No. 15-1736

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PLANNED PARENTHOOD OF WISCONSIN, INC., et al.

Plaintiffs-Appellees,

v.

BRAD D. SCHIMEL, Attorney General of Wisconsin, in his official capacity, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Wisconsin
(No. 13-00465, Hon. William M. Conley)

Amicus Curiae brief of
Legislators from the States of
Alabama, Mississippi, Oklahoma, and Texas
in Support of Defendants-Appellants
and Reversal of the Lower Court

Mailee R. Smith
Counsel of Record for Amici Curiae
Americans United for Life

655 15th St. NW, Suite 410
Washington, D.C. 20005
Telephone: 202-289-1478
Facsimile: 202-289-1473
Email: Mailee.Smith@AUL.org

No. 15-1736

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PLANNED PARENTHOOD OF WISCONSIN, INC., et al.

Plaintiffs-Appellees,

v.

BRAD D. SCHIMEL, Attorney General of Wisconsin, in his official capacity, et al.,

Defendants-Appellants.

On Appeal f[illegible] United States District Court
[illegible] District of Wisconsin
[illegible]n. William M. Conley)

[illegible]e brief of
[illegible]he States of
[illegible]ahoma, and Texas
[illegible]s-Appellants
[illegible]ver Court

Mailee R[illegible]
Counsel o[illegible]
Americans [illegible]
[illegible]15th St. NW, Suite 410
Washington, D.C. 20005
Telephone: 202-289-1478
Facsimile: 202-289-1473
Email: Mailee.Smith@AUL.org

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 15-1736

Short Caption: Planned Parenthood of Wisconsin, et al. v. Brad D. Schimel, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[X] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

(2)

New info: Alabama Representatives Mack Butler, Jim Carns, Matt Fridy, Steve McMillan, and Arnold Mooney; Mississippi Senators Phillip A. Gandy and Michael D. Watson, Jr., and Representatives Chris Brown, Lester Carpenter, Dennis DeBar, Jr., William C. Denny, Jr., Mark Formby , Andy Gipson, Speaker Phillip Gunn, Bill Kinkade, Sam C. Mims, V, and John Moore; Oklahoma Senators Don Barrington, AJ Griffin, Kyle Loveless, Rob Standridge, Dan Newberry, and Gary Stanislawski, and Representatives Gary Banz, Lisa Billy, David Derby, John Enns, George Faught, Randy Grau, Dennis Johnson, Sally Kern, Randy McDaniel, Lewis Moore, Glen Mulready, Pam Peterson, Mike Ritze, Todd Thomsen, Weldon Watson, and Paul Wesselhoft; and Texas Senator Bob Hall and Representatives Jimmie Don Aycock, Dennis Bonnen, Greg Bonnen, M.D., Cindy Burkett, Angie Chen Button, Giovanni Capriglione, Travis Clardy, Byron Cook, Pat Fallon, James "Jim" Keffer, Brooks Landgraf, Jodie Laubenberg, Debbie Riddle, Drew Springer, Ed Thompson, James White, and John Zerwas, M.D.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

New info: Americans United for Life

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Mailee R. Smith Date: May 26, 2015

Attorney's Printed Name: Mailee R. Smith

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

Address: 655 15th St NW, Suite 410
Washington, D.C. 20005

Phone Number: 202-289-1478 Fax Number:

E-Mail Address: Mailee.Smith@AUL.org

rev. 01/08 AK

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are legislators from Alabama, Mississippi, Oklahoma, and Texas, where their respective state legislatures have advanced their legitimate interests in protecting maternal health through commonsense laws that require abortion providers to have admitting privileges at local hospitals. As such, *Amici* have an interest in ensuring that a similar law in Wisconsin seeking to protect maternal health through an admitting privileges requirement is upheld.

In addition, *Amici* have an interest in protecting the welfare of women seeking abortion in their states. As routinely affirmed by the U.S. Supreme Court, this important governmental interest vests in the State from the outset of pregnancy.

The ability of *Amici* to ensure maximum patient safety, if and when abortion is practiced in their states, is threatened by the district court's decision and analysis. Contrary to the district court's analysis, the State's interest in protecting maternal health is present from the outset of pregnancy

---

[1] In accordance with Fed. R. App. P. 29, the parties have consented to the filing of this *amicus* brief. No party's counsel has authored the brief in whole or in part. No party or party's counsel has contributed money intended to fund preparing or submitting this brief. No person other than *Amici*, their members, or their counsel has contributed money that was intended to fund preparing or submitting the brief.

and indisputably provides a rational basis for Wisconsin's law. Under prevailing Supreme Court precedent, the requirement does not impose an undue burden on women seeking abortions.

Amici include **Alabama** Representatives Mack Butler, Jim Carns, Matt Fridy, Steve McMillan, and Arnold Mooney; **Mississippi** Senators Phillip A. Gandy and Michael D. Watson, Jr., and Representatives Chris Brown, Lester Carpenter, Dennis DeBar, Jr., William C. Denny, Jr., Mark Formby , Andy Gipson, Speaker Phillip Gunn, Bill Kinkade, Sam C. Mims, V, and John Moore; **Oklahoma** Senators Don Barrington, AJ Griffin, Kyle Loveless, Rob Standridge, Dan Newberry, and Gary Stanislawski, and Representatives Gary Banz, Lisa Billy, David Derby, John Enns, George Faught, Randy Grau, Dennis Johnson, Sally Kern, Randy McDaniel, Lewis Moore, Glen Mulready, Pam Peterson, Mike Ritze, Todd Thomsen, Weldon Watson, and Paul Wesselhoft; and **Texas** Senator Bob Hall and Representatives Jimmie Don Aycock, Dennis Bonnen, Greg Bonnen, M.D., Cindy Burkett, Angie Chen Button, Giovanni Capriglione, Travis Clardy, Byron Cook, Pat Fallon, James "Jim" Keffer, Brooks Landgraf, Jodie Laubenberg, Debbie Riddle, Drew Springer, Ed Thompson, James White, and John Zerwas, M.D.

Amici urge this court to reverse the lower court.

ARGUMENT

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), are the governing precedents in abortion jurisprudence. Under those precedents, an abortion regulation that protects maternal health is valid where there is a rational basis for its enactment, and it does not impose an undue burden. *See* Part I, *infra*. However, the district court's decision invalidating Section 1 of 2013 Wisconsin Act 37 ("the Wisconsin regulation") contravenes this explicit Supreme Court precedent.

The district court refused to apply the required rational basis test, instead manufacturing its own legal standard. *See* Part II.A, *infra*. Without explanation, the district court instead cited mainly to inapplicable pre-*Casey* cases, ignoring the Court's directive in *Planned Parenthood v. Gonzales* to provide broad deference to the State. *Id*. Both Supreme Court precedent and the medical testimony provided to the district court support the State's rational basis, contrary to the district court's analysis. *Id*.

In addition, the district court manufactured factors to be used in determining whether the Wisconsin regulation poses an undue burden on women. *See* Part II.B, *infra*. In direct contravention of Supreme Court precedent, the district court improperly required the State to prove the "link"

between its asserted state interests in protecting women's health through the admitting privileges requirement and the actual medical efficacy of the law. *See* Part II.B.i, *infra*. It also improperly impugned the State's decision to regulate abortion differently than it does other "similar" procedures. *See* Part II.B.ii, *infra*. These factors have no place in an undue burden analysis and demonstrate deep flaws in the district court opinion.

The court's failure to properly apply the straightforward rational basis and "undue burden" standards undermines its entire opinion and requires that the decision below be reversed.

I. Supreme Court precedent is clear: An abortion regulation enacted to protect maternal health is valid where there is a rational basis for its enactment and it does not pose an undue burden.

In both *Gonzales v. Carhart* and *Planned Parenthood v. Casey*, the Supreme Court affirmed *Roe v. Wade*'s "essential" holding, which explicitly included not only the woman's "right" to "choose to have an abortion" without "undue interference from the State," but also "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman...." *Gonzales*, 550 U.S. at 145; *Casey*, 505 U.S. at 846 (both citing *Roe v. Wade*, 410 U.S. 113 (1973)). *Roe* "was express in its recognition of the State's 'important and legitimate interests in preserving

and protecting the health of the pregnant woman...." *Casey*, 505 U.S. at 875-76.

In fact, the Court made clear in *Roe* the broad discretion the State reserves to ensure maximum patient safety, stating, "[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe*, 410 at 150. The Court found that the State's legitimate interest in regulating abortion to protect maternal health "obviously extends at least to [regulating] the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that may arise." *Id.*

Preceded by the phrase "at least," these examples clearly set a floor, not a ceiling, of the "obvious" interests a State maintains in protecting maternal health. Notably, the Court's list of the minimum "obvious" examples of measures advancing women's health goes beyond regulating the abortion procedure itself and extends to regulations that would ensure the qualifications of the physician and the availability of comprehensive post-abortive after-care treatment and emergency care in the case of

complications. Simply, the State's interest in maternal health is comprehensive.[2]

In *Casey*, the Court elaborated on *Roe's* "essential" holding by explaining that the woman's "right" is not so unlimited that it is absolute. *Casey*, 505 U.S. at 869, 875. In fact, the Court termed it an "overstatement" to describe it as a "right to decide whether to have an abortion 'without interference from the State.'" *Id.* at 875. Rather, from the outset of pregnancy, the State may show concern for maternal health and the life of the unborn child and act to further those interests. *Id.* at 853, 869.

Rejecting previous decisions that invalidated regulations "which in no real sense deprived women of the *ultimate* decision," the plurality in *Casey* introduced the "undue burden" standard: only where a state regulation imposes an undue burden on a woman's ability to choose abortion does the State overreach. *Id.* at 874, 875 (emphasis added). The Court elaborated:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.

---

[2] The Court also expressed concern in *Roe* with what it called illegal "abortion mills," noting that their reported negative impact on women's health "strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed." *Roe*, 410 U.S. at 150.

Id. at 877. As the Court further noted, "[a] particular burden is not of necessity a substantial obstacle." *Id.* at 887.

Given that the "undue burden" standard established a new framework for evaluating abortion regulations, the plurality in *Casey* provided some "guiding principles" to help direct the federal courts as to what constitutes a "substantial obstacle," including the principle that "[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden." *Id.* at 877-78.

Equating the regulation of abortion to the regulation of any medical procedure, the Court further stated that, "[a]s with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion." *Id.* at 878. Only "unnecessary" regulations which have the "purpose or effect of presenting a substantial obstacle to a woman" pose an undue burden. *Id.*

In *Gonzales*, the Court elaborated on the significant state interests that support an abortion regulation and clarified that a rational basis inquiry does, in fact, have a place in reviewing abortion regulations. After recognizing that the State "has an interest in protecting the integrity and ethics of the medical profession" and has a "significant role to play in regulating the medical profession," the Court determined, "[w]here it has a *rational basis*

to act, and it *does not impose an undue burden*, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession...." *Gonzales*, 550 U.S. at 157, 158 (citations omitted) (emphasis added). Thus, the first step in evaluating the constitutionality of an abortion regulation aimed at protecting women's health is to determine whether the State has "a rational basis to act." *Id.* at 158. Then, once a rational basis has been established, a court must determine whether the regulation imposes an undue burden on women seeking abortions. *Id.*[3]

Further, the Court explicitly held that state and federal lawmakers are given "*wide discretion* to pass legislation in areas where there is medical and scientific uncertainty." *Id.* at 163 (emphasis added). In other words, if there is medical disagreement in the medical community over a particular abortion regulation, a court must make a finding in favor of the State on the rational basis prong of the Supreme Court's legal standard. *See also Simopoulos v. Virginia*, 462 U.S. at 516 (1983) ("In view of its interest in protecting the health of its citizens, the State necessarily has considerable discretion in determining standards for the licensing of medical facilities.").

---

[3] "Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is *rational* and in pursuit of legitimate ends." *Gonzales*, 550 U.S. at 166 (emphasis added).

Such deference to the State was not a new or anomalous construct when recognized in *Gonzales*. As the *Gonzales* Court itself noted, in the 1997 case *Mazurek v. Armstrong*, 520 U.S. 968 (1997), the Supreme Court upheld a Montana law that restricted the performance of abortions to licensed physicians *despite* abortion advocates' contention that "all health evidence contradicts the claim that there is any health basis for the law." *Gonzales*, 550 U.S. at 164 (citing *Mazurek*). In other words, deference to the legislature is appropriate even when a challenger contends that it is not based upon scientific facts.[4]

Together, *Casey* and *Gonzales* demonstrate that regulations enacted to foster the health of a woman seeking an abortion are valid if the State has a *rational basis* to act, including situations where there is medical disagreement over the best way to protect maternal health, and, subsequently, there is no undue burden. As discussed below, the district court completely ignored the clear rational basis test and undue burden standard of *Casey* and *Gonzales* and instead employed a "test" that contradicts clear Supreme Court precedent.

[4] The Court further noted that legislative fact-findings are to be reviewed under "a deferential standard." *Id.* at 165.

II. The district court employed an erroneous legal standard that contradicts Supreme Court precedent, skewing its entire analysis and requiring reversal

A. The district court refused to apply the required rational basis test.

As stated in *Gonzales*, "[w]here [the State] has a *rational basis* to act, and it *does not impose an undue burden*, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession...." *Gonzales*, 550 U.S. at 158 (emphasis added). *See also* Part I, *supra*.

Under the rational basis standard of review, courts must presume that a law in question is constitutional and sustain it so long as the law is rationally related to a legitimate state interest. *See, e.g., Heller v. Doe*, 509 U.S. 312, 320 (1993). "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* (internal citations omitted). In other words, the test provides an incredibly high level of deference to the State, placing the burden on the plaintiffs challenging a law to prove that the State has absolutely no rational justification for enacting it.

However, rather than utilizing a straightforward application of the rational basis test and undue burden standard, the district court manufactured

its own standard, weighing the extent of the burden a law allegedly imposes against the strength of the State's justification for the law. In fact, the district court explicitly rejected the rational basis prong of the Supreme Court's required analysis, stating that it would not "apply a vanilla rational basis test." Slip Op. at 21-22.[5] As such, the district court's entire undue burden analysis fails because it refused to take the first step: placing the burden on the plaintiff to establish that the state does not have a rational basis for the regulation.

While the district court briefly referenced *Casey* when laying out the "legal standard" in its opinion, it cherry-picked which aspects of *Casey* it chose to apply. It cited to the Supreme Court's statement that a "woman's right to terminate her pregnancy before viability is the most central purpose of *Roe v. Wade*," *id.* at 20, but it failed to include any reference to the "essential holding" in *Roe*, including the State's legitimate interest from the outset of pregnancy in regulating abortion to protect maternal health. *See Gonzales*, 550 U.S. at 145; *Casey*, 505 U.S. at 846 (both citing *Roe*).

---

[5] The district court noted that it must follow this Circuit's "directive to weigh legitimate health benefits derived from an abortion regulation against the burden it places on women seeking access to abortion services." Slip Op. at 22. As demonstrated herein, such a directive contravenes Supreme Court precedent and ignores the required application of the rational basis test.

Instead, the court claimed it must balance the following: "the health interests of women who may suffer a complication requiring hospitalization because of an abortion procedure performed by a physician without admitting privileges within 30 miles of the procedure against the health interests of women facing obstacles in obtaining an abortion because of this privileges requirement." Slip Op. at 23. The district court committed clear legal error by completely omitting the State's interest in maternal health from its "balancing test," in clear contravention of Supreme Court precedent. The Supreme Court has never advocated a "harm to the woman versus harm to the woman" balancing standard.

Moreover, the district court inexplicably cited mainly to pre-*Casey* decisions, ignoring the Supreme Court's clear statements about the State's legitimate interests in maternal health and the discretion to be given the state legislature. For example, the district court heavily relied on *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983)—a case that was explicitly *overruled* in *Casey*[6]—claiming that "the Supreme Court appears more willing to treat skeptically and strike down State regulations purportedly aimed at the health of women where the evidence of such a

[6] *Casey*, 505 U.S. at 882 (overruling *Akron*). Heavily relying on the outdated *Akron* case, the district court also cited to it at pages 24, 52, 54-55, and 82.

requirement is lacking." Slip Op. at 23. This conclusion is not only based on outdated cases, but it ignores the Court's recent statements in *Casey* and *Gonzales* providing great deference to the State and holding that such "evidence" is not required. For example, the district court completely ignored the *Gonzales* "wide discretion" standard[7] as well as the Court's decision in *Mazurek* (upholding the contested abortion law despite assertions that "all health evidence" contradicted the State's purported basis for the law). *See* Part I, *supra*. Clearly, the district court's analysis so contravenes Supreme Court jurisprudence that it must be overturned.

In fact, the district court's legal analysis is so erroneous and without proper basis that it completely mischaracterized one of the only recent (although not Supreme Court) cases it cited. In attempting to argue that other courts have utilized its "harm to women versus harm to women" standard, which balances burdens and benefits (a standard that has not been adopted by the Supreme Court), the district court erroneously claimed that the Ninth Circuit case *Planned Parenthood of Arizona, Inc. v. Humble*, 753

[7] The Eighth Circuit provides an example of the proper application of the "wide discretion" standard in the abortion context, where that Circuit utilized the standard in upholding *en banc* South Dakota's informed consent law requiring that women be informed of the risk of suicide and suicide ideation following abortion. *See Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889 (8th Cir. 2012).

F.3d 905 (9th Cir. 2014), "review[ed] similar admitting privilege requirements." The *Humble* case involved a preliminary injunction of a regulation of abortion-inducing drugs and never broached the subject of admitting privileges. *See* Slip Op. at 22 n.14.

When Supreme Court precedent is properly applied, it is clear that the State had a rational basis for enacting the admitting privileges requirement. First, the State's rational basis for requiring a physician to have admitting privileges at a local hospital is found in the Supreme Court's explicit support for the State's role in regulating the medical profession. In *Gonzales*, the Court recognized that there is "no doubt" that the State "has an interest in protecting the integrity and ethics of the medical profession" and declared it is "clear" that the State has a "significant role to play in regulating the medical profession." *Gonzales*, 550 U.S. at 157.[8] Under *Roe*, the State has a comprehensive and legitimate interest in regulating abortion to protect maternal health that "obviously extends" to the qualifications of performing

[8] The Fourth Circuit has explained that a valid purpose (*i.e.*, rational basis) is "one not designed to strike at the right itself." *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 166 (4th Cir. 2000) (quoting *Casey*, 505 U.S. at 874). Here, the Wisconsin regulation was enacted to help protect women's health—not to strike at the right to abortion itself. Indeed, as long as a physician has admitting privileges at a local hospital (something that benefits the woman), there is no obstacle to her access to abortion whatsoever.

physicians, the availability of after-care, and the adequate provision for "*any* complication or emergency" that may arise. *Roe*, 410 U.S. at 150 (emphasis added).

Second, the Court's "wide discretion" analysis when evaluating a State's rational basis is particularly relevant here. *Gonzales*, 550 U.S. at 163. The plaintiffs and the district court may disagree with the State and its experts on the effect an admitting privilege requirement may have on the health of women seeking an abortion, but that disagreement only buttresses the State's rational basis for the law.[9] Under *Gonzales*, this medical "uncertainty" must weigh in favor of the State; where medical opinion

---

[9] Overall, the district court's discussion of the parties' experts shows that there is a range of opinion on the health benefits of an admitting privileges requirement. The very need to discuss the varying opinions demonstrates that "wide discretion" should be afforded to the State. But the court's discussion also demonstrated its clear bias. It dismissed the State's witnesses as lacking credibility because they had testified or been involved in other cases or advocacy roles, *see, e.g.*, Slip Op. at 29 n.16, 33, 44, 46, 79 n.46, yet it accepted at face value all of the plaintiffs' experts despite their clear advocacy roles. For example, the district court heavily credited the testimony of Dr. Stanley Henshaw, a former Senior Fellow with the Guttmacher Institute—an organization that routinely advocates against any form of abortion regulation. *See, e.g.*, *id.* at 34, 78-79. Perhaps most telling is the district court's applause for the plaintiffs in the case. *Id.* at 61 n.34. While the State's witnesses were discredited by the court for having previously expressed support for abortion regulations, the court accepted and commended the testimony and efforts of the plaintiff-abortion providers who *profit* from abortion. Apparently, the district court did not find *profiting* from abortion to evidence any sort of bias.

differs, rational basis exists. *See also Bryant*, 222 F.3d at 169 ("The fact that not all healthcare professionals agree with [the abortion clinic regulations] is immaterial in light of South Carolina's 'considerable discretion' in adopting licensing requirements aimed at the health of women seeking abortions.").

Debate over or contrary views as to the need for and efficacy of hospital admitting privileges for abortion patients are just such areas of "medical and scientific uncertainty" that are exclusively within the legislature's purview. *See Planned Parenthood of Greater Tex. Surgical Health Servs.v. Abbott* (*Abbott II*), 748 F.3d 583, 594 (5th Cir. 2014) (stating that a law that is "'based on rational speculation unsupported by evidence or empirical data' satisfies rational basis review," and the fact that there is disagreement (as here between the plaintiffs and the State) "suffices to prove that the law has a rational basis").[10]

---

[10] In *Abbott II*, the Fifth Circuit outlined the following as "the most comprehensive statement" on the rationale behind a similar Texas admitting privileges requirement:

> There are four main benefits supporting the requirement that operating surgeons hold local hospital admitting and staff privileges: (a) it provides a more thorough evaluation mechanism of physician competency which better protects patient safety; (b) it acknowledges and enables the importance of continuity of care; (c) it enhances inter-physician communication and optimizes patient information transfer and complication management; and (d) it supports the ethical duty

The Wisconsin regulation seeks to improve continuity of care and communication, ensure quality of physicians providing care, and provide peer review and accountability. Enacting legislation designed to help ensure that a physician can be contacted and be properly held accountable for complying with Wisconsin laws is clearly within the ambit of the State's role in regulating the practice of medicine. Attempting to create an environment of care in which a woman undergoing an abortion can experience the benefits of comprehensive continuity of care is another legitimate goal of the State's traditional role in regulating medicine.

In fact, the "consensus among the experts during the colloquy that admitting privileges is [sic] an indication of quality of the physician" mandates a finding of rational basis. *See* Slip Op. at 49. One of the plaintiffs' witnesses conceded that peer review is a benefit of admitting privileges. *Id.* at 53. So not only is there medical disagreement between the parties and their experts that requires wide deference to the State, but some of the plaintiffs' testimony actually weighs in favor of the State. Further,

---

> of care for the operating physician to prevent patient abandonment.

Abbott II, 748 F.3d at 592. These state interests are equally applicable here.

there were some Wisconsin physicians who testified on the benefit of the admitting privileges requirement at trial. *Id.* at 84-85.[11]

In sum, Supreme Court precedent is clear that the abortion "right" is qualified by a State's legitimate and comprehensive interest in regulating abortion providers and the practice of abortion to protect maternal health. The Wisconsin regulation clearly furthers these historic and compelling state interests. By refusing to consider the State's rational basis for the Wisconsin regulation, the district court failed to properly apply the "undue burden" standard.

B. The district court employed factors rejected by the Supreme Court in its erroneous "undue burden" analysis.

Rather than follow the "guiding principles" set forth in *Casey* for determining whether a regulation amounts to an undue burden, *Casey*, 505 U.S. at 877-78, the district court applied its own factors for the determination of whether a regulation poses an undue burden. At trial, the court's inquiry improperly applied the following factors: "(i) are admitting privileges required for other outpatient procedures; (ii) how safe is abortion, especially compared to similar outpatient procedures and childbirth; and (iii)

[11] The district court glossed over this testimony without explaining its failure to weigh the testimony in favor of the State.

would the admitting privileges requirement further women's health?" Slip Op. at 25.[12]

Thus, the trial court improperly placed the burden on the State to prove the adequacy of the regulation (part (iii) of the court's inquiry). In addition, the court improperly weighed against the State the fact that abortion is being treated differently than other "similar" procedures (parts (i) and (ii) of the court's inquiry). The use of both of these factors contradicts established Supreme Court precedent and fails to establish an "undue burden."[13]

---

[12] Citing this Court, the district court also claimed that the undue burden test "is not a matter of the number of women likely to be affected." Slip Op. at 55, 80. While *Amici* disagree with the broad application of the Supreme Court's "large fraction" language discussed in *Casey*, the district court's conclusion flies in the face of that language. *See Casey*, 505 U.S. at 895 ("in a large fraction of the cases in which [the provision at issue] is relevant, it will operate as a substantial obstacle…."). While the district court acknowledges that its conclusion is at odds with another Seventh Circuit case, Slip Op. at 80, it never resolves the discrepancy it and this Circuit have created with the "large fraction" language in *Casey*.

[13] The district court failed to cite any other concrete evidence that women will be burdened by the admitting privileges requirement. Instead, its opinion relies on rank speculation, utilizing phrases like "will likely close," "likely," "could be," and "may." *Id.* at 72, 75.

i. The district court erroneously required the State to prove that the regulation was justified, a requirement that amounts to strict scrutiny.

Contrary to the district court's analysis, the burden of proof is not on the State to *prove* the positive impact of the Wisconsin regulation in order for a court to determine that the requirement has a rational basis (and is, thus, not an undue burden). The burden of proof is on the plaintiffs to establish that the State has absolutely no rational justification for enacting the regulation. In refusing to correctly apply the Supreme Court's rational basis and undue burden standard, the district court reversed the burden and improperly required the State to prove the "link" between its interest in maternal health and the impact of the admitting privileges regulation. *See, e.g.*, Slip Op. at 24 (citing to pre-*Casey* cases *Akron* and *Doe v. Bolton*).

Requiring the State to prove the actual effectiveness of a regulation has never been a component of the "undue burden" analysis. It ignores the mandate of *Gonzales* and directly contravenes the Supreme Court's rejection of strict scrutiny analysis within the context of abortion regulations. *See Gonzales*, 550 U.S. at 157, 158, 163; *Casey*, 505 U.S. at 874-75, 877-78; *see also* Part I, *supra*. It also ignores the "wide discretion" that is to be afforded to state legislatures, instead scrutinizing the State's interest and purpose to an extent never intended by the Supreme Court. The district court did

exactly what the Supreme Court rejected in *Casey*: it asserted that the Wisconsin regulation could "be sustained only if drawn in narrow terms to further a compelling state interest." *Casey*, 505 U.S. at 871.

Indeed, by requiring the State to prove the efficacy of the law, the district court is improperly requiring the State to prove both the existence of a compelling state interest and that this regulation accomplishes the State's goal through the least restrictive means.[14] This amounts to strict scrutiny. Moreover, the district court's clear rejection of the rational basis standard and application of strict scrutiny supplants the Supreme Court's explicit directives and ignores the deference due the Wisconsin Legislature, substituting instead its own opinions regarding the justification for the admitting privileges requirement.

The Supreme Court has made clear that courts are not permitted to second guess a legislature's stated purposes for enacting a law absent clear and compelling evidence to the contrary. *See Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). Such evidence is missing here. Instead, the district court

[14] The district court made several statements indicating it was improperly requiring the State to enact abortion regulations that meet the "least restrictive means" prong of the strict scrutiny standard. *See* Slip Op. at 49 (claiming that the admitting privileges requirement "is a poor substitute for better measures of quality"); *id.* at 52 (weighing "refer-and-follow" privileges against the state as a lesser restriction); *id.* at 53 (citing one of the plaintiff's witnesses as conceding that peer review is a benefit of admitting privileges but that "there are other ways to discipline providers").

anchored its decision on unsupported opinions that do not reflect proper legal analysis.

As the Fifth Circuit recently stated, "the district court's approach ratchets up rational basis review into a pseudo-strict-scrutiny approach by examining whether the law advances the State's asserted purpose," turning rational basis into strict scrutiny under the "guise" of the undue burden standard. *Whole Woman's Health v. Lakey*, 769 F.3d 285, 297 (5th Cir. 2014). Yet "[m]ost legislation deals ultimately in probabilities," and "[s]uccess often cannot be 'proven' in advance." *Abbott II*, 748 at 594 (upholding Texas admitting privileges requirement). Requiring the state to do so here is clear legal error.

The Fifth Circuit properly applied the Supreme Court's precedent in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott* and *Whole Woman's Health v. Lakey*. In *Lakey*, the Fifth Circuit held, "[i]f the State establishes that a law is rationally related to a legitimate state interest, [courts] do not second guess the legislature regarding the law's wisdom or effectiveness." *Lakey*, 769 F.3d at 294 (citing *Abbott II*, 748 F.3d at 594).

Here, the State has a legitimate interest in regulating abortion to protect maternal health that includes regulating the performing physician,

the availability of after-care, and the adequate provision for any complication or emergency that may arise. *Roe*, 410 U.S. at 150. The parties presented conflicting medical testimony on the need for an admitting privileges law; however, under *Gonzales*, such medical disagreement vests in the State wide discretion to regulate. *Gonzales*, 550 U.S. at 163. There can be no question that the State has succeeded in demonstrating its rational basis for the law.

ii. The district court erroneously required the State to treat abortion similarly to other medical procedures

The district court also made a number of findings and rulings indicating it inappropriately weighed against the State its choice to regulate abortion differently than other arguably comparable medical procedures.[15] However, the district court's decision ignores clear Supreme Court precedent and further undermines the court's already flawed legal analysis. Indeed, the Supreme Court's abortion decisions regarding a woman's "choice" do not translate into an affirmative constitutional obligation on the part of the State to facilitate abortions. In fact, through a series of decisions, the Court has made it clear that a State is under no duty to provide, fund, or encourage abortion.

---

[15] *See, e.g.*, Slip Op. at 2 ("the court finds no rational reason to treat physicians who perform abortions differently than those who regularly perform equally or more risky outpatient procedures").

In *Planned Parenthood of Central Missouri v. Danforth*, the Court rejected the argument that "the State should not be able to impose any [requirements on abortion providers] that significantly differ from those imposed with respect to other, and comparable, medical or surgical procedures." *Danforth*, 428 U.S. 52, 80-81 (1976). In *Harris v. McRae*, the Court noted that abortion is "*inherently different* from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *McRae*, 448 U.S. 297, 325 (1980). Likewise, in *Casey*, the Court was explicit in recognizing that abortion is a "unique act" "fraught with consequences." *Casey*, 505 U.S. at 852. States "may select one phase of one field and apply a remedy there, neglecting others." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

This sentiment, engendered by the Supreme Court's clear determination that abortion is inherently different and can be treated differently than other medical procedures, is repeated in other federal court decisions. In *Bryant*, the Fourth Circuit noted that "[n]o authority exists to support a conclusion that abortion clinics or abortion providers have a fundamental liberty interest in performing abortions free from governmental regulation," and "[t]he rationality of distinguishing between abortion services and other medical services when regulating physicians or women's

healthcare has long been acknowledged by Supreme Court precedent." *Bryant*, 222 F.3d at 173. Abortion is "rationally distinct from other routine medical services, if for no other reason than the particular gravitas of the moral, psychological, and familial aspects of the abortion decision." *Id.*; *see also Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 538, 544-49 (9th Cir. 2004) (rejecting claims that Arizona's abortion clinic regulations violated equal protection by distinguishing between abortion providers and other physicians).

The Fourth Circuit also noted that, by adopting an array of regulations that treated the "often relatively simple medical procedures of abortion more seriously than other medical procedures," it created an effective balance of "recogniz[ing] the importance of the abortion practice while yet permitting it to continue." *Bryant*, 222 F.3d at 175.

Wisconsin is free to do the same: regulate abortion for the safety of women even if it chooses not to similarly regulate other arguably comparable medical procedures. Yet, the district court improperly used this choice—a choice that the Supreme Court has affirmed that the States is free to make— in an inappropriate attempt to manufacture an "undue burden." The court's decision must be reversed.

CONCLUSION

This Court should reject the district court's flawed analysis which, contrary to Supreme Court precedent, fails to properly weigh the State's rational basis for the Wisconsin admitting privileges requirement and injects factors into the undue burden standard which directly contradict the Supreme Court's clear guidance. The district court's erroneous analysis negates its entire opinion. For the forgoing reasons, the district court erred as a matter of law, and the decision should be reversed.

Respectfully submitted,

s/ Mailee R. Smith
Mailee R. Smith
Counsel of Record for Amici Curiae
Americans United for Life
655 15th St. NW, Suite 410
Washington, D.C. 20005
Telephone: 202-289-1478
Facsimile: 202-289-1473

Dated: May 26, 2015

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   _X_ this brief contains **5,727** words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   _X_ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman font, size 14.

s/ Mailee R. Smith
Counsel of Record for *Amici Curiae*

Dated: May 26, 2015

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Mailee R. Smith
Counsel of Record for *Amici Curiae*