United States since Gonzales v. Carhart

Typically, the pro-life movement has taken two approaches to undermining *Roe* and restricting abortion.⁶¹ In the first approach, anti-abortion advocates attempt to pass state statutes that criminalize abortion;⁶² however, these statutes have proven ineffective because they fail to pass constitutional muster.⁶³ The second approach to undermining *Roe* has been more successful than the first. In this approach, anti-abortion advocates pass laws that are incremental in spirit and chip away at a woman’s ability to obtain an abortion.⁶⁴ These regulations have been described as having the “cumulative effect of [creating] legal restrictions short of bans and extralegal pressures to restrict the provision of legal abortion services and create ‘abortion free’ states without criminalization.”⁶⁵ Anti-abortion activists

⁵⁸ Shainwald, *supra* note 5, at 154 (emphasis added) (citation omitted).

⁵⁹ Robertson, *supra* note 3, at 329–30 (“Even if the scope of new regulatory leeway is small, the victory has energized anti-abortion forces to chip away at the right recognized in *Roe* and *Casey*.”).

⁶⁰ Shainwald, *supra* note 5, at 154.

⁶¹ Dawn Johnsen, “TRAP”ing *Roe* in Indiana and a Common Ground Alternative, 118 YALE L.J. 1356, 1359–60 (2009).

⁶² *Id.* at 1358–59 (explaining that in 2006 and 2008 pro-life activists in South Dakota tried to pass a ballot measure criminalizing abortion in direct conflict with the Supreme Court’s ruling in *Roe v. Wade*).

⁶³ *Id.* See generally *Roe v. Wade*, 410 U.S. 113 (1986).

⁶⁴ Shainwald, *supra* note 5, at 154–55.

⁶⁵ Johnsen, *supra* note 61, at 1360.

typically argue that these incremental regulations are necessary to protect maternal health.⁶⁶

In recent years, anti-abortion activists have promulgated one particularly popular form of incremental regulations, referred to as TRAP laws: Targeted Regulation of Abortion Providers.⁶⁷ As of 2013, forty-five states have enacted TRAP laws.⁶⁸

Common TRAP regulations include those that restrict where abortion care may be provided. Regulations limiting abortion care to hospitals or other specialized facilities, rather than physicians' offices, require doctors to obtain medically unnecessary additional licenses, needlessly convert their practices into mini-hospitals at a great expense or provide abortion services only at hospitals, an impossibility in many parts of the country.⁶⁹

Although individually these laws may appear to only have a minimal effect on a woman's ability to obtain an abortion, when aggregated, these laws have the effect of heavily regulating abortion providers.⁷⁰ Thus, these TRAP laws compound to significantly undermine a woman's right to abortion services.⁷¹ The admitting privileges statutes at issue in both *Van Hollen* and *Abbott* are characterized as TRAP laws.

⁶⁶ *Id.*

⁶⁷ Shainwald, *supra* note 5, at 154–55.

⁶⁸ *Id.* at 165.

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *See* Johnsen, *supra* note 61, at 1359–60.

C. Planned Parenthood of Wisconsin Inc. v. Van Hollen

1. Statement of the Facts

On Friday, July 5, 2013, the Governor of Wisconsin signed into law a statute requiring doctors who perform abortions in a clinical setting to have admitting privileges at a hospital within thirty miles of the clinic where an abortion is performed.⁷² By its terms, the statute was to become effective three days later, on Monday, July 8, 2013.⁷³

2. Procedural Background

Wisconsin's two abortion providers, Planned Parenthood of Wisconsin and Milwaukee Women's Medical Services, filed suit in federal district court on July 5, 2013 challenging the constitutionality of the law, and simultaneously moved for a temporary restraining order.⁷⁴ The district court "granted the motion on July 8 and later converted it to a preliminary injunction against enforcement of the statute pending a trial on the merits."⁷⁵ Following the court's decision, state officials appealed the injunction.⁷⁶ The district court then stayed the trial as it awaited Seventh Circuit review of the issuance of the preliminary injunction order.⁷⁷ Judge Posner noted that had "enforcement of the statute not been stayed two of the four abortion clinics . . . would have had to shut down because none of their doctors had admitting privileges at a hospital within the prescribed [thirty-

⁷² *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 788 (7th Cir. 2013).

⁷³ *Id.*

⁷⁴ *Id.* at 788.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

mile] radius of the clinics, and a third hospital would have lost the services of half its staff.”⁷⁸

When the district court issued the temporary restraining order blocking the admitting privileges statute from going into effect, it used a two-part balancing test.⁷⁹ To receive a preliminary injunction,

a party must show that it has (1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits. If the moving party makes this threshold showing, the court weighs the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied.⁸⁰

First, the district court analyzed the admitting privileges statute under the undue burden test and held that Planned Parenthood would likely prevail in a trial on the merits.⁸¹ The court reasoned that the law did not bear a rational relationship to its purported purpose of protecting maternal health.⁸² The court also stated that the law had the effect of placing a substantial obstacle in the path of a woman seeking an abortion because it would have a substantial impact on the practical availability of abortion in Wisconsin.⁸³ Second, the district court held women were likely to suffer irreparable harm if the law was permitted to go into effect.⁸⁴ The Court reasoned that women will be “foreclosed from having an abortion in the next week either because of the undue

⁷⁸ *Id.* at 789.

⁷⁹ *Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 864 (W.D. Wis. 2013).

⁸⁰ *Id.* (quoting *Ezell v. City of Chi.*, 651 F.3d 684, 694 (7th Cir. 2011)) (citing *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012)).

⁸¹ *Id.* at 865–67.

⁸² *Id.* at 865–66.

⁸³ *Id.* at 867–68.

⁸⁴ *Id.* at 868.

burden of travel or the late stage of pregnancy, as well as fac[e] increasing health risks caused by delay.”⁸⁵ A few weeks later, the district court employed the same balancing test and reasoning when it issued a preliminary injunction, which extended the temporary restraining order.⁸⁶

When the Seventh Circuit reviewed the issuance of the preliminary injunction it stated that it must use a deferential standard of review because of the “uncertainty involved in balancing the considerations that bear on the decision” and the “haste with which the district judge must strike the balance.”⁸⁷ However, when applying the balancing test to decide whether issuance of a preliminary injunction was appropriate, Judge Posner used language from *Casey’s* undue burden test and *Carhart’s* reasoning to weigh in on the merits of the law.⁸⁸

3. Holdings

First, in applying the two-prong balancing test employed by the district court, the Seventh Circuit held that the district court’s issuance of a preliminary injunction was justified, pending a trial on the merits.⁸⁹ The Court reasoned that it would be impracticable for abortion providers to obtain the statutorily required hospital admitting privileges within the three days between the statute’s signing into law and its enactment.⁹⁰ Judge Posner agreed that at a minimum, the process for obtaining admitting privileges at a hospital takes two to

⁸⁵ *Id.*

⁸⁶ *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-cv-465-wmc, 2013 WL 3989238 (W.D. Wis. Aug. 2, 2013).

⁸⁷ *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013).

⁸⁸ *See generally id.*

⁸⁹ *Id.* at 798–99.

⁹⁰ *Id.* at 788–89, 793.

three months.⁹¹ Thus, it was nearly impossible for abortion doctors to obtain these privileges within the State mandated timeline.⁹²

Judge Posner also reasoned that based on the facts in the record, enacting the statute would place an undue burden on women seeking an abortion, and Planned Parenthood was likely to prevail in a trial on the merits.⁹³ He noted that the State did not adequately demonstrate that the law had a rational basis or that its enactment furthered its stated purpose of protecting the health of a woman having an abortion.⁹⁴ Furthermore, he found that the law would have a substantial impact on the “practical” availability of abortion in Wisconsin, placing an undue burden on a woman seeking an abortion.⁹⁵

Second, the court held that Planned Parenthood faced greater irreparable harm from immediate enforcement of the statute than the State faced by having the enforcement delayed.⁹⁶ Allowing the law to go into effect on July 8 would have forced two and a half of Wisconsin’s four abortion clinics to close, subjecting patients to weeks of delays while doctors attempted to secure hospital-admitting privileges.⁹⁷ Moreover, Judge Posner reasoned that the State failed to demonstrate that Wisconsin is so “rife with serious complications from abortions” that the statute needed to take effect immediately.⁹⁸

In addition to applying the two-part balancing test, Judge Posner observed “an issue of equal protection of the law is lurking in this case.”⁹⁹ He noted that the state appears to be treating doctors who perform surgical abortion differently than doctors who perform other

⁹¹ *Id.* at 788.

⁹² *Id.*

⁹³ *Id.* at 788–99.

⁹⁴ *Id.* at 789–90, 798.

⁹⁵ *See id.* at 791–96.

⁹⁶ *Id.* at 793, 795–96.

⁹⁷ *Id.* at 789, 796.

⁹⁸ *Id.* at 797.

⁹⁹ *Id.* at 790.

outpatient surgical procedures—even though these other procedures are more likely to result in complications requiring hospitalization.¹⁰⁰ The Analysis section of this article describes Judge Posner’s reasoning in more detail and explains why the Supreme Court should use his reasoning as a guide when it hears a case involving an admitting privileges statute.

D. Planned Parenthood of Greater Texas Surgical Health Services v. Abbott

The Seventh Circuit is not the only federal circuit court to hear a case involving a state statute requiring abortion doctors to have hospital admitting privileges. In 2013, the Fifth Circuit decided *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, which presented the same issue as *Van Hollen*.¹⁰¹ However, contrary to the Seventh Circuit’s holding in *Van Hollen*, the Fifth Circuit’s decision stayed the district court’s preliminary injunction and permitted the law to go into effect.¹⁰² The court reasoned that the admitting privileges statute was unlikely to place an undue burden on a woman seeking an abortion.¹⁰³

Two amendments to Texas abortion laws were at issue in *Abbott*.¹⁰⁴ Similar to the Wisconsin law, one of the amendments at issue required doctors performing abortions in Texas to have admitting privileges “on the date of the procedure” at a hospital located no more than thirty miles from the clinic where the “abortion is performed.”¹⁰⁵ The Texas legislature passed its law on July 12, 2013 and it was to

¹⁰⁰ *Id.*

¹⁰¹ *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406 (5th Cir. 2013).

¹⁰² *Id.* at 410, 419.

¹⁰³ *Id.* at 416.

¹⁰⁴ The other amendment at issue in this case “[L]imits the use of abortion-inducing drugs to a protocol authorized by the United States Food and Drug Administration (FDA), with limited exceptions.” *Id.* at 409.

¹⁰⁵ *Id.*

take effect on October 29, 2013.¹⁰⁶ Thus, the time between signing into law and the effective date of the Texas statute distinguished it from the Wisconsin statute; whereas abortion doctors in Wisconsin had three days to clamor for abortion privileges,¹⁰⁷ doctors in Texas had a little over three months to secure these privileges.¹⁰⁸

Planned Parenthood of Texas brought a suit challenging the constitutionality of the amendments in the United States District Court for the Western District of Texas in September of 2013.¹⁰⁹ Following a three-day bench trial, the district court struck down the portion of the law requiring doctors to have hospital admitting privileges.¹¹⁰ The court stated that the law was “without a rational basis and places a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”¹¹¹ The court enjoined the enforcement of that provision.¹¹² The State appealed the judgment.¹¹³

The issue before the Fifth Circuit was “the disposition of the State’s motion to stay the district court’s permanent injunction pending the outcome of the appeal on the merits.”¹¹⁴ Writing for the court, Judge Owen stated that the court must use a four-factor balancing test to decide whether to grant the stay pending appeal.¹¹⁵ The four factors used were: (1) whether the applicant [the State] made a strong showing that it is likely to succeed on the merits; (2) whether the State will be “irreparably injured” if a stay is not granted; (3) whether

¹⁰⁶ *See id.*

¹⁰⁷ *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 788 (7th Cir. 2013).

¹⁰⁸ *See Abbott*, 734 F.3d at 409.

¹⁰⁹ *Id.* at 409–10.

¹¹⁰ *Id.* at 410.

¹¹¹ *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 896–97 (W.D. Tex. 2013).

¹¹² *Id.* at 909.

¹¹³ *Abbott*, 734 F.3d at 410.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

issuing the stay would “substantially injure the other parties interested in the proceeding;” and (4) “where the public interest lies.”¹¹⁶

The court addressed the first factor at length in its opinion, and only very briefly addressed the three other factors.¹¹⁷ The court reasoned that the State demonstrated that it was likely to succeed on the merits because the State’s “substantial interests” in regulating the medical profession provided a rational basis for the law.¹¹⁸ After making this determination, the court weaved *Casey’s* undue burden test into its reasoning to demonstrate why the State is likely to succeed in a trial on the merits.¹¹⁹

Ultimately, the Fifth Circuit decided that there is “a substantial likelihood that the State will prevail in its argument. The Court decided that Planned Parenthood failed to demonstrate that an undue burden would be placed on women seeking abortions or that the hospital-admitting-privileges requirement creates a substantial obstacle in the path of a woman seeking an abortion.”¹²⁰ The Court held that, on its face, the text of the law does not “indicate that its purpose is ‘to place a substantial obstacle in the path of a woman seeking an abortion,’”¹²¹ and the law furthers a substantial governmental interest in regulating the medical profession.¹²² Ultimately, the court found that requiring hospital admitting privileges did not place an undue burden on a woman seeking an abortion in a large “fraction” of cases, and for this reason, it passed constitutional muster.¹²³

¹¹⁶ *Id.*

¹¹⁷ *See generally id.*

¹¹⁸ *Id.* 411–12.

¹¹⁹ *See id.* at 412–16.

¹²⁰ *Id.* at 416.

¹²¹ *Id.* at 413–14 (quoting *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

¹²² *Id.* at 411–12.

¹²³ *Id.* at 414–15.

ANALYSIS

The underlying cases in *Van Hollen* and *Abbott* have yet to be decided on their merits. However, the Supreme Court will likely soon weigh the constitutionality of admitting privileges TRAP laws because of their growing prevalence throughout the United States.¹²⁴ Currently, ten states require abortion doctors to have hospital admitting privileges or an alternate arrangement,¹²⁵ and courts in four more states (including Wisconsin) have temporarily blocked the enforcement of similar statutes.¹²⁶ When asked to decide whether these admitting privileges laws are constitutional, the Supreme Court should strike them down. Even individually, these laws impose an unconstitutional undue burden on a woman seeking an abortion, let alone when they are aggregated.

TRAP laws substantially impact the practical availability of abortions in a state because clinics are forced to close as doctors try to obtain the requisite privileges from hospitals.¹²⁷ Moreover, hospital credential committees have complete discretion over whether to grant a physician admitting privileges.¹²⁸ These committees can justify denying privileges to physicians who perform surgical abortions using an array of unweighed and subjective criteria without violating federal

¹²⁴ Erik Eckholm, *Access to Abortion Falling as States Pass Restrictions*, N.Y. TIMES (Jan. 3, 2014), <http://www.nytimes.com/2014/01/04/us/women-losing-access-to-abortion-as-opponents-gain-ground-in-state-legislatures.html?src=xps>.

¹²⁵ Guttmacher Inst., *State Policy Regulations in Brief as of March 1, 2014: Targeted Regulation of Abortion Providers*, http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf (describing an alternate arrangement as having an agreement with another physician who has admitting privileges).

¹²⁶ Eckholm, *supra* note 124 (noting Alabama, Mississippi and North Dakota have temporarily blocked these statutes).

¹²⁷ *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 791–97 (7th Cir. 2013).

¹²⁸ *Id.* at 791–93.

law.¹²⁹ Although these admitting privileges laws are unconstitutional when standing alone, they become even more unduly burdensome when combined with other abortion regulations because they unreasonably restrict the practical availability of abortion.¹³⁰

Furthermore, admitting privileges statutes bear no rational relationship to their purported purpose of protecting maternal health. There is no medical justification for requiring these privileges. Less than 1-percent of surgical abortions result in complications requiring hospitalization,¹³¹ thus no legitimate medical basis exists to justify requiring abortion doctors to have admitting privileges.¹³² Moreover, best practices within the United States' medical community do not require physicians performing outpatient surgeries that are similar to surgical abortion to provide an additional level of "continuity of care" to their patients.¹³³ In fact, admitting privileges laws raise constitutional equal protections concerns because abortion doctors receive disparate treatment when compared to other similarly situated medical professionals.¹³⁴

Thus, momentum to hear a case addressing this specific type of TRAP law is building. These laws severely restrict a woman's ability to exercise her right to terminate her pregnancy without bearing any rational relationship to their purported purpose of protecting maternal health. In fact, these laws do nothing more than discriminate against abortion providers. Due to the controversial nature of these laws, it is

¹²⁹ *Id.*

¹³⁰ See Guttmacher Inst., *State Policies in Brief: An Overview of Abortion Laws*, 2–3 (Apr. 2014), http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (showing how many states layer regulations on top of each other creating a heavily regulated environment for abortion providers and their patients).

¹³¹ *Van Hollen*, 738 F.3d at 797.

¹³² *Id.* at 790.

¹³³ *Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 864 (W.D. Wis. 2013).

¹³⁴ *Van Hollen*, 738 F.3d at 790.

unsurprising that some Supreme Court Justices have expressed that they fully expect to hear the *Abbott* case on appeal.¹³⁵

When the Supreme Court finally decides to weigh in on the constitutionality of these admitting privileges statutes, it should use Judge Posner's reasoning in *Van Hollen* as a guide. First, the Court should apply *Casey's* undue burden test to strike down these laws because they place a substantial obstacle in the path of a woman seeking an abortion. Second, even if the Court decides that these laws do not have the effect of placing an undue burden on a woman, they cannot survive the rational basis review prescribed by *Carhart* because they do not bear any rational relation to their asserted purpose of protecting maternal health. Third, these laws violate equal protections of the law because they require physicians who perform abortions to have an additional layer of oversight that is not required for other similarly situated physicians.

A. Requiring Abortion Doctors to have Hospital Admitting Privileges Places an Undue Burden on a Woman Seeking an Abortion

By requiring physicians who perform abortions in outpatient clinics to have admitting privileges at a local hospital, state governments place an undue burden on a woman seeking an abortion because this requirement substantially impacts the practical availability of abortion.¹³⁶ For example, after the Fifth Circuit stayed the law at issue in *Abbott*, one-third of Texas' thirty-some abortion clinics closed their doors as doctors tried to secure admitting privileges,¹³⁷ "[leaving] much of South Texas without any abortion clinics."¹³⁸ Similarly, Judge Posner anticipated that if the Wisconsin's statute goes into effect, two-and-a-half of the state's four abortion

¹³⁵ Eckholm, *supra* note 124.

¹³⁶ See *Van Hollen*, 738 F.3d at 791–97.

¹³⁷ Eckholm, *supra* note 124.

¹³⁸ *Id.*

clinics would be forced to close.¹³⁹ Thus, when contemplating these TRAP laws within the context of the overall abortion policy landscape of the United States, it is clear that Judge Posner’s reasoning in *Van Hollen* is applicable beyond the borders of Wisconsin. These laws substantially affect the practical availability of abortion in a given state and impose an undue burden on a woman seeking an abortion.

In *Van Hollen*, Judge Posner reasoned that the enactment of these TRAP laws would substantially restrict the practical availability of abortion in Wisconsin. First, Judge Posner reasoned that the three-day window abortion providers needed to obtain admitting privileges in Wisconsin was impracticable.¹⁴⁰ Second, he explained that hospitals have discretion when granting admitting privileges,¹⁴¹ and this discretion makes it difficult to predict which doctors will receive admitting privileges and will likely impede women’s access to abortion services.¹⁴² Third, Judge Posner reasoned that “virtually all abortions in Wisconsin” are performed in Planned Parenthood’s four clinics, and a “significant fraction” of Planned Parenthood’s doctors did not have admitting privileges at a hospital within thirty miles of a clinic.¹⁴³

1. The Unreasonable Timeframe for Wisconsin Doctors to Acquire Hospital Admitting Privileges

When Judge Posner affirmed the district court’s issuance of the preliminary injunction, he wrote, “[t]he impossibility of compliance with the statute even by doctors fully qualified for admitting privileges is a compelling reason for the preliminary injunction, albeit a reason that diminishes with time.”¹⁴⁴ He noted that it was “unquestioned” that

¹³⁹ *Van Hollen*, 738 F.3d at 789, 791.

¹⁴⁰ *Id.* at 788.

¹⁴¹ *Id.* at 788–89.

¹⁴² *See id.*

¹⁴³ *Id.* at 791.

¹⁴⁴ *Id.* at 789.

it usually takes a “minimum of two to three” months for a doctor to obtain hospital-admitting privileges because hospital credential committees typically only meet once a month to make these decisions.¹⁴⁵ Thus, Judge Posner held that the impossibility of statutory compliance within the three-day timeframe was a sufficient reason for the issuing the preliminary injunction.¹⁴⁶ Judge Manion also concurred with Judge Posner’s decision on this ground.¹⁴⁷ However, in writing for the court, Judge Posner moved beyond the impossibility of statutory compliance within the three-day timeframe and addressed substantive reasons that the statute created an unconstitutional undue burden on women.¹⁴⁸ Judge Posner’s reasoning regarding these substantive issues is universally applicable to this type of TRAP law and should be used to strike down these laws across the United States.

2. Hospitals have Discretion in Granting Doctors Admitting Privileges

In *Van Hollen*, Judge Posner reasoned that the statute at issue would substantially affect the practical availability of abortion in Wisconsin because hospital credential committees have full discretion when deciding whether to grant admitting privileges to a doctor.¹⁴⁹ He noted that “[h]ospitals are permitted rather than required to grant such privileges,”¹⁵⁰ and requiring these privileges will cause delays in a woman’s ability to obtain an abortion.¹⁵¹ Hospital credential committees typically only meet once a month and the process typically takes at least three months.¹⁵² Moreover, the criteria used by hospital credential committees to decide which doctors will receive admitting

¹⁴⁵ *Id.* at 788.

¹⁴⁶ *Id.* at 788–89.

¹⁴⁷ *Id.* at 799 (Manion, J., concurring).

¹⁴⁸ *See generally id.* (majority opinion).

¹⁴⁹ *Id.* at 791–93.

¹⁵⁰ *Id.*

¹⁵¹ *See id.*

¹⁵² *Id.*

privileges are not uniform—the criteria may vary from hospital to hospital.¹⁵³ As Planned Parenthood noted in its brief to the Seventh Circuit:

Barriers to obtaining privileges include hospital requirements that physicians admit a minimum number of patients each year; requirements that physicians live in the vicinity of the hospital; and requirements that physicians identify other physicians with privileges at the same hospital willing to provide back-up coverage. In addition, some hospitals have ‘closed’ staff requirements, such as academic hospitals that only privilege faculty members or hospitals that only privilege doctors who belong to certain private physician practices.¹⁵⁴

The criteria used to determine whether a doctor will receive admitting privileges is “multiple, various and unweighed,”¹⁵⁵ and as such, the process used for granting these privileges is not mechanical—it is an art. Thus, it is difficult to predict which doctors will be granted these privileges.¹⁵⁶ Supporters of these statutes argue that federal law (the “Church Amendments”) prohibits hospitals that receive federal funding, including religiously affiliated hospitals, from denying admitting privileges to doctors who perform abortions.¹⁵⁷ However, this argument is flawed.

First, hospital administrators may not even be aware of the Church Amendments. As mentioned in *Van Hollen*, one of the Wisconsin State Senators responsible for promulgating the admitting privileges TRAP law and the chief medical officer of a Catholic

¹⁵³ *Id.* at 792.

¹⁵⁴ Brief of Plaintiffs-Appellees at 8, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786 (2014) (No. 13-2726).

¹⁵⁵ *Van Hollen*, 738 F.3d at 792.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 791 (citing 42 U.S.C. § 300a-7(c)(1)(B)).

Hospital in Wisconsin were unaware the Church Amendments even existed.¹⁵⁸ The chief medical officer, Rita Hanson, wrote in an email, “Wheaton Franciscan Healthcare is a ministry of the Catholic Church . . . [f]or that reason, if it's known to us that a doctor performs abortions and that doctor applies for privileges at one of our hospitals, our hospital board would not grant privileges.”¹⁵⁹

Second, as Judge Posner explained, even if religiously affiliated hospitals are aware of the Church Amendments, hospitals can easily argue that an abortion doctor was denied privileges on grounds other than the doctor’s provision of abortion services.¹⁶⁰ The process for granting admitting privileges is not objective and mechanical; it is subjective and amorphous. Hospital administrators are not required to use standardized criteria to decide which physicians are granted admitting privileges, making difficult—if not impossible—for a physician who performs abortions to prove that he has been unlawfully denied these privileges.¹⁶¹ For example, Judge Posner stated that the Senior Counsel for the National Women’s Law Center found:

[I]n other states that have recently passed privileges requirements for abortion providers, religiously affiliated hospitals have denied the doctors’ applications by citing their failure to meet other standards, such as admitting a certain number of patients per year. In Mississippi, a Baptist hospital did not provide doctors at an abortion clinic with an application for privileges because none of its staff would write letters in support of the doctors, according to a court

¹⁵⁸ *Id.* at 792 (citing Akbar Ahmed, *Court file shows confusion over Wisconsin abortion regulation*, MILWAUKEE WIS. J. SENTINAL (July 26, 2013), <http://www.jsonline.com/news/statepolitics/court-file-shows-confusion-over-wisconsin-abortion-regulation-law-b9961373z1-217196251.html>).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See id.* at 791–92.

affidavit provided by the clinic's attorneys at the Center for Reproductive Rights.¹⁶²

An example from Texas further highlights the subjective criteria used to evaluate whether to grant a doctor admitting privileges. Recently, University General Hospital Dallas revoked two abortion doctors' hospital admitting privileges.¹⁶³ The doctors received identical letters explaining that their privileges were revoked because the hospital had learned that the doctors perform abortions and performing abortions amounts to unacceptable "disruptive behavior."¹⁶⁴

Nevertheless, as Judge Posner noted, "pretext aside," one common and lawful criteria used to evaluate whether to grant admitting privileges to a doctor is "the number of patient admissions a doctor can be expected to produce for the hospital."¹⁶⁵ Typically, hospitals want to grant privileges to doctors who will likely admit many patients; these doctors generate more revenue for the hospital because admitted patients require more hospital employees and staff to care for them.¹⁶⁶ However, using this criterion to decide whether to grant these privileges is problematic for abortion doctors because very few abortions, a "negligible" number, result in complications requiring hospitalization.¹⁶⁷ An "even smaller fraction" of these complications

¹⁶² *Id.*

¹⁶³ *Texas Hospital Discriminates Against Physicians Providing Abortion Services*, CTR. FOR REPROD. RIGHTS (Apr. 17, 2014), <http://reproductiverights.org/en/press-room/Texas-Hospital-Discriminates-Against-Physicians-Providing-Abortion-Services>.

¹⁶⁴ *Id.* (linking to one of the letters at <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/UGHDLetter.pdf>) (last visited Apr. 18, 2014). After filing a lawsuit and settling with the hospital out of court, the physicians' admitting privileges were reinstated. Becca Aaronson & Alexa Ura, *2 Abortion Doctors Settle Suit Over Revoked Privileges*, THE TEXAS TRIBUNE (June 10, 2014), <http://www.texastribune.org/2014/06/10/abortion-doctors-sue-hospital-revoking-privileges/>.

¹⁶⁵ *Van Hollen*, 738 F.3d at 792–93.

¹⁶⁶ *Id.* at 793.

¹⁶⁷ *Id.*

are likely to arise when a woman is located near the hospital where the doctor who performed the abortion has admitting privileges, making it likely a woman suffering from abortion related complications would visit a different hospital for treatment.¹⁶⁸

Even moving beyond Judge Posner's reasoning in *Van Hollen*, the American Medical Association (AMA) has criticized hospital credentialing committees' use of criterion that takes into account a doctor's anticipated number of patient admittances.¹⁶⁹ The AMA issued an opinion in 1994 stating, "[d]ecisions regarding hospital privileges should be based upon the training, experience, and demonstrated competence of candidates, taking into consideration the availability of facilities and the overall medical needs of the community, the hospital, and especially patients. Privileges should not be based on numbers of patients admitted to the facility."¹⁷⁰ Thus, when the number of patients a doctor will admit is factored into the admitting privileges calculus, hospital administrators can easily and lawfully deny abortion doctors these privileges; physicians who perform abortions are unlikely to generate much business for the hospital.¹⁷¹

When evaluating the constitutionality of these statutes, the Supreme Court should remain cognizant of the fact that hospital administrators have the ability to arbitrarily deny doctors admitting privileges. Hospital administrators are not held accountable for their choices because they are not required to use a transparent and standardized process when deciding who will receive admitting privileges. The lack of transparency and subjective nature of the process for deciding whether to grant a doctor admitting privileges

¹⁶⁸ See *id.* (noting that the state did not dispute the district court's finding that "up to half of the complications will not present themselves until after the patient is home").

¹⁶⁹ *Id.* at 792–93.

¹⁷⁰ *Opinion 4.07–Staff Privileges*, AM. MED. ASS'N. (June 1994), <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion407.page>.

¹⁷¹ See *Van Hollen*, 738 F.3d at 793.

places a substantial obstacle in the path of a woman seeking an abortion. Hospitals can arbitrarily and significantly restrict the number of doctors eligible to perform abortions in a given state by denying doctors these requisite admitting privileges.

3. The Substantial Impact of Hospital Admitting Privilege Requirements on the Practical Availability of Abortion in a State

Where enacted, these TRAP laws impose an undue burden on women who are trying to obtain abortions because of the likeliness that these laws will greatly reduce the number of doctors and clinics that perform abortions.¹⁷² As Judge Posner reasoned in *Van Hollen*, clinic closures and the “sudden shortage of eligible doctors” to perform abortions will likely create a substantial delay in a woman’s ability to obtain an abortion and may “result in the progression of pregnancy to a stage at which an abortion would be less safe, and eventually illegal.”¹⁷³ When evaluating the constitutionality of admitting privileges statutes, the Supreme Court should take into account the substantial impact that these laws will have on the practical availability of abortion when clinics are forced to close and women are unduly burdened as a result.¹⁷⁴

In *Van Hollen*, Judge Posner explained that two of Wisconsin’s four abortion clinics will be forced to close if Wisconsin’s law goes into effect and a third clinic will lose half of its abortion doctors.¹⁷⁵ Many of the doctors at Planned Parenthood work at more than one clinic, so each doctor must obtain admitting privileges at multiple hospitals, which will cause a delay in the provision of abortions within the state.¹⁷⁶ Since these doctors must wait to obtain privileges before providing abortions, clinics will shut down or staff will be reduced

¹⁷² *See id.* at 795–96.

¹⁷³ *Id.* at 796.

¹⁷⁴ *See id.* at 791–98.

¹⁷⁵ *Id.* at 789.

¹⁷⁶ *Id.* at 791.

until these privileges are granted.¹⁷⁷ Furthermore, because 60-percent of the patients served by the state's four abortion clinics have incomes below the federal poverty line, "some patients will be unable to afford the longer trips they'll have to make to obtain an abortion when the clinics near them shut down."¹⁷⁸ Thus, poor women become unduly burdened as a result of the implementation of these statutes.

Nationally, the percentage of women seeking an abortion with an income 100-percent below the federal poverty line drops slightly to 42-percent;¹⁷⁹ however, a significant portion of women obtaining abortions throughout the United States are low-income and regulations that force clinics to close only make it increasingly difficult for these women to obtain abortions. For example, if the Wisconsin law is permitted to take effect, one of the clinics that will be forced to close is located in Appleton.¹⁸⁰ Appleton is located near the center of the state, and the two clinics that would remain open are both about one hundred miles south of Appleton.¹⁸¹ Thus, a low-income woman who lives north of Appleton and does not live near the Minnesota border, must travel up to an additional one hundred miles in each direction to obtain an abortion.¹⁸²

The American College of Obstetricians and Gynecologists (ACOG) and the AMA's amici brief for the *Abbott* case further illustrates the hardship that clinic closures place on low-income women.¹⁸³ The ACOG and AMA noted in their brief, that 40-percent of women obtaining abortions in Texas fall below the federal poverty

¹⁷⁷ *Id.* at 789.

¹⁷⁸ *See id.* at 796.

¹⁷⁹ *See Fact Sheet: Induced Abortion in the United States*, GUTTMACHER INST. (February 2014), http://www.guttmacher.org/pubs/fb_induced_abortion.html.

¹⁸⁰ *Van Hollen*, 738 F.3d at 796.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *See* Brief of Amici Curiae American College of Obstetricians and Gynecologists and the American Medical Association in Support of Plaintiffs-Appellees and in Support of Affirmance at 9–10, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891 (2013) (No. 13-51008).

line.¹⁸⁴ The brief then discussed how surveys have revealed that low-income women often need time “to raise money [to obtain an abortion], including for travel” and that low-income women often delay having abortions because they lack the financial means to obtain an abortion.¹⁸⁵ The ACOG and AMA explain that delaying an abortion for financial reasons or otherwise has real consequences—it “increases [a woman’s] exposure to complications and risks.”¹⁸⁶

The *Abbott* court stated that this “incidental effect” of making it more expensive or difficult for a woman to obtain an abortion is not alone enough to invalidate a law.¹⁸⁷ However, these admitting privileges statutes have more than an “incidental effect” on poor women. They place a “nontrivial burden on the financially strapped” and other women who have difficulty traveling long-distances, “such as those who already have children.”¹⁸⁸ As Judge Posner noted in the case of the Appleton clinic, this additional two hundred-mile trip really translates to a four hundred-mile trip because the state also requires a woman to wait 24-hours before having an abortion.¹⁸⁹

Thus, the effect of these admitting privileges statutes becomes even more unduly burdensome when considered in conjunction with other abortion regulations. Even if the Supreme Court were to decide that the admitting privileges statutes alone are not enough to impose an undue burden on a woman seeking an abortion, when combined with other abortion regulations, these statutes impose an undue burden on women.¹⁹⁰ As Judge Posner observed in *Van Hollen*, “when one

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 10.

¹⁸⁷ *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 413 (5th Cir. 2013).

¹⁸⁸ *Id.*

¹⁸⁹ *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013).

¹⁹⁰ See *State Facts About Abortion: Texas*, GUTTMACHER INST. (April 2014) (<http://www.guttmacher.org/pubs/sfaa/texas.html>); see also Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—and*

abortion regulation compounds the effects of another, the aggregate effects on abortion rights must be considered.”¹⁹¹

Judge Posner’s reasoning regarding the aggregate effect of these laws applies beyond the borders of Wisconsin because many states heavily regulate abortion.¹⁹² For example, the financial burden on a large proportion of Texas women seeking abortions is further compounded when hospital admitting privileges requirements are applied on top of existing state laws which require a woman to both receive “state-directed counseling” and wait 24-hours before having an abortion.¹⁹³ Moreover, after the admitting privileges statute went into effect in Texas, one-third of the state’s thirty clinics closed.¹⁹⁴ As a result, many low-income women in Texas must not only make multiple trips to obtain an abortion, they must also travel to clinics located even farther from their homes.¹⁹⁵

A study by the Guttmacher Institute further reinforces the idea that these laws compound to substantially restrict the practical availability of abortion in a state and create an undue burden on

the Women They Serve—Pay the Price, 16 GUTTMACHER POL’Y REV. 2013, <http://www.guttmacher.org/pubs/gpr/16/2/gpr160207.html> (describing the influx of TRAP laws in the United States and how these laws exacerbate clinic closures).

¹⁹¹ *Van Hollen*, 738 F.3d at 796.

¹⁹² Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, 17 GUTTMACHER POL’Y REV. (2014), <http://www.guttmacher.org/pubs/gpr/17/1/gpr170109.html>.

¹⁹³ See GUTTMACHER INST., *supra* note 190.

¹⁹⁴ Eckholm, *supra* note 124.

¹⁹⁵ See THE TEXAS POLICY EVALUATION PROJECT, *Texas State Abortion Rate Decreases 13 Percent Since Implementation of Restrictive Law: Number of abortion clinics falls from 41 to 22 over same period* (July 23, 2014), http://www.utexas.edu/cola/orgs/txpep/_files/pdf/7-23-14-TxPEP-AbortionRateDecreases-Press-Release.pdf (stating the number of women of reproductive age in Texas living in a county more than 200 miles from a clinic providing abortion in Texas increased from 10,000 in April 2013 to 290,000 by April 2014).

women seeking abortions.¹⁹⁶ Between 2011 and 2013, thirty states enacted 205 new abortion restrictions, totaling more than the “number that had been enacted in the entire previous decade.”¹⁹⁷ The Guttmacher Institute study identified ten categories of major abortion restrictions; it then assessed whether a state had enacted at least one provision from any of these categories in the years 2000, 2010, and 2013.¹⁹⁸ In the study, “[a] state was considered “supportive” of abortion rights if it had enacted provisions in no more than one of the restrictive categories, “middle ground” if it had enacted provisions in two or three, and “hostile” if it had enacted provisions in four or more.”¹⁹⁹ According to the study, “the overall number of states hostile to abortion rights has grown since 2000, while the number of supportive and middle-ground states has shrunk. In 2000, 13 states were hostile to abortion rights; by 2010, that number was 22, and by 2013, it was 27.”²⁰⁰

“[T]he cohort of states already hostile to abortion rights was responsible for nearly all of the abortion restrictions enacted in 2013.”²⁰¹ These new restrictions have dramatically altered the abortion policy landscape.²⁰² The influx in abortion regulation since 2011 has had the effect of piling abortion regulations on top of each other, particularly in hostile states.²⁰³ When examined in the aggregate, these laws have made it unduly burdensome for a woman to exercise her fundamental right to terminate a pregnancy. As the Guttmacher Institute observed, doctors must meet very robust, stringent and

¹⁹⁶ Boonstra & Nash, *supra* note 192 (citation omitted).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* (“In 2000, only two states—Mississippi and Utah—had five of the 10 major types of restrictions in effect. By 2013, 18 states had six or more major restrictions, and seven states had eight or more. Louisiana, the most restrictive state in 2013, had 10.”).

²⁰² *Id.*

²⁰³ *See id.*

expensive regulatory requirements to provide abortion services in a given state.²⁰⁴ As doctors struggle to implement these regulatory requirements, clinics close and women have no choice but to travel farther, spend more money, and wait longer to obtain abortions.²⁰⁵

B. Admitting Privileges TRAP Laws are not Rationally Related to their Purported Purpose of Protecting Maternal Health

In *Van Hollen* and *Abbott*, the State asserted that the rationale for requiring abortion doctors to have hospital admitting privileges is to protect maternal health.²⁰⁶ However, these admitting privileges statutes bear no rational relation to their purported purpose because very few abortions result in complications that require hospitalization. Moreover, the medical community does not believe that abortion doctors need to provide “continuity of care” to ensure optimal treatment for patients²⁰⁷ or that requiring continuity of care even aligns with medical best practices.²⁰⁸

First, in *Van Hollen*, “no documentation of medical evidence” was presented to the Wisconsin legislature demonstrating “a medical need” for requiring doctors to have admitting privileges.²⁰⁹ Generally, the medical community considers surgical abortion a relatively safe and low-risk procedure when compared to other outpatient medical procedures.²¹⁰ As noted by the district court in *Van Hollen*, “the risk of

²⁰⁴ *See id.*

²⁰⁵ *See id.*

²⁰⁶ *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 789 (7th Cir. 2013); *see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 411–12 (5th Cir. 2013).

²⁰⁷ *See Van Hollen*, 738 F.3d at 789.

²⁰⁸ *Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 864 (W.D. Wis. 2013).

²⁰⁹ *Van Hollen*, 738 F.3d at 789.

²¹⁰ Elizabeth Flock, *Docs: Texas Abortion Bill Doesn't Make Sense*, U.S. NEWS AND WORLD REP. (June 27, 2013),

death associated with childbirth is 14 times higher than that associated with abortion. The risk of death related to abortion overall is less than 0.7 deaths per 100,000 procedures.”²¹¹ Abortion complications “are estimated to occur in only one out of 111 physician-performed aspiration abortions (the most common type of surgical abortion); and 96 percent of complications are ‘minor.’”²¹² In fact, a recent study found that “only 1 in 1,915 aspiration abortions (0.05%)” results in complications that require hospitalization.²¹³ These statistics are staggering when compared to studies demonstrating that the rate of complications arising from colonoscopies is significantly higher than that of abortions—yet doctors performing colonoscopies are not required to have hospital admitting privileges.²¹⁴

Furthermore, in *Van Hollen*, Judge Posner noted that doctors who perform outpatient surgeries, such as various arthroscopic or laparoscopic procedures, are not required to have hospital admitting privileges.²¹⁵ He observed that doctors who perform surgical abortion often perform other similar gynecological procedures, such as “surgical completion of a miscarriage,”²¹⁶ and these doctors are not required to have admitting privileges when performing a procedure that “appear[s] to be virtually indistinguishable from an abortion from a medical standpoint.”²¹⁷ Even doctors performing other outpatient surgeries that require general anesthesia, are not required to have

<http://www.usnews.com/news/articles/2013/06/27/obgyn-docs-say-provisions-in-filibustered-texas-abortion-bill-dont-make-sense>.

²¹¹ *Van Hollen*, 963 F. Supp. 2d at 863.

²¹² *Van Hollen*, 738 F.3d at 797.

²¹³ *Id.*

²¹⁴ *Id.* at 790.

²¹⁵ *Id.* (citing a study showing that “a quarter of all surgery in the United States is performed outside of hospitals”).

²¹⁶ *Id.* (explaining this procedure occurs when a doctor removes the remaining fetal tissue from a woman’s uterus following a miscarriage and likening this procedure to a “spontaneous abortion”).

²¹⁷ *Id.*

admitting privileges,²¹⁸ despite the fact that ACOG believes that abortion is less risky than the use of general anesthesia.²¹⁹ Thus, this statute does not further its purported rationale of protecting the health of the mother because surgical abortions are relatively safe.²²⁰ Women who have had a surgical abortion do not typically experience complications that require hospitalization.²²¹

Yet, anti-abortion advocates argue that if a woman is hospitalized from abortion-related complications, she will receive “better continuity of care” if the doctor who performed the abortion has hospital admitting privileges and can continue to treat her.²²² However, even in the rare instance where a patient requires hospitalization, the appropriate doctor to manage the patient’s care may be a subspecialist and not the physician who performed the abortion.²²³ For example, if the patient has “a cardiac or lung related complication [she] should be seen by a cardiologist or a pulmonologist” rather than the doctor who performed the abortion.²²⁴ Moreover, as the district court in *Van Hollen* observed, the admitting privileges requirement runs “counter to the current hospital care model, which increasingly relies on dedicated staff physicians or ‘hospitalists,’ including an on-call ob-gyn, rather than the outdated model that relies on physicians who provide outpatient care with hospital privileges.”²²⁵ Thus, the practice of highly qualified outpatient physicians, such as abortion doctors, handing off care to a hospital-employed physician is congruent with

²¹⁸ Shainwald, *supra* note 5, at 166.

²¹⁹ *Id.* (citing Flock, *supra* note 210).

²²⁰ *Van Hollen*, 738 F.3d at 789, 797.

²²¹ *Id.*

²²² *Id.* at 789.

²²³ Shainwald, *supra* note 5, at 166.

²²⁴ *Id.*

²²⁵ *Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 864 (W.D. Wis. 2013).

best practices in hospital care and does not constitute “patient abandonment.”²²⁶

Even the ACOG has publicly condemned these admitting privileges TRAP laws, stating that they are unnecessary for “the provision of safe abortions.”²²⁷ ACOG guidelines recommend that clinicians who provide abortions outside of a hospital should have protocols in place to transfer patients to a hospital if complications arise.²²⁸ Lisa Hollier, chair of the Texas district of ACOG, noted, “[T]he [hospital admitting privileges] regulations are much more stringent than for other surgical procedures at similar risk, such as a colonoscopy.”²²⁹ Thus, as Judge Posner states, absent a requirement that physicians performing similar or riskier outpatient procedures have hospital admitting privileges, the only purpose the Wisconsin legislature could have when enacting this law was to restrict access to safe and legal abortions within the state.²³⁰

C. Admitting Privileges Statutes Violate the Equal Protections Clause by Discriminating Against Doctors who Perform Abortions

Beyond the fact that these admitting privileges laws do not bear any rational relationship to protecting maternal health, they also violate equal protections of the law.²³¹ As Judge Posner stated in *Van Hollen*, “the state seems indifferent to complications from non-hospital procedures other than surgical abortion (especially other gynecological procedures) even when they are more likely to produce complications.”²³² In fact, the incidence of complications of abortion

²²⁶ *Id.*

²²⁷ Shainwald, *supra* note 5, at 165 (citations omitted).

²²⁸ *Id.*

²²⁹ Flock, *supra* note 210.

²³⁰ *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 790–91 (7th Cir. 2013).

²³¹ *See id.* at 789–90.

²³² *Id.* at 790.

is so low that the Court cited the State's report, which noted that in 2012 there were "only 11 complications out of 6,692 abortions" in Wisconsin.²³³ Therefore, complications occurred at "a rate of less than 1.6 tenths of 1 percent (1 per 608 abortions)."²³⁴ There is no reasonable justification for singling out abortion providers for additional medical oversight when the rate of complications related to surgical abortions is significantly lower than the rate of complications associated with similar outpatient surgical procedures.²³⁵

Anti-abortion advocates argue that requiring abortion doctors to have admitting privileges at a local hospital acts as a "Good Housingkeeping Seal of Approval," a testament to the competence of the physician.²³⁶ According to the Fifth Circuit's *Abbott* decision, the State has a "substantial interest" in regulating and "protecting the integrity and ethics of the medical profession."²³⁷ Writing for the court, Judge Owen believed that requiring local admitting privileges furthered this interest.²³⁸ She stated, "the State offered evidence that such a requirement fosters a woman's ability to seek consultation and treatment for complications directly from her physician, not from an emergency room provider."²³⁹ Judge Owen cited testimony from multiple doctors who argue that this requirement provides additional oversight beyond the initial licensing and license renewal process, which helps ensure high quality patient care and the quality of doctors permitted to perform abortions.²⁴⁰ These doctors argued this extra-layer of "protection for patient safety" is necessary because the stigma attached to abortion makes it likely that complications are likely

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 797.

²³⁶ *See id.*

²³⁷ *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 411 (5th Cir. 2013).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* 411–12.

underreported.²⁴¹ However, in *Van Hollen*, the State did not present any evidence to support the claim that abortion-related complications were underreported, which calls into question the doctors' reasoning in *Abbott* that abortions are likely underreported.²⁴²

Moreover, as noted previously, best practices in hospital care do *not* require physicians from outpatient clinics to continue to provide care at a hospital when complications do arise.²⁴³ According to the Plaintiffs-Appellees' brief in *Van Hollen*, when a complication arises in outpatient medicine, "hospitals provide emergency care to patients who need it, including admitting the patients if necessary, regardless of whether the physician who provided the outpatient care has admitting privileges at that hospital."²⁴⁴

In fact, in the case of Wisconsin's statute, "nothing [in the statute] . . . requires an abortion doctor who has admitting privileges to care for a patient . . . [h]e doesn't have to accompany her to the hospital, treat her there, visit her, call her, or indeed do anything that a doctor employed by the hospital might not do for the patient."²⁴⁵ Thus, it is unconstitutional to require extra oversight of abortion doctors when physicians performing equally invasive procedures are not monitored in this manner and there are no statutory provisions requiring physicians who perform outpatient surgical procedures to provide continuity of care to their patients.

²⁴¹ *See id.* at 412.

²⁴² *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 790 (7th Cir. 2013).

²⁴³ *Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 864 (W.D. Wis. 2013).

²⁴⁴ Brief of Plaintiffs-Appellees at 13–14, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786 (2014) (No. 13-2726) ("Transfers of care between physicians occur routinely in medicine. Dr. Hargarten testified that such transfers occur 'every day from other hospitals and physicians in cases where those physicians cannot provide the definitive treatment the patient requires,' and the 'transferring physician is rarely, if ever' on the staff of the hospital.").

²⁴⁵ *Van Hollen*, 738 F.3d at 798.

CONCLUSION

Although the Supreme Court has yet to evaluate the constitutionality of admitting privileges TRAP laws, when it does, the Court should rely on Judge Posner's reasoning in *Van Hollen* to reach its decision. Even though Judge Posner's opinion relied on the facts in the record for *Van Hollen*, his reasoning can be expanded beyond the borders of Wisconsin. As one state successfully promulgates a regulation restricting access to abortion, other states follow suit by enacting similar statutes, resulting in an influx of abortion regulation and making it increasingly difficult for a woman to obtain an abortion in the United States.

Thus, although the combination of abortion regulations may vary from state to state, access to abortion is a universal concern. When the Supreme Court has the opportunity to make a decision about the constitutionality of hospital admitting privileges statutes, it should strike them down. These laws impose an undue burden on a woman seeking to exercise her fundamental right to terminate a pregnancy; they bear no rational relation to their purported purpose of protecting maternal health; and they violate equal protections of the laws through disparate treatment of abortion doctors.