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A Costly Victory: June Medical, Federal Abortion Legislation, and Section 5 of the Fourteenth Amendment

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A COSTLY VICTORY: *JUNE MEDICAL*, FEDERAL ABORTION LEGISLATION, AND SECTION 5 OF THE FOURTEENTH AMENDMENT

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I. INTRODUCTION

The United States Supreme Court's recent major abortion ruling in *June Medical Services L.L.C. v. Russo*[1] was a win for abortion rights supporters, but a costly one. Although the *June Medical* Court struck down a Louisiana law requiring abortion doctors to have admitting privileges at a local hospital,[2] a majority of the Justices—and most importantly, Chief Justice Roberts, whose concurrence constitutes the Court's holding—stressed that *Casey*'s constitutional standard for pre-viability abortion regulations is not the amorphous balancing test the Court suggested in *Whole Woman's Health v. Hellerstedt*, but a more deferential one under which a pre-viability regulation typically will be sustained if it does not place a substantial obstacle in the path of a woman seeking an abortion before viability.[3]

Pro-choice advocates seem to have realized immediately what *June Medical* portends because, amidst their cheering the

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1. June Med. Services L.L.C. v. Russo, 140 S. Ct. 2103, 2113 (2020).

2. *See* June Med. Services L.L.C. v. Russo, 140 S. Ct. 2103, 2113 (2020) ("We . . . hold that the Louisiana statute is unconstitutional.").

3. *See id.* at 2136 (Roberts, C.J., concurring) ("Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts. . . . *Casey* instead focuses on the existence of a substantial obstacle . . . ."); *id.* at 2154 (Alito, J., dissenting) ("*Casey* . . . rules out the balancing test adopted in [*Hellerstedt*]."); *id.* at 2165 (Alito, J., dissenting) ("The District Court should apply *Casey*'s 'substantial obstacle' test, not the [*Hellerstedt*] balancing test."); *id.* at 2179 (Gorsuch, J., dissenting) ("[T]he legal standard the plurality applies when it comes to admitting privileges for abortion clinics turns out to be exactly the sort of all-things-considered balancing of benefits and burdens this Court has long rejected."); *id.* at 2182 (Kavanaugh, J., dissenting) ("[F]ive Members of the Court reject the [*Hellerstedt*] cost-benefit standard. . . . I agree with [that] conclusion[].").

result, they renewed calls for federal legislation[4] to protect the constitutional right to choose that the Court recognized in 1973.[5] Two days after inauguration, the Biden administration declared that it is of the same mind, so a bill to "codify[] *Roe v. Wade*" may not be far away.[6]

Proposing measures to protect a woman's ability to have an abortion, however, is not something new. Members of Congress have introduced and reintroduced bills of this type many times over the years. In 2007, for example, the day after the Court upheld the federal partial birth abortion ban in *Gonzales v. Carhart*,[7] then Senator Barbara Boxer introduced the Freedom of Choice Act (FOCA),[8] legislation that supposedly would enshrine *Roe v. Wade* in federal law. Barack Obama promised to sign FOCA as his first act as President.[9] That didn't happen, and beginning in 2014, members of the House and Senate began proposing the more modest Women's Health Protection Act (WHPA), a version of which Representative Judy Chu and

4. *See* Colin Seeberger, *The Supreme Court Rejects Attempt to Undermine Abortion Rights in* June Medical Services v. Russo, CTR. FOR AM. PROGRESS (June 29, 2020), https://perma.cc/GP7J-D3HG ("Reliance on the courts . . . is not enough; state and federal legislation is also necessary to prevent attacks on abortion care and proactively improve access."); *Supreme Court Rules in favor of Abortion Providers in* June Medical Services v. Russo, CTR. FOR REPROD. RTS. (June 29, 2020), https://perma.cc/KW45-VZWD ("It's time for Congress to pass . . . a federal bill that would ensure the promise of *Roe v. Wade* is realized in every state for every person."); *NARAL President Ilyse Hogue Comments on Supreme Court Decision in* June Medical Services v. Russo, NARAL PRO-CHOICE AM. (June 29, 2020), https://perma.cc/C8C9-K9AU ("This case underscores the need for federal protections for abortion rights."); *ACLU Statement on Supreme Court Ruling in* June Medical Services v. Russo, ACLU (June 29, 2020), https://perma.cc/NR9B-PGLN ("This is a critical victory for Louisianans, but . . . the right to get an abortion is far from secure. . . . That's why Congress must . . . help ensure that a person who needs abortion care is able to get it . . . ."); Herminia Palacio, *How Congress Can Immediately Seize on Monday's Abortion Rights Win,* REWIRE NEWS GRP. (June 30, 2020), https://perma.cc/EAP7-DXC8 ("[W]e need federal action to restore and protect access to abortion across the whole country . . . .").

5. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (declaring that a woman has a constitutional right to have an abortion).

6. Statement from President Biden and Vice President Harris on the 48th anniversary of Roe v. Wade, White House (Jan. 22, 2021), https://perma.cc/5M4G-FWZ7.

7. *See* Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (concluding that the federal partial-birth abortion ban is constitutional).

8. *See* Freedom of Choice Act, S. 1173, 110th Cong. (2007). Senator Boxer first introduced a similar bill in 2004. *See* Freedom of Choice Act, S. 2020, 108th Cong. (2004).

9. *See* Irin Carmon, *Pro-choice politicians try playing offense (again)*, MSNBC (Nov. 13, 2013), https://perma.cc/7Q5J-E3A7 ("The first thing I'd do as president is sign the Freedom of Choice Act.") (quoting then-presidential candidate Barack Obama).

Senator Richard Blumenthal most recently sponsored in 2019.[10] The irony of the abortion rights victory in *June Medical*, though, is that it weakens Congress's power under Section 5 of the Fourteenth Amendment to enact laws like FOCA and WHPA.

Both FOCA and WHPA cite Section 5 as a source of congressional authority.[11] Which makes sense as a general proposition, for when the Court decided to preserve *Roe*'s "essential holding" in its 1992 *Planned Parenthood of Southeastern Pennsylvania v. Casey* decision,[12] it declared that a woman's right to have an abortion emanates from the guarantee of liberty secured under the Fourteenth Amendment's Due Process Clause.[13] Section 5 grants Congress the power to enforce the rights the Clause protects.[14]

But Congress's power under Section 5 is not unlimited. As the Court explained in *City of Boerne v. Flores* when it decided that Congress did not have the power under Section 5 to impose on state and local governments the limitations under the Religious Freedom Restoration Act,[15] Congress may use Section 5 to adopt remedial or deterrent legislation, but it may not use it to effect a substantive change to the Due Process Clause.[16] And to be

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10. *See* Women's Health Protection Act of 2019, S. 1645, 116th Cong.; Women's Health Protection Act of 2019, H.R. 2795, 116th Cong. Senator Blumenthal first introduced a similar bill in 2013. *See* Women's Health Protection Act of 2013, S. 1696, 113th Cong.

11. *See* Freedom of Choice Act, S. 1173, 110th Cong. § 2(14) (2007) (proposing congressional power for legislation); Women's Health Protection Act of 2019, S. 1645, 116th Cong. § 2(b)(3) (proposing congressional power for legislation). The two bills also suggest that the Commerce Clause supplies Congress with the necessary power. *See* Freedom of Choice Act, S. 1173, 110th Cong. § 2(14) (2007); Women's Health Protection Act of 2019, S. 1645, 116th Cong. § 2(b)(3); *see also* U.S. CONST. art. I, § 8, cl. 3 (providing that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

12. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

13. *See id.* ("The controlling word . . . is 'liberty.'"). U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

14. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

15. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (concluding that Congress could not require State and local governments to comply with the Religious Freedom Restoration Act of 1993).

16. *See id.* at 519 ("The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.").

preventative rather than substantive, "many of the laws affected by the congressional enactment [must] have a significant likelihood of being unconstitutional."[17]

That's why *June Medical* is so significant to Section 5 power. Because of *June Medical*, the probability that an abortion regulation contravenes a woman's due process rights has declined sharply. Congress's Section 5 power is more constrained than previously thought.

This Article explores Congress's ability to use its power under Section 5 of the Fourteenth Amendment to enact FOCA and WHPA. Part I describes what FOCA and WHPA attempt to accomplish. Part II briefly discusses the relationship between the Federal Government and the States before turning to the contours of Congress's Section 5 power, with particular attention to *City of Boerne* and important decisions that followed it. Next, Part III analyzes the extent to which Section 5 might sustain FOCA and WHPA. In so doing, this Article explains how *June Medical* simultaneously opened the door to state regulation of abortion and weakened congressional power under Section 5 to protect abortion rights. Part IV then considers the implications for Section 5 power if the Court goes beyond *June Medical* and overrules *Roe*. Finally, this Article concludes that, if Congress wishes to adopt FOCA or WHPA, it will need to find its power somewhere other than Section 5.

II. THE FREEDOM OF CHOICE ACT AND THE WOMEN'S HEALTH PROTECTION ACT

As the Court in *Casey* reaffirmed *Roe*'s "essential holding,"[18] it opened the door to increased State and Federal regulation of abortion.[19] And when the *Gonzales* Court determined that the opening was wide enough to allow the federal

17. *Id.* at 532.

18. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

19. *See, e.g.*, *id.* at 873 ("[A] necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life.").

partial-birth abortion ban, FOCA's sponsors saw a threat to *Roe* and concluded that they needed to act.[20]

FOCA is sweeping legislation. It attempts to bar government at every level—federal, state, and local—from "deny[ing] or interfer[ing] with" a woman's right to choose to have an abortion either before fetal viability or when necessary to protect her life or health after viability.[21] Moreover, FOCA would prohibit measures that discriminate against a woman's "exercise of the[se] rights . . . in the regulation or provision of benefits, facilities, services, or information."[22] Importantly, FOCA would not permit a government to escape its restrictions under any circumstances—even when a regulation is supported by a compelling interest and is narrowly tailored to serve that interest.[23]

WHPA is more modest. Although the proposed legislation applies to all levels of government[24] and similarly would invalidate any ban on abortion prior to viability or a ban after viability that does not include an exception to allow the procedure when "continuation of the pregnancy would pose a risk to the pregnant patient's life or health,"[25] WHPA gives governments a bit more latitude with respect to regulations that might "interfere" with a woman's ability to choose. And rather than seeking a

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20. Freedom of Choice Act, S. 1173, 110th Cong. § 2(9) (2007) ("[T]hreatening Roe, the Supreme Court recently upheld the first-ever Federal ban on [an] abortion [procedure] . . . .").

21. Freedom of Choice Act, S. 1173, 110th Cong. § 4(b)(1) (2007). Departing from *Roe*'s definition, FOCA defines "viability" as "that stage of pregnancy when . . . there is a reasonable likelihood of the sustained survival of the fetus outside of the woman." Freedom of Choice Act, S. 1173, 110th Cong. § 3(3) (2007); *see also* Roe v. Wade, 410 U.S. 113, 160 (1973) (indicating that viability is the "point at which the fetus becomes . . . potentially able to live outside the mother's womb, albeit with artificial aid.").

22. Freedom of Choice Act, S. 1173, 110th Cong. § 4(b)(2) (2007).

23. *See Casey*, 505 U.S. at 871 (indicating that, following *Roe*, "regulation[s] touching upon the abortion decision . . . [could] be sustained only if drawn in narrow terms to further a compelling state interest.").

24. *See* Women's Health Protection Act of 2019, S. 1645, 110th Cong. § 4(e) (addressing the Act's relationship to Federal law); Women's Health Protection Act of 2019, S. 1645, 110th Cong. § 5 (addressing the Act's relationship to State and local law).

25. Women's Health Protection Act of 2019, S. 1645, 110th Cong. § 4(a)(9). Like FOCA, departing from *Roe*, WHPA defines "viability" as "the point in a pregnancy at which . . . there is a reasonable likelihood of sustained fetal survival outside the uterus with or without artificial support." Women's Health Protection Act of 2019, S. 1645, 110th Cong. § 3(5).

return to *Roe*, WHPA takes aim at so-called TRAP—Targeted Regulation of Abortion Providers—measures that purport to regulate abortion for the purpose of fostering maternal health, but that pro-choice advocates insist are intended to limit access.[26]

WHPA would bar a host of specific TRAP laws, including those that require certain tests and procedures, that limit the ability to use certain drugs or telemedicine, that require hospital privileges, or that impose credentialing or facility standards.[27] WHPA also would prohibit some waiting periods, as well as laws that place limitations on abortion based on a woman's reasons for having one.[28] More broadly, though, WHPA would free abortion providers from laws similar to those specified and from other measures that "both—(A) single[] out the provision of abortion services, health care providers who provide abortion services, or facilities in which abortion services are provided; and (B) impede[] access to abortion services based on [specified factors]."[29]

Unlike FOCA, however, WHPA does not impose an absolute bar on all regulations of the types specified. Instead, WHPA allows a challenged regulation to stand if the government successfully "establish[es], by clear and convincing evidence, that—(1) the limitation or requirement significantly advances the safety of abortion services or the health of patients; and (2) the safety of abortion services or the health of patients cannot be advanced by a less restrictive alternative measure or action."[30]

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26. *See Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INST. (Jan. 2020), https://perma.cc/24LD-246L (defining TRAP laws as "regulations[] targeted specifically at abortion clinics that go beyond what is necessary to ensure patient safety," and contending that the "primary purpose [of these laws] is to limit access to abortion."); *see also* Women's Health Protection Act of 2019, S. 1645, 110th Cong. § 2(b)(1) (describing the law's purposes).

27. *See* Women's Health Protection Act of 2019, S. 1645, 110th Cong. §§ 4(a)(1), (4-6).

28. *See* Women's Health Protection Act of 2019, S. 1645, 110th Cong. §§ 4(a)(7), (11) (barring "medically unnecessary in-person visits" and regulations that require a woman to state her reasons for having an abortion or prohibit a physician from performing an abortion based on a woman's reasons).

29. Women's Health Protection Act of 2019, S. 1645, 110th Cong. § 4(b)(2).

30. Women's Health Protection Act of 2019, S. 1645, 110th Cong. § 4(d).

III. CONGRESSIONAL POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

A. Limitations on Congressional Power

Driving both FOCA and WHPA is the threat that state legislation poses to the availability of abortion access throughout the country.[31] The Constitution, however, does not give Congress dominion over the States.[32] Under the federal system the Constitution preserves, the States are separate, "indissoluble" sovereigns,[33] and only when Congress acts within the confines of the powers delegated to it under the Constitution can Congress encroach on the States' ability to govern what happens within their borders.[34]

When Congress acts pursuant to its delegated powers, the federal legislation reigns supreme and overrides inconsistent state laws,[35] but the Constitution "contains no whatever-it-takes-to-solve-a-national-problem power." [36] Thus, regardless of what Congress may perceive about the importance of nationwide access to abortion, its authority to adopt FOCA and WHPA must find its roots in a power *specified* in the Constitution.

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31. *See* Women's Health Protection Act of 2019, S. 1645, 110th Cong. § 2(a)(5) ("An independent review . . . found that . . . the biggest threats to the quality of abortion services in the United States are State regulations that create barriers to care."); Freedom of Choice Act, S. 1173, 110th Cong § 2(10) (2007) ("Incremental restrictions on the right to choose . . . have made access to abortion care extremely difficult, if not impossible, for many women across the country.").

32. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476 (2018) ("[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States.").

33. Texas v. White, 74 U.S. 700, 726 (1868).

34. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535 (2012) (opinion of Roberts, C.J.) ("The Federal Government . . . must show that a constitutional grant of power authorizes each of its actions. . . . The Constitution may restrict state governments . . . . But where such prohibitions do not apply, . . . [t]he States . . . can and do perform many of the vital functions of modern government."); Gonzales v. Raich, 545 U.S. 1, 29 (2005) ("[I]f there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be.").

35. *See* U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

36. *Sebelius*, 567 U.S. at 659-60 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

Article I, Section 8 of the Constitution represents the original delegation of congressional power.[37] Various amendments adopted over the years, however, have expanded Congress's power such that it may adopt legislation to enforce the amendments' substantive features.[38] One such amendment is the Fourteenth,[39] and with a woman's right to choose ostensibly found in Section 1's Due Process Clause,[40] both FOCA and WHPA identify Congress's enforcement power under the Fourteenth Amendment as one of the sources of power for the legislation.[41] Critical to understanding the scope of this power are the Court's 1997 decision in *City of Boerne v. Flores* and the rulings that followed it.

B. *City of Boerne* and Its Progeny

In *City of Boerne*, the Court evaluated whether Section 5 gave Congress the authority to impose on state and local governments the restrictions set forth in the Religious Freedom Restoration Act (RFRA).[42] Enacted in 1993 on the heels of the Court's landmark decision in *Employment Division v. Smith*, RFRA provides that a government may not "substantially burden a person's exercise of religion" unless the government can establish that it has a compelling interest for doing so and uses the

37. *See* U.S. CONST. art. I, § 8 (listing Congress's powers).

38. *See, e.g.*, U.S. CONST. amend. XIII, § 1 (granting Congress enforcement power); U.S. CONST. amend. XIV, § 5 (same); U.S. CONST. amend. XV, § 2 (same).

39. *See* U.S. CONST. amend. XIV, § 5 ("Congress [has] power to enforce, by appropriate legislation, the [amendment's] provisions.").

40. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992) ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."); *see also* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

41. *See* Freedom of Choice Act, S. 1173, 110th Cong. § 2(14) (2007) (proposing congressional power for legislation); Women's Health Protection Act of 2019, S. 1645, 116th Cong. § 2(b)(3) (same).

42. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (indicating that the case required the Court to determine whether Congress had the power to enact the Religious Freedom Restoration Act of 1993).

"least restrictive means" of advancing its interest.[43] To apply RFRA against the States, Congress looked to Section 5.[44]

The positive grant of authority under Section 5, the *City of Boerne* Court explained, allows Congress to enact remedial and deterrent legislation even when the legislation encroaches on traditional state legislative power and bars conduct that the Constitution permits.[45] But the Court stressed that Congress cannot use Section 5 to expand the meaning of Section 1's Due Process Clause: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[46] Moreover, according to the Court, although Congress has substantial freedom to determine what legislation is necessary to enforce Section 1,[47] Section 5 does not permit Congress to usurp the role of the judiciary.[48]

According to the Court, Congress went too far with RFRA.[49] In *Smith*, the Court held that neutral laws of general applicability do not run afoul of the Free Exercise Clause of the First Amendment.[50] Though laws directed at religion had to satisfy a demanding constitutional test,[51] the *City of Boerne* Court pointed

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43. *Id.* at 515-16.

44. *See id.* at 516-17 (indicating that Congress relied on Section 5 of the 14th Amendment as the source of authority for imposing RFRA's requirements on state and local governments).

45. *See id.* at 517-18 (describing the scope of congressional power under Section 5).

46. *Id.* at 520.

47. *See City of Boerne*, 521 U.S. at 536 ("It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference.").

48. *See id.* at 524 ("[T]he Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing. . . . The power to interpret the Constitution in a case or controversy remains in the Judiciary.").

49. *See id.* at 536 ("RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

50. *See* Emp't Div. v. Smith, 494 U.S. 872, 878 (1990) ("[I]f prohibiting the exercise of religion (or burdening the activity of printing) is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."); *City of Boerne*, 521 U.S. at 514 (describing the *Smith* Court's holding).

51. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (stating that if "the law is not neutral, . . . it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."); *see also City of Boerne*, 521 U.S. at 529 (citing *City of Hialeah*, 508 U.S. at 533).

out that RFRA's legislative record did not reflect a recent history of religious bigotry or laws intentionally discriminating against religious exercise.[52] More importantly, the Court remarked that RFRA's breadth belied a remedial aim:

> RFRA is so out of proportion to a supposed remedial or preventive object that . . . . [i]t appears . . . to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected . . . have a significant likelihood of being unconstitutional.[53]

The Court noted that RFRA was broad, reaching every level of government and all laws—Federal, State, and local.[54] Although the Court indicated that the absence of a termination date or geographic limits (like those found in remedial voting rights legislation) was not dispositive, RFRA failed to include such provisions, which would have tailored its scope.[55] Moreover, the Court emphasized that RFRA's compelling interest/least restrictive means test placed disproportionate burdens on the States, significantly "intru[ding] into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[56]

Following *City of Boerne*, the Court principally has applied the decision's lessons in cases in which states have claimed sovereign immunity from private lawsuits for violations of federal laws barring discriminatory conduct. In those cases, the Court explained that Congress effectively abrogates sovereign immunity when its legislation clearly reflects a congressional intent to do so, and Congress has the power to regulate the relevant conduct under Section 5 of the Fourteenth Amendment.[57]

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52. *See City of Boerne*, 521 U.S. at 531 (indicating that the legislative record was devoid of "examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that . . . indicate some widespread pattern of religious discrimination in this country.")

53. *Id.* at 532.

54. *See id.* (describing RFRA's breadth).

55. *See id.* at 533 (indicating the absence of limitations of the types present in remedial voting rights legislation).

56. *Id.* at 534.

57. *See* Tennessee v. Lane, 541 U.S. 509, 517 (2004) (explaining the conditions under which Congress may abrogate sovereign immunity); Nev. Dep't of Hum. Res. v. Hibbs, 538

The Court uniformly determined that Congress sufficiently had indicated its intent to abrogate sovereign immunity in the statutes at issue,[58] but applying *City of Boerne*, the Court reached differing conclusions as to Congress's Section 5 power.[59]

The first notable case after *City of Boerne*, though, did not involve an anti-discrimination measure. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court considered whether Congress had the power under Section 5 to enact the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), a law that subjected states to liability for patent infringement.[60] The Court concluded that Congress did not have that power.[61]

The *Florida Prepaid* Court recognized that, through the Patent Remedy Act, Congress sought to address the harm patent holders suffer when they are not compensated for state patent infringement,[62] but similar to what the *City of Boerne* Court had noted in relation to RFRA, the Court in *Florida Prepaid* observed that the congressional record supporting the patent legislation did not identify a "pattern of patent infringement by the States, let alone a pattern of constitutional violations."[63] Moreover, the

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U.S. 721, 726 (2003) (same); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001) (same); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) (same); *see also* Allen v. Cooper, 140 S. Ct. 994, 1000-01 (2020) (stating what is required to abrogate sovereign immunity); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 635 (1999) (same). The Court consistently has recognized that Congress cannot abrogate sovereign immunity through its Article I powers. *See Cooper*, 140 S. Ct. at 1001 (indicating that Congress cannot abrogate sovereign immunity when it draws its power from Article I); *Hibbs*, 538 U.S. at 727 (same); *Garrett*, 531 U.S. at 364 (same); *Kimel*, 528 U.S. at 80 (same); *Fla. Prepaid*, 527 U.S. at 636 (same).

58. *See Cooper*, 140 S. Ct. at 1001 (indicating that Congress effectively indicated its intent to abrogate sovereign immunity); *Lane*, 541 U.S. at 518 (same); *Hibbs*, 538 U.S. at 726 (same); *Garrett*, 531 U.S. at 363-64 (same); *Kimel*, 528 U.S. at 73 (same); *Fla. Prepaid*, 527 U.S. at 635 (same).

59. *See Cooper*, 140 S. Ct. at 1007 (finding that the statute could not be sustained under Section 5 of the Fourteenth Amendment); *Garrett*, 531 U.S. at 365, 374 (same); *Kimel*, 528 U.S. at 80-83 (same); *Fla. Prepaid*, 527 U.S. at 647 (same). *But see Lane*, 541 U.S. at 531 (finding that the statute was sustainable under Section 5 of the Fourteenth Amendment); *Hibbs*, 538 U.S. at 728, 735 (same).

60. *Fla. Prepaid*, 527 U.S. at 631-32 (describing federal patent law).

61. *See id.* at 630 (indicating that Congress could not use is Fourteenth Amendment enforcement power to enact the patent law).

62. *See id.* at 639-40 (specifying the "'evil' or 'wrong' that Congress intended to remedy").

63. *Id.* at 640.

Court explained, the Fourteenth Amendment only protects against the deprivation of property *without due process*, and Congress had not given much attention to whether state remedies were inadequate.[64] Furthermore, the Court added that the Fourteenth Amendment protects against intentional conduct and that most of the evidence suggested that state patent infringement was unintentional.[65] The Court stressed that Congress had not attempted to tailor the Patent Remedy Act to non-negligent infringement for which a state-court remedy is unavailable or to limit the Act's application to particular states with a pattern of infringement or without adequate remedies.[66] According to the Court, "it simply cannot be said that 'many of [the acts of infringement] affected by the congressional enactment have a significant likelihood of being unconstitutional.'"[67]

A year after *Florida Prepaid*,[68] the Court in *Kimel v. Florida Board of Regents* decided that Congress did not have the power under Section 5 to enact the Age Discrimination in Employment Act (ADEA) with application to state and local governments.[69] In so doing, the Court emphasized that age is not a suspect or quasi-suspect class for purposes of the Fourteenth Amendment's Equal Protection Clause, and therefore, state legislation that discriminates based on age need only satisfy the deferential rational basis standard of review, under which a law passes constitutional muster so long as it bears a rational relationship to a legitimate government interest.[70]

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64. *See id.* at 643-44 (discussing state law remedies).

65. *See Fla. Prepaid*, 527 U.S. at 645 (noting the reach of the Fourteenth Amendment).

66. *See id.* at 646-47 (observing the absence of limitations).

67. *Id.* at 647.

68. Later in the same year, the Court addressed Section 5 in *United States v. Morrison*, 529 U.S. 598 (2000). According to the *Morrison* Court, Section 5 could not sustain Violence Against Women Act (VAWA) because it was directed at private action rather than state action and imposed penalties on private officials rather than state officials. *See id.* at 625 (stating that VAWA "is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias"). Because FOCA and WHPA are directed at state action, *Morrison* generally is inapposite to Congress's Section 5 authority to adopt those bills. Therefore, detailed attention to *Morrison* in this Article is not warranted.

69. Kimel v. Fla. Bd. Of Regents, 528 U.S. 62, 67 (2000) (describing the Court's conclusion).

70. *See id.* at 83-84 (describing the standard for assessing the constitutionality of legislation that discriminates based on age).

For the *Kimel* Court, the relevant standard of review was critical to its determination that ADEA did not satisfy *City of Boerne*'s congruence and proportionality test: "[t]he Act . . . prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[71] The Court stressed that ADEA makes age-based discrimination "prima facie unlawful" and that its "bona fide occupational qualification[s]" defense could not save the law because the defense required proof that the classification was a "reasonable necessity."[72] According to the Court, the standard for the defense was more like the "heightened scrutiny" that would apply to a suspect or quasi-suspect classification.[73]

The *Kimel* Court added, however, that the wide net that ADEA casts was not enough to preclude Section 5 power.[74] The Court also had to consider the harm that Congress intended to remediate or prevent: "[d]ifficult and intractable problems often require powerful remedies . . . ."[75] As in *City of Boerne* and *Florida Prepaid*, though, the Court in *Kimel* found lacking a record of unconstitutional state age discrimination.[76] The Court discounted a California age discrimination study because it did not suggest that the State's discriminatory conduct was unconstitutional,[77] and the Court indicated that, even if the study had identified unconstitutional age discrimination, the study would not justify applying ADEA to every state.[78] According to the Court, "Congress'[s] failure to uncover any significant pattern of unconstitutional discrimination . . . confirms that Congress had

71. *Id.* at 86.

72. *Id.* at 86-87 (discussing the bona fide occupational qualifications defense).

73. *See id.* at 87-88 (indicating that the standard under the ADEA was far higher than the constitutional standard).

74. *See Kimel*, 528 U.S. at 88 ("That the ADEA prohibits very little conduct likely to be held unconstitutional . . . does not alone provide the answer to our §5 inquiry.").

75. *Id.* at 88-89 (noting that remedial efforts must be measured against the harm to be addressed).

76. *Id.* at 89 (indicating the deficiencies in the congressional findings).

77. *Id.* at 90 ("[T]he California study does not indicate that the State had engaged in any *unconstitutional* age discrimination.") (emphasis in original).

78. *Id.* (discussing the geographic scope of ADEA).

no reason to believe that broad prophylactic legislation was necessary in this field."[79]

In 2001, the Court turned from ADEA to the Americans with Disabilities Act of 1990 (ADA), deciding in *Board of Trustees of University of Alabama v. Garrett* that Congress did not have the power under Section 5 to force state governments to comply with Title I's employment discrimination provisions.[80] As with age in *Kimel*, the Court in *Garrett* observed that disability is not a protected class under the Fourteenth Amendment, and therefore, measures that discriminate based on disability are subject only to a rational basis standard.[81] And again, consistent with *Kimel*, the Court concluded that Congress had not identified a sufficient pattern of unconstitutional conduct,[82] and even if it had, the scope of Title I's prohibition against employment discrimination was so broad that it effected a substantive alteration of the Fourteenth Amendment's meaning.[83]

According to the Court, the legislative record included fewer than ten instances of state employment discrimination, and the discrimination in those cases was not necessarily irrational and therefore unconstitutional.[84] The Court added that the standard that an employer must satisfy for relief from its obligation to make an employment accommodation—establishing "that the accommodation would impose an *undue hardship*"[85]—was much more rigorous than the Constitution's rationality requirement.[86]

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79. *Kimel*, 528 U.S. at 91.

80. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (concluding that Congress did not have the power under Section 5 to extend the Title I antidiscrimination provisions to the States).

81. *See id.* at 366-67 (specifying the standard of review applicable to disability-based discrimination).

82. *Id.* at 368 ("The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.").

83. *See id.* at 372 ("Even were it possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States, the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*.").

84. *Id.* at 368-69 (discussing the absence of evidence of unconstitutional discrimination in the legislative record). The Court considered evidence of local government or societal discrimination immaterial. *Id.* (discussing the legislative record).

85. *Garrett*, 531 U.S. at 361 (emphasis added) (reciting the ADA's exception).

86. *Id.* at 372 ("[E]ven with this exception, the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that

With heightened scrutiny applicable to gender discrimination for purposes of the Equal Protection Clause, the Court in *Nevada Department of Human Resources v. Hibbs* reached a different conclusion regarding Congress's Section 5 power to extend the Family Medical Leave Act of 1993 (FMLA) to the States.[87] Referring to *Garrett* and *Kimel*, the *Hibbs* Court pointed out that, because discrimination based on age and disability is subject to the rational basis standard of review, evidence of widespread discriminatory conduct was necessary to confer Section 5 power.[88] According to the Court in *Hibbs,* the higher standard of review for gender discrimination eased Congress's burden of "show[ing] a pattern of state constitutional violations."[89]

The evidence in the congressional record, the *Hibbs* Court determined, was sufficient.[90] The Court noted in particular that both public and private employers had failed to treat men and women comparably with respect to leave for childcare, and the Court emphasized that "differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work."[91] Moreover, the Court credited evidence of disparate treatment of men by state employers, even when the policies for women and men were comparable.[92]

Having identified ample congressional findings, the *Hibbs* Court then determined that FMLA represented a proportionate response.[93] By extending family leave benefits to all employees, the Court pointed out, Congress had tried to reduce an employer's

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would be reasonable but would fall short of imposing an 'undue burden' upon the employer.").

87. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003) (noting the FMLA's aim and the applicable Fourteenth Amendment standard of review); *id.* at 740 (concluding that application of the FMLA to the States is a valid exercise of Congress's Section 5 authority).

88. *Id.* at 735 (discussing *Garrett* and *Kimel*).

89. *Id.* at 736.

90. *Id.* at 734.

91. *Hibbs*, 538 U.S. at 731

92. *See id* at 732 (discussing discriminatory application of facially comparable policies).

93. *Id.* at 740.

temptation to hire men rather than women and attempted to drive out stereotypes about the roles men and women play in caring for their families.[94] In addition, the Court distinguished *City of Boerne*, *Kimel*, and *Garrett*, stating that "FMLA is narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship."[95] Moreover, the Court highlighted structural aspects of FMLA that further limit its scope. For example, the Court noted that the statute allows for unpaid leave, only applies to employees with a certain tenure, and requires advance notice when a leave is anticipated.[96]

Though the *Garrett* Court had decided that Congress did not have the power under Section 5 to apply Title I of the ADA to the States, [97] consistent with *Hibbs*, the Court in *Tennessee v. Lane* concluded that—to the extent that Title II seeks to assure "basic constitutional guarantees, infringements of which are subject to more searching judicial review"—Congress could use its Section 5 power to make the States subject to Title II's prohibition against discrimination in benefits from services, programs, and activities.[98] Among these basic guarantees, the Court explained, are "access to the courts," which serves the rights to procedural due process under the Fourteenth Amendment, to free speech under the First Amendment, and to certain protections in criminal proceedings under the Sixth Amendment.[99]

The Court in *Lane* stated that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[100] As proof, the Court cited state laws discriminating against the disabled in voting, marriage, and jury service and previous rulings in which the Court determined that state agencies unconstitutionally

94. *Id.* at 737 (discussing the FMLA's aims).

95. *Id.* at 738.

96. *Hibbs*, 538 U.S. at 739 (listing limitations to the FMLA's scope).

97. *See supra* notes 80-86 and accompanying text.

98. Tennessee v. Lane, 541 U.S. 509, 522-23 (2004).

99. *Id.* at 523 (describing constitutional rights the protection of which requires access to courts).

100. *Id.* at 524.

discriminated against the disabled with respect to zoning, institutional commitment, and the provision of mental health care.[101] The Court added that lower courts similarly had concluded that the disabled had been subject to unlawful discrimination in connection with "public services, programs, and activities."[102] Looking even more narrowly, the *Lane* Court credited evidence before Congress suggesting that disabled individuals were being prevented from accessing the courts and participating in a meaningful way in court proceedings.[103]

Evaluating Title II's proportionality to the harms identified, the Court acknowledged that Title II applies to a wide range of activities and services but limited its evaluation to court access and did not opine as to other activities, such as access to public hockey rinks.[104] And with respect to court access, the *Lane* Court decided that Title II was sufficiently limited, requiring only "reasonable measures to remove architectural and other barriers to accessibility."[105] Thus, according to the Court, "Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress'[s] §5 authority."[106]

The Court's foray again into Section 5 power, in *Allen v. Cooper*, was a 2020 reprise of *Florida Prepaid*, but in the copyright context. And the result was the same.[107] The *Cooper* Court concluded that Congress could not use Section 5 to enact the Copyright Remedy Clarification Act of 1990 (CRCA), a statute that sought to make states liable for copyright infringement.[108]

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101. *See id.* at 524-25 (citing evidence of unconstitutional discrimination).

102. *Id.* at 525.

103. *See Lane*, 541 U.S. at 527 (describing the evidence Congress considered when it enacted the ADA).

104. *See id.* at 530-31 (specifying the scope of the Court's decision).

105. *Id.* at 531.

106. *Id.* at 533-34.

107. *See* Allen v. Cooper, 140 S. Ct. 994, 998-99 (2020) ("[T]his Court held in *Florida Prepaid* . . . that the patent statute lacked a valid constitutional basis. Today, we take up the copyright statute. We find that our decision in *Florida Prepaid* compels the same conclusion.").

108. *See id.* at 999 (explaining what CRCA does).

"*Florida Prepaid* all but prewrote [its] decision," the *Cooper* Court declared.[109] Referring to *Florida Prepaid*, the Court in *Cooper* explained that the Due Process Clause only precludes the intentional or perhaps reckless taking of a copyright when no adequate state remedy is available.[110] Observing that a report before Congress identified "only a dozen possible examples of state [copyright] infringement"[111] and noting that just two of the twelve examples involved conduct that might violate the Due Process Clause, the *Cooper* Court did not see evidence of constitutional harm sufficient to differentiate CRCA from the Patent Remedy Act for Section 5 purposes.[112] Thus, consistent with *Florida Prepaid*, the Court in *Cooper* concluded that CRCA failed *City of Boerne*'s "congruence and proportionality" requirement: "[T]he scope of the two statutes is identical—extending to every infringement case against a State. . . . In this case, as in *Florida Prepaid*, the law's 'indiscriminate scope' is 'out of proportion' to any due process problem. . . . and [therefore] . . . is invalid under Section 5."[113]

IV. *JUNE MEDICAL* AND ITS IMPLICATIONS FOR FOCA AND WHPA

As the Court's decisions from *City of Boerne* to *Cooper* testify, evidence of unconstitutional activity and the related constitutional test are critical to determining the scope of Congress's Section 5 power. Thus, evaluating FOCA and WHPA in relation to Section 5 requires one to understand the constitutional standard that governs to abortion regulations. That standard is the undue burden test the *Casey* Court adopted, and Chief Justice Roberts's concurrence in *June Medical* controls what the test requires.

109. *Id.* at 1007.
110. *See id.* at 1004-05 (discussing the Due Process Clause's requirements).
111. *Id.* at 1006.
112. *See Cooper*, 140 S. Ct. at 1006-07 (evaluating the congressional record).
113. *Id.* at 1007.

A. *June Medical L.L.C. v. Russo*

To grasp the contours of *Casey*'s undue burden test and what *June Medical* means for the test, one best starts with the familiar trimester framework that the Court established in *Roe* and replaced in *Casey*. *Roe*'s trimester framework specified a series of tests that would apply over the course of a woman's pregnancy.[114] During the first trimester, according to the *Roe* Court, a woman had the right, based on her physician's medical judgment, to terminate her pregnancy "free of interference by the State."[115] After the end of the first trimester, *Roe* explained, the right became subject to a State's ability to regulate abortion in service of the State's interest in maternal health.[116] And finally, the Court decided, once a fetus becomes viable—the point at which the fetus can live outside the womb with or without medical assistance[117]—a State may bar a woman from choosing abortion except when "it is necessary, in appropriate medical judgment, for the preservation of [her] life or health."[118]

As the *Casey* Court reaffirmed a woman's abortion rights in 1992, however,[119] it discarded the trimester framework, stating that the framework "misconceive[d] the nature of the pregnant woman's interest[] and . . . undervalue[d] the State's interest in potential life."[120] To protect a woman's right to make "the ultimate decision" prior to viability while preserving an appropriate level of regulatory latitude throughout pregnancy, the *Casey* Court substituted a new undue burden standard for *Roe*'s trimester system.[121] The Court explained that, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[122]

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114. *See* Roe v. Wade, 410 U.S. 113, 164-65 (1973).

115. *See id.* at 163.

116. *See id.* at 164 (discussing the nature of a woman's right after the first trimester).

117. *See id.* at 160 (reciting the meaning of the term "viability").

118. *Id.* at 165.

119. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992) (affirming that "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.").

120. *Id.* at 873.

121. *See id.* at 875-76.

122. *Id.* at 878.

In a critical departure from *Roe*, the Court stressed that a State may adopt pre-viability regulations aimed at preserving maternal health and potential life, even if the regulations have the "incidental" effect of increasing the cost of abortion or making access to the procedure more difficult.[123] With respect to post-viability regulations, though, the Court charted no new waters, leaving states with the higher degree of autonomy that *Roe* permitted in the third trimester.[124]

Importantly, the *Casey* Court declared that decisions following *Roe* were wrong to employ strict scrutiny because that standard undervalued the State's interests in safeguarding maternal health and protecting potential life.[125] Yet the Court's uneven application and description of the undue burden standard over time have made it difficult to pin down the standard's limits. Both in *Casey* itself and then in *Gonzales*, the Court signaled that the undue burden standard has a rational basis component or at least one that is similarly deferential.[126] The Court in *Hellerstedt* later suggested otherwise, however, asserting that the undue burden standard requires courts to balance a regulation's benefits against its burdens.[127] Justice Thomas accused the *Hellerstedt* Court of reframing the undue burden standard as one that

123. *See id.* at 874 ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.").

124. *See Casey*, 505 U.S. at 879 ("We also reaffirm *Roe*'s holding that 'subsequent to viability, the State . . . may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'").

125. *See id.* at 871 (indicating that courts were wrong to apply strict scrutiny when evaluating abortion regulations).

126. *See* Gonzales v. Carhart, 550 U.S. 124, 158 (2007) ("Where 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 . . . in furtherance of its legitimate interest[] in . . . promot[ing] respect for life, including life of the unborn."); *Casey*, 505 U.S. at 885 ("[T]he Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others.").

127. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016) ("*Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer. . . . [It] is wrong to equate the judicial review . . . with the less strict review applicable where, for example, economic legislation is at issue.").

resembles strict scrutiny.[128] *June Medical*, though, now brings some measure of clarity, rejecting *Hellerstedt*'s balancing test as inconsistent with *Casey*.[129]

In *June Medical*, a fractured 5-4 majority struck down a Louisiana statute that required a physician performing an abortion to have admitting privileges at a nearby hospital.[130] In so doing, four Justices concluded that the law was invalid under *Hellerstedt*'s balancing test.[131] Chief Justice Roberts, the fifth Justice in the majority, however, concurred only in the Court's judgment and only based on *stare decisis*. The Chief Justice noted that he had joined the dissent in *Hellerstedt* and continued to think that the *Hellerstedt* majority had gone off course,[132] but he emphasized that the Louisiana law was "nearly identical to the Texas [admitting privileges statute]" which the *Hellerstedt* Court declared unconstitutional.[133]

Under *Marks v. United States*, as the *June Medical* judgment's narrowest basis—the near identity of the Louisiana and Texas laws, the near identity of the factual records in *Hellerstedt* and *June Medical*, and *stare decisis*—the Chief Justice's concurring opinion represents the holding of the Court.[134] Thus, one must look to the Chief Justice's explanation of the Constitution's demands with respect to abortion regulation to determine whether a particular regulation stands or must fall.

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128. *See id.* at 2324 (Thomas, J., dissenting) (asserting that the Court "transform[ed] the undue-burden test to something . . . akin to strict scrutiny").

129. *See* June Med. Services L.L.C. v. Russo, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J, concurring) ("Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts.").

130. *See id.* at 2133 ("Act 620's admitting-privileges requirement places a substantial obstacle in the path of a large fraction of those women seeking an abortion for whom it is a relevant restriction. . . . [and] is unconstitutional.").

131. *See id.* at 2120 (opinion of Breyer, J.) (quoting *Hellerstedt*, 136 S. Ct. at 2324) ("[C]ourts must 'consider the burdens a law imposes on abortion access together with the benefits those laws confer.'").

132. *See id.* at 2133 (Roberts, C.J, concurring) (stating that he "joined the dissent in [*Hellerstedt*] and continue[s] to believe that the case was wrongly decided").

133. *See id.* ("Today's case is a challenge from several abortion clinics and providers to a Louisiana law nearly identical to the Texas law struck down four years ago in [*Hellerstedt*].").

134. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'").

In his *June Medical* concurrence, Chief Justice Roberts employed *stare decisis* in two ways. First, he determined that *stare decisis* required him to reject *Hellerstedt*'s balancing test to "remain[] true to an 'intrinsically sounder' doctrine established in [*Casey* that] better serves the values of *stare decisis* than would following the recent departure" from that doctrine in *Hellerstedt*.[135] Second, he concluded that, notwithstanding the *Hellerstedt* Court's mischaracterization of *Casey*'s undue burden test, *stare decisis* demanded adherence to the Court's judgment in *Hellerstedt* to the extent that, but only to the extent that, the judgment rests on the conclusion that the Texas admitting privileges statute placed a substantial obstacle in the path of a woman seeking an abortion before viability, a conclusion the Chief Justice continued to believe was wrong, but that would have been sufficient to invalidate the statute under *Casey*'s test properly understood.[136] Reconciling *Hellerstedt* with the proper understanding of *Casey*'s undue burden standard was necessary to the Chief Justice's conclusion that the Louisiana statute at issue in *June Medical* was unconstitutional, and his articulation of what *Casey* demands now controls future applications of *Casey*'s test.[137]

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135. *June Medical*, 140 S. Ct. at 2134 (Roberts, C.J, concurring) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231 (1995)) (alterations adopted) (internal quotations omitted).

136. *See id.* at 2138-39 (Roberts, C.J., concurring) ("We should respect the statement in [*Hellerstedt*] that it was applying the undue burden standard of *Casey*. . . . In this case, *Casey*'s requirement of finding a substantial obstacle before invalidating an abortion regulation is therefore a sufficient basis for the decision, as it was in [*Hellerstedt*].").

137. *Cf.* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). The United States Courts of Appeals for the Sixth and Eighth Circuits both have recognized that Chief Justice Robert's *June Medical* concurrence controls what *Casey*'s undue burden standard requires. *See* EMW Women's Surgical Center, P.S.C. v. Friedlander, 978 F.3d 418, 433 (6th Cir. 2020) ("Because all laws invalid under the Chief Justice's rationale are invalid under the plurality's, but not all laws invalid under the plurality's rationale are invalid under the Chief Justice's, the Chief Justice's position is the narrowest under *Marks*. His concurrence therefore "constitutes [*June Medical*'s] holding . . . ."); Hopkins v. Jegley, 968 F.3d 912, 915 (8th Cir.2020) ("Chief Justice Robert's [sic] vote was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is controlling."). The United States Court of Appeals for the Fifth Circuit and the United States District Courts for the Southern District of Indiana and the District of Maryland, however, have disagreed, insisting that *Hellerstedt*'s balancing test continues to apply because *June Medical*'s plurality opinion and the Chief Justice's concurrence do not share a sufficient "common denominator." *See* Whole Woman's Health

v. Paxton, 972 F.3d 649, 652 (5th Cir. 2020) ("In *June Medical*, the only common denominator between the plurality and the concurrence is their shared conclusion that the challenged Louisiana law constituted an undue burden."); Whole Woman's Health Alliance v. Hill, No. 1:18-cv-01904-SEB-MJD, 2020 WL 5994460, at *28 (Oct. 9, 2020) ("[W]e conclude that *June Medical* did not hand down a new controlling rule for applying the undue burden test in abortion cases. We thus shall apply the constitutional standards set forth in the Supreme Court's earlier abortion-related jurisprudence, in particular, *Casey* and *Hellerstedt*."); Am. Coll. of Obstetricians & Gynecologists v. FDA, 472 F.Supp.3d 183, 209 (D. Md. 2020) ("Where [*Hellerstedt*] remains the most recent majority opinion delineating the full parameters of the undue burden test, the Court finds that its balancing test remains binding on this Court."). But those courts the Fifth Circuit and district courts drift off course by ignoring the "common denominator" that both the plurality and the Chief Justice considered *Hellerstedt* binding precedent. For each, though, it was a matter of degree. While the plurality considered *Hellerstedt* binding in full, the Chief Justice treated it more narrowly—as precedent only to the extent of its conclusion that the Texas admitting privileges requirement creates a substantial obstacle. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.6 (2020) (Kavanaugh, J., concurring) ("On very rare occasions, . . . it can be difficult to discern which opinion's reasoning has precedential effect under *Marks*. But even when that happens, the result of the decision still constitutes a binding precedent . . . .") (internal citations omitted). And if the Court did not view the Chief Justice's concurrence as a retreat from *Hellerstedt*, one wonders why the Court granted petitions for certioriari, vacated the underlying judgments, and remanded for further consideration in light of *June Medical* two Seventh Circuit decisions that address abortion regulations other than an admitting privileges requirement. *See* Box v. Planned Parenthood of Indiana & Kentucky, Inc., 937 F.3d. 973, 974-75 (7th Cir. 2019) (affirming an injunction against amendment of an Indiana parental consent requirement), *cert. granted*, *vacated*, and *remanded*, 141 S. Ct. 187, 187-88 (2020); Box v. Planned Parenthood of Indiana & Kentucky, 896 F.3d. 809, 812 (7th Cir. 2018) (affirming an injunction against an Indiana statute extending waiting period following ultrasound), *cert. granted*, *vacated*, and *remanded*, 141 S. Ct. 184, 184 (2020). *See also* Amy Howe, *Justice grant new cases, send Indiana abortion cases back for a new look*, SCOTUSBLOG (July 2, 2020), https://perma.cc/5TKB-3EVZ (suggesting that Court remanded the ultrasound case for consideration in light of "the more lenient test outlined" in the Chief Justice's concurrence); Michael C. Dorf, *SCOTUS Abortion GVR's Suggest June Medical Narrowed The Right*, DORF ON LAW (July 6, 2020), https://perma.cc/82V3-SSNU (describing the decision to remand as *pro forma*, but describing *Hellerstedt*'s balancing test as "now-defunct"). Finally, although not dispositive, Justice Sotomayor's dissent from the Court's 2021 decision to grant a stay with respect to the Maryland District Court's injunction against a restriction on medication abortions makes absolutely no mention of "balancing" or "benefits" in reference to *Casey*'s undue burden standard. *See* FDA v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 578, 579-85 (Sotomayor, J., dissenting).Given that Chief Justice Roberts's substantive analysis of *stare decisis* begins with his conclusion that the Texas and Louisiana laws were "nearly identical," *June Medical*, 140 S. Ct. at 2141-42 (Roberts, C.J, concurring), and his professed continuing disagreement with *Hellerstedt*, which disagreement included disputing that the petitioners' evidence was sufficient for the district court to conclude that the Texas admitting privileges requirement represented a substantial obstacle, *see Hellerstedt*, 136 S. Ct. at 2343-50 (discussing evidentiary deficiencies), the Chief Justice's *June Medical* concurrence properly is interpreted as limiting *Hellerstedt* to its facts. *Hellerstedt* should have no application outside a challenge to an admitting privileges regulation, and whether another admitting privileges requirement might withstand constitutional challenge depends on the underlying record. If the Chief Justice considered *Hellerstedt* applicable to other types of abortion regulations, then the

June Medical[138] is a marked departure from *Hellerstedt*'s uncertain balancing test and a declaration that the undue burden standard offers much more latitude for state regulation. The Court in *June Medical* explains:

> [T]he threshold requirement [is] that the State have a "legitimate purpose" and that the law be "reasonably related to that goal." So long as that showing is made, the only question for a court is whether a law has the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[139]

Casey and *Gonzales* confirm that the showing that an abortion regulation is reasonably related to a legitimate purpose is akin to deferential rational basis review. [140] *Casey* does so indirectly when it cites *Williamson v. Lee Optical of Oklahoma, Inc.* in connection with its conclusion that requiring a physician to provide information to a woman satisfies constitutional demands.[141] Deferring to the legislature's decision to bar opticians from engaging in certain activities, the *Williamson* Court had declared that "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[142] *Gonzales* is explicit on this point: "Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power . . . in furtherance of its legitimate interests in

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comparability of the Louisiana and Texas statutes would have been irrelevant. The factual record in those cases regarding the effect on access alone would have been sufficient to conclude that the Louisiana statute imposed a substantial obstacle and was unconstitutional.

138. Because the Chief Justice's concurrence in *June Medical* is controlling under *Marks,* when this Article refers below to *June Medical* or the *June Medical* Court, it is referring to the Chief Justice's opinion.

139. *June Medical*, 140 S. Ct. at 2138 (Roberts, C.J., concurring) (internal citations omitted) (quoting *Casey*, 505 U.S. at 878, 882, 877).

140. The United States Court of Appeals for the Sixth Circuit equates the "showing" with the rational basis standard. *See Friedlander*, 978 F.3d at 433 (explaining that the requirement that an abortion regulation "be 'reasonably related' to a legitimate state interest . . . is met whenever a state has 'a rational basis to . . . use its regulatory power . . . .'"). One scholar, however, describes *Casey*'s 'reasonably related' test "as falling somewhere between rational-basis review and intermediate scrutiny—or in other words, as a form of rational-basis with 'teeth' or 'bite.'" Stephen G. Gilles, *Restoring* Casey*'s Undue-Burden Standard After* Whole Woman's Health v. Hellerstedt, 35 QUINNIPIAC L. REV. 701, 753 (2017).

141. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 885 (1992) (citing Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955)).

142. *Williamson*, 348 U.S. at 488.

regulating the medical profession in order to promote respect for life."[143] And, citing *Gonzales*, the *June Medical* Court similarly affirmed that the "traditional rule" of permitting legislative discretion in cases of medical uncertainty.[144]

Moreover, specific applications of the undue burden standard in *Casey*, *Mazurek v. Armstrong*, and *Gonzales* indicate how little is required in the initial "showing" to which *June Medical* refers. Pointing out that "the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others," the *Casey* Court upheld the requirement that a physician provide information to a woman seeking an abortion as a "reasonable means" to achieve the legitimate purpose of "ensur[ing] that the woman's consent is informed,"[145] Similarly, when the Court in *Mazurek* determined that a law banning medical professionals who are not physicians from performing abortions did not violate the Constitution,[146] the Court stressed that *Casey* "foreclosed" any argument that the "law must have had an invalid purpose because 'all health evidence contradicts the claim that there is any health basis' for the law."[147] Moreover, the *Gonzales* Court upheld the federal partial birth abortion ban in the absence of "reliable data to measure the [extent to which] . . . some women come to regret their choice to abort"[148] and over Justice Ginsburg's charge that "[t]he law saves not a single fetus from destruction, for it targets only a *method* of performing abortion."[149]

Gonzales instructs that those challenging an abortion regulation bear the burden of showing[150] that the regulation has

143. Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

144. *June Medical*, 140 S. Ct. at 2136 (Roberts, C.J., concurring).

145. *Casey*, 505 U.S. at 885. *See also id.* at 882 (indicating that seeking to ensure that woman is adequately informed is a legitimate purpose).

146. *See* Mazurek v. Armstrong, 520 U.S. 968, 974 (1997) (concluding that the evidence was insufficient to establish that the law violated the undue burden standard).

147. *Id.* at 973.

148. *Gonzales*, 550 U.S. at 159.

149. *Id.* at 181 (Ginsburg, J., dissenting) (emphasis in original).

150. *See id.* at 156 (indicating that those challenging the federal partial birth abortion ban has not met their burden of proof that the ban would impose an undue burden). *See also* June Med. Services L.L.C. v. Russo, 140 S. Ct. 2103, 2133 (2020) ("[T]he plaintiff's burden

the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[151] With respect to the very few measures the Court has struck down under *Casey*'s test, the Court described what it considered a massive effect on access. In *Casey*, the Court concluded that Pennsylvania's spousal notification requirement likely would cause a "significant number of women who fear for their safety and the safety of their children . . . to be deterred from procuring an abortion as surely as if the Commonwealth *had outlawed abortion* in all cases."[152] The Court in *Stenberg v. Carhart* decided that Nebraska's partial-birth abortion ban would prohibit the most common second trimester abortion procedure.[153] The *Hellerstedt* Court determined that Texas's admitting privileges requirement eliminated about half of the abortion facilities in the State and that the State's ambulatory surgery center requirement would reduce the number by another thirty percent.[154] And the Court in *June Medical* credited the District Court's findings that Louisiana's admitting privilege requirement would "result in a *drastic* reduction in the number and geographic distribution of abortion providers," thereby burdening access "to the same degree [as] or worse [than]" the Texas statute, reducing the number of clinics in Louisiana from three to one or two and the number of physicians performing abortions from five to one or two.[155]

When it established the undue burden standard, the *Casey* Court explained: "What is at stake is the woman's right to make

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in a challenge to an abortion regulation is to show that the regulation's 'purpose or effect' is to 'plac[e] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'"); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2343 (2016) (Alito, J., dissenting) ("Under our cases, petitioners must show that the admitting privileges and ASC requirements impose an 'undue burden' on women seeking abortions.").

151. *June Medical*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (quoting *Casey*, 505 U.S. at 877).

152. *Casey*, 505 U.S. at 894 (emphasis added).

153. Stenberg v. Carhart, 530 U.S. 914, 938 (2000) (emphasis in original) ("Nebraska does not deny that the statute imposes an 'undue burden' *if* it applies to the more commonly used D&E procedure . . . . And we agree with the Eighth Circuit that it does so apply.").

154. *See Hellerstedt*, 136 S. Ct. at 2312, 2316 (discussing the effect of Texas's admitting privileges requirement and the stipulated effect of the ambulatory surgery center requirement).

155. *June Medical*, 140 S. Ct. at 2140 (Roberts, C.J., concurring) (emphasis added) (indicating the possible changes in the number of clinics and doctors); *see also June Medical*, 140 S. Ct. at 2128-32 (Breyer, J., plurality).

the ultimate decision . . . . [A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[156] The burden on those challenging an abortion regulation is to show that the regulation violates this fundamental principal.

B. Section 5 Power to Enact FOCA and WHPA After *June Medical*

It is in reference to *June Medical*'s explanation of *Casey*'s undue burden standard that one must assess the extent to which Congress has the power under Section 5 of the Fourteenth Amendment to enact FOCA and the WHPA. *Garrett* offers a structured way to do this. The first step, the *Garrett* Court explained, "is to identify with some precision the scope of the constitutional right at issue."[157] The second is to determine whether Congress has "identified a history and pattern of unconstitutional" conduct relevant to the legislation under consideration.[158] And the final step (though the *Garrett* Court did not label it as such) is to evaluate whether the measure is "congruen[t] and proportional[]" to the identified harm.[159]

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156. *Casey*, 505 U.S. at 877, 879.

157. Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001). *See also* Tennessee v. Lane, 541 U.S. 509, 522 (2004) ("The first step of the *Boerne* inquiry requires us to identify the constitutional right or rights that Congress sought to enforce . . . ."); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999) ("Following *City of Boerne*, we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy . . . .").

158. *Garrett*, 531 U.S. at 368. *See also* Allen v. Cooper, 140 S. Ct. 994, 1004 (2020) ("[C]ourts are to consider the constitutional problem Congress faced—both the nature and the extent of state conduct violating the Fourteenth Amendment. That assessment usually (though not inevitably) focuses on the legislative record . . . ."); *Lane*, 541 U.S. at 523 ("Whether Title II validly enforces these constitutional rights is a question that 'must be judged with reference to the historical experience which it reflects.'"); *Fla. Prepaid*, 527 U.S. at 639-40 ("[A]ny §5 legislation 'must be judged with reference to the historical experience . . . it reflects.'").

159. *Garrett*, 531 U.S. at 372. *See also Cooper*, 140 S. Ct. at 1004 ("[C]ourts are to examine the scope of the response Congress chose . . . . Here, a critical question is how far, and for what reasons, Congress has gone beyond redressing actual constitutional violations."); *Lane*, 541 U.S. at 530 ("The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment."); City of Boerne v. Flores, 521 U.S. 507, 533 (1997) (indicating that whether Congress has the power under Section 5 of the Fourteenth Amendment to enact a measure depends on whether there is

1. Scope of the Constitutional Right

Defining "with some precision" the right that FOCA and the WHRA seeks to protect—a woman's right to choose abortion—requires an understanding of the limitations that *Roe* and *Casey* identify.[160] Importantly, the *Roe* Court commented that the right to choose is not "absolute" and is inherently different from other rights protected by the constitutional right to privacy.[161] Because of the pre-natal life involved,[162] the *Roe* Court explained, "at some point . . . . [t]he woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly."[163]

Casey likewise stresses that "[a]bortion is a unique act"[164] and that a woman's freedom "is not . . . unlimited."[165] The Constitution, the *Casey* Court declared, protects "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."[166] "What is at stake," according to the Court, "is the woman's right to make the ultimate decision."[167]

After viability, though, the right to choose is more limited. As *Roe* declares and *Casey* affirms, "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[168]

With the *Roe* and *Casey* Courts' admonitions and *Casey*'s undue burden test as the governing standard, then, the scope of the abortion right has two parts. First, a woman has the right to

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"proportionality or congruence between the means adopted and the legitimate end to be achieved").

160. Roe v. Wade, 410 U.S. 113, 154 (1973) (right to choose is not absolute and not unqualified).

161. *Id.*

162. *Id.* at 159 ("She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus.").

163. *Id.*

164. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 852 (1992).

165. *Id.* at 869.

166. *Id.* at 846.

167. *Id.* at 877.

168. *Roe*, 410 U.S. at 164-65; *see also Casey*, 505 U.S. at 879 (quoting *Roe*, 410 U.S. at 164-65).

"mak[e] the ultimate decision to terminate her pregnancy before viability."[169] Second, a woman has the right to have an abortion after viability when "necessary" to "preserv[e] [her] life or health."[170]

2. Evidence of Unconstitutional Conduct

Having defined the abortion right's scope, one turns to evidence of unconstitutional conduct. The Court in *Kimel* explained that, for Section 5 to confer power on Congress, Congress must identify a "significant pattern of unconstitutional [behavior sufficient to give] Congress . . . reason to believe that broad prophylactic legislation [i]s necessary."[171] The *Hibbs* Court stressed, however, that "it [i]s easier for Congress to show a pattern of state constitutional violations" when a demanding standard of review applies.[172]

The Court's evaluation of the congressional record in *City of Boerne* and the cases that followed it is demonstrative of the importance of the standard of review to Congress's evidentiary burden. For the Court in *City of Boerne*, *Florida Prepaid*, *Kimel*, *Garrett*, and *Cooper*, the absence of evidence in the congressional record of widespread unconstitutional behavior was significant,[173] and in all of those cases, the constitutional test for the applicable state measures and conduct was very lenient. For example, a State contravenes the due process rights of a patent or copyright holder only if the State intentionally (or perhaps

169. *Casey*, 505 U.S. at 879.

170. *Id.*

171. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000).

172. Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003).

173. *See* Allen v. Cooper, 140 S. Ct. 994, 1006 (2020) (indicating that no "part of the legislative record shows concern with whether the States' copyright infringements (however few and far between) violated the Due Process Clause."); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) ("The legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."); *Kimel*, 528 U.S. at 64-65 ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640 (1999) ("Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."); City of Boerne v. Flores, 521 U.S. 507, 530 (1997) ("[T]he emphasis of the hearings was on laws of general applicability which place incidental burdens on religion.").

recklessly) infringes on the patent or copyright.[174] Similarly, to avoid contravening the right to free exercise of religion, a regulation need only be neutral and generally applicable.[175] And state action that discriminates based on age or, in the employment context, disability need only have a rational basis.[176]

In *Hibbs*, on the other hand, the Court noted that the intermediate standard of review applicable to sex discrimination eased Congress's burden of establishing "a pattern of state constitutional violations."[177] Accordingly, the *Hibbs* Court credited evidence in the congressional record not only of states' gender-based discriminatory leave policies and practices, but also more generally state laws discriminating against women in the workplace and private sector discrimination with respect to leave benefits.[178] Referring to what *Hibbs* stated regarding the test for gender-based discrimination, the *Lane* Court noted that the constitutional rights associated with access to courts enjoyed at least as much, and in some cases more, scrutiny than gender-based discrimination.[179] And, the Court in *Lane* indicated, the evidence of "widespread exclusion of persons with disabilities from the enjoyment of public services" is more plentiful than the evidence of gender discrimination in *Hibbs*.[180] Specifically, the *Lane* Court noted discriminatory conduct with respect to the disabled, not only with respect to access to the courts, but also in a wide array of other contexts involving public services.[181]

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174. *See Cooper*, 140 S. Ct. at 1004 ("[A]n infringement must be intentional, or at least reckless, to come within the reach of the Due Process Clause."); *Fla. Prepaid*, 527 U.S. at 645 ("[A] state actor's negligent act that causes unintended injury to a person's property does not 'deprive' that person of property within the meaning of the Due Process Clause.").

175. *See City of Boerne*, 521 U.S. at 514 ("[*Employment Division v.*] *Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.").

176. *See Garrett*, 531 U.S. at 367 ("States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational."); *Kimel*, 528 U.S. at 83 ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.").

177. *Hibbs*, 538 U.S. at 736.

178. *See id.* at 730 (discussing *Hibbs*'s consideration of evidence associated with gender-based discrimination).

179. *See* Tennessee v. Lane, 541 U.S. 509, 529 (discussing *Hibbs*).

180. *Id.*

181. *See id.* at 523-29 (detailing the history of discrimination against the disabled in public services).

Casey's undue burden test is not quite as lenient as the standards of review that *City of Boerne*, *Kimel*, and *Garrett* describe, nor is the test a heightened standard like the ones involved in *Hibbs* and *Lane*. Indeed, *Hellerstedt*'s uncertain balancing test is gone, and the *June Medical* Court emphasized the substantial regulatory latitude that states enjoy under the undue burden standard.[182] *Casey*, *Mazurek*, and *Gonzales* testify that the initial "showing" (presumably by the State) which *June Medical* specifies—that the regulation at issue is reasonably related to a legitimate purpose—is very deferential.[183] Moreover, unlike when a traditional heightened standard of review applies, the undue burden test does not require *the State* to show a tight means-ends connection. Instead, it is *a party challenging* an abortion regulation who bears the burden of establishing that the regulation places a substantial obstacle in the path of a woman seeking an abortion before viability.[184]

Though *Casey*'s undue burden test undoubtedly calls for review that is less deferential than the rational basis standard, given the minimal showing required of the government in the first part of the test and the heavy burden on a regulation's challenger in the second part, Congress must satisfy greater evidentiary demands than those in *Hibbs* and *Lane* if it wishes to use Section 5 to free women from state abortion regulations.[185] So long as the Court continues to adhere to *Casey* and *Roe*, however, existing evidence of unconstitutional behavior should be sufficient to confer on Congress at least some Section 5 authority in relation to abortion.

Casey is quite clear: "[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy

182. *See* June Med. Services L.L.C. v. Russo, 140 S. Ct. 2103, 2136 (Roberts, C.J, concurring) ("[W]e have explained that the 'traditional rule' that 'state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty' is 'consistent with *Casey*.'").

183. *See id*. at 2138, 2157 (discussing *Casey*, *Mazurek*, and *Gonzales*). *See also supra* notes 145-49 and accompanying text (explaining how *Casey*, *Mazurek*, and *Gonzales* reveal a deferential standard).

184. *See id*. at 2133 (indicating that one challenging an abortion regulation has the burden of showing that a substantial obstacle exists).

185. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 878 (1992).

before viability[,]"[186] and the *Casey* Court did nothing to disturb the Court's suggestion in *Planned Parenthood of Central Missouri v. Danforth* that determining when viability occurs is a case-by-case medical decision not subject to legislative determination.[187] Yet, state legislation banning abortion entirely or during the early stages of a woman's pregnancy has a long history that continues to this day.

The *Roe* Court indicated that the Texas abortion ban at issue in the case had existed in substantially the same form since 1857[188] and that "a large majority of jurisdictions" had adopted very restrictive abortion bans by the 1950s.[189] Moreover, when the Court decided *Roe*, thirty-one states broadly banned abortion throughout pregnancy.[190]

A similar number of states have pre-viability bans in place today. As of November 2020, twenty-eight states had laws in place that prohibit abortion at or before twenty-four weeks, most with exceptions for the life or physical health of the woman and a few with other exceptions.[191] Twenty-four of those twenty-eight states ban abortion at twenty-two or fewer weeks, with fourteen states banning the procedure at twenty or fewer weeks.[192]

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186. *Id.* at 879.

187. *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 64 (1976) ("[I]t is not the proper function of the legislature . . . to place viability . . . at a specific point in the gestation period. The time . . . may vary with each pregnancy, and the determination . . . is, and must be, a matter for the judgment of the responsible attending physician.").

188. *See* Roe v. Wade, 410 U.S. 113, 119 (1973) (recounting the history of the Texas abortion ban).

189. *Id.* at 139.

190. *Id.* at 118 n.2 (citing Arizona, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming abortion laws).

191. *See State Bans on Abortion Throughout Pregnancy,* GUTTMACHER INST. (Nov. 1, 2020), https://perma.cc/ZF22-67HU (describing state abortion bans). Ten of those states have more than one week-specific ban. *See id*. (same). The number of weeks is measured from the beginning of a woman's last menstrual period.

192. *See id.* (describing state abortion bans). Alabama has both a twenty-two week ban and an outright ban; Louisiana has a twenty-two week ban, a fifteen week ban and an outright ban; Utah has both an eighteen week ban and an outright ban; Arkansas has a twenty-two week ban, an eighteen week ban and a twelve week ban; Mississippi has a twenty week ban, a fifteen week ban, and a six week ban; and Georgia, Iowa, Kentucky, North Dakota, and Ohio each have both a twenty-two week ban and a six week ban. *See id*. (describing the

And three of those fourteen states had laws that prohibit abortion entirely, one including exceptions for when the life or physical health of the woman is at stake and the other two containing a life exception only.[193] Finally, sixteen of the twenty-eight states with week-specific bans had enacted pre-viability bans that apply depending on a woman's reason for choosing abortion—whether based on the sex or race of the fetus or the existence of a "genetic anomaly" with respect to the fetus.[194]

The *Casey* Court recognized that, in 1992, viability sometimes occurred around twenty-three to twenty-four weeks gestation and viability may be achieved earlier in the future depending on technological advances.[195] Based on a 2015 New England Journal of Medicine article, viability now may be achieved as early as twenty-two weeks gestation.[196] Because the number of weeks in the week-specific bans described above is measured from the beginning of a woman's last menstrual period and gestational age is measured from the date of fertilization (approximately two weeks later),[197] a twenty-four week ban bars abortion beginning at what may be the earliest date of viability right now. Thus, even a twenty-four week ban likely prohibits at least some pre-viability abortions and thereby would run afoul of *Casey*'s categorical proscription of pre-viability bans.

Alabama, Louisiana, Utah, Arkansas, Mississippi, Georgia, Iowa, Kentucky, North Dakota, and Ohio abortion bans).

193. *See id.* (describing the abortion bans in Louisiana, Alabama, and Utah).

194. *See Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly,* GUTTMACHER INST. (Nov. 1, 2020), https://perma.cc/8935-T7RD (describing state abortion bans based on the reason a woman seeks to terminate her pregnancy).

195. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 860 (1992) (discussing the timing of viability).

196. *See* Matthew A. Rysavy et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 N.E. J. MED. 1801, 1804 (2015) ("Overall rates of survival, survival without severe impairment, and survival without moderate or severe impairment were 5.1% (interquartile range, 0 to 10.6), 3.4% (interquartile range, 0 to 6.9), and 2.0% (interquartile range, 0 to 0.7), respectively, among children born at 22 weeks of gestation.").

197. As the Guttmacher Institute explains, "20 weeks postfertilization is equivalent to 22 weeks [from the beginning of the last menstrual period]." *State Bans on Abortion Throughout Pregnancy*, *supra* note 190 (describing state abortion bans). *See also* Leo Han et al., *Blurred Lines: Disentangling the Concept of Fetal Viability from Abortion Law*, 28 WOMEN'S HEALTH ISSUES 287, 288 (2018) ("[S]tates have chosen to limit abortion at 20 weeks after fertilization (22 weeks after the last menstrual period) . . . .").

Consequently, it is not at all surprising that lower courts have enjoined all but one ban at twenty weeks or earlier,[198] and although the vast majority of twenty-two week, twenty-four week, and pre-viability purpose-based bans are in effect,[199] their constitutionality is extremely suspect.[200] Considering abortion bans alone, the evidence of unconstitutional behavior in relation to *Roe* certainly exceeds what the Court found in *City of Boerne*, *Florida Prepaid*, *Kimel*, *Garrett*, and *Cooper*.

Abortion bans, however, constitute only a small fraction of post-*Roe* state abortion regulatory activity. As of February 2020, each of twenty-six states had enacted twenty or more abortion regulations since *Roe*, and the total number enacted by those states collectively exceeded 1,000.[201] Louisiana, Indiana, Oklahoma, and Arkansas alone accounted for over 250.[202] Among the state measures adopted are TRAP laws, informed consent provisions, ultrasound requirements, parental or spousal consent or notification measures, prohibitions on the use of telemedicine, laws barring non-physicians from performing abortions, waiting periods, and reporting requirements.[203] Many

198. *See State Bans on Abortion Throughout Pregnancy*, *supra* note 190 (indicating which state abortion bans are in effect).

199. *See id*. (indicating which state abortion bans are in effect); *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly, supra* note 193 (same).

200. *But see* Thomas J. Molony, Roe*,* Casey*, and Sex-Selection Abortion Bans*, 71 WASH. & LEE L. REV. 1089, 1109-29 (2014) (proposing a possible basis for concluding that a narrow sex selection is constitutional).

201. *See* Elizabeth Nash, *Louisiana Has Passed 89 Abortion Restrictions Since Roe: It's About Control, Not Health,* GUTTMACHER INST. (Feb. 11, 2020), https://perma.cc/3TLD-MD2D (tabulating abortion regulations on a State by State basis).

202. *See id.* (describing Louisiana's regulatory activity).

203. *See* Elizabeth Nash & Megan K. Donovan, *Ensuring Access to Abortion at the State Level: Selected Examples and Lessons*, GUTTMACHER INST. (Jan. 9, 2019), https://perma.cc/E66K-ATJ5 (describing various state abortion regulations); *Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (Nov. 1, 2020), https://perma.cc/GE7X-T4JV (identifying various types of TRAP regulations); *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Nov. 1, 2020), https://perma.cc/RRV7-CCKY (describing informed consent and waiting period requirements); *Requirements for Ultrasound*, GUTTMACHER INST. (Nov. 1, 2020), https://perma.cc/XB4K-ZZYS (describing state laws requiring ultrasounds); *An Overview of Abortion Laws*, GUTTMACHER INST. (Nov. 1, 2020), https://perma.cc/C7VW-GFEL (describing various types of abortion regulations); *Medication Abortion*, GUTTMACHER INST. (Nov. 1, 2020), https://perma.cc/EGX6-ZX87 (specifying states that bar telemedicine for medication abortions); *Abortion Reporting Requirements*, GUTTMACHER INST. (Nov. 1, 2020), https://perma.cc/AHA4-J8XC (describing reporting requirements).

states also have imposed restrictions on medication abortions and have adopted bans on particular abortion methods, some prohibiting dilation and evacuation (D&E) abortions and a majority making "partial birth" abortion illegal.[204]

That states are active in abortion regulation, however, is not the measure of Congress's power to enact prophylactic or remedial measures under Section 5. It is widespread unconstitutional behavior that matters, and outside of pre-viability abortion bans and a handful of other lesser limitations, invalidation of abortion regulations has been very rare.

To be sure, the Court invalidated some abortion regulations in *Casey*, *Stenberg*, *Hellerstedt*, and *June Medical*, but in each of those cases, the Court determined that the regulations would have a severe impact on a woman's right to make the ultimate decision.[205] Abortion regulations that do not affect access in a similar way have received the Court's approbation. As the *Casey* Court explained, "[a]ll abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy."[206] But that does not mean they all are unconstitutional.[207] The crucial question is whether a regulation *actually deprives* a woman being able to terminate her pregnancy.[208]

Even before *Casey*, the Court upheld regulations that had applied to first trimester abortions. In *Danforth*, for instance, the Court rejected a challenge to a Missouri statute that required a woman to provide written consent before having a first trimester abortion—even though almost no other Missouri law applicable

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204. *See Medication Abortion*, *supra* note 202 (detailing restrictions on medication abortions); *Bans on Specific Abortion Methods Used After the First Trimester*, GUTTMACHER INST. (Nov. 1, 2020), https://perma.cc/W3QQ-9VZ2 (describing state bans on abortion methods).

205. *See supra* notes 149-54 and accompanying text (discussing *Casey*, *Stenberg*, *Hellerstedt*, and *June Medical*).

206. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 875 (1992).

207. *See id* at 874 ("The fact that a law . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.").

208. *See id.* at 875 ("[T]he Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision. Those decisions went too far . . . .").

to similar medical care contained a comparable requirement.[209] Moreover, the *Danforth* Court determined that reporting and recordkeeping requirements that applied regardless of the stage of pregnancy did not run afoul of the Constitution.[210] Later, in *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, the Court found constitutional a Missouri law mandating that tissue from a surgical abortion performed in a licensed clinic be sent for examination by a pathologist, even though a pathologist's examination would make an abortion more expensive.[211] And although the Court in *City of Akron v. Akron Center for Reproductive Health, Inc.* invalidated an ordinance that forced the "attending physician" to provide certain information to a woman seeking an abortion (rather than allowing another qualified person to provide the information), the Court acknowledged that a State may limit to doctors the authority to *perform* abortions.[212]

Of course, the *Casey* Court opened the door to even more state regulation, sustaining a host of statutory provisions, including ones like those the Court had struck down under *Roe*'s trimester framework: a specific medical emergency definition woven throughout Pennsylvania's regulatory web, a requirement that a physician (rather than another qualified person) provide information in connection with a woman's informed consent, an obligation to disclose to a woman information specified by the State, a twenty-four hour waiting period, a parental consent requirement, and reporting and recordkeeping duties.[213] After

209. *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 (1976) ("[T]he imposition . . . of . . . a [written] requirement . . . even during the first stage . . . is not in itself an unconstitutional requirement. . . . [W]e see no constitutional defect in requiring it only for some types of surgery . . . or . . . for abortions.").

210. *See id.* at 79-81 (evaluating Missouri reporting and recordkeeping requirements).

211. *See* Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 490 (1983) ("We think the cost of a tissue examination does not significantly burden a pregnant woman's abortion decision. The estimated cost of compliance . . . was $19.40 per abortion performed, and in light of the substantial benefits that a pathologist's examination can have, this small cost clearly is justified.") (internal citations omitted).

212. *See* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 447 (1983) ("[W]e have left no doubt that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions.").

213. *Casey*, 505 U.S. at 879-887, 899-901 (1992) (evaluating and upholding various provision of the abortion law at issue); *see also* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 759-65 (1986) (striking down an informed

Casey and consistent with *Akron*, the Court in *Mazurek* upheld a district court's denial of an injunction against a law that restricted the performance of abortions to physicians (and did not allow physician's assistants to perform them), based on the conclusion that there was insufficient evidence that the restriction would give rise to a substantial obstacle to a woman's ability to choose abortion.[214] And finally, after *Stenberg*, the Court in *Gonzales* upheld against constitutional challenge a federal partial birth abortion ban that was narrower than the Nebraska ban at issue in *Stenberg*, even though the federal law applied throughout pregnancy and contained no exception that would allow the procedure when necessary to protect the health of the woman.[215]

Moreover, other than many pre-viability bans, the vast majority of existing abortion regulations have not been invalidated by lower courts.[216] For example, although most admitting privileges requirements have been enjoined, the lion's share of TRAP laws remain in place across the country.[217] In addition, nearly all informed consent, waiting period, ultrasound, and reporting requirements and all but two restrictions on medication abortions are in effect.[218] Finally, even though

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consent measure requiring that a woman be given information specified by the State); *City of Akron,* 462 U.S. at 444, 449-51 (striking down an informed consent measure requiring that a woman be given information specified by the State, a 24-hour waiting period, and a regulation requiring a physician to provide certain information).

214. *See* Mazurek v. Armstrong, 520 U.S. 968, 971, 976 (1997) (discussing the district court's conclusion and reversing the decision of the United States Court of Appeals for the Ninth Circuit that denial of the injunction was improper).

215. *See* Gonzales v. Carhart, 550 U.S. 124, 154 (2007) ("In *Stenberg* the Court found the statute covered D&E. Here, by contrast, interpreting the Act so that it does not prohibit standard D&E is the most reasonable reading and understanding of its terms.") (internal citations omitted); *id.* at 168 ("Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception.").

216. *See generally An Overview of Abortion Laws*, *supra* note 202 (detailing the status of various abortion regulations); *Counseling and Waiting Periods for Abortion*, *supra* note 202 (detailing the status of mandatory counseling and waiting period requirements); *Requirements for Ultrasound*, *supra* note 202 (detailing the status of state laws mandating conveyance of information related to performance of an ultrasound).

217. *See Targeted Regulation of Abortion Providers*, *supra* note 202 (indicating the status of various types of TRAP regulations).

218. *See Counseling and Waiting Periods for Abortion*, *supra* note 202 (detailing the status of mandatory counseling and waiting period requirements); *Requirements for Ultrasound*, *supra* note 202 (detailing the status of state laws mandating conveyance of information related to performance of an ultrasound); *Abortion Reporting Requirements*,

Stenberg and lower courts have determined that almost all bans that would cover D&E abortions are unconstitutional, at least fourteen state partial birth abortion bans were in force as of November 1, 2020.[219]

Still, the invalidation of abortion bans and at least some other types of abortion regulations make FOCA and WHPA different from the legislation at issue in *City of Boerne*, *Florida Prepaid*, *Kimel*, and *Garrett*, in which the Court found a dearth of even arguably unconstitutional activity.[220] For FOCA and WHPA, then, so long as the Court continues to recognize a constitutional right to choose,[221] the question of Section 5 power comes down to "congruence and proportionality."[222]

3. Congruence and Proportionality

Emphasizing the necessity of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," [223] the *City of Boerne* Court stated that Congress may not rely on Section 5 of the Fourteenth Amendment "to attempt a substantive change in constitutional protections."[224] Both FOCA and WHPA are just such attempt.

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supra note 202 (detailing the status of reporting requirements); *Medication Abortion*, *supra* note 202 (detailing the status of medication abortion restrictions).

219. *See Bans on Specific Abortion Methods Used After the First Trimester*, *supra* note 203 (detailing the statute of state abortion-method bans).

220. *See* Bd. of Trustees of the Univ. of Al. v. Garrett, 531 U.S. 356, 369-70 (2001) ("Respondents in their brief cite half a dozen [relevant] examples from the [congressional] record . . . . [E]ven if . . . each incident . . . showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination . . . ."); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 64-65 (2000) ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640 (1999) ("In enacting the Patent Remedy Act, . . . Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."); City of Boerne v. Flores, 521 U.S. 507, 530 (1997) ("The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. . . . Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion.").

221. *See infra* notes 266-72 and accompanying text (discussing what overruling *Roe* would mean for Congress's Section 5 power in relation to FOCA and WHPA).

222. *City of Boerne*, 521 U.S. at 520.

223. *Id.*

224. *Id.* at 532

As a consequence, adopting either proposed Act would exceed Congress's Section 5 power.

a. Freedom of Choice Act

Just as Congress enacted RFRA in response to *Smith*, the most recent version of FOCA cites the Court's decision in *Gonzales* as one of the reasons why Congress should act.[225] Unlike RFRA, however, FOCA does not purport to restore a woman's right to abortion as it existed immediately before *Gonzales*. Rather, FOCA ventures back "to guarantee the protections of *Roe v. Wade*."[226]

Roe's trimester framework, though, no longer is the controlling Due Process Clause standard for abortion regulations.[227] *Casey*'s undue burden test governs, and when measured against this standard as interpreted in *June Medical*, it is easy to see that FOCA would not be a proportional and congruent response to perceived infringements on the right to choose that the Court recognized in *Roe*.

FOCA prohibits interference—large or small and subject to no exception—with a woman's ability to choose abortion before viability.[228] But even under *Roe*'s trimester framework, a woman had a right to choose abortion "free of interference" only during the first trimester.[229] Before viability, but after the first trimester, a State could regulate abortion in a manner designed to advance maternal health.[230] And *Casey* goes further, stating unequivocally that a woman has the right to choose abortion pre-viability free

225. *See* Freedom of Choice Act, S. 1173, 110th Cong. § 2(9) (2007) (referring to *Gonzales*).

226. Freedom of Choice Act, S. 1173, 110th Cong. § 2(12) (2007) (emphasis added).

227. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 873 (1992) ("We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.").

228. Freedom of Choice Act, S. 1173, 110th Cong. § 4(b)(1)(B) (2007) (prohibiting a State from "interfer[ing] with a woman's right to choose . . . to terminate a pregnancy prior to viability.").

229. Roe v. Wade, 410 U.S. 113, 163 (1973).

230. *Id.* at 164 ("For the stage subsequent to approximately the end of the first trimester, the State . . . may . . . regulate the abortion procedure in ways that are reasonably related to maternal health.").

from "*undue* interference."[231] "[I]t is an overstatement," the *Casey* Court declared, "to describe [the right to choose] as a right to decide whether to have an abortion 'without interference from the State.'"[232] Indeed, under *Casey*'s undue burden standard, a State may adopt regulations designed to advance maternal health and protect potential life so long as the regulations do not have the purpose or effect of creating a substantial obstacle to a woman's ability to choose abortion before viability.[233]

Laws that unquestionably are valid under the undue burden standard as interpreted by *June Medical* would fail under FOCA regardless of whether the laws are reasonably related to protecting maternal health or potential life or have the effect of creating a substantial obstacle to a woman's ability to choose abortion.[234] FOCA would bar every aspect of the Pennsylvania statute that the Court upheld in *Casey*, the physician-only requirement that the Court sustained in *Mazurek*, and the partial-birth abortion ban that the *Gonzales* Court decided was constitutional. It would nullify regulations whose benefits would be sufficient to satisfy *Hellerstedt*'s more rigorous, though errant balancing test.[235] Indeed, FOCA is so broad that it would invalidate laws applying throughout pregnancy that the Court specifically permitted under *Roe*'s trimester framework, including the reporting and recordkeeping regulations at issue in *Danforth* and the pathology report requirement the Court upheld in *Ashcroft*.[236]

Similarly, regulations that the Fourteenth Amendment's Equal Protection Clause permits would run afoul of FOCA's antidiscrimination provision, which broadly bars government discrimination—again, large or small and subject to no exception—against a woman's "exercise of [her statutory right to choose] in the regulation or provision of benefits, facilities,

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231. *See Casey*, 505 U.S. at 887 (emphasis added).

232. *Id.* at 875.

233. *See id.* at 877 (describing the undue burden standard).

234. *See id.* at 878 (describing the undue burden standard); *see also* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2138 (2020) (Roberts, C.J., concurring) (explaining what the undue burden standard requires).

235. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016) (describing the undue burden standard as a balancing test)

236. *See supra* notes 208-10 and accompanying text (discussing *Danforth* and *Ashcroft*).

services, or information."[237] The governing standard for equal protection purposes, though, is even more deferential than *Casey*'s undue burden test. Under *Geduldig v. Aiello*, a measure treating abortion differently from other medical procedures does not discriminate based on sex, but on pregnancy, and therefore does represent a suspect classification requiring heightened scrutiny.[238] Moreover, in *Harris v. McRae*, the Court stressed that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."[239] And the Court in *Maher v. Roe* explained that a government's election to provide funds in connection with childbirth, but not abortion, does not infringe on a fundamental right because the election "places no obstacles absolute or otherwise in the pregnant woman's path to an abortion."[240] Thus, discriminating in favor of childbirth and against abortion in allocating resources need only be rationally related to a legitimate government interest,[241] and the Court repeatedly has decided that a government may favor childbirth over abortion in providing facilities, services, benefits, and information.[242] As a result, FOCA's antidiscrimination simply is not a proportional and

237. Freedom of Choice Act, S. 1173, 110th Cong. § 4(b)(2) (2007).

238. *See* Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) ("While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.").

239. Harris v. McRae, 448 U.S. 297, 325 (1980).

240. Maher v. Roe, 432 U.S. 464, 474 (1977).

241. *See id.* at 478 ("[T]he less demanding test of rationality . . . applies in the absence of a suspect classification or the impingement of a fundamental right.").

242. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 886 (1992) ("[U]nder the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion . . . ."); Webster v. Reproductive Servs., 492 U.S. 490, 510-11 (1989) (upholding Missouri's decision to permit use of public employees and facilities for childbirth, but bar use of public employees for nontherapeutic abortions); *McRae*, 448 U.S. at 325 ("[I]t [is not] irrational that Congress has authorized federal reimbursement for medically necessary services generally, but not for certain medically necessary abortions."); Poelker v. Doe, 432 U.S. 519, 521 (1977) ("[W]e find no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions."); *Maher*, 432 U.S. at 478 (determining that Connecticut's decision to fund childbirth costs, but not costs associated with abortion does not violate the Equal Protection Clause).

congruent response to conduct that the Equal Protection Clause does not permit.

Unlike FMLA, which the Court in *Hibbs* noted was targeted at a very narrow aspect of the employment relationship,[243] FOCA would make "[a]ny law . . . subject to challenge at any time by any [woman] who alleges" interference with her statutory right to choose or discrimination in exercising that right.[244] In this way, FOCA is similar to RFRA, ADEA, and Title I of ADA, which the Court in *City of Boerne*, *Kimel*, and *Garrett* determined were too broad for Congress's Section 5 power.[245] Like RFRA, FOCA applies to every level of government and contains no geographic limitation, no ending date and no means by which its requirements terminate.[246] And FOCA's absolute prohibition against interference with a woman's ability to choose abortion before viability and its sweeping antidiscrimination provision treads on state authority even more than RFRA, which is not absolute, but leaves standing regulations that do not substantially burden the exercise of religion and even ones that do impose substantial burdens, so long as the more burdensome measures are the least restrictive means of serving a compelling interest.[247]

FOCA is so disconnected from the history of state abortion regulation and from the scope of a woman's right to choose abortion before viability—the right to make the "ultimate

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243. *See* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 738 (2003) ("Unlike the statutes at issue in *City of Boerne*, *Kimel*, and *Garrett*, which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted . . . and affects only one aspect of the employment relationship."). The Court in *Lane* did not determine that Title II of ADA was likewise so limited, but the Court only considered Congress's Section 5 power as it applied to court access. *See* Tennessee v. Lane, 541 U.S. 509, 530-31 (2003) (specifying the limitations of the Court's evaluation of Title II).

244. City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

245. *See id.* at 532 (stating that RFRA's "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter"); *see also* Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001) ("[T]he accommodation duty far exceeds what is constitutionally required . . . ."); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000) ("The ADEA makes unlawful, in the employment context, all 'discriminat[ion] against any individual . . . because of such individual's age.'").

246. *See City of Boerne*, 521 U.S. at 532-33 (discussing RFRA); Freedom of Choice Act, S. 1173, 110th Cong. § 3(1) (2007) (defining "government" for purposes of the Act); *see also* United States v. Morrison, 529 U.S. 598, 626-27 (2000) (noting the failure of a federal gun control law to contain geographic limitations).

247. *See City of Boerne*, 521 U.S. at 515-16 (describing RFRA's requirements).

decision"[248]—that "[i]t appears . . . to attempt a substantive change in constitutional protections."[249] Consistent with what the Court stated with respect to RFRA, "[l]aws valid under [*Casey* and *June Medical*] would fall under [FOCA] without regard to whether they" place a substantial obstacle in the path of a woman seeking an abortion pre-viability. [250] As a result, FOCA cannot be considered preventive or remedial, and Congress does not have the power under Section 5 of the Fourteenth Amendment to enact the legislation.

b. Women's Health Protection Act

Like FOCA, WHPA applies to every level of government, contains no geographic or time limitation, and offers no means for a State to be relieved of its requirements entirely.[251] Arguably, though, WHPA, is more modest and focused. Rather than broadly barring states from interfering with a woman's decision to have an abortion pre-viability, WHPA invalidates only particular types of abortion measures and even would allow some measures of those types if they satisfy a statutory means-ends test.[252] Still, the WHPA does not have the same degree of focus that the *Hibbs* Court noted with respect to FMLA, and it otherwise does not represent a proportionate and congruent response to the alleged harm WHPA seeks to prevent or remedy.[253] This is so for a number of reasons.

First, inconsistent with both *Casey* and *Roe*, WHPA generally makes no distinction between regulations that apply pre-viability and post-viability. WHPA refers to viability only in

248. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877 (1992).

249. *City of Boerne*, 521 U.S. at 532.

250. *Id.* at 534.

251. *See* Women's Health Protection Act of 2019, S. 1645, 116th Cong. § 5 (providing that the Act preempts all inconsistent state and local regulations).

252. *See* Women's Health Protection Act of 2019, S. 1645, 116th Cong. § 4(a)-(c) (covering certain types of regulations and offering states a means to be relieved of the statute's limitations).

253. *See* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 737-38 (2003); *see also* Megan K. Donovan, *After the Latest Supreme Court Ruling on Abortion, the Women's Health Protection Act Is More Important than Ever*, GUTTMACHER INST. (July 30, 2020), https://perma.cc/F5VH-J48W.

relation to certain prohibitions on abortion and abortion procedures.[254] Yet, *Casey* and *Roe* both recognize that states have substantial latitude with respect to post-viability regulations, permitting a State to "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[255]

Second, what WHPA requires in terms of exceptions from post-viability restrictions when a woman's health is in jeopardy is a stark departure from *Roe* and *Casey*.[256] *Roe* and *Casey* only require post-viability exceptions when "*necessary* . . . for the *preservation*" of a woman's "life or health."[257] In addition, the *Casey* Court determined that a medical emergency exception that applies when "immediate abortion of [a woman's] pregnancy [is necessary] to avert her death or for which a delay will create *serious risk of substantial and irreversible impairment* of a *major bodily function*"[258] does not constitute an undue burden. Under WHPA, however, a State must permit a post-viability abortion or allow for relief from a pre-viability regulation whenever the physician determines in good faith that a failure to perform a post-viability abortion or a failure to perform any abortion immediately would pose a risk—*any* risk—to a woman's health.[259] The upshot of this is that a physician could avoid compliance with an abortion restriction if, for example, the

254. *See* Women's Health Protection Act of 2019, S. 1645, 116th Cong. §§ 4(a)(8), 4(a)(11).

255. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 879 (1992) (quoting Roe v. Wade, 410 U.S. 113, 165 (1973)). While *Casey*'s summary indicates that a State's ability to regulate abortion post-viability relates to its interest in protecting potential life, the opinion also provides that a State may regulate abortion post-viability in furtherance of other interests. *See Casey*, 505 U.S. at 846 (identifying as part of *Roe*'s essential holding that a "State[] [has the] power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health."). Moreover, if a State may prohibit post-viability abortions entirely based on its interest in potential life, it would make little sense that a State could not use unnecessary health and safety regulations to make it harder to obtain an abortion and thereby protect potential life in a more limited way than an absolute bar.

256. *See supra* notes 122-23 and accompanying text (discussing the distinctions between pre- and post-viability regulations that both *Roe* and *Casey* recognized); *see also* Women's Health Protection Act of 2019, S. 1645, 116th Cong. § 4(a)(9) (addressing post-viability prohibitions).

257. *Casey*, 505 U.S. at 879 (emphasis added) (quoting *Roe*, 410 U.S. at 165).

258. *Id.* (emphasis added).

259. *See* Women's Health Protection Act of 2019, S. 1645, 116th Cong. § 4(a)(9)-(10).

physician determines in good faith that the restriction would pose a 0.00000001% chance that the woman will suffer from negligible anxiety for a day or two.[260]

Third, although WHPA offers states some flexibility to regulate abortion pre-viability by permitting an otherwise statutorily prohibited regulation if a State establishes "by clear and convincing evidence" that the regulation "significantly advances" a woman's health or safety and is the least restrictive means of doing so, WHPA's exception varies greatly from the undue burden standard.[261] Like Title I of ADA as applied to the States, WHPA inappropriately shifts the burden of proof with respect to challenged abortion regulations: "[WHPA] . . . makes it the [State]'s duty to prove that [a regulation does not impose an impermissible] burden, instead of requiring (as the Constitution does) that the complaining party" prove that it does.[262] Moreover, in upholding Title II of ADA as it applied to conduct involving access to courts, the *Lane* Court observed that the statute only demands that a State satisfy a reasonableness standard, not an onerous one like WHPA's "less restrictive" means requirement.[263] In contrast to Title II, WHPA's standard substantially mirrors the one in RFRA that the *City of Boerne* Court determined Congress did not have Section 5 power to apply to the States,[264] and similar to the effect under RFRA, "[l]aws valid under [*Casey*] would fall under [WHPA] without regard to whether they" place a substantial obstacle in the path of a woman seeking an abortion previability or apply post-viability with a life or health exception.[265] For example, WHPA's prohibition against

260. Under Doe v. Bolton, 410 U.S. 179, 191-92 (1973), a physician's discretion with respect to a woman's health "may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to [her] well-being . . . ."

261. Women's Health Protection Act of 2019, S. 1645, 116th Cong. § 4(d).

262. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001).

263. *See* Tenn. v. Lane, 541 U.S. 509, 531-32 (2004) ("Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities. . . . It requires only 'reasonable modifications' that would not fundamentally alter the nature of the service provided . . . ."); *see also* Women's Health Protection Act of 2019, S. 1645, 116th Cong. § 4(d)(2).

264. *See* City of Boerne v. Flores, 521 U.S. 507, 533-34 (1997) (describing RFRA's test for permissible state regulation).

265. *Id.* at 534.

requiring "medically unnecessary in-person visits to the provider of abortion services"[266] almost certainly would reach the twenty-four hour waiting period that the *Casey* Court upheld,[267] and WHPA's exception only permits measures that "significantly advance" health or safety, thereby failing to take into account a State's "profound interest in potential life"[268] and a State's ability to regulate in pursuit of that interest even when there is no health-related benefit.[269] In addition, WHPA's bar against imposing more severe penalties on abortion providers than are imposed on other health care professionals for similar acts or omissions fails to take into account that both *Roe* and *Casey* recognize that the presence of a fetus makes abortion unique.[270]

Finally, WHPA would take away the discretion that state legislatures have in determining how to regulate the medical profession and hand that role to the courts, which would be a substantive change in what the Due Process Clause requires. *Casey* explains that, "[a]s with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion."[271] Moreover, the *June Medical* Court underscored that "[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts" and that once a showing is made that a regulation is reasonably related to a legitimate purpose, "the only question for a court is whether [the regulation] has the 'effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'"[272] WHPA, in contrast, would make courts, not state legislatures, the arbiters of whether an abortion

266. Women's Health Protection Act of 2019, S. 1645, 116th Cong. § 4(a)(7).

267. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 885 (1992) (discussing Pennsylvania's waiting period).

268. *Id.* at 837; *see also* Women's Health Protection Act of 2019, S. 1645, 116th Cong. § 4(a)(7).

269. *See Casey*, 505 U.S. at 886 (discussing Pennsylvania's waiting period and stating that, "under the undue burden standard[,] a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest").

270. *See supra* notes 169-72 and accompanying text (indicating how the *Roe* and *Casey* Courts described the abortion procedure); Harris v. McRae, 448 U.S. 297, 325 (1980) (explaining why abortion is different from other medical procedures).

271. *Id.*

272. June Med. Services L.L.C. v. Russo, 140 S. Ct. 2103, 2136, 2138 (2020) (Roberts, C.J., concurring).

regulation sufficiently advances health and safety.[273] Section 5 of the Fourteenth Amendment does not give Congress the authority to make a shift of this sort.

V. BEYOND *JUNE MEDICAL*—IMPLICATIONS IF *ROE* IS OVERRULED

Although Congress's enforcement power under Section 5 of the Fourteenth Amendment will not allow it to enact far-reaching statutes like FOCA and WHPA, given the history of judicial decisions regarding certain abortion regulations, Congress currently has some power to enact preventative or remedial legislation with respect to abortion rights. If *Roe* is overruled, however, its Section 5 power nearly disappears. Overruling *Roe* would mean that a woman has no right under the Due Process Clause to choose abortion,[274] and as discussed above, under *Geduldig v. Aiello*, abortion regulations typically will not give rise to equal protection claims commanding heightened scrutiny.[275] Without *Roe* and *Casey*, the evidence of unconstitutional conduct described above would evaporate because laws previously thought to be unconstitutional in fact were not.

Moreover, though it long has been recognized that the Fourteenth Amendment bars "the arbitrary deprivation of . . . liberty, . . . 'the Amendment, broad and comprehensive as it is, . . . was [not] designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people[.]'"[276] For Fourteenth Amendment purposes, then, just

273. *See* Women's Health Protection Act of 2019, S. 1645, 116th Cong. § 4(d)(1) (providing that a State must convince a court that a "limitation or requirement significantly advances the safety of abortion services or the health of patients").

274. *Cf. Casey*, 505 U.S. at 846 ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."); Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

275. *See supra* note 238 and accompanying text (discussing *Geduldig*).

276. Mugler v. Kansas, 123 U.S. 623, 663 (1887).

like legislation that discriminates based on age or disability,[277] abortion regulation would need only be rationally related to a legitimate government interest. This, the Court emphasized in *Heller v. Doe*, is an extremely deferential standard:

> [A regulation] neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. . . . [A] legislature . . . need not "actually articulate at any time the purpose or rationale supporting its [regulation]." . . . Instead, a [regulation] "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the [regulation]."[278]

Given the State's interests in protecting potential life and women's health,[279] it would be nearly impossible to establish that an abortion ban, limitation, or regulation does not meet this standard.[280] Congress cannot enforce under Section 5 what the Fourteenth Amendment does not protect under Section 1.

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277. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) ("States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational."); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.").

278. Heller v. Doe, 509 U.S. 312, 319-20 (1993) (internal citations omitted). *See* Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (describing rational basis review in the due process context).

279. *See Casey*, 505 U.S. at 872-73 (describing government interests supporting abortion regulations).

280. *See* Roe v. Wade, 410 U.S. 113,154 (1973) ("[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."); *see also Glucksberg*, 521 U.S. at 728 ("[T]he asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests."); *Heller*, 509 U.S. at 319-20 ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.") (internal citations omitted); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) ("The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.").

VI. CONCLUSION

Roe endures—at least for now. Thus, Congress seems to have some meaningful measure of power under Section 5 of the Fourteenth Amendment to adopt preventive and remedial legislation with respect to the constitutional right to choose that *Roe* established and that the *Casey* Court declared to be within Section 1's Due Process Clause. Contrary to *Hellerstedt*, though, *June Medical* explains that courts are not to engage in some rigorous balancing of benefits and burdens when evaluating a due process challenge to an abortion regulation.[281] *Casey*'s undue burden standard, the *June Medical* Court emphasized, leaves states with much more freedom to regulate abortion. As a consequence, Congress's Section 5 power in the abortion context is not quite as hearty as one might have thought during *Hellerstedt*'s reign.

Enacting FOCA or WHPA would be "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[282] Because of *June Medical*, it now is quite apparent that Congress does not have the power under Section 5 to adopt either proposed Act. "Simply put, [WHPA and FOCA are] not designed to identify and counteract state laws likely to be unconstitutional because of their" effect on a woman's ability to choose abortion.[283] Proponents of FOCA and WHPA will need to make significant changes to the bills to squeeze them into Section 5. If they don't want to do that, they must find congressional power elsewhere in the Constitution.

281. *See* June Med. Services L.L.C. v. Russo, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring) (emphasizing that the *Casey* Court did not adopt a balancing test).

282. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

283. *Id.* at 534-35