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The Impact of H.B. 214: A Critical Analysis of the Texas "Rape Insurance" Bill

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COMMENT

THE IMPACT OF H.B. 214: A CRITICAL ANALYSIS OF THE TEXAS “RAPE INSURANCE” BILL

LUCIE ARVALLO*

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I. OVERVIEW

On December 1, 2017, Texas House Bill 214 (H.B. 214) took effect, and as a result, women in Texas will soon be forced to purchase an additional insurance policy to cover an “elective abortion,” even in cases of rape or incest.¹ Due to its lack of exceptions,² the bill is colloquially known as the Texas “rape insurance bill.”³ Under the new restrictions, an insurance policy offered under a health benefit exchange plan in Texas cannot provide coverage for an elective abortion unless:

1. See H. Research Org., Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 5 (“[Texas women] could choose to carry a supplemental insurance plan for elective abortion coverage, if needed, or they could choose a private insurance plan that provided that coverage separately from the issuer’s other health coverage.”); see also Royce Poinsett, *A Recap of the 85th Texas Legislature’s Special Session*, 80 TEX. B.J. 594, 594 (2017) (“HB 214 makes Texas one of eight states to bar private insurance companies from including abortion procedures in base coverage; Texas women will have to buy supplemental policies to cover abortions performed outside of medical emergencies.”).

2. See H. Research Org., Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 5 (“The bill would not include an exception for insurance to cover abortion in the case of rape or incest.”).

3. See Gaby Galvin, *New Texas Law Bans Health Insurers from Covering Abortion in General Plans*, U.S. NEWS & WORLD REP. (Aug. 15, 2017, 2:15 PM), <https://www.usnews.com/news/national-news/articles/2017-08-15/texas-gov-greg-abbott-signs-abortion-coverage-ban-into-law> [https://perma.cc/FJX8-U9LC] (“The new law would require consumers to purchase supplemental coverage, which opponents liken to ‘rape insurance.’”); see also Shannon Najmabadi, *Abbott Signs Bill Restricting Insurance Coverage of Abortion*, TEX. TRIB. (Aug. 15, 2017, 12:00 PM), <https://www.texastribune.org/2017/08/15/abbott-signs-bill-restricting-insurance-coverage-abortion/> [https://perma.cc/AG8Q-B4JN] (“Detractors [of H.B. 214] . . . dubbed the separate insurance now needed to cover non-emergency abortions ‘rape insurance.’”); Alexandra Sifferlin, *Texas Passes Law Significantly Limiting Coverage for Abortion Procedures*, TIME (Aug. 16, 2017, 10:05 AM), <http://time.com/4901883/texas-abortion-law.pdf> [https://perma.cc/XMI2-DHUP] (“Critics have dubbed the law, ‘rape insurance,’ since women will have to anticipate their need for an abortion ahead of time.”).

(1) the *coverage is provided to an enrollee separately* from other health benefit plan coverage offered by the health benefit plan issuer; (2) the *enrollee pays the premium for coverage for elective abortion separately* from, and in addition to, the premium for other health benefit plan coverage, if any; and (3) the *enrollee provides a signature for coverage for elective abortion, separately* and distinct from the signature required for other health benefit plan coverage, if any, provided to the enrollee by the health benefit plan issuer.⁴

Proponents of the bill herald its passage as a win for the economic and religious freedoms of Texans who object to abortion.⁵ These proponents argue more needs to be done to ensure federal funds are not allocated to subsidize abortion services covered by health benefit exchange plans through premiums garnered from the public.⁶ Proponents also claim that, prior to H.B. 214's passage, freedom of choice in insurance coverage was limited for those who oppose abortion, and many were "forced" to buy plans which covered the procedure, even if they would never be interested in obtaining an abortion.⁷

However, opponents of the bill counter that H.B. 214 "could create a situation in which a woman might not have insurance coverage if she and her doctor determined it was necessary to terminate a wanted, planned pregnancy."⁸ For example, in instances where a pregnant woman is diagnosed with a fatal disease and given a prognosis of only a few years, or a serious fetal abnormality develops during pregnancy "that [does] not clearly meet the definition of a 'medical emergency' under state law," the woman would not have insurance coverage for an elective abortion unless she anticipated needing such coverage beforehand and contracted for it

4. TEX. INS. CODE ANN. § 1218.004 (emphasis added).

5. See H. Research Org., Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 5 ("Many Texans do not want to pay for abortion coverage as part of their basic health insurance plan for moral or other reasons."); see also Galvin, *supra* note 3 ("[H.B. 214] will ensure the economic freedom of Texans who oppose the procedure.")

6. See Galvin, *supra* note 3 ("Rep. John Smithee, the lead author of the abortion coverage bill, said abortion opponents should not have to subsidize 'elective' abortions through their insurance plans 'This isn't about who can get an abortion,' Smithee said. 'It is about who is forced to pay for an abortion.'").

7. See H. Research Org., Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 5 ("[H.B. 214] would enhance transparency and help ensure that Texans were not paying for health insurance coverage that they did not want or need."); see also Press Release, Office of the Tex. Governor, Governor Abbott Signs Pro-Life Insurance Reform (Aug. 15, 2017), <https://gov.texas.gov/news/post/governor-abbott-signs-pro-life-insurance-reform> [<http://perma.cc/PPU7-BBY9>] ("[H.B. 214] prohibits insurance providers from forcing Texas policy holders to subsidize elective abortions.").

8. H. Research Org., Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 5.

separately.⁹ In this situation, the mother may never have thought she would need an abortion and did not think to procure separate coverage.¹⁰ Even worse, now that H.B. 214 is in full effect, a woman may even retroactively lose coverage provided under her previous insurance plan unless she contracts for supplemental abortion coverage and pays additional premiums.¹¹ This means a woman, who would have had coverage for an abortion under her insurance policy prior to the implementation of H.B. 214, could have no other option but to pay the entire cost of a surgical abortion shortly after being placed in a dire situation.¹²

While freedom of choice and a right to conscience are undeniably worthy of acknowledgment and protection, the blanket regulation within H.B. 214 obstructs a woman's constitutional right to choose whether to terminate her pregnancy. First, although the bill's drafters claim the provisions are "necessary to prevent those with moral, religious and philosophical objections from having to pay for the procedure,"¹³ the bill fails to accommodate the inevitable cost increase of obtaining insurance coverage for abortion and the slippery slope created by allowing citizens to opt out of generally applicable and nonrestrictive laws based on individual religious beliefs.¹⁴ Further, by failing to make exceptions for abortions procured in cases of rape or incest, exceptions recognized under the Hyde Amendment,¹⁵ the provisions of H.B. 214 impose an additional, unjustified

9. *Id.* See generally TEX. HEALTH & SAFETY CODE ANN. § 171.002(3) (defining "medical emergency" [as] a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed").

10. H. Research Org., Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 5.

11. See *id.* at 4 ("[H.B. 214] would take effect December 1, 2017, and would apply to a qualified health plan offered through a health benefit exchange or a health benefit plan issued on or after April 1, 2018.").

12. See Galvin, *supra* note 3 ("[H.B. 214] will impact people who have coverage and will now be denied services So regardless of how big that number is, people who have health coverage should be able to get the services they need."); see also Eugene Gu, *Texas 'Rape Insurance' Bill is About Economic Violence Against Women*, THE HILL (Aug. 17, 2017, 4:00 PM), <http://thehill.com/blogs/pundits-blog/healthcare/347004-texas-rape-insurance-bill-about-economic-violence-against-women> [<https://perma.cc/7WZ6-7WDF>] ("A surgical abortion can cost up to \$1[,]500 in the first trimester to around \$10,000 in the second trimester.").

13. Najmabadi, *supra* note 3.

14. See H. Research Org., Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 6 (reporting opponents of H.B. 214 argue "[t]he bill would open the door to possible exclusions on other basic health insurance coverage").

15. See, e.g., Act of Nov. 13, 1997, Pub. L. No. 105-78, §§ 509–510, 111 Stat. 1467, 1516 (prohibiting any of "the funds appropriated under this Act" from being "expended for any abortion")

restriction on a woman's access to abortion. Although these restrictions are purported to fulfill a state interest in the conscience use of taxpayer funds,¹⁶ this interest was already being sufficiently met by the protective provisions in the Hyde Amendment and related legislation.¹⁷ Finally, H.B. 214 fails the Supreme Court's three-prong undue burden standard, established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁸ (hereinafter *Planned Parenthood v. Casey*) and its progeny.

This paper will critically examine H.B. 214 and argue that the bill is subject to a constitutional challenge under the Supreme Court's undue burden standard for the following reasons: (1) H.B. 214's purpose, although proclaimed to be an interest in economic and religious freedom from subsidizing abortion, appears in context to be motivated mainly by a political agenda to restrict a woman's access to abortion in Texas; (2) the effect of H.B. 214 is to increase the cost of previously easily attainable and affordable coverage for abortion, thereby serving as an additional deterrent to an already stigmatized and highly traumatic procedure; and (3) even taking the stated purposes at face value, these purposes fail to pass the threshold of veracity—whereby a reviewing court is justified in examining the context of the proclaimed purpose—because there are less restrictive measures in place that adequately protect the purported interests.

or “health benefits coverage that includes coverage of abortion[,]” except “if the pregnancy is the result of an act of rape or incest[,]” or the woman suffers from “a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as a certified physician, place the woman in danger of death unless an abortion is performed”). “One of the quirks of the Hyde amendment is that it is a ‘rider’ to an annual appropriations bill, which means it is not permanent law, but must be renewed by Congress each year.” Julie Rovner, *Abortion Funding Ban Has Evolved Over the Years*, NPR (Dec. 14, 2009, 6:00 AM), <https://www.npr.org/templates/story/story.php?storyId=121402281> [<https://perma.cc/SL9D-J7JR>].

16. See *supra* text accompanying notes 5–7 (describing the purported purpose of H.B. 214).

17. See *supra* note 15 (discussing the nature and substance of the Hyde Amendment).

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

II. THE ABORTION DEBATE IN THE CONTEXT OF INSURANCE COVERAGE

A. *The Growing Trend of Regulating Abortion Coverage in State Insurance Markets*

The topic of abortion is contentious and often polarizing,¹⁹ even in discussions regarding insurance coverage.²⁰ In this debate, Texas has traditionally taken a hard-line pro-life stance regarding abortion, which serves as air in the sails of H.B. 214.²¹

Upon signing H.B. 214, Governor Greg Abbott quickly released a statement heralding the bill as “an important piece of the Governor’s pro-life agenda,” and declaring that he was “proud to sign legislation that ensures no Texan is ever required to pay for a procedure that ends the life of an unborn child.”²² Texas State Representative John Smithee (R-Amarillo), lead author of H.B. 214, expressed similar sentiments, emphasizing the bill was “necessary to prevent those with moral, religious[,] and philosophical objections from having to pay for the procedure.”²³

However, in the midst of Governor Abbott’s celebration, the bill’s passage garnered an opposite response from Democrats and the media alike.²⁴ Texas State Representative Chris Turner (D-Grand Prairie), among the first to speak out against H.B. 214 during its consideration, discussed the unfortunate situation some women may find themselves in now that the bill is law: “Women don’t plan to be raped. Parents don’t plan for their children to be victims of incest Asking a woman or a parent to foresee

19. See MICHAEL S. ARIENS, *AMERICAN CONSTITUTIONAL LAW AND HISTORY* 421 (2d ed. 2016) (“As a political matter, positions hardened by about 1980, when Republicans adopted a pro-life position and Democrats adopted a pro-choice position in their national platforms. . . . [T]he hardening of national positions made the issue of abortion contentious in the nomination and confirmation of federal judges . . .”).

20. See Kaitlyn Schallhorn, *Texas Abortion Bill Criticized for ‘Forcing’ Women to Buy ‘Rape Insurance’*, FOX NEWS (Sept. 26, 2017), <http://www.foxnews.com/politics/2017/08/09/texas-abortion-bill-criticized-for-forcing-women-to-buy-rape-insurance.html> [<https://perma.cc/R9NZ-K6XJ>] (“As a legislator, a lawyer and a mother of two girls, I think the fact that rape insurance is even being discussed by this body is repulsive . . .”).

21. See Kinsey Hasstedt & Adam Sonfield, *At It Again: Texas Continues to Undercut Access to Reproductive Health Care*, GUTTMACHER INST. (July 2017), <https://www.guttmacher.org/article/2017/07/it-again-texas-continues-undercut-access-reproductive-health-care> [<https://perma.cc/8W6J-ZMA5>] (“[Texas] has spent years crippling a once-successful program supporting family planning and related services for low-income residents—all in service of an ideological agenda to shut out and shut down health centers that have any connection to abortion services.”).

22. Press Release, Office of the Tex. Governor, *supra* note 7.

23. Najmabadi, *supra* note 3.

24. See Schallhorn, *supra* note 20 (“Democrats who spoke out against the bill said they did so because it would ‘force’ women to buy insurance in case of a rape.”).

something like that and buy supplemental insurance to cover that horrific possibility is not only ridiculous, it is cruel.”²⁵

This controversy is not unique to Texas.²⁶ Currently, twenty-five states have restricted abortion coverage in plans offered through their health insurance exchanges.²⁷ Limitations on coverage for abortion vary from state to state; however, most seek to restrict abortion coverage to very specific circumstances.²⁸

The wave of state restrictions is largely in response to the passage of the Patient Protection and Affordable Care Act (PPACA).²⁹ Several states challenged the provisions of the PPACA individual mandate by enacting laws prohibiting or severely limiting coverage of abortion in an insurance plan offered under the PPACA.³⁰ Consequently, cases came up in several jurisdictions challenging these restrictive statutes, which often resemble

25. Najmabadi, *supra* note 3.

26. See *Restricting Insurance Coverage of Abortion*, GUTTMACHER INST. (Oct. 1, 2017), <https://www.guttmacher.org/state-policy/explore/restricting-insurance-coverage-abortion> [https://perma.cc/KP6J-BUX5] (“[R]estrictive state abortion insurance policies are not a new phenomenon. Several states already restrict private insurance coverage of abortion; these restrictions also apply to plans sold on the exchanges.”).

27. *Id.*

28. See *id.* (“[Seven] states limit coverage to life endangerment[, and three] states limit coverage to life endangerment and ‘substantial and irreversible impairment of a major bodily function.’”). Furthermore, “[twenty-one] states restrict abortion coverage in insurance plans for public employees. . . . [Ten] states limit coverage to some combination of life endangerment, threat to the woman’s health, rape, incest[,] or fetal abnormality; two] states prohibit any abortion coverage; eighteen] states have more than one of the above restrictions.” *Id.*; see also Thomas J. Molony, Roe, Casey, and Sex-Selection Abortion Bans, 71 WASH. & LEE L. REV. 1089, 1091 (2014) (“Legislative efforts have accelerated recently, with states such as Texas, North Dakota, Kansas, and North Carolina adopting new abortion laws in the face of strong opposition by pro-choice advocates.” (footnotes omitted)).

29. See Lara Cartwright-Smith, *Benefit or Burden? Religious Employers and the Patient Protection and Affordable Care Act’s Contraception Coverage Mandate*, 18 NEXUS 29, 29 (2013) (“One of the most significant and controversial components of the 2010 health reform law, the Patient Protection and Affordable Care Act (ACA), is the preventive services mandate. This mandate requires group health plans and insurance issuers to cover specified preventive services without cost-sharing.”).

30. See, e.g., J. Daniel Seifker, Jr., Comment, *Louisiana’s Abortion Politics and the Constitution: The Attempt to Regulate Health Insurance Benefits in the Wake of National Healthcare Reform*, 13 LOY. J. PUB. INT. L. 253, 254 (2011) (“[T]he Louisiana legislature declared its objective during the summer of 2010 to absolutely prohibit ‘health care plan[s] required to be established’ in Louisiana ‘through an exchange pursuant to federal health reform legislation enacted by the 111th Congress’ from offering coverage for ‘abortion services.’ Through passing Act 941 . . . the legislature stated its intent to chip away at insurance coverage that uniquely affects women—the coverage of abortions. The legislature anchored its reasoning on the ‘longstanding policy of [Louisiana] to protect the right to life of the unborn child from conception by prohibiting abortion impermissible only because of the decisions of the United States Supreme Court.’” (footnotes omitted) (quoting 2010 La. Acts 941)).

H.B. 214.³¹ For example, in 2013 the U.S. District Court of Kansas examined a series of laws passed by the Kansas legislature that sought to regulate abortion services, including a provision prohibiting “insurance companies from covering ‘elective’ abortions in their comprehensive health insurance policies delivered, issued for delivery, amended, or renewed on or after July 1, 2011.”³² Insurance providers in Kansas were only able to offer coverage for elective abortion through a separate, additional policy, which was required to independently and “fully cover the cost of elective abortions per enrollee as determined on an average actuarial basis.”³³

The plaintiff, the American Civil Liberties Union (ACLU) of Kansas and West Missouri, citing several employees who lost coverage under the new law, challenged the provision on multiple grounds, including the undue burden it imposed on a woman’s right to access abortion.³⁴ The defendant moved for summary judgment and argued that “even if the Act imposes a burden, the burden is not undue” because the restriction did not affect “a woman’s ability to make a decision to have an abortion [but rather] her ability to pay the financial cost of procuring an abortion”³⁵ The District Court of Kansas rejected this distinction, noting the restriction placed on insurance coverage “burdens women’s ability to pay using private funds, which is fundamentally different from refusing to provide state funds to women to pay for abortions.”³⁶

31. See Cartwright-Smith, *supra* note 29, at 30 (“As of the time of this writing, forty-three cases have been filed arguing that the ACA’s preventative services mandate is unconstitutional because it requires individuals, and particularly employers, to either violate their religious beliefs or pay a penalty for refusing to do so.”).

32. *ACLU of Kan. & W. Mo. v. Praeger*, 917 F. Supp. 2d 1179, 1182 (D. Kan. 2013). The Kansas statutory provision defined elective abortion as “any abortion for any reason other than to prevent the death of the mother upon whom the abortion is performed.” *Id.* The Act made no exceptions for abortions necessary to prevent severe or permanent harm to the woman’s health to the extent that “such effects would not lead to the death of the mother[,]” even in cases of potential organ failure, disability, or loss of fertility. *Id.* Furthermore, the Act included “no exceptions for the health of the mother, for a nonviable fetus, or for pregnancies that result from rape or incest.” *Id.*

33. *Id.*

34. See *ACLU of Kan. & W. Mo. v. Praeger*, 815 F. Supp. 2d 1204, 1207 (D. Kan. 2011) (“[S]eeking declaratory and injunctive relief to halt enforcement of a Kansas statute which took effect on July 1, 2011. A portion of the statute essentially prohibits insurance companies in Kansas from providing coverage for ‘elective’ abortion services under comprehensive health insurance policies.” (footnote omitted)).

35. *Praeger*, 917 F. Supp. 2d at 1187.

36. *Id.* at 1188; see also *id.* (“The first is an added burden, while the second is only a refusal to remove a burden.”).

The court made several findings, including the recognition of several plaintiffs who have lost “their insurance coverage for abortion because of the Act” or will lose such coverage upon renewal.³⁷ The court further noted that “[s]ome members are unable to purchase a rider to their policy to cover abortions because some insurance companies have not made such riders available.”³⁸ Additionally, the court found that of the members who would lose coverage, some “would consider abortion,” but paying for the procedure without insurance would “impose financial difficulties.”³⁹ Ultimately, the court denied the summary judgment motion because the undisputed facts “create[d] a genuine issue of material fact concerning whether the Act imposes an undue burden on women seeking an insurance-funded abortion in Kansas.”⁴⁰

Compare this with a case out of the District Court of Vermont, where a state insurance statute was challenged because it allegedly infringed on the policyholders genuinely held religious beliefs.⁴¹ This case arose when a Vermont man challenged a provision within his insurance policy which used his premiums to provide coverage for non-federally funded (NFF) abortion services.⁴² Abortion services were subsidized through a separate fund raised from premiums charged in all health insurance policies offered through Vermont’s health benefit exchange.⁴³ The plaintiff argued that

37. *Praeger*, 815 F. Supp. 2d at 1220.

38. *Id.*

39. *Id.*

40. *Praeger*, 917 F. Supp. 2d at 1188. *Cf.* Nat’l Educ. Ass’n of Rhode Island v. Garrahy, 598 F. Supp. 1374, 1384 (D. R.I. 1984), *aff’d*, 779 F.2d 790 (1st Cir. 1986) (holding unconstitutional a state provision prohibiting coverage of abortion procedures in insurance plans, reasoning “the statute imposes a surcharge on women wishing privately to insure against the risk of abortion. The state’s imposition of this surcharge on privately financed insurance is precisely the sort of affirmative ‘obstacle’ which *Maber* and *Harris* stated the government was prohibited from creating”).

41. *Howe v. Burwell*, No. 2:15-cv-6, 2015 WL 4479757, at *15 (D. Vt. July 21, 2015).

42. *Id.* at *2.

43. *Id.* at *1. “Under the ACA, an insurer offering a health insurance plan has a [v]oluntary choice [to provide] coverage of abortion services[.]’ The ACA thus neither requires health insurers to provide coverage for NFF abortion services, nor prohibits them from doing so.” *Id.* at *2 (quoting 42 U.S.C. § 18023(b)(1)). However, “[p]ursuant to the Hyde Amendment, federal funds may not be used to pay for abortion services except in the case of rape, incest, or danger to the life of the mother.” *Id.* Therefore, in compliance with the Hyde Amendment, “a health insurer that chooses to offer coverage for NFF abortion services must segregate a portion of each subscriber’s premium as a ‘separate payment’ to pay for those services . . . and place that money into a separate account” *Id.* (quoting 42 U.S.C. § 18023(b)(2)(D)(ii)(III)). The provider must pay for all NFF abortion services out of this account. *Id.* “Every health insurance plan offered on VHC [the Vermont health benefit exchange program] at this time provides coverage for NFF abortion services.” *Id.* at *3.

forcing him to pay for NFF abortion services was “contrary to his genuinely held religious beliefs, violate[d] his constitutional rights, and fail[ed] to reflect accommodations to which he is entitled” under the Religious Freedom Restoration Act (RFRA).⁴⁴ The defendants countered that “any burden on Plaintiff’s religious beliefs is supported by a compelling governmental interest in providing universal health insurance while complying with the Hyde Amendment . . . [and] that they have chosen the least restrictive means of furthering that interest.”⁴⁵

Because the plaintiff only needed to “plausibly allege that the . . . enforcement of certain provisions of the [PP]ACA imposes substantial burdens on his religious beliefs[,]” the court granted the plaintiff’s request for a declaratory judgment, stating “that [the plaintiff] is entitled to a religious accommodation under RFRA that will permit any health insurer from whom he obtains health insurance coverage to refrain from collecting a separate payment from him”⁴⁶ The court reasoned that the granted relief would “assist in ensuring that Plaintiff will not pay for NFF abortion services in contravention to his genuinely held religious beliefs.”⁴⁷

These disparate findings, and divergent results, suggest that no clear consensus will emerge from lower courts as they continue to litigate the intricacies of providing insurance coverage for abortion. Therefore, even if legislation restricting the coverage of abortion between states cite similar interests and achieve similar ends, challenges to the legislation in court will likely be decided based on that particular state’s proposed interests and the burden it imposes on women seeking an abortion in that state. This is due to the highly individualized nature of each state’s respective health market exchange plans and the specific limitations on insurance coverage of abortion put forth by each state’s legislature. Ultimately, we will likely be left with splintering and inconsistent holdings between various jurisdictions.⁴⁸

44. *Id.* at *1.

45. *Id.* at *15.

46. *Id.*

47. *Id.*

48. For example, under Vermont’s health benefit exchange plan, 100% of the plans offered included a separate payment provision, in which a portion of the insured’s premium payment is allocated to cover NFF abortion procedures. However, in states that offer plans in which a separate payment is not diverted to cover NFF abortion procedures, the challenges that arise, as well as the reasoning of the court, will differ.

B. *The Regulatory Regime of H.B. 214*

Upon enactment of H.B. 214, Texas joined the ranks of twenty-five fellow states in regulating insurance coverage of abortion.⁴⁹ H.B. 214 was first read on July 18, 2017, and signed by both the House and Senate on August 14, 2017.⁵⁰ Governor Greg Abbott signed the bill the very next day.⁵¹ However, H.B. 214 only applies to qualified health plans issued or renewed after April 1, 2018.⁵²

The substance of H.B. 214 serves to amend the Texas Insurance Code by “prohibit[ing] a qualified health plan offered through a health benefit exchange administered by the federal government or created under the Patient Protection and Affordable Care Act from providing coverage for elective abortion.”⁵³ However, in order to receive coverage for an elective abortion, a woman must purchase “supplemental coverage for elective abortion under a health benefit plan other than a qualified health plan offered through a health benefit exchange.”⁵⁴ As previously stated, coverage for elective abortion under a health benefit plan in Texas cannot be provided unless:

- (1) the coverage is provided to an enrollee separately from other health benefit plan coverage offered by the health benefit plan issuer; (2) the enrollee pays the

49. See S. Comm. on Bus. & Commerce, Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 1 (“Texas is one of [twenty-five] states yet to enact legislation to ban abortion coverage offered through the federally mandated Texas health exchange marketplace.”); see also *State Bans on Insurance Coverage of Abortion Endanger Women’s Health and Take Health Benefits Away from Women*, NAT’L WOMEN’S L. CTR. (Apr. 2014), https://www.nwlc.org/wp-content/uploads/2015/08/state_bans_on_abortion_covg_factsheet_4.7.14.pdf [<https://perma.cc/645F-M8DU>] (describing twenty-four states in which health insurance plans providing for abortion have or will be banned).

50. See H.J. of Tex., 85th Leg., 1st C.S. 41, 43–44 (2017) (fourth day) (showing H.B. 214 was first read and referred to committees on July 24, 2017); see also S.J. of Tex., 85th Leg., 1st C.S. 401, 406 (2017) (tenth day) (indicating the Senate signed H.B. 214 on August 14, 2017); H.J. of Tex., 85th Leg., 1st C.S. 447, 520 (2017) (twenty-first day) (indicating the House signed H.B. 214 on August 15, 2017).

51. See H.J. of Tex., 85th Leg., 1st C.S. 523, 577 (2017) (twenty-second day) (indicating the governor signed H.B. 214 on August 15, 2017).

52. See H. Research Org., Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 4 (“The bill would take effect December 1, 2017, and would apply to a qualified health plan offered through a health benefit exchange or a health benefit plan issued on or after April 1, 2018.”).

53. H. Comm. on State Affairs, Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 1; see also TEX. INS. CODE ANN. § 1696.001(1) (defining “[e]lective abortion” as “an abortion . . . other than an abortion performed due to a medical emergency as defined by Section 171.002, Health and Safety Code”); TEX. INS. CODE ANN. § 1696.001(2) (defining “[h]ealth benefit exchange” as an “American Health Benefit Exchange administered by the federal government or created under Section 1311(b) of the Patient Protection and Affordable Care Act”).

54. INS. § 1696.002(b).

premium for coverage for elective abortion separately from, and in addition to, the premium for other health benefit plan coverage, if any; and (3) the *enrollee provides a signature for coverage for elective abortion, separately* and distinct from the signature required for other health benefit plan coverage, if any, provided to the enrollee by the health benefit plan issuer.⁵⁵

Prior to the enactment of H.B. 214, insurance companies in Texas were able to offer coverage for abortion services without requiring an additional policy or premium.⁵⁶ Women in Texas whose health insurance plans currently offer coverage for elective abortion services will lose this coverage unless it is separately contracted for after April 1, 2018.⁵⁷

III. H.B. 214 OUGHT TO BE DECLARED UNCONSTITUTIONAL UNDER THE SUPREME COURT CASE LAW ON REPRODUCTIVE AUTONOMY

By restricting coverage of elective abortions in this manner, the Texas legislature placed a clear and undue burden on a woman's constitutional right to choose whether to terminate her pregnancy. Further, the bill bears an irrational connection between the state interests put forth and the restriction imposed.

55. *Id.* § 1218.004 (emphasis added).

56. *Cf.* Galvin, *supra* note 3 (observing that Texans who had insurance plans which provided coverage for abortion services will no longer have such coverage after the passage of H.B. 214).

57. *See id.* (“[H.B. 214] will impact people who have coverage and will now be denied services . . .”). *See generally* H. Research Org., Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 2–3 (stating H.B. 214 applies to all insurance plans offered by: “an insurance company, a group hospital service corporation, a fraternal benefit society, a stipulated premium company, a reciprocal exchange, a health maintenance organization, an Employee Retirement Income Security Act (ERISA) group health plan that holds a certificate of authority, or a nonprofit health corporation that holds a certificate of authority. It also would apply to: group health coverage made available by a school district; a basic coverage plan under the Texas Employees Group Benefits Act; a basic plan under the Texas Public School Employees Group Benefits Program; a primary care coverage plan under the Texas School Employees Uniform Group Health Coverage Act; basic coverage under the Uniform Insurance Benefits Act for employees of the University of Texas and Texas A&M systems; a small or large employer health benefit plan subject to the Health Insurance Portability and Availability Act (HIPAA) in Insurance Code, ch. 1501; and a consumer choice of benefits plan issued under Insurance Code, ch. 1507.”).

A. *The Constitutional Basis for a Woman's Right to Choose*

1. From the Trimester Framework to the Undue Burden Standard

Today, it is well established that women have a constitutional right to choose whether to terminate a pregnancy.⁵⁸ This right is commonly understood to be embedded in the right to privacy found within the Due Process Clause of the Fourteenth Amendment.⁵⁹ The Supreme Court first established the framework for a woman's right to choose in *Roe v. Wade*,⁶⁰ and the specifics of this right have since been hotly contested and often challenged.⁶¹ Because a woman's right to choose is rooted in and shaped by case law, it is helpful to examine not only the doctrine laid out in *Roe v. Wade*, but also the progeny of cases that followed, which both modified and reaffirmed a woman's right to choose.

On January 22, 1973, when the Supreme Court issued their opinion in *Roe v. Wade*, the Court formally established a constitutional right for a

58. *See* *Roe v. Wade*, 410 U.S. 113, 154 (1973), *modified*, 505 U.S. 833 (1992) (concluding “the right of personal privacy includes the abortion decision,” and further that the right “is not unqualified and must be considered against important state interests in regulation”).

59. The right to privacy is generally found in the penumbra of rights guaranteed by the Fourteenth Amendment. *See* *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (explaining that although a protection or right is not explicitly “mentioned in the Constitution [or] in the Bill of Rights[,]” it may nevertheless still be recognized, and thereby protected, as a constitutional right under the penumbra of the specific guarantees in the Bill of Rights). Thus, the roots of the constitutional right to privacy regarding reproductive matters, such as the right to choose whether to terminate a pregnancy, are not found in the text of the Constitution, but rather in case law. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 834 (1992) (holding the right for a woman to decide to terminate her pregnancy “is a ‘liberty’ protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment”); *see also* *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing “the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”).

60. *Roe v. Wade*, 410 U.S. 113, 154 (1973), *modified*, 505 U.S. 833 (1992).

61. *Compare* Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 471 (2009) (arguing “[s]everal years after *Roe*, the Court approved laws that denied poor women and young women full access to abortion” (footnotes omitted)), and Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J.L. & GENDER 377, 389 (2011) (“Since the 1970s, anti-abortion strategists have pursued a remarkably consistent and successful strategy to attack *Roe v. Wade* . . .”), with Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 262 (1992) (“Constitutional critics of the abortion right [argue] that the privacy analysis *Roe* employed to protect the abortion decision lacks textual support in the Constitution, [question] whether the abortion decision deserves the same protection as other rights of privacy, and [attack] *Roe*’s trimester framework as imposing unreasonable restraints on the state’s interest in protecting potential life.”).

woman to choose whether to terminate her pregnancy before viability of the fetus.⁶² The Court began their analysis by first acknowledging that the State may validly assert legitimate and compelling interests “in safeguarding health, in maintaining medical standards, and in protecting potential life[,]” and further that the right for a woman to choose whether to terminate her pregnancy must be considered against these important state interests.⁶³ In order to provide a foundation for deciding when regulation was appropriate, the Court put forth a trimester framework, under which the compelling point for legislative regulation in the interest of preserving the health of the mother was “approximately the end of the first trimester,”⁶⁴ and the compelling point for regulation made in the interest of the potential life of the unborn fetus was viability.⁶⁵ The trimester framework established in *Roe v. Wade*, established the right for a woman to choose whether or not to terminate her pregnancy before the point of viability as determined by trimester.⁶⁶

In the decades following *Roe v. Wade*, the amount of litigation related to abortion regulations and women’s newfound right to choose increased drastically.⁶⁷ These cases were largely concerned with whether a particular abortion regulation was constitutional in light of *Roe v. Wade*.⁶⁸ Of these

62. *See Roe*, 410 U.S. at 154 (“We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”); *see also* Linda L. Schlueter, *40th Anniversary of Roe v. Wade: Reflections Past, Present and Future*, 40 OHIO N.U. L. REV. 105, 108 (2013) (“[A] woman has a fundamental right under the United States Constitution to decide whether to end her pregnancy.”).

63. *Roe*, 410 U.S. at 153–54.

64. *Id.* at 164.

65. *Id.* at 164–65; *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992) (“[L]egislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable.”). *See generally* *Viable*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining viable as “capable of living . . . outside the womb”).

66. *See* *ARIENS*, *supra* note `19, at 421 (“[T]he right of an individual to decide whether to have an abortion [before the point of viability] . . . belongs to the pregnant woman.”).

67. *See id.* at 422–23 (providing a timeline of seventeen cases regarding regulation of abortion that went before the Supreme Court between 1973–1993).

68. *See* *Doe v. Bolton*, 410 U.S. 179, 201 (1973) (“[W]e hold that the [requirement that an abortion take place in a] JCAH-accredited hospital . . . and the requirements as to approval by the hospital abortion committee, as to confirmation by two independent physicians, and as to residence in Georgia are all violative of the Fourteenth Amendment.”). For additional examples *compare* *Hodgson v. Minnesota*, 497 U.S. 417, 457–58 (1990) (holding a parental notice requirement that the minor receive consent from both parents before abortion unconstitutional, and a 48-hour statutory waiting period for minors constitutional), *Colautti v. Franklin*, 439 U.S. 379, 400 (1979) (holding the imposition of a requirement that a physician determine viability of fetus before performing abortion

decisions, perhaps the most notable is *Planned Parenthood v. Casey*, in which the Supreme Court replaced the trimester framework with the “undue burden” standard.⁶⁹

In *Planned Parenthood v. Casey*, the Supreme Court examined five provisions of the Pennsylvania Abortion Control Act of 1982, including several consent provisions requiring parental consent for minors, spousal consent for married women, and informed consent for all patients.⁷⁰ The Court began their analysis by expressing disappointment that nearly nineteen years after holding the Constitution “protects a woman’s right to terminate her pregnancy in its early stages, that definition of liberty is still questioned.”⁷¹ The Court then reaffirmed the principles of *Roe v. Wade* by recognizing the balance between the “right of the woman to choose to have an abortion before viability[,]” and the State’s legitimate interest “in protecting the health of the woman and the life of the fetus that may become a child.”⁷²

Although the Court began by reaffirming “*Roe*’s essential holding,”⁷³ the Supreme Court ultimately rejected the trimester framework in favor of an undue burden standard.⁷⁴ Under the undue burden standard, a restriction on abortion is unconstitutional “if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.”⁷⁵ The Court provided the following reasoning to justify the shift to the undue burden standard:

unconstitutional), and *Bellotti v. Baird*, 443 U.S. 622, 651 (1979) (holding a parental notice requirement mandating the minor receive consent from both parents or judicial waiver prior to undergoing abortion unconstitutional), with *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 522 (1989) (holding a requirement that physicians use prudent judgment when evaluating the viability of a fetus, prohibitions against performance of abortion in public facilities or by public employees, and prohibitions on the use of public funds for abortion counseling, constitutional), and *Harris v. McRae*, 448 U.S. 297, 326–27 (1980) (holding a mandatory prohibition against the use of federal funds to subsidize abortions sought by indigent women, even when necessary to preserve the health of the mother, constitutional).

69. *Casey*, 505 U.S. at 878.

70. *Id.* at 844.

71. *Id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

72. *Id.* at 846.

73. *Id.*

74. *Id.* at 878.

75. *Id.* The shift from the trimester framework to the undue burden standard did more than change how courts review abortion restrictions. By applying an “undue burden intermediate test,” rather than the trimester framework created under a strict scrutiny standard, “the Court seems to have demoted the right to make decisions concerning abortion . . . to quasi-fundamental status, down from its pure *Roe*-era position as a fundamental right.” Roy G. Spece, Jr., *The Purpose Prong of Casey’s Undue Burden Test and its Impact on the Constitutionality of Abortion Insurance Restrictions in the Affordable Care Act or its Progeny*, 33 WHITTIER L. REV. 77, 79 (2011). But see Julie F. Kowitz, *Not Your Garden Variety Tort*

[T]he means chosen by the State to further [their] interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.⁷⁶

Applying this standard, the Court found all but the spousal consent provisions to be constitutional.⁷⁷ The Court reasoned that while the informed consent provision may inevitably make obtaining an abortion more expensive and less convenient, only the spousal consent requirement would likely prevent a significant number of women from obtaining an abortion due to abuse or disapproval from their husbands.⁷⁸

2. Expanding the Undue Burden Standard: Two Prongs Become Three

The undue burden standard put forth in *Planned Parenthood v. Casey* is the predominant test used today to determine the constitutionality of restrictions on abortion.⁷⁹ The standard is understood as having two prongs, either of which is sufficient to render a restriction unconstitutional.⁸⁰ The first prong is known as the *purpose* prong, while the latter is known as the *effect* prong.⁸¹ Under these prongs, a statute will be found unconstitutional if either (1) its *purpose* "is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains

Reform; Statutes Barring Claims for Wrongful Life and Wrongful Birth are Unconstitutional under the Purpose Prong of Planned Parenthood v. Casey, 61 BROOK. L. REV. 235, 238 (1995) ("At the same time as the *Casey* plurality lowered the constitutional standard of review for laws that affect the right to choose abortion, *Casey* expanded the scope of legislation that would be subject to that review.").

76. *Casey*, 505 U.S. at 877.

77. *Id.* at 900.

78. *Id.* at 901.

79. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) ("Before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy. It also may not impose upon this right an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" (citations omitted) (quoting *Casey*, 505 U.S. at 878–79)).

80. *See Casey*, 505 U.S. at 878 ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.").

81. *See Spece, supra* note 75, at 101 ("[T]he purpose prong is itself [a] standard of review, which flatly proscribes government actions that have an improper purpose. []The same is true concerning its twin standard—the effects prong of the undue burden test. []").

viability” or (2) its *effect* places a “substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”⁸² This standard is meant to prevent a state from outright prohibiting abortion, or implementing procedures which substantially impair a woman’s ability to make the decision to terminate her pregnancy;⁸³ however, “[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.”⁸⁴

Recently, the Supreme Court expanded upon the undue burden standard in *Whole Woman’s Health v. Hellerstedt*.⁸⁵ In *Hellerstedt*, the Court examined two provisions of Texas House Bill 2 (H.B. 2) being challenged by a small group of Texas abortion providers.⁸⁶ The first provision, known as the “admitting-privileges requirement,” required any “physician performing or inducing an abortion” to have “active admitting privileges at a hospital . . . located not further than [thirty] miles from the” abortion facility.⁸⁷ The second provision, known as the “surgical-center requirement,” mandated that an abortion facility “meet the minimum standards for ambulatory surgical centers.”⁸⁸

The Court began their examination of the constitutionality of these provisions by adding an additional threshold test to the undue burden standard, requiring the examining court to “interrogate the veracity of healthcare claims underlying abortion restrictions[,]” *before* balancing “the purported health benefits of an abortion regulation against the burdens placed upon women’s access to abortion-related healthcare.”⁸⁹ Utilizing

82. *Casey*, 505 U.S. at 878.

83. *Gonzales*, 550 U.S. at 146.

84. *Casey*, 505 U.S. at 877. Therefore, a state is allowed to promote childbirth over abortion as a matter of policy, but it may not implement arbitrary restrictions on the practice in pursuit of this agenda. *See Webster v. Reprod. Health Serv.*, 492 U.S. 490, 511 (1989) (“[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth . . .” (quoting *Poelker v. Doe*, 432 U.S. 519, 521 (1977))); *see also Maher v. Roe*, 432 U.S. 464, 474 (1977) (“[The right to choose whether or not to terminate a pregnancy] implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.”).

85. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

86. *Id.* at 2300.

87. *Id.* (quoting TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)).

88. *Id.* at 2314.

89. Yvonne Lindgren, *The Doctor Requirement: Griswold, Privacy, and At-Home Reproductive Care*, 32 CONST. COMMENT. 341, 353 (2017).

this additional threshold, the Court ultimately found the requirements at issue “place[d] a substantial obstacle in the path of women seeking a previability abortion, constitute[d] an undue burden on abortion access, and thus violate[d] the Constitution.”⁹⁰

The Court reasoned that because (1) the State failed to provide an evidentiary basis to substantiate its claim that the proposed restrictions protected women’s health, and (2) there was a “virtual absence of any health benefit” perceivable on the face of the regulations, H.B. 2 placed an unjustifiable, and thus undue, burden on abortion access.⁹¹ The Court found especially compelling the detrimental effect on women’s access to abortion-related healthcare the restrictions imposed and ultimately failed to find the justifications put forth by the State compelling enough to warrant such a detriment on a woman’s right to choose.⁹²

The recent holding in *Hellerstedt* suggests an expansion to the undue burden standard through the addition of the threshold of veracity. Following the precedent put forth by this holding, it seems a statute can be found to be unduly burdensome, and thus unconstitutional, if it fails to satisfy either the *purpose* or *effect* prong of the undue burden standard, *or*, if upon “interrogat[ing] the veracity of [the] healthcare claims underlying abortion restrictions[,]” the examining court finds the regulation lacks any health benefit and is a significant detriment to the accessibility of abortion.⁹³

B. H.B. 214 Universally Fails the Undue Burden Standard

As it stands, H.B. 214 is yet to be challenged (likely because the provision is still so new).⁹⁴ However, if and when such a case arises, the reviewing court will almost certainly apply the undue burden standard because the undue burden standard applies “whenever there is no per se impermissible intrusion, but there is a substantial risk that a government abortion restriction will trench on the woman’s quasi-fundamental right to an

90. *Hellerstedt*, 136 S. Ct. at 2298.

91. *Id.*

92. *See id.* at 2299 (“[The] evidence, along with the absence of any contrary evidence, supports the District Court’s conclusions, including its ultimate legal conclusion that requirement is not necessary.”); *see also* Dania Y. Pulido, Comment, *When Giving Birth Becomes a Liability: The Intersection of Reproductive Oppression and the Motherhood Wage Penalty for Latinas in Texas*, 19 SCHOLAR 111, 115 (2016) (“[I]n many instances, H.B. 2 required women to travel over 100 miles to procure an abortion.”).

93. Lindgren, *supra* note 89, at 352–53.

94. *See* Galvin, *supra* note 3 (stating “abortion activists were weighing their options as to whether they should challenge the law in court”).

abortion.”⁹⁵ H.B. 214 provides the perfect avenue for Texas courts to again become embroiled in a litigation battle over the undue burden standard and abortion restrictions; however, in the event such a case is filed, it is likely H.B. 214 would succumb to the same fate as its predecessor, H.B. 2.⁹⁶

1. H.B. 214 Is the Most Recent Attempt by the Texas Legislature to Systematically Advance a Pro-Life Political Agenda

Although application of the undue burden standard appears simple, it can be more difficult than initially thought to ascertain the true purpose of any legislative measure,⁹⁷ much less a loaded legislative measure that pertains to abortion restrictions.⁹⁸ Under the *purpose* prong of the undue burden standard, the reviewing court may look to the following factors in ascertaining the purpose of the legislature:

[The] passing [of] a limitation that is admitted to be unconstitutional . . . ; legislative history . . . ; the language of the enactment; a bill’s social and historical context; “other legislation concerning the same subject matter;” the creation of substantial, likely insurmountable obstacles to fulfillment of the right involved; and . . . the failure to use less restrictive alternatives or the enactment of patently ineffective legislation⁹⁹

For a purpose to be improper, it must “place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.”¹⁰⁰ Furthermore, the “improper purpose does not have to be either the sole or predominant purpose, but only a substantial causative factor.”¹⁰¹

95. Spece, *supra* note 75, at 98.

96. See *Hellerstedt*, 136 S. Ct. at 2298 (finding H.B. 2 placed a substantial obstacle in a woman’s path to abortion and consequently holding the provision to be unconstitutional).

97. Spece, *supra* note 75, at 99.

98. See *supra* text accompanying notes 5–7 (describing the purported purpose of H.B. 214).

99. Spece, *supra* note 75, at 99; see also *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (“[D]iscriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of[]’ . . . its adverse effects” (quoting *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979))); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996) (“[A] forbidden purpose may be gleaned both from the structure of the legislation and from examination of the process that led to its enactment.” (quoting *Armstrong v. Mazurek*, 94 F.3d 566, 567 (9th Cir. 1996))); Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2030 (1994) (“In order to satisfy the purpose prong, the state cannot seek to hinder a woman’s choice”).

100. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992).

101. Spece, *supra* note 75, at 100.

According to the Texas Legislature, H.B. 214 was passed in the interest of ensuring “taxpayer funds are not used to cover the costs associated with health benefit plans that cover elective abortions and to provide choices for private insurance marketplace consumers who prefer not to purchase a plan that covers elective abortions.”¹⁰² Additionally, in the same legislative session in which H.B. 214 passed, the Texas legislature considered several other provisions regarding abortion.¹⁰³ Two measures other than H.B. 214 passed both the house and senate: the first (H.B. 13) “requires health care providers to report more details about abortion complications[.]” while the second (H.B. 215) “requires doctors to report more details on whether minors receiving abortions did so as a result of parental consent or a judicial bypass.”¹⁰⁴ The third and final measure regarding abortion sought to “broaden the existing state and federal bans on abortion funding by prohibiting Texas governmental entities from entering into any contractual relationships with clinics affiliated with abortion providers[.]” this provision passed in the senate, but did not pass in the house.¹⁰⁵

Furthermore, Governor Greg Abbott is not shy in expressing his openly pro-life stance. As previously mentioned, shortly after the passing of H.B. 214, Governor Greg Abbott released a statement characterizing the bill as “an important piece of [his] pro-life agenda,” and as something he was proud to sign because of the bill’s purported ability to “protect innocent life” and ensure “no Texan is ever required to pay for a procedure that ends the life of an unborn child[.]”¹⁰⁶ Incidentally, H.B. 214 was filed on July 24, 2017,¹⁰⁷ only one year after the Supreme Court struck down Texas H.B. 2 as unconstitutional because the provisions contained therein “place[d] a substantial obstacle in the path of women seeking a previability abortion, [and] constitute[d] an undue burden on abortion access[.]”¹⁰⁸

102. H. Comm. on State Affairs, Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 1.

103. See Poinsett, *supra* note 1, at 594–95 (summarizing all enacted legislation of the eighty-fifth Texas Legislature’s special session, including four abortion provisions, three of which passed both the House and Senate).

104. *Id.*

105. *Id.* at 595.

106. Press Release, Office of the Tex. Governor, *supra* note 7.

107. See generally H.J. of Tex., 85th Leg., 1st C.S. 41, 43–44 (2017) (providing a comprehensive list of bills, including H.B. 214, that were “laid before the house, read [for the] first time, and referred to committees” on July 24, 2017).

108. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2298 (2016); see also Galvin, *supra* note 3 (“In the regular session, the Texas Legislature passed a sweeping anti-abortion bill, just one year after the U.S. Supreme Court overturned a law that had forced more than half of the state’s abortion clinics to close.”).

While any of the factors above may not alone rise to the level of an improper purpose, when taken together in context, they create a pattern on the part of the Texas Legislature to systematically impede the ability of Texas women to seek and have access to abortion. Although proponents of the bill cite worthy motives (i.e., religious beliefs) in seeking to avoid contributing to abortion procedures, “there remains a clear, unitary, and [indistinguishable] intent to restrict abortion.”¹⁰⁹

Furthermore, although the bill and its proponents formally list an interest in ensuring “taxpayer funds are not used to cover the costs associated with health benefit plans that cover elective abortions[.]”¹¹⁰ it is clear from the myriad of other abortion restrictions released in a short period of time, as well as the statements promulgated by the Governor himself, that a pro-life political agenda serves as a substantive causative factor in creating these legislative measures.

However, under the *purpose* prong, it is not enough for the bill merely to have an improper purpose; the purpose must also place a significant obstacle in the path of a woman seeking an abortion.¹¹¹ Due to the pro-life agenda championed by the Texas Governor and Legislature, Texas women have had to filibuster, protest, and litigate their way to a right to choose that is more than illusory.¹¹² Now, in the interest of “economic freedom,” women in Texas will have to make separate contractual arrangements and additional payments for insurance coverage that was once affordable and easily attainable.¹¹³ Moreover, the bill will disproportionately affect low-income women in Texas who rely on public insurance programs (which, as mentioned above, are undoubtedly covered by the prohibition), and struggle to maintain the coverage they have, much less procure additional coverage

109. Spece, *supra* note 75, at 102.

110. H. Comm. on State Affairs, Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 1.

111. *See* Planned Parenthood of Se. Pa v. Casey, 505 U.S. 833, 878 (1992) (“An 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 . . .”).

112. *See, e.g., Hellerstedt*, 136 S. Ct. at 2298 (adjudicating H.B. 2, a Texas statute imposing two distinct regulations on abortion access and procedures, to be unconstitutional); *see also* Harriet Sinclair, *Texas Abortion Bill Makes Woman Buy ‘Rape Insurance,’ Critics Say*, NEWSWEEK (Aug. 10, 2017, 6:24 PM), <http://www.newsweek.com/texas-votes-abortion-bill-critics-say-would-make-woman-buy-rape-insurance-649548> [<https://perma.cc/M6F9-49N7>] (depicting a photo of women protesting for their right to choose).

113. *See* H. Research Org., Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 5 (discussing how H.B. 214 might lead some women who would need to seek an abortion in extenuating circumstances, such as an illness or medical emergency, to discover that their insurance would not cover the costs because such coverage was not contracted and paid for separately).

at a higher or additional premium.¹¹⁴ H.B. 214 serves as merely the most recent in a long line of Texas abortion restrictions that stigmatize and seek to make an already agonizing, expensive procedure unattainable.

Because H.B. 214 is justified by an improper purpose, even if not the sole purpose, and places a significant obstacle in the way of Texas women seeking abortion, it is likely that, when reviewed in context, H.B. 214 will fail to survive a constitutional challenge under the *purpose* prong of the undue burden standard.

2. H.B. 214 Places a Substantial Obstacle in the Path of a Woman Seeking Abortion by Raising and Shifting Cost

The *effect* prong of the undue burden standard “is fact-sensitive [and] requires a case-by-case investigation into all of the effects of a regulation[.]”¹¹⁵ Furthermore, the effects under examination “must be calculated from the perspective of those women for whom the regulation is a restriction[.]”¹¹⁶

In Texas, approximately “53% of all pregnancies are unintended.”¹¹⁷ Furthermore, a majority of the women seeking abortions in Texas are young and low-income.¹¹⁸ Additionally, “[a]bortion patients were less likely to have no health insurance coverage in 2014 than in 2008 (28% vs. 34%), likely because of the Affordable Care Act.”¹¹⁹ “[35%] of patients had

114. See *id.* at 6 (“H.B. 214 disproportionately would affect low-income women who cannot afford to purchase supplemental insurance in addition to their basic health insurance plan. Increasing the financial burden on women could incentivize them to seek unsafe abortion methods, which could endanger their lives.”).

115. Metzger, *supra* note 99, at 2030.

116. *Id.*

117. Mariel Puryear, Comment, *Hardline Ideology Stymies Real Results: Texas Lawmakers' Battle Over Family Planning Leaves Texas Women Unprotected*, 15 SCHOLAR 829, 831 (2013); see also *Induced Abortion in the United States*, GUTTMACHER INST. (Jan. 2018), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states> [<https://perma.cc/D9VD-JJ6A>] (indicating that in 2014, “[19%] of pregnancies (excluding miscarriages) . . . [in the United States] ended in abortion”).

118. “In 2014, the majority of abortion patients (60%) were in their [twenties], and the second-largest age-group was in their [thirties] (25%).” Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, GUTTMACHER INST. (May 2016), <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014> [<https://perma.cc/JE38-KX6H>]. “In 2014, three-fourths of abortion patients were low income—49% living at less than the federal poverty level, and 26% living at 100%–199% of the poverty level.” *Id.* Additionally, and almost ironically in this context, a majority of the “abortion patients reported a religious affiliation.” *Id.*

119. *Id.*; see also Neil Barton, Note, *Warm Lessons from Our Frozen Neighbors: Reviewing the PPACA's Effectiveness Through a Comparative Analysis with the Canada Health Act*, 55 U. LOUISVILLE L. REV. 355, 372–75 (2017) (explaining the PPACA “sought to improve the availability of health insurance for all

Medicaid coverage, 31% had private insurance[,] and 3% each had either insurance through HealthCare.gov or a different type of insurance.”¹²⁰

Because of the demographics of abortion patients in Texas, a tangible and immediate effect of H.B. 214 will be an increased cost of abortion services. The new premiums for coverage for an abortion, other than those performed to save the life of the mother, will be calculated so that an enrollee’s premium “fully cover[s] the estimated cost of elective abortion per enrollee[.]”¹²¹ Furthermore, “[w]hen calculating the premium, the issuer [may] not take into account any cost savings in other health benefit plan coverage that was estimated to result from coverage for elective abortion[.]” or “discount an enrollee’s premium[,] or reduce an enrollee’s premium on the basis that the enrollee had health benefit plan coverage for elective abortion.”¹²² This will most likely affect the women on Medicaid the fastest, as it was the “second-most-common method of payment” for abortion procedures in 2014 and has likely increased since the last time the data was made available.¹²³ However, even women with private insurance are not guaranteed to maintain their existing coverage, and they will still have to pay an additional premium and contract separately for abortion coverage in accordance with H.B. 214.¹²⁴

Women, especially those in low-income communities, are already in positions where seeking an abortion can prove to be debilitatingly expensive.¹²⁵ By further prohibiting coverage of an elective abortion, even

Americans” in addition to reducing “the price of insurance through marketplace competition” and providing “an affordable health insurance option for individuals whose income is below 200% of the poverty line”).

120. Jerman, *supra* note 118.

121. H. Research Org., Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 4.

122. *Id.*

123. Jerman, *supra* note 118.

124. See H. Research Org., Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 5 (stating “Texans could choose to carry a supplemental insurance plan for elective abortion coverage, if needed, or they could choose a private insurance plan that provided that coverage separately from the issuer’s other health coverage[.]” but not guaranteeing whether those with existing private insurance will be offered a separate plan or whether such plans will be cost effective or readily attainable).

125. See Gu, *supra* note 12 (“A surgical abortion can cost up to \$1[,500 in the first trimester to around \$10,000 in the second trimester.”); see also *Research Brief: The Impact of Medicaid Coverage Restrictions on Abortion*, IBIS REPROD. HEALTH 2 (Nov. 2015), <https://ibisreproductivehealth.org/sites/default/files/files/publications/ResearchBriefImpactofMedicaidRestrictions.pdf> [<https://perma.cc/DNW4-Y35F>] (“Explaining what it took for her to gather the money for her abortion, one [twenty-seven]-year[-]old, low-income, [b]lack woman said, ‘It was hard, it took me three weeks. . . . I don’t have a strong family support where I could borrow money from. . . . The payday loan [I took out for my abortion] wiped out my entire account. . . . I got a three-day notice on my apartment door . . . when I

in the case of rape or incest, and by only making allowances for medical emergencies as strictly defined by statute, the Texas Legislature imposed an undue burden on a woman's constitutional right to choose by creating situations in which the choice is merely illusory.

Although the government has no affirmative duty to provide abortion funding,¹²⁶ H.B. 214 regulates abortion insurance as opposed to the abortion procedure itself.¹²⁷ Requiring women to affirmatively opt in to insurance coverage for abortion could create "substantial anxiety or mental anguish [in women] even though they never turn out to seek an abortion[.]" and further deter them from seeking coverage out of fear or stigma, while others "will have lost or never gained insurance[.]" leaving them without meaningful access to abortion as mandated by their constitutionally protected right.¹²⁸

Because H.B. 214 has the effect of making an already cost-prohibitive procedure essentially unattainable both for those who cannot afford it and for those who do not foresee the need for such coverage until it is too late,

became evicted I lived in a shelter temporarily." (alteration in original)); *id.* (describing the following experience of a young, white woman living on a low income and the hardship she encountered in raising money for her abortion: "I saved as much money as I could with still paying my rent and water and electric and car payment and child support and everything else that I have to pay. I ended up being late on my electric bill. . . . You can't have groceries when you don't have electricity. . . . Little things like that that you take for granted until you don't have electricity, [you have] ice[-]cold showers and no groceries in the fridge."). See generally *Abortion Patients are Disproportionately Poor and Low Income*, GUTTMACHER INST. (May 9, 2016), <https://www.guttmacher.org/infographic/2016/abortion-patients-are-disproportionately-poor-and-low-income> [<https://perma.cc/CSQ4-YGVJ>] ("Nearly half of abortion patients in the United States are poor and another 26% are low income.").

126. See Aditi Gowri, *Reproduction, Rights and Public Policy: A Framework for Assessment*, 35 TEX. INT'L L.J. 13, 14 (2000) ("For instance, U.S. Supreme Court decisions hold that a pregnant woman has a (negative) right to seek out abortion but no (positive) right to receive state assistance or the use of state funds in doing so.").

127. See *supra* Section II.B (describing the regulatory regime of H.B. 214).

128. Roy G. Spece, Jr., *Constitutional Attacks Against the Patient Protection and Affordable Care Act's "Mandating" that Certain Individuals and Employers Purchase Insurance While Restricting Purchase by Undocumented Immigrants and Women Seeking Abortion Coverage*, 38 N. KY. L. REV. 489, 566 (2011). *But see id.* at 565 (opining the Court could conclude "the government has not intruded upon the right to choose whether to have an abortion because any inability still exists because of the woman's lack of sufficient wealth to directly purchase an abortion [or obtain supplemental coverage]"). See generally Paula Abrams, *Abortion Stigma: The Legacy of Casey*, 35 WOMEN'S RTS. L. REP. 299, 300 (2014) ("A growing body of research attests to a culture of stigma surrounding abortion. Abortion stigma may negatively impact a woman's experience of abortion. . . . [A] culture of deviancy has developed around abortion. In many states abortion is subject to regulations not imposed on other medical procedures." (footnotes omitted)).

the bill is unlikely to survive scrutiny under the *effect* prong of the undue burden standard.

3. H.B. 214 Fails the Threshold of Veracity Because It Does Not Regulate in the Interest of Health

Evaluating courts are now authorized to evaluate “the veracity of healthcare claims underlying abortion restrictions” *before* balancing “the purported health benefits of an abortion regulation against the burdens placed upon women’s access to abortion-related healthcare.”¹²⁹ In *Whole Woman’s Health v. Hellerstedt*, the Court found the claims underlying the challenged regulation lacked veracity where the State of Texas claimed H.B. 2 was enacted to protect women’s health, but further examination revealed a “virtual absence of any health benefit” resulting from the bill’s enactment.¹³⁰ The Court thus examined not only the purpose and effect of the regulation in determining whether it imposed an undue burden but also the veracity of the factual basis underlying the regulation’s purported purpose.¹³¹

As discussed above, the stated purpose of H.B. 214 is to ensure “taxpayer funds are not used to cover the costs associated with health benefit plans that cover elective abortions and to provide choices for private insurance marketplace consumers who prefer not to purchase a plan that covers elective abortions.”¹³² As opposed to H.B. 2, the drafters of H.B. 214 do not claim that the underlying purpose of the bill is healthcare related.¹³³ However, it is likely that the Court would allow factual consideration of the purpose provided, regardless of what that purpose may be, because the “Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”¹³⁴ Therefore, taking the stated

129. Lindgren, *supra* note 89, at 353.

130. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2298 (2016).

131. *Cf. id.* at 2311 (explaining that although the stated purpose behind the admitting-privilege requirement “is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure[,]” the evidence showed “no significant health-related problem for the new law to cure”).

132. H. Comm. on State Affairs, Bill Analysis, Tex. H.B. 214, 85th Leg., 1st C.S. (2017), at 1.

133. *See* Najmabadi, *supra* note 3 (stating proponents of H.B. 214 claim the bill is “necessary to prevent those with moral, religious[,] and philosophical objections from having to pay for the procedure”).

134. *Hellerstedt*, 136 S. Ct. at 2310 (citing *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)); *see also id.* at 2309 (“The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.” (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887–98 (1992))).

purpose at face value, it is unlikely that H.B. 214 would survive the threshold of veracity.

Although the drafters of H.B. 214 claim to be concerned with the use of taxpayer funds for abortion, the bill does little more to protect taxpayers than legislation already in place. For example, the PPACA, enacted on March 23, 2010 and later amended by the Health Care and Education Reconciliation Act, includes provisions allowing states to “enact legislation prohibiting qualified health plans operating in their Exchanges from offering abortion coverage.”¹³⁵

Furthermore, in addition to and in conjunction with the PPACA, the Hyde Amendment and the RFRA provide specific restrictions on the use of public funding for abortion services.¹³⁶ These restrictions include a prohibition on the use of federal funds to subsidize abortion procedures, except in the case of rape, incest, or life endangerment (exceptions not found in H.B. 214).¹³⁷

Additionally, the PPACA itself provided full exemptions from the Health and Human Services mandates requiring abortifacient and contraceptive coverage for a limited number of organizations based on the following criterion: “(1) The inculcation of religious values is the purpose of the organization; (2) The organization primarily employs persons who share the religious beliefs of the organization; (3) The organization serves primarily persons who share the religious tenets of the organization; [and] (4) The

135. Wilton B. Hyman, *An Explanation of the Patient Protection and Affordable Care Act*, 38 OHIO N.U. L. REV. 579, 603 (2012). After the passage of the PPACA, states were required “to create Health Insurance Exchanges that [offer] competing health insurance to individuals and small businesses[.]” *Id.* at 580. Insurers are still able to offer coverage in the non-exchange individual market, “but only those plans purchased through the exchange are eligible for federal subsidies.” Elizabeth Kukura, *Giving Birth Under the ACA: Analyzing the Use of Law As a Tool to Improve Health Care*, 94 NEB. L. REV. 799, 821–22 (2016). Essential minimum coverage requirements of each plan offered in the exchange are determined by the HHS Secretary and include the following: “ambulatory services, emergency care, hospitalization, maternity and newborn care, mental health and substance abuse, prescription drugs, rehabilitative and habilitative services, lab services, preventative and wellness services and chronic disease management, and pediatric care.” Hyman, *supra*, at 600.

136. See Maria Ioanna Pantelaki & Chloe White, *Health Care: Access After Health Care Reform*, 15 GEO. J. GENDER & L. 95, 118 (2014) (illustrating the passing of the PPACA required numerous concessions on both sides of the aisle, including “guarantees regarding abortion . . . offered to anti-abortion Democrats” for the act to pass in the House and an executive order “signed by President Obama directly after the law’s enactment” which sought to reaffirm the PPACA’s application of the Hyde Amendment); see also *supra* note 15 (discussing the nature and substance of the Hyde Amendment).

137. See *supra* note 2 and accompanying text (describing H.B. 214’s lack of exceptions).

organization is a nonprofit organization”¹³⁸ These exemptions were later expanded, in part, to for-profit organizations that were rooted in religious values from their very inculcation.¹³⁹

These restrictions, which were in place well before the enactment of H.B. 214, adequately protect against the use of taxpayer funds for abortion services. If these protections are still insufficient, the ruling in *Burwell v. Hobby Lobby*¹⁴⁰ provides a less restrictive framework for the Texas Legislature to utilize in creating exemptions for individuals that resemble those laid out by the Court for the contraceptive mandate.¹⁴¹ Rather than having those opposed to abortion affirmatively opt out of coverage for such a procedure or meet exemption requirements, the Texas Legislature unilaterally placed the duty upon all of the women in Texas who are sexually active, or a potential victim of sexual assault or incest, to procure and pay for additional insurance to cover the possibility of abortion.¹⁴² If the factual basis for H.B. 214 is additional protection for taxpayers against the use of public funds for abortion, there are less restrictive methods already in place to serve that need, and thus the veracity of that claim does not hold up.

Alternatively, if the drafters of H.B. 214 claim the underlying purpose is religious, the Hyde Amendments and the RFRA provide existing protections to serve this purpose.¹⁴³ And if not, who is to say what other exemptions may need to be put in place to accommodate specific religious beliefs? Would Christians be able to opt out of tax premiums used to subsidize the military and thus the killing of other human beings? Would

138. *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 414–15 (W.D. Pa. 2013).

139. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (finding “[t]he contraceptive mandate, as applied to closely held corporations, violates RFRA[,]” and allowing exemptions to extend to the for-profit corporation Hobby Lobby Stores, Inc.).

140. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

141. *See id.* at 2775 (allowing exemptions to the PPACA’s contraceptive mandate for “closely held” religious organizations to extend to for-profit corporation’s such as Hobby Lobby Stores, Inc.).

142. *See supra* Section II.B (describing the regulatory regime of H.B. 214).

143. *See Hunt v. Hunt*, 648 A.2d 843, 850 (Vt. 1994) (“In response to *Smith*’s ‘virtual elimination’ of the mandate that government justify burdening religious practice through neutral laws, the United States Congress passed the Religious Freedom Restoration Act of 1993, explicitly overruling *Smith*. . . . The Act provides that government ‘shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,’ unless the government demonstrates that burdening the person (1) furthers a compelling governmental interest, and (2) advances that interest in the least restrictive means possible.” (citation omitted) (quoting Religious Freedom Restoration Act, Pub. L. No. 103–141, § 3, 107 Stat. 1488, 1488–89 (1993) (codified at 42 U.S.C. § 2000bb-1)); *see also* Religious Freedom Restoration Act, § 3, 107 Stat. at 1488–89 (defining the appropriate level of judicial scrutiny for courts reviewing laws that burden a person’s free exercise of religion).

Christian Scientists be able to choose where to allocate their premiums so that they did not support vaccinations or blood transfusions? Would Muslims be allowed to stop their insurance premiums from subsidizing medical research incorporating pork or other forbidden substances? The simple answer is of course not.¹⁴⁴ H.B. 214 fails to provide a purpose that can withstand factual scrutiny, and as such is unlikely to pass the threshold of veracity under the modified undue burden standard.

IV. CONCLUSION

“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”¹⁴⁵ The Texas Legislature is simply not in the best position to understand the burdens reproductive issues present.¹⁴⁶ The person in the best position to balance the difficult factors inherent in deciding whether to terminate a pregnancy is the woman deciding to terminate her pregnancy, and it is up to the courts to place her in the best position to make that decision.

H.B. 214 places an undue burden on this right in the following ways. First, while the bill purports to be motivated by economic and religious freedom for taxpayers, the social and political climate of Texas coupled with myriads of abortion regulations proposed in this and recent legislative

144. Justice Ginsburg posed a similar argument in her dissent for *Burwell v. Hobby Lobby*: “Would the exemption the Court holds RFRA demand for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?” *Burwell*, 134 S. Ct. at 2805 (J. Ginsburg, dissenting).

145. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (citing ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN’S CHOICE* 109, 133, n.7 (rev. ed. 1190)); see also Erin Nelson, *Autonomy, Equality, and Access to Sexual and Reproductive Health Care*, 54 *ALTA. L. REV.* 707, 708 (2017) (discussing the significance of reproductive health care in helping women have control and autonomy over their lives).

146. Although Texas women make up half of the state’s population, women “only hold [20%] of the seats” in the Texas Legislature; and in addition to being predominately male, a majority of the legislature hold postgraduate degrees and are 45 years old or more. Alexa Ura & Jolie McCullough, *Meet Your 84th Texas Legislature: White. Male. Middle-Aged. Christian.*, *TEX. TRIB.* (Jan. 14, 2015, 6:00 AM), <https://www.texastribune.org/2015/01/14/demographics-2015-texas-legislature/> [https://perma.cc/7M3A-2L4Q]. In contrast, “In 2014, the majority of abortion patients (60%) were in their [twenties], and the second-largest age-group was in their [thirties] (25%).” Jerman, *supra* note 118. Therefore, not only are Texas legislators exponentially less likely to encounter the need for an abortion, they are even less likely to need financial assistance to obtain one.

sessions—some of which were adjudicated to be unconstitutional—suggests that the bill’s true purpose is to restrict access to abortion based on Texas’s traditionally pro-life stance. Second, the effect of the bill constitutes a significant economic and procedural burden for Texas women seeking an abortion, especially those in low income communities. And third, the veracity of the bill’s underlying purpose, whether it be economic or religious freedom, does not satisfy the standard of scrutiny put forth by the Supreme Court. There are many federal restrictions in place that already achieve the same end that H.B. 214 seeks to accomplish, and these existing laws could have been utilized to make accommodations that were least restrictive for all parties.

However, most importantly, the bill demoralizes the women that think one day they may exercise their right to choose, even if it is only in the case of rape. Most of the women targeted by H.B. 214 are in one of the most difficult positions of their lives. Under H.B. 214, young women, married women, drug-addicted women, and victims of sexual assault alike are all at risk of being placed in a situation where, despite their and their doctor’s best wishes, the woman is not able to receive an abortion due to prohibitive cost or unavailability of doctors willing to perform. Upon the failure of H.B. 2, or more specifically upon the Supreme Court’s holding that the bill was unconstitutional, the Texas Legislature appears to have deliberately attempted to regain the restrictions back in piecemeal. Had all of the provisions regarding abortion passed in the 85th Legislature as intended, not only would women be unable to cover insurance under their health exchange plan, but existing state and federal bans on abortion funding would be broadened by “prohibiting Texas governmental entities from entering into any contractual relationships with clinics affiliated with abortion providers.”¹⁴⁷

This systematic degradation of the right to choose is exactly how a constitutional right becomes a veiled fiction.¹⁴⁸ The least restrictive provisions are already in place to allow protections of those with genuinely held religious beliefs to freely practice their faith without undue encumbrance. Further, H.B. 214’s restrictions merely serve to stigmatize an

147. Poinsett, *supra* note 1, at 595.

148. *Cf.* Hasstedt & Sonfield, *supra* note 21 (“[Texas] has spent years crippling a once-successful program supporting family planning and related services for low-income residents—all in service of an ideological agenda to shut out and shut down health centers that have any connection to abortion services.”).

already sensitive procedure that is often sought in the most difficult time of a woman's life.

The constitutional right found in *Roe* must stand as more than a mere illusion of freedom for those who cannot afford to pay out of pocket, or those who cannot jump all of the necessary hurdles the Texas Legislature puts in their way. If this right is to stand, H.B. 214 cannot go on as enacted. The undue burden standard requires the purposes put forth by the Legislature to be grounded in more than gilded words unsupported by evidence; it requires that restrictions be made in the least burdensome manner, and that they be made first, with the mother in mind.