

CAN THE STATE PROCLAIM LIFE AFTER DEATH?  
*HELLERSTEDT* AND REGULATING THE DISPOSITION OF  
FETAL REMAINS

*Thomas J. Molony\**

Abstract

The United States Supreme Court dealt a significant blow to abortion opponents in *Whole Woman's Health v. Hellerstedt*, but the 2016 ruling did not dampen their resolve. Just days after Texas lost the *Hellerstedt* battle, the Texas Department of State Health Services (DSHS) returned to the fight and proposed regulations requiring health care facilities to inter or cremate the remains of aborted and miscarried fetuses. Undeterred by a preliminary injunction entered against those regulations once they became final, the Texas legislature enacted a law with similar effect in June 2017.

The Texas law, however, proved to be good ground for yet another victory for those who advocate choice. Having already found the DSHS regulations wanting, the United States District Court for the Western District of Texas enjoined the new statute, concluding that it was unlikely to survive the undue burden test that the Supreme Court set out in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

The United States Court of Appeals for the Seventh Circuit has now followed suit with respect to an Indiana law regulating the disposition of fetal remains. But rather than applying *Casey's* undue burden test, the appeals court determined that the Indiana statute could not survive even the very deferential rational basis standard of review. Importantly, the decisions of both the Texas district court and the Seventh Circuit conflict with a 1990 decision of the United States Court of Appeals for the Eighth Circuit to uphold a Minnesota fetal remains disposition law—in a case tried before *Roe v. Wade's* demanding trimester framework gave way to *Casey's* more lenient undue burden standard. Thus, three federal courts are now in conflict, and the Supreme Court may need to step in yet again to decide who is right.

Unfortunately, *Hellerstedt* provides no easy answer to the question of whether fetal remains disposition requirements like those enacted in Texas and Indiana can survive constitutional challenge. The Texas legislation at issue in *Hellerstedt* purportedly advanced the state's interest in safeguarding maternal health, and thus one questions how the *Hellerstedt* Court's interpretation of *Casey's* undue burden standard will apply to abortion regulations that are founded on the state's interest in protecting potential life. What is certain, though, is that the *Hellerstedt* Court did not overrule its decision either in *Casey* or in *Gonzales v.*

---

\* Associate Professor of Law, Elon University School of Law.

*Carhart*, both of which upheld measures aimed at encouraging a woman to choose childbirth over abortion. This Article thus contends that, when viewed in light of *Casey* and *Gonzales*, *Hellerstedt*'s interpretation of the undue burden test leaves states with a great deal of latitude to regulate abortion in a manner aimed at protecting potential life. As a result, efforts to regulate the method of disposing of fetal remains should pass constitutional muster.

INTRODUCTION .....1048

I. *PLANNED PARENTHOOD OF MINNESOTA* AND OTHER  
PRE-*CASEY* CHALLENGES TO FETAL REMAINS  
DISPOSITION REGULATIONS.....1052

II. THE UNDUE BURDEN STANDARD AND THE STATE’S  
INTEREST IN PROTECTING POTENTIAL LIFE .....1057

A. *Casey and Hellerstedt I* .....1057

B. *Placing the State’s Interest in Protecting Potential  
Life on the Scale* .....1062

III. THE CONSTITUTIONALITY OF MODERN FETAL  
REMAINS DISPOSITION REQUIREMENTS.....1072

A. PPINK .....1073

B. *Hellerstedt II*.....1074

C. *Examining PPINK and Hellerstedt II*.....1077

1. The State’s Interest in Protecting Potential Life ...1078

2. Rational Basis Review .....1084

3. *Casey’s Undue Burden Standard* .....1085

D. *The Louisiana Statute* .....1092

CONCLUSION.....1095

INTRODUCTION

Abortion foes are relentless. Within days after Texas suffered defeat in *Whole Woman’s Health v. Hellerstedt (Hellerstedt I)*,<sup>1</sup> the state’s Department of State Health Services (DSHS) was at it again, proposing regulations that would require health care facilities to bury or cremate the remains of aborted and miscarried fetuses.<sup>2</sup> Fetal remains disposition

---

1. See 136 S. Ct. 2292, 2300 (2016) [hereinafter *Hellerstedt I*] (concluding that Texas’s admitting privileges and ambulatory surgery center requirements are unconstitutional).

2. See *Whole Woman’s Health v. Hellerstedt*, 231 F. Supp. 3d 218, 222 (W.D. Tex. 2017) [hereinafter *Hellerstedt II*] (“Four days after the Supreme Court issued its decision in *Whole*

requirements were in the spotlight elsewhere on the same day when abortion providers brought a challenge to a 2016 Louisiana law.<sup>3</sup> And just the day before, a federal district court had granted a preliminary injunction against a fetal remains disposition law that Vice President Mike Pence signed while he was Indiana's governor.<sup>4</sup>

The flurry of activity surrounding fetal remains disposition requirements in the wake of *Hellerstedt I* may foretell a “brand-new front” in the battle over abortion.<sup>5</sup> Thus far, however, it has not been a successful front for opponents of abortion. The United States District Court for the Western District of Texas has granted two preliminary injunctions against fetal remains disposition requirements—one in January 2017 with respect to regulations that DSHS ultimately adopted and another about a year later with respect to a June 2017 Texas statute that codified the substance of the DSHS regulations.<sup>6</sup> In addition, the preliminary injunction that the United States District Court for the Southern District of Indiana had issued with respect to the Indiana law became permanent in September 2017, and in April 2018, the United

---

*Woman's Health*, the first draft of the proposed [modifications to Texas regulations governing the disposition of fetal remains] was published.”).

3. See Complaint for Declaratory and Injunctive Relief at 4, *June Med. Servs. LLC v. Gee*, No. 16-CV-444/BAJ-RLB (M.D. La. July 1, 2016) (asserting that Louisiana's fetal remains disposition requirement is unconstitutional).

4. See *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, 194 F. Supp. 3d 818, 825, 834 (S.D. Ind. 2016) (enjoining an Indiana fetal remains disposition requirement that was set to go into effect on July 1, 2016); Molly Redden, *Texas Measure Requiring Burial of Fetal Remains May Herald a New Wave of Similar Laws*, THE GUARDIAN (Dec. 19, 2016), <https://www.theguardian.com/us-news/2016/dec/19/texas-fetal-remains-burial-cremation-law> (indicating that then-Governor Mike Pence had signed Indiana's law).

5. Redden, *supra* note 4. For the sake of simplicity, this Article uses the term “fetal remains” to refer to all remains subject to the disposition requirements. The disposition requirements in Indiana, Louisiana, and Texas, however, apply even to remains from an abortion that occurs before a fetus has developed. See IND. CODE § 16-18-2-128.7 (West 2016) (defining a “fetus” as “an unborn child, irrespective of gestational age or the duration of the pregnancy”); LA. STAT. ANN. § 40:1061.9(9) (West 2018) (defining an “unborn child” or “fetus” as “the unborn offspring of human beings from the moment of conception through pregnancy and until live birth”); 25 TEX. ADMIN. CODE § 1.132 (West 2018) (defining fetal tissue as “[a] fetus, body parts, or organs from a pregnancy”); TEX. HEALTH & SAFETY CODE ANN. § 697.002 (West 2017) (defining “embryonic and fetal tissue remains” as “an embryo, a fetus, body parts, or organs from a pregnancy that terminates in the death of the embryo or fetus and for which the issuance of a fetal death certificate is not required by state law”).

6. Compare 25 TEX. ADMIN. CODE §§ 1.136–1.137 (West 2018), with TEX. HEALTH & SAFETY CODE ANN. §§ 697.002–796.004, 697.008 (West 2017). See 2017 Tex. Sess. Law Serv. 441 (West 2017) (establishing requirements for the disposition of fetal remains); *Hellerstedt II*, 231 F. Supp. 3d at 233 (granting a preliminary injunction against the Texas regulations); *Hellerstedt II*, No. A-16-CA-1300, 2018 BL 30317, at \*8 (W.D. Tex. Jan. 29, 2018) [hereinafter *Hellerstedt II (order)*] (enjoining the Texas statute).

States Court of Appeals for the Seventh Circuit affirmed the lower court's decision.<sup>7</sup>

The Texas district court in *Whole Woman's Health v. Hellerstedt* (*Hellerstedt II*) and the Seventh Circuit in *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner (PPINK)* were united in the view that a fetal remains disposition requirement cannot be justified based on what *Roe v. Wade* had recognized as the state's "important and legitimate" interest in protecting potential life<sup>8</sup> because the requirement applies after an abortion is completed, when no potential life remains.<sup>9</sup> But the courts differed as to why injunctive relief was appropriate. While the *Hellerstedt II* court concluded that DSHS's regulations and the Texas statute were unlikely to survive the undue burden standard adopted in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and later interpreted by the *Hellerstedt I* Court,<sup>10</sup> the court in *PPINK* struck down Indiana's fetal remains disposition law as an "arbitrary deprivation[] of liberty" rather than an undue burden.<sup>11</sup> Both courts parted company with the United States Court of Appeals for the Eighth Circuit, which in *Planned Parenthood of Minnesota v. Minnesota*—before the *Casey* Court abandoned the rigorous post-*Roe* trimester framework in favor of the more forgiving undue burden standard—upheld a Minnesota fetal remains disposition requirement that looks much like the ones at issue in *Hellerstedt II* and *PPINK*.<sup>12</sup> Thus, three federal courts have now

---

7. See *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, 265 F. Supp. 3d 859, 873 (S.D. Ind. 2017), *aff'd*, 888 F.3d 300, 310 (7th Cir. 2018) [hereinafter *PPINK*] (permanently enjoining Indiana's fetal remains disposition requirement).

8. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

9. See *PPINK*, 888 F.3d at 308 ("[S]tate and federal fetal homicide statutes, as well as state wrongful death statutes . . . seek to address a valid state interest in promoting respect for potential life. The fetal disposition provisions differ because there is no potential life at stake."); *Hellerstedt II*, 231 F. Supp. 3d at 229 ("While the Supreme Court has acknowledged the State has an 'important and legitimate interest[ ] . . . in protecting the potentiality of human life [,]' the Amendments do not further such a legitimate state interest [because they] regulate activities . . . that occur when there is no potential life to protect."); *Hellerstedt II (order)*, 2018 BL 30317, at \*6 ("[T]here is no precedent showing expressing respect for the unborn by restricting [embryonic and fetal tissue remains] disposal after the potential for life no long exists is a valid state interest.").

10. See *Hellerstedt II*, 231 F. Supp. 3d at 228, 232 (explaining *Hellerstedt I*'s application of *Casey*'s undue burden standard and determining that the Texas regulations governing the disposition of fetal remains likely violated that standard); *Hellerstedt II (order)*, 2018 BL 30317, at \*5 ("As recently confirmed by the Supreme Court, courts are to apply the 'undue burden' standard when evaluating potential restrictions on abortion access." (citing *Hellerstedt I*)).

11. *PPINK*, 888 F.3d at 307.

12. See *Planned Parenthood of Minn. v. Minn.*, 910 F.2d 479, 481 n.2 (8th Cir. 1990) (upholding a Minnesota statute requiring remains from an abortion or miscarriage to be disposed of "by cremation, interment by burial, or in a manner directed by the commissioner of health); *infra* notes 65–75 and accompanying text (discussing *Casey* and *Roe*'s trimester framework).

expressed divergent views as to the constitutionality of similar fetal remains disposition requirements. Given this split, the Supreme Court may need to weigh in—again.<sup>13</sup>

This Article analyzes whether fetal remains disposition requirements like those recently adopted in Indiana, Louisiana, and Texas unconstitutionally infringe on the right to choose that the Court first recognized in *Roe*.<sup>14</sup> Part I of this Article discusses the Eighth Circuit's decision in *Planned Parenthood of Minnesota* and recounts other pre-*Casey* challenges to measures governing the disposition of fetal remains. Part II turns to *Casey* and *Hellerstedt I* and offers an in-depth analysis of what *Hellerstedt I*'s interpretation of *Casey*'s undue burden test means for abortion regulations designed to advance the state's substantial interest in protecting potential life. Part III then critically examines the recent challenges to the Indiana and Texas fetal remains disposition requirements in *PPINK* and *Hellerstedt II*. After describing the reasoning that the Seventh Circuit and the Texas district court employed, Part III explains the serious missteps the two courts made. Among other things, Part III contends that both courts went off course by failing to appreciate the relationship between *Hellerstedt I*, *Casey*, and *Gonzales v. Carhart*,<sup>15</sup> the Court's 2007 decision upholding the federal partial-birth abortion ban, and the way in which fetal remains disposition requirements serve the government's interest in protecting potential life notwithstanding their direct application to fetuses who no longer have that potential. Part III concludes by evaluating how Louisiana's fetal remains disposition statute stands up to constitutional challenge.<sup>16</sup>

---

13. Alexandra Zavis, *The Latest Battlefield in the Abortion Wars: Some States Want to Require Burial or Cremation for Fetuses*, L.A. TIMES (Jan. 23, 2017), <http://www.latimes.com/nation/la-na-aborted-fetus-burial-2017-story.html> [<https://perma.cc/B5BQ-2YHL>] (“[L]egal battles over the new regulations are likely to be long and could wind up before the Supreme Court.” (citing a Wake Forest University law professor)).

14. *Roe*, 410 U.S. at 154 (“We . . . conclude that the right of personal privacy includes the abortion decision . . .”). This Article considers the constitutionality of new laws that restrict the *methods* that may be used to dispose of fetal remains. It does not address the validity of laws that regulate other aspects of the disposition of fetal remains without altering the permissible disposition methods. For example, this Article does not give detailed attention to recent Arkansas legislation that dictates who may direct the final disposition of a dead fetus. See 2017 Ark. Acts 603 (amending ARK. CODE ANN. § 20-17-801(b)(1)(B) to require the disposition of a dead fetus in accordance with the Arkansas Final Disposition Rights Act of 2009). While the U.S. District Court for the Eastern District of Arkansas granted a preliminary injunction against the Arkansas law under *Casey*'s undue burden test, it also indicated that the law “does not specify any new method of disposal.” *Hopkins v. Jegley*, F. Supp. 3d 1024, 1069, 1104 (E.D. Ark. 2017).

15. See *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (upholding the federal partial-birth abortion ban).

16. The defendants in the Louisiana action agreed not to enforce that state's fetal disposition requirement pending a ruling by the United States District Court for the Middle District of

This Article concludes that, although *Hellerstedt I* was a setback for abortion opponents, states continue to have broad latitude to adopt abortion regulations aimed at protecting potential life and, consequently, fetal remains disposition requirements like those adopted in Indiana and Texas are apt to be upheld. States that adopt these requirements express “profound respect for the life of the unborn”<sup>17</sup> by proclaiming that what is now dead was, at one time, a living human being. To be sure, this proclamation comes too late to protect fetuses to whom the requirements directly apply, but the very existence of the requirements delivers a message that might persuade some women to choose childbirth over abortion.<sup>18</sup> And even after *Hellerstedt I*, that is enough.

### I. *PLANNED PARENTHOOD OF MINNESOTA* AND OTHER PRE-*CASEY* CHALLENGES TO FETAL REMAINS DISPOSITION REGULATIONS

Regulations governing the disposition of fetal remains are not new. Less than two years after the Court handed down *Roe*,<sup>19</sup> Pennsylvania enacted a statute requiring its Department of Health to “make regulations to provide for the humane disposition of dead fetuses.”<sup>20</sup> In *Planned Parenthood v. Fitzpatrick*,<sup>21</sup> a decision the Supreme Court affirmed without opinion,<sup>22</sup> the United States District Court for the Eastern District of Pennsylvania upheld the law against a facial challenge, deciding that a state can exercise its police power to regulate the disposition of fetuses in a manner designed to protect public health.<sup>23</sup> Pennsylvania persuaded the court that it sought only “to preclude the mindless dumping of aborted fetuses on to garbage piles,”<sup>24</sup> and while the court rejected the plaintiffs’ argument that the fetal remains disposition statute unconstitutionally burdened a woman’s right to choose by allowing health department regulations that might place financial and psychological burdens on

---

Louisiana on the plaintiffs’ motion for a preliminary injunction, and the district court has not yet rendered a decision. See Joint Stipulation for Non-Enforcement as to Plaintiffs and Proposed Order, at 1, *June Med. Servs. LLC v. Gee*, 136 S. Ct. 1354 (2016) (No. 16-CV-00444/BAJ-RLB) (including the defendants’ agreement not to enforce Louisiana’s fetal remains disposition statute).

17. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

18. See *id.* at 877–78 (indicating that unless it represents a substantial obstacle to a woman’s “right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal”).

19. See *Planned Parenthood Ass’n v. Fitzpatrick*, 401 F. Supp. 554, 599 n.1 (E.D. Pa. 1975) (indicating that the Pennsylvania requirement was enacted on September 10, 1974).

20. *Id.*

21. *Id.*

22. 428 U.S. 901, 901 (1976).

23. See *Fitzpatrick*, 401 F. Supp. at 573 (rejecting the facial challenge to Pennsylvania’s fetal remains statute).

24. *Id.*

women seeking first or second trimester abortions and might require “treating the fetus as a human,”<sup>25</sup> the court did not foreclose a later challenge to the extent that an underlying regulation would “invade the privacy of [a] pregnant woman and burden her decision concerning abortion.”<sup>26</sup>

Just a few years later, in *Margaret S. v. Edwards*,<sup>27</sup> the United States District Court for the Eastern District of Louisiana found that a Louisiana statute did just that.<sup>28</sup> The statute at issue in *Edwards* directed abortion doctors to ensure that fetal remains were disposed of in accordance with the state’s laws governing the disposition of human remains in general—laws which required that the remains of a deceased child be “decently interred or cremated” and that the child’s parents choose between the two.<sup>29</sup> According to the *Edwards* court, Louisiana’s fetal remains disposition statute unconstitutionally burdened a woman’s right to choose abortion by “requir[ing] that fetal remains be treated with the same dignity as the remains of a person.”<sup>30</sup> In reaching its decision, the court insisted that *Roe* barred Louisiana from deciding when life begins and that asking a woman to choose the method of disposition creates psychological burdens because the “question equates the abortion process with the taking of a human life.”<sup>31</sup> Moreover, the court speculated, because Louisiana law gave both parents the right to direct the disposition of a deceased child’s remains, the challenged fetal remains disposition requirement might burden the abortion decision by requiring a woman to consult with the aborted fetus’s father.<sup>32</sup>

In *Leigh v. Olson*,<sup>33</sup> on the other hand, the United States District Court for the District of North Dakota found a North Dakota statute similar to the one at issue in *Fitzpatrick* to be rationally related to the state’s legitimate interest in protecting public health and therefore facially valid.<sup>34</sup> The court also determined, however, that the statute was unconstitutional as applied, because regulations adopted under statutory authority required a woman or her “next of kin” to direct the manner of

---

25. *Id.* at 572.

26. *Id.* at 573.

27. 488 F. Supp. 181 (E.D. La. 1980).

28. *See id.* at 223 (striking down a Louisiana fetal remains disposition requirement).

29. *Id.* at 221–22 (describing the effect of Louisiana’s fetal remains disposition requirement).

30. *Id.* at 222.

31. *Id.*

32. *See id.* at 222 n.132 (discussing the potential effect of the father’s involvement).

33. 497 F. Supp. 1340, 1351 (D.N.D. 1980).

34. The North Dakota law required that a fetus “be disposed of in a humane fashion under regulations adopted by the state department of health.” *Leigh*, 497 F. Supp. at 1351 (finding the North Dakota Statute facially constitutional).

disposal of an aborted fetus.<sup>35</sup> According to the court, requiring a woman to choose the manner of disposal directly burdened her decision to have an abortion and did not advance the state's interest in protecting potential life or its interest in safeguarding maternal health.<sup>36</sup>

Like the district court in *Olson*, the Supreme Court in *City of Akron v. Akron Center for Reproductive Health, Inc.*<sup>37</sup> faced a fetal remains disposition requirement similar to the Pennsylvania statute upheld in *Fitzpatrick*. This time, the Court struck down the requirement as facially invalid.<sup>38</sup> The Court, though, did not find that the requirement imposed an impermissible burden on a woman's right to choose abortion, but concluded instead that it was unconstitutionally vague.<sup>39</sup>

The measure at issue in *Akron* was a city ordinance that required the disposition of fetal remains "in a humane and sanitary manner," but unlike the statute in *Fitzpatrick*, the ordinance imposed criminal penalties for violations.<sup>40</sup> In deciding that the ordinance was unconstitutional, the Court indicated that the word "humane" might suggest an "intent to 'mandate some sort of "decent burial" of an embryo at the earliest stages of formation[,]'"<sup>41</sup> and that, because violations gave rise to criminal sanctions, the Constitution would not tolerate the uncertainty that the language created.<sup>42</sup> Nevertheless, the Court indicated in a footnote that "Akron remain[ed] free ... to enact more carefully drawn regulations that further its legitimate interest in proper disposal of fetal remains."<sup>43</sup>

After suffering defeat in *Edwards*, Louisiana adopted what it may have thought was a "more carefully drawn" fetal remains disposition requirement. According to the district court in *Margaret S. v. Treen*,<sup>44</sup> however, the new law still fell short of constitutional standards.<sup>45</sup> Rather than forcing abortion doctors in all cases to treat fetal remains in the same manner as the state required for other human remains,<sup>46</sup> the new statute directed a physician performing an abortion for a woman to notify her

35. *See id.* at 1352 (finding the North Dakota statute "unconstitutional as applied").

36. *See id.* at 1351.

37. 462 U.S. 416 (1983), *overruled in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

38. *See Akron*, 462 U.S. at 452 (determining that an Akron ordinance was invalid).

39. *See id.* at 451 (affirming the decision of the United States Court of Appeals for the Sixth Circuit that the Akron ordinance was unconstitutionally vague).

40. *Id.*

41. *Id.*

42. *Id.* at 451 n.44.

43. *Id.* at 451 n.45.

44. 597 F. Supp. 636 (E.D. La. 1984).

45. *See id.* at 671 ("[I]t is this Court's holding that [the fetal remains disposition law] is unconstitutional.").

46. *See supra* note 29 and accompanying text (discussing requirements of the statute struck down in *Edwards*).

(within 24 hours after the abortion) of the requirements of law regarding disposal of the “remains of the child”<sup>47</sup> and, based on the *Treen* court’s reading, mandated disposition of the fetus by burial or cremation if the woman so chose.<sup>48</sup>

The new Louisiana statute, the court in *Treen* determined, raised a host of problems. First, the court indicated that by requiring a woman to be notified regarding how “the remains of the child” were to be disposed of, the statute impermissibly equated a fetus with a born human person.<sup>49</sup> Second, the court contended that the law imposed “psychological burdens” on women by suggesting that the state “equates abortion with the taking of a human life” and that it did not matter that a woman would not be provided with information about disposition of the fetus until after her abortion had been completed.<sup>50</sup> Third, the court added, the disposition requirement interfered with the physician–patient relationship because it required a physician to inform a woman about the disposition of fetal remains even if the physician judged that providing the information would be harmful to the woman.<sup>51</sup> Finally, the court concluded that neither an interest in protecting public health nor an interest in respecting the rights of patients who had particular views about the disposition of fetal remains was “sufficiently compelling” to justify the Louisiana statute’s burdens.<sup>52</sup> In fact, according to the *Treen* court, the statute served “no state interest whatsoever.”<sup>53</sup>

Unlike the Louisiana statute at issue in *Treen*, the Minnesota fetal remains disposition requirement that the Eighth Circuit upheld in *Planned Parenthood of Minnesota*—and that is still in place today—does not require a woman who has an abortion to be involved in the disposition of the aborted fetus’s remains.<sup>54</sup> Instead, the Minnesota law simply provides that health care facilities must dispose of the remains from abortions and miscarriages by means of “cremation, interment by burial, or in a manner directed by the commissioner of health.”<sup>55</sup> This requirement, the Eighth Circuit concluded, satisfies constitutional norms because it is reasonably related to the state’s “interest in protecting public

---

47. *Treen*, 597 F. Supp. at 668–69.

48. *See id.* at 669 (presuming that the requirement that fetal remains be treated in the same manner as other remains would arise “at the behest of the woman”).

49. *Id.* at 670.

50. *Id.* at 670–71.

51. *Id.* at 671.

52. *Id.*

53. *Id.*

54. *See Planned Parenthood of Minn. v. Minn.*, 910 F.2d 479, 486–87 (8th Cir. 1990) (“The woman need not be told of the disposition means, and indeed, she need not be consulted about the particular provider’s choice for disposition.”).

55. *Id.* at 481 n.2.

sensibilities,” an interest Planned Parenthood acknowledged as legitimate.<sup>56</sup>

Notably, the Eighth Circuit determined that the Minnesota statute “d[id] not burden the abortion choice” and therefore was not subject to review as an abortion regulation.<sup>57</sup> In reaching this decision, the court rejected the plaintiffs’ claim that increased costs resulting from the Minnesota statute and related adverse psychological effects on women represented impermissible burdens.<sup>58</sup> As to costs, the Eighth Circuit observed that the Supreme Court in *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*<sup>59</sup> had concluded that an increase in costs of up to \$19.40 per patient did not give rise to an unconstitutional burden, and the evidence indicated that the increase resulting from the Minnesota statute would be far less.<sup>60</sup> In addition, the court decided that the Minnesota law does not impose a “psychological burden” on women because it does not require a woman’s input in connection with the disposition of fetal remains.<sup>61</sup> Moreover, the court dismissed Planned Parenthood’s suggestion that Minnesota intended to convey through the statute the state’s view that “fetal remains are the equivalent of human remains.”<sup>62</sup> According to the court, even if this were the purpose, the legislation would stand because “[a] state may make a value judgment favoring childbirth over abortion.”<sup>63</sup>

Having decided that the Minnesota statute does not burden a woman’s ability to choose abortion, the Eighth Circuit then turned to the district

---

56. *Id.* at 487–88. By citing *Maheer v. Roe*, *Harris v. McRae*, *Minnesota v. Clover Leaf Creamery*, and *Plyler v. Doe*, the court appears to have applied rational basis review in reaching this conclusion. See *Planned Parenthood of Minn.*, 910 F.2d at 486, 487–88 (citing *Maheer v. Roe*, 432 U.S. 464, 473–74 (1977); *Harris v. McRae*, 448 U.S. 297, 315 (1980); *Minn. v. Clover Leaf Creamery*, 449 U.S. 456, 464 (1981); and *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). The court also cites *Akron* and *Ashcroft*, however, each of which employs a standard of review that is not so deferential. See *Planned Parenthood of Minn.*, 910 F.2d at 486, 487 (citing *Akron*, 462 U.S. at 429, and *Ashcroft*, 462 U.S. at 489–90); *Akron*, 462 U.S. at 430 (noting that, in previously upholding abortion regulations that did not have a significant impact on a woman’s ability to choose abortion, “[t]he decisive factor was that the State met its burden of demonstrating that the[] regulations furthered important health-related State interests”); *Ashcroft*, 462 U.S. at 489–90 (balancing the burdens and benefits of an abortion regulation).

57. The Eighth Circuit suggested that, in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), the Supreme Court may have jettisoned strict scrutiny in favor of “a less rigorous standard of review” for abortion regulations. *Planned Parenthood of Minnesota*, 910 F.2d at 486.

58. *Planned Parenthood of Minnesota*, 910 F.2d at 486–87.

59. 462 U.S. 476 (1983).

60. *Planned Parenthood of Minnesota*, 910 F.2d at 487.

61. See *id.* at 486–87 (“The woman need not be told of the disposition means, and indeed, she need not be consulted about the particular provider’s choice for disposition.”).

62. *Id.* at 487.

63. *Id.* (citing *Webster*, 492 U.S. at 506).

court's conclusion that the law could not survive even deferential rational basis review because it was both underinclusive and overinclusive.<sup>64</sup> The law's failure to address abortions or miscarriages in which a fetus is delivered outside a health care facility, the court indicated, did not make the law impermissibly underinclusive because regulating activity inside the home raises "privacy concerns."<sup>65</sup> Furthermore, the court rejected the claim that the statute was overinclusive, explaining that, to advance its interest in protecting public sensibilities, the state could reasonably have decided to include both miscarriages and abortions because they both result in the delivery of fetal remains requiring disposal.<sup>66</sup> Therefore, the court decided, Minnesota's fetal remains disposition requirement "fall[s] within the permissible boundaries" the Supreme Court had established.<sup>67</sup>

## II. THE UNDUE BURDEN STANDARD AND THE STATE'S INTEREST IN PROTECTING POTENTIAL LIFE

### A. *Casey* and *Hellerstedt* I

When the Eighth Circuit confirmed Minnesota's right to prefer childbirth over abortion, it relied on the Supreme Court's 1989 decision in *Webster v. Reproductive Health Services*<sup>68</sup> and expressed a principle that would later feature prominently in *Casey*.<sup>69</sup> But to understand why the *Casey* Court emphasized this principle, one must first return to *Roe*.

The Court in *Roe* recognized three interests that may justify regulating abortion: an interest in maintaining standards for the medical profession, an interest in safeguarding maternal health, and an interest in protecting

---

64. *See id.* ("The district court . . . concluded that . . . [the statute] was not rationally related to any legitimate governmental interest.").

65. *Id.* at 488.

66. *See id.* (discussing the district court's conclusion that the statute is overinclusive).

67. *Id.*

68. 492 U.S. 490 (1989); *see Planned Parenthood of Minnesota*, 910 F.2d at 487 (citing *Webster*, 492 U.S. at 506).

69. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992) ("[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.") (quoting *Webster*, 492 U.S. at 511); *id.* at 878 ("[A] state measure designed to persuade [a woman] to choose childbirth over abortion will be upheld if reasonably related to that goal."); *id.* ("[M]easures designed to advance [the State's profound interest in potential life] will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion."); *id.* at 883 ("[W]e permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion."); *id.* at 886 ("[U]nder 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.").

potential life.<sup>70</sup> Those interests—and the Court’s view of their strength at various points during pregnancy—served as the basis for the familiar trimester framework that courts used to assess abortion regulations during the period following *Roe*.<sup>71</sup> Under that framework,

almost no regulation at all [was] permitted during the first trimester of pregnancy; regulations designed to protect the woman’s health, but not to further the State’s interest in potential life, [were] permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions [were] permitted provided the life or health of the mother is not at stake.<sup>72</sup>

The trimester framework applied for almost 20 years, until the *Casey* Court rejected it as inconsistent “with the holding in *Roe* itself” because it undervalued a state’s interest in protecting potential life,<sup>73</sup> an interest *Roe* recognizes as “important and legitimate” and *Casey* describes as “substantial” and “profound.”<sup>74</sup> Accordingly, while the Court in *Casey* retained viability as the point at which a state’s ability to regulate abortion is the most robust,<sup>75</sup> it abandoned the “rigid” trimester framework<sup>76</sup> and adopted an “undue burden” standard for abortion regulations that apply before viability.<sup>77</sup> In minting this new standard, the Court explained:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it. 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. . . . Unless it has that effect . . . , a state measure

---

70. See *Roe*, 410 U.S. at 154 (identifying government interests in regulating abortion).

71. See *Casey*, 505 U.S. at 872 (discussing *Roe*’s trimester framework).

72. *Id.*

73. See *id.* at 876 (“Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman’s decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy.”).

74. *Id.* at 875–76, 878 (quoting *Roe*, 410 U.S. at 162).

75. *Id.* at 872.

76. *Id.* at 873.

77. See *id.* at 876 (“[T]he undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”).

designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.<sup>78</sup>

Applying the undue burden standard, the Court upheld nearly every aspect of the Pennsylvania statute at issue in *Casey*, including informed consent provisions, a 24-hour waiting period, a parental consent requirement, and reporting and recordkeeping requirements.<sup>79</sup> The only provisions that the Court struck down were those with respect to spousal notification.<sup>80</sup>

Nearly 25 years later in *Hellerstedt I*, a Texas statute did not fare quite so well. Under the statute, Texas had required (1) a physician performing an abortion to have admitting privileges at a hospital within 30 miles of the facility in which the abortion was to be performed and (2) abortion facilities to comply with standards applicable to ambulatory surgery centers operating in the state.<sup>81</sup> The Court struck down both requirements.<sup>82</sup> In so doing, the Court indicated that “*Casey* . . . requires . . . courts [to] consider the burdens a law imposes on abortion access together with the benefits those laws confer [and] . . . whether any burden imposed on abortion access is “undue.”<sup>83</sup> The Court added that evaluating abortion regulations requires a more searching review than applies under a traditional rational basis standard, which calls for nothing more than a “reasonably conceivable state of facts” that might support the regulation.<sup>84</sup> Furthermore, according to the Court, when subjected to a more demanding review, Texas’s admitting privileges and ambulatory surgery center requirements did not measure up to the requirements of the Fourteenth Amendment.

---

78. *Id.* at 877–78.

79. *See id.* at 887, 899, 900 (concluding that various Pennsylvania abortion regulations are constitutional).

80. *See id.* at 898, 901 (invalidating Pennsylvania spousal notification provisions and a related reporting requirement).

81. *See Whole Woman’s Health v. Hellerstedt (Hellerstedt I)*, 136 S. Ct. 2292, 2300 (2016) (describing the provisions of the Texas statute at issue in the case).

82. *Id.* at 2300.

83. *Id.* at 2309–10.

84. *Heller v. Doe*, 509 U.S. 312, 320 (1993). The Court in *Hellerstedt I* rebuked U.S. Court of Appeals for applying the traditional rational basis standard normally applicable to economic regulations such as those at issue in *Williamson v. Lee Optical of Okla., Inc.* *See Hellerstedt I*, 136 U.S. at 2309 (“And the second part of the test [the Fifth Circuit used] is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue.” (citing *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 491 (1955))). The Court in *Williamson* explained that “it [was] for the legislature, not the courts, to balance the advantages and disadvantages” of the law at issue in the case. *Williamson*, 348 U.S. at 487.

As to any benefits associated with the Texas law, the Court noted that Texas's admitting privileges requirement was intended to make abortion safer by facilitating access to a hospital if a woman has complications from the procedure.<sup>85</sup> The record, the Court insisted, indicated that the requirement offered no significant benefit in this regard.<sup>86</sup> In particular, the Court cited expert testimony and other evidence suggesting that abortion is "extremely safe" in Texas, and the Court observed that Texas had not shown that the admitting privileges requirement "would have helped even one woman obtain better treatment."<sup>87</sup> Indeed, the Court stated that it "found nothing . . . that show[ed] that . . . the [requirement] advanced Texas' legitimate interest in protecting women's health."<sup>88</sup>

On the other hand, the Court concluded that the admitting privileges requirement imposed significant burdens on women seeking abortions.<sup>89</sup> In reaching that conclusion, the Court credited evidence that, around the time the admitting privileges requirement went into effect, approximately 20 abortion facilities closed, thereby decreasing access to abortion and creating other adverse consequences: "In our view, the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas'[s] clinics, or thereabouts. Those closures meant fewer doctors, longer waiting times, and increased crowding."<sup>90</sup> The Court observed that the closures also resulted in greater driving distances for women seeking abortions, and while the Court "recognize[d] that increased driving distances do not always constitute an 'undue burden,'" it found that they were "but one additional burden, which, when taken together with others . . . and when viewed in light of the virtual absence of any health benefit, . . . support[ed] the District Court's 'undue burden' conclusion."<sup>91</sup>

The Court reached the same conclusion with respect to Texas's ambulatory surgery center requirement.<sup>92</sup> Highlighting evidence indicating that abortion is safer than other procedures that are not required to be performed in an ambulatory surgery center, the Court found "that the surgical-center provision impose[d] 'a requirement that simply is not

---

85. *Hellerstedt I*, 136 S. Ct. at 2311.

86. *Id.*

87. *Id.* at 2311–12.

88. *Id.* at 2311.

89. *Id.* at 2312 ("At the same time, the record evidence indicates that the admitting-privileges requirement places a 'substantial obstacle in the path of a woman's choice.'" (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992))).

90. *Id.* at 2313.

91. *Id.*

92. *See id.* at 2318 ("[T]he surgical-center requirement . . . provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an 'undue burden.'").

based on differences’ between abortion and other surgical procedures ‘that are reasonably related to’ preserving women’s health, the asserted ‘purpos[e] of the Act in which it is found.’”<sup>93</sup> Moreover, the Court emphasized that the record offered “sufficient support for the more general conclusion that the surgical-center requirement ‘will not [provide] better care or . . . more frequent positive outcomes.’”<sup>94</sup>

In addition, just as with the admitting privileges provision, the Court found that the ambulatory surgery center requirement imposed disproportionate burdens on abortion access. Of particular concern to the Court was the stipulated fact that the ambulatory surgery center requirement would increase the number of abortion facility closures even more, leaving the state with only seven or eight such facilities.<sup>95</sup> As to the closures, the Court endorsed the district court’s reliance on a single expert who testified that it was unlikely that the remaining facilities would be able to meet the demand for abortion services.<sup>96</sup> Furthermore, the Court cited “common sense” that existing facilities designed to meet a certain level of demand will not be able to meet five times that level of demand “without expanding or otherwise incurring significant costs.”<sup>97</sup> And again the Court pointed out possible collateral effects that could result from clinic closures—even if remaining facilities could meet demand:

Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients . . . are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. . . . Surgical centers attempting to accommodate sudden, vastly increased demand may find that quality of care declines.<sup>98</sup>

Thus, with “few, if any, health benefits for women,” the Court concluded that the “the surgical-center requirement, like the admitting-privileges requirement, . . . pose[d] a substantial obstacle to women seeking abortions, and constitute[d] an “undue burden” on their constitutional right to do so.”<sup>99</sup>

---

93. *Id.* at 2315.

94. *Id.* at 2316.

95. *Id.*

96. *Id.*

97. *Id.* at 2317.

98. *Id.* at 2318.

99. *Id.*

### B. *Placing the State's Interest in Protecting Potential Life on the Scale*

In reaching its decision in *Hellerstedt I*, the Court assumed that Texas's admitting privileges and ambulatory surgery center requirements were aimed at protecting maternal health<sup>100</sup> and not at either of the other governmental interests (protecting potential life and maintaining medical standards) that the Court in *Roe* identified.<sup>101</sup> As a result, it is unclear as to whether and how the balancing test found in *Hellerstedt I* might apply to regulations—like fetal remains disposition requirements—that advance the state's "substantial interest in potential life."<sup>102</sup> What is clear, however, is that the Court in *Hellerstedt I* did not overrule *Casey* or *Gonzales*, but merely interpreted *Casey*'s undue burden standard.<sup>103</sup> Thus, when considering measures designed to serve the state's interest in protecting potential life, one must look to how the Court in *Casey* treated those parts of the Pennsylvania statute sustained based on that interest and what led the Court in *Gonzales* to uphold the federal partial-birth abortion ban.

Notably, in concluding that *Casey*'s undue burden standard is a balancing test, the Court in *Hellerstedt I* only cited the *Casey* Court's analysis regarding the spousal notification and parental consent provisions that were at issue.<sup>104</sup> And *Casey*'s discussion of neither provision focuses on the state's interest in protecting potential life. Instead, to the extent that the *Casey* Court was balancing the benefits and burdens of these provisions, it was considering other interests.

With respect to the Pennsylvania spousal notification provision, the Court in *Casey* considered the benefits to the husband and his interest in potential life against the burdens the notification requirement imposed on his wife.<sup>105</sup> In addition, the *Casey* Court relied on *Planned Parenthood of Central Missouri v. Danforth*,<sup>106</sup> a case in which it had considered a spousal consent requirement relative to "the interest of the state in protecting the mutuality of decisions vital to the marriage

---

100. *See id.* at 2310 ("[O]ne is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protected women's health).").

101. *See supra* note 70 and accompanying text (listing the governmental interests *Roe* recognized).

102. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992).

103. *See Hellerstedt I*, 136 S. Ct. at 2300 ("We must here decide whether two provisions of Texas' House Bill 2 violate the Federal Constitution as interpreted in *Casey*.").

104. *See id.* at 2309 (describing *Casey*'s undue burden test as a balancing test).

105. *See Casey*, 505 U.S. at 896–98 (noting the husband's interest and indicating that the Court held in *Danforth* that "the balance weighs in [the wife's] favor").

106. *Id.* at 897 ("The principles that guided the Court in *Danforth* should be our guides today.").

relationship.”<sup>107</sup> In *Danforth*, of course, the Court would not have given any weight to the state’s interest in protecting potential life because the consent requirement applied during the first trimester of pregnancy, the period in which *Roe*’s trimester framework demanded that “the abortion decision and its effectuation . . . be left to the medical judgment of the pregnant woman’s attending physician.”<sup>108</sup>

*Casey*’s treatment of Pennsylvania’s parental consent requirement similarly involves no consideration of the state’s interest potential life.<sup>109</sup>

---

107. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (quoting *Planned Parenthood of Cent. Mo. V. Danforth*, 392 F. Supp 1362, 1370 (E.D. Mo. 1975)).

108. *Danforth*, 428 U.S. at 60 (quoting *Roe*, 410 U.S. at 164). *Roe* suggests that only in the third trimester does the state’s interest in protecting potential life become strong enough to serve as a basis for abortion regulation. See *Roe*, 410 U.S. at 164–65 (“For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate . . . abortion.”). It was not until 1992 that the Court in *Casey* abandoned this far-reaching prohibition, concluding that *Roe*’s “essential holding” was that the state’s interest in protecting potential life is not strong enough to justify pre-viability regulations *that impose a substantial obstacle* on the ability of a woman to choose abortion. See *Casey*, 505 U.S. at 846 (“Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure.”).

109. In setting out “guiding principles” for the undue burden standard, the Court in *Casey* indicated that a state may “create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn . . . , if [the mechanism is] not a substantial obstacle to the woman’s exercise of the right to choose.” *Casey*, 505 U.S. at 877. But neither those “guiding principles” nor *Casey*’s specific consideration of Pennsylvania’s parental consent requirement indicates that such a requirement is justified based on the *state’s* interest in potential life.

Moreover, when evaluating parental consent and notification requirements, the Court and individual justices have historically focused on the state’s interests in protecting the integrity of the family, protecting pregnant minors, and protecting the interests of parents. See *Akron*, 497 U.S. at 520 (opinion of Kennedy, J.) (concluding that an Ohio parental consent statute did not pose an undue burden on a minor’s ability to choose abortion and indicating that “[i]t would deny all dignity to the family to say that the State cannot take this reasonable step in regulating its health professions . . . .”); *Hodgson*, 497 U.S. at 444 (opinion of Stevens, J.) (“Three separate but related interests—the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit—are relevant to our consideration of the constitutionality of the 48-hour waiting period and the two-parent notification requirement.”); *Akron*, 462 U.S. at 439 (“In *Bellotti* . . . , a majority of the Court indicated that a State’s interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial.”); *Planned Parenthood Ass’n of Kan. City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 490–91 (1983) (“A State’s interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial.”); *H.L. v. Matheson*, 450 U.S. 398, 411 (1981) (“As applied to immature and dependent minors, the statute plainly serves the important considerations of family integrity and protecting adolescents . . . . In addition, . . . the statute serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician.”); *Bellotti*, 443 U.S. at 648 (“There is . . . an important state interest in encouraging a family rather than a judicial resolution of a minor’s abortion decision.”); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976) (“One suggested interest is the safeguarding of the

In fact, contrary to what *Hellerstedt I* suggests, *Casey* evidences no real balancing of the benefits and burdens of the parental consent requirement at all. In fact, the Court's opinion in *Casey* did little more than affirm that the judicial bypass provisions in the Pennsylvania statute fit within the parameters the Court had employed in prior opinions: "We have been over most of this ground before. Our cases establish, and we reaffirm today, that a state may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."<sup>110</sup>

Because the Court in *Hellerstedt I* cited only *Casey*'s treatment of the Pennsylvania spousal notification and parental consent requirements and because, in analyzing those requirements, *Casey* does not consider the state's interest in protecting potential life, one might conclude that the balancing test that *Hellerstedt I* employed is inapplicable when a regulation is designed to serve the state's interest in potential life.<sup>111</sup> But *Casey*'s analysis of the spousal notification and parental consent provisions makes no mention of the state's interest in maternal health

---

family unit and of parental authority." While the district court in *Hodgson* determined that "the legislature was motivated by a desire to deter and dissuade minors from choosing to terminate their pregnancies," Minnesota's Attorney General disclaimed this purpose on appeal and the Court did not consider it, noting that "the state judges who have interpreted the statute in over 3,000 decisions implementing its bypass procedures have found no legislative intent to disfavor the decision to terminate a pregnancy." *Hodgson*, 497 U.S. at 428, 436. And although the Court in *Matheson* mentioned the state's interest in protecting potential life, see *Matheson*, 450 U.S. at 413 ("[S]tate action 'encouraging childbirth except in the most urgent circumstances' is 'rationally related to the legitimate governmental objective of protecting potential life.'"), the plurality in *Casey* did not cite *Matheson* anywhere in its opinion.

110. *Casey*, 505 U.S. at 899; see *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 510–19 (1990) (focusing on whether an Ohio judicial bypass provision satisfied constitutional requirements); *Hodgson v. Minn.*, 497 U.S. 417, 461 (1990) (O'Connor, J., concurring) (assessing whether a Minnesota judicial bypass provision was constitutional); *Hodgson*, 497 U.S. at 497–501 (Kennedy, J., concurring in part and dissenting in part) (discussing the constitutionality of a judicial bypass provision); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 439–40 (1983) (analyzing whether an Akron ordinance allowed for judicial bypass), *overruled in part by Casey*, 505 U.S. 833 (1992); *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979) (discussing the judicial bypass requirement). Similar to *Casey*'s treatment of the Pennsylvania spousal notification provision, the Court in *Hodgson* balanced the interests of a minor woman and one of her parents against the interests of the other parent in connection with a parental notification provision, see *Hodgson*, 497 U.S. at 453 ("[T]he combined force of the separate interest of one parent and the minor's privacy interest must outweigh the separate interest of the second parent."), but in analyzing the parental consent requirement in *Casey*, the Court does not cite the opinion of the Court in *Hodgson*.

111. See, e.g., *Hellerstedt II*, 231 F. Supp. 3d at 228 ("According to DSHS, the Court should not balance the benefits and burdens of regulations expressing respect for the life of the unborn."); *Hopkins*, F. Supp. 3d at 1055 ("Defendants contend that the balancing test . . . applies only when 'the state's interest is in . . . a patient's health or safety' and that the lesser standard of rational basis review applies 'when a state regulates to promote respect for unborn life.'").

either, and that interest was the focus in *Hellerstedt I*.<sup>112</sup> Thus, deciding how broadly the balancing test recognized in *Hellerstedt I* applies is a challenge.<sup>113</sup>

What type of means-ends analysis the balancing test contemplates also is elusive. *Hellerstedt I* unequivocally states that traditional, deferential rational basis review is not the proper standard: “[I]t is wrong to equate the judicial review [under the undue burden test] . . . with the less strict review applicable where, for example, economic legislation is at issue.”<sup>114</sup> *Hellerstedt* also purports to apply *Casey*, though, and the Court in *Casey* rejected strict scrutiny:

[C]ases [in the period following *Roe*] decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest. Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her.<sup>115</sup>

---

112. See *Hellerstedt I*, 136 S. Ct. at 2310 ([O]ne is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women’s health.”). Curiously, the Court in *Hellerstedt I* did not cite *Casey*’s treatment of Pennsylvania’s recordkeeping and reporting requirements, the only provisions of the Pennsylvania statute that the *Casey* Court explicitly acknowledged as being designed to further the state’s interest in maternal health. See *Casey*, 505 U.S. at 900 (“Although [the recordkeeping and reporting requirements] do not relate to the State’s interest in informing the woman’s choice, they do relate to health.”).

113. Under the Court’s precedent, no judicial balancing test would be required if an abortion regulation does not impose an obstacle in the path of a woman seeking an abortion. See *Harris v. McRae*, 448 U.S. 297, 315, 326 (1980) (“The Hyde Amendment, like the Connecticut welfare regulation at issue in *Maher*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, . . . . In making an independent appraisal of the competing interests involved here, the District Court went beyond the judicial function. Such decisions are entrusted under the Constitution to Congress, not the courts.”); *Maher v. Roe*, 432 U.S. 464, 474, 479 (1977) (“The Connecticut regulation places no obstacles . . . in the pregnant woman’s path to an abortion . . . . Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution . . . is the legislature.”).

114. *Hellerstedt I*, 136 S. Ct. at 2309.

115. *Casey*, 505 U.S. at 871. The Court in *City of Akron* applied strict scrutiny to strike down an Akron ordinance regulating abortion, and in overruling *City of Akron* in part, the Court in *Casey* referred to *City of Akron* as a case that errantly applied strict scrutiny. See *id.* at 882 (referring to *City of Akron* as an example of the inappropriate application of strict scrutiny and overruling the decision in *City of Akron* to strike down certain informed consent provisions); *City of Akron*, 462 U.S. at 427 (“[R]estrictive state regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be supported by a compelling state interest.”), *overruled in part by Casey*, 505 U.S. 833 (1992).

Moreover, neither the Court's analysis in *Hellerstedt I* nor in *Casey* or *Gonzales* contains the marks of strict scrutiny—which requires a regulation to be narrowly tailored to serve a compelling government interest<sup>116</sup>—or of “intermediate” scrutiny—which requires that a regulation bear a substantial relationship to an important or legitimate government interest.<sup>117</sup> Thus, to the extent that the balancing test *Hellerstedt I* employs is broadly applicable, it would seem to be less demanding than even intermediate scrutiny, but more rigorous than deferential rational basis review. Unfortunately, the Court in *Hellerstedt I* did not give any meaningful guidance as to how to apply the balancing test in general or in any particular situation, leading Justice Clarence Thomas to suggest in his *Hellerstedt I* dissent that application of the undue burden standard “will surely mystify lower courts for years to come.”<sup>118</sup>

But a couple of things are relatively certain. If *Hellerstedt I* means that *Casey*'s undue burden standard requires balancing in all circumstances,<sup>119</sup> the Court in *Casey* and *Gonzales* necessarily employed a balancing test when it sustained various regulations based on the governmental interest in protecting potential life. And if that is so, because *Hellerstedt I* does not address the interest in protecting potential

---

116. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (explaining the requirements of strict scrutiny).

117. See *id.* at 441 (describing the requirements of intermediate scrutiny). *Hellerstedt I* refers to the state's “legitimate” interest in protecting maternal health, *Gonzales* describes the state's interest in protecting potential life as “legitimate” and “substantial” and its interest in maintaining medical standards as “legitimate,” and *Casey* indicates that the state's interest in protecting potential life is “important,” “legitimate,” “substantial,” and “profound” and its interest in protecting maternal health is “important” and “legitimate.” *Hellerstedt I*, 136 S. Ct. at 2309, 2311; *Gonzales v. Carhart*, 550 U.S. 124, 145–46, 158 (2007); *Casey*, 505 U.S. at 846, 853, 870, 871, 875–76, 878, 882, 883. But neither *Hellerstedt I* nor *Gonzales* refer to any compelling interest nor considers whether the regulations at issue are narrowly tailored or substantially related to the relevant government's interests. And the Court in *Casey* specifically rejected applying strict scrutiny to abortion regulations and nowhere considered the substantiality of the relationship between the Pennsylvania statute and the state's interests. See *supra* note 113 and accompanying text (indicating that *Casey* concluded that strict scrutiny was inconsistent with *Roe*). But see *Hellerstedt I*, 136 S. Ct. at 2326 (Thomas, J., dissenting) (“The majority's undue-burden test looks far less like our post-*Casey* precedents and far more like the strict-scrutiny standard that *Casey* rejected, under which only the most compelling rationales justified restrictions on abortion.”).

118. *Hellerstedt I*, 136 S. Ct. at 2326 (Thomas, J., dissenting).

119. This Article assumes, but does not conclude, that *Hellerstedt I* balancing always is required under *Casey*'s undue burden standard. Given, however, that the *Hellerstedt I* Court concluded that each of the Texas regulations represented a substantial obstacles to abortion access, see *supra* note 99 and accompanying text (discussing *Hellerstedt I*), one might reasonably conclude that what the Court stated about balancing is mere dicta or only applies when a health-based regulation poses a substantial obstacle.

life at all, *Casey* and *Gonzales* must control how to weigh the benefits and burdens of a measure that purports to serve that interest.

The *Hellerstedt I* Court's rebuke of the Fifth Circuit for not considering the medical benefits of Texas's admitting privileges and ambulatory surgery center requirements<sup>120</sup> may tempt one to question whether a pre-viability abortion regulation always must yield medical benefits to satisfy the undue burden standard. Again, though, *Hellerstedt I* did not overrule *Casey*,<sup>121</sup> and the Court in *Casey* could not have been clearer that a regulation seeking to protect potential life by informing a woman's choice need not offer any medical benefit: "[U]nder 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.*"<sup>122</sup>

Thus, when a state regulates abortion pre-viability in a manner designed to protect potential life—at least when it does so by adopting measures to inform a woman's decision—the state's regulation need not offer any medical benefits. On further inspection of both *Casey* and *Gonzales*, in fact, one can see that the benefit required to satisfy the undue burden test when an abortion regulation targets the interest in protecting potential life is minimal. Indeed, both decisions indicate that, for a regulation founded on that interest to withstand constitutional scrutiny, it need only be conceivable that the regulation would cause a woman to choose childbirth over abortion; the regulation's constitutionality does not depend on how likely it is that the regulation will achieve that end in any particular case or any percentage of cases.

In various places, the language the Court used in *Casey* and *Gonzales* validates this conclusion. For instance, in upholding Pennsylvania's informed consent provision, the *Casey* Court stated:

*Nor can it be doubted* that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. . . . We . . . *see no reason* why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus. . . . [W]e permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed . . . . In short, requiring that the woman

---

120. See *Hellerstedt I*, 136 S. Ct. at 2309

121. See *supra* note 98 and accompanying text.

122. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. at 886 (emphasis added); see also *id.* at 886 ("We . . . see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, *even when those consequences have no direct relation to her health.*") (emphasis added).

be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which *might* cause the woman to choose childbirth over abortion.<sup>123</sup>

And with respect to the waiting period at issue in *Casey*, the Court added: “*The idea* that important decisions will be more informed and deliberate if they follow some period of reflection *does not strike us* as unreasonable . . . *In theory, at least*, the waiting period is a reasonable measure to implement the State’s interest in protecting the life of the unborn . . . .”<sup>124</sup> Simply put, these are not words that evidence a rigorous assessment of whether a woman actually would, or even would be likely to, decide against abortion ban based on the regulation.<sup>125</sup>

*Gonzales* is even clearer in this regard. In that case, the Court upheld the federal partial-birth abortion merely on its intuition regarding the effect abortion may have on an unspecified number of women: “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude *some women* come to regret their choice to

123. *Id.* at 882–83 (emphasis added).

124. *Id.* at 885.

125. In a number of places, the Court in *Casey* indicates that its decision to uphold aspects of the Pennsylvania statute were made in reliance on the record in the case. *See id.* at 884–85 (“Since there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue burden.”); *id.* at 885 (“[T]he record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk.”); *id.* at 887 (“[O]n the record before us, . . . we are not convinced that the 24-hour waiting period constitutes an undue burden.”); *Casey*, 505 U.S. at 901 (“While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.”). Thus, one might contend that *Casey* leaves a window open for a plaintiff to present evidence that an abortion regulation founded on the state’s interest in potential life is or will be ineffective in causing women to choose childbirth over abortion. In each case in which the Court referred to the record, however, it was discussing the obstacles or burdens the relevant provisions imposed, not the potential benefits. *See id.* at 879–901. Moreover, one finds in *Gonzales* no evidence that it was relying on the record in deciding that the federal partial-birth abortion ban advanced the state’s interest in protecting potential life. Thus, the *Casey* Court’s references to the record should not undermine the conclusion that a regulation intended to advance the state’s interest in protecting prenatal life need only offer a conceivable benefit. In addition, even if the record were relevant in determining that a benefit exists, with campaigns like Silent No More in which women testify that they regret their abortions, it seems likely that the State would be able to offer evidence to rebut a plaintiff’s assertion that a regulation would not cause a woman to choose childbirth over abortion. *See About Us*, SILENT NO MORE AWARENESS, <http://www.silentnomoreawareness.org/about-us/> [<https://perma.cc/4FAY-WTG6>] (last visited Mar. 25, 2018); *cf. Hellerstedt I*, 136 S. Ct. 2311–12 (“[W]hen directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case.”).

abort the infant life they once created and sustained.”<sup>126</sup> Furthermore, the Court relied on inference to conclude that the partial-birth abortion ban furthers the state’s interest in protecting potential life:

It is a *reasonable inference* that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. . . . The State’s interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.<sup>127</sup>

In addition to the language the Court used in both *Casey* and *Gonzales*, the nature of the regulations that the Court upheld in the two cases confirms that to have a benefit sufficient to satisfy the undue burden test, it need only be conceivable that a regulation designed to promote childbirth could achieve that end. In *Casey*, for example, the Court sustained a requirement that a woman be told about available information regarding fetal development and resources available to a woman who chooses not to terminate her pregnancy,<sup>128</sup> even though the applicable statute contained no requirement that a woman actually look at the information. And in *Gonzales*, the Court deemed the federal partial-birth abortion ban constitutional based on the information provided by the ban itself<sup>129</sup> without considering whether any particular woman would know of the ban then or in the future.

But perhaps the most compelling evidence of the low bar that applies to regulations designed to further the state’s interest in protecting potential life is found by comparing what the *Hellerstedt I* Court stated when it struck down Texas’s admitting privileges and ambulatory surgery center requirements to what Justice Ruth Bader Ginsberg said in objecting to the *Gonzales* Court’s decision to uphold the federal partial-birth abortion ban. In striking down the ambulatory surgery center requirement, the Court in *Hellerstedt I* reported: “record evidence . . . provides ample support for the . . . conclusion that “[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of

---

126. *Gonzales*, 550 U.S. at 159 (emphasis added).

127. *Id.* at 160 (emphasis added).

128. *See Casey*, 505 U.S. at 883 (determining that Pennsylvania’s informed consent requirements were constitutional).

129. *See Gonzales*, 550 U.S. at 133, 160, 168 (reversing decisions of appeals courts that struck down the federal partial-birth abortion ban).

abortion as to be nearly *arbitrary*.”<sup>130</sup> Likewise, with respect to the admitting privileges requirements, the Court stressed: “[W]hen directly asked at oral argument whether Texas knew of *a single instance* in which the new requirement would have helped *even one woman* obtain better treatment, Texas admitted that there was *no evidence* in the record of such a case.”<sup>131</sup>

What Justice Ginsburg stated in her dissent in *Gonzales* is strikingly similar: “The law saves *not a single fetus* from destruction, for it targets only a *method* of performing abortion.”<sup>132</sup> Yet, in *Gonzales*, a “reasonable inference” about the federal partial-birth abortion ban’s effect and the message it delivers offered “ample justification” for the ban—even in the absence of ‘reliable data’ to support the conclusion that “some women come to regret their choice to abort.”<sup>133</sup> Thus, the measures at issue in *Casey* and *Gonzales* and the language the Court used in those cases (particularly when held up against the language found in *Hellerstedt I*) attest to the fact that, if a regulation plausibly could cause a woman to choose childbirth over abortion, the regulation’s benefit is sufficient to satisfy *Casey*’s undue burden test.

With such a low bar for finding a sufficient benefit, the critical constitutional question for an abortion regulation that serves the state’s interest in protecting potential life becomes the degree to which the regulation burdens women’s access to abortion. On this point, *Casey* is once again instructive. In describing its undue burden test, the Court in *Casey* explained: “What is at stake is the woman’s right to make the ultimate decision . . . . Regulations 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.”<sup>134</sup> While the Court acknowledged that increased costs could impose an impermissible obstacle, those associated with Pennsylvania 24-hour waiting period and reporting and recordkeeping requirements did not.<sup>135</sup> Moreover, the

---

130. *Hellerstedt I*, 136 S. Ct. at 2316 (emphasis added).

131. *Id.* at 2311–12 (emphasis added).

132. *Gonzales*, 550 U.S. at 181 (Ginsberg, J., dissenting); *see id.* at 160 (“It is objected that the standard D & E is in some respects as brutal, if not more, than the intact D & E, so that the legislation accomplishes little. What we have already said, however, shows ample justification for the regulation.”).

133. *Id.* at 159, 160.

134. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

135. *See id.* at 886 (“We do not doubt that, as the District Court held, the waiting period has the effect of ‘increasing the cost and risk of delay of abortions,’ . . . but the District Court did not conclude that the increased costs and potential delays amount to substantial obstacles.”); *id.* at 901 (“While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.”).

Court determined that the waiting period did not “impose[] a real health risk” and that the effect on women living significant distances away from an abortion provider was not enough to invalidate the measure.<sup>136</sup> In fact, the only aspect of the Pennsylvania statute that the Court determined unduly burdensome was the spousal notification requirement, which the Court explained would operate as a practical ban on abortion for some women.<sup>137</sup>

The collection of burdens that drove the Court in *Hellerstedt I* to strike down Texas’s admitting privileges and ambulatory surgery center requirements arose from a consequence of perhaps greater magnitude—large-scale abortion facility closures. According to the Court, the two requirements, when taken together, would cause the number of abortion facilities in the State to drop from approximately 40 to just 7 or 8.<sup>138</sup> The closures resulting from the admitting privileges requirement, the Court decided, would impose substantial obstacles to abortion access because they “meant fewer doctors, longer waiting times, and increased crowding.”<sup>139</sup> In addition, while acknowledging that increased driving distances alone may not present a significant obstacle to abortion, the Court stated that that burden was just one more to add to the mix.<sup>140</sup> As to the additional closures attendant to the ambulatory surgery center requirement, the Court credited evidence and relied on “common sense” to conclude that the remaining facilities would be unable to meet demand<sup>141</sup> and recited a litany of collateral consequences even if the remaining facilities could accommodate additional women seeking abortion services.<sup>142</sup>

Therefore, the consequences—an effective ban on abortion for a particular population of women and an approximately 80% reduction in

---

136. *See id.* at 885–86 (discussing the delay imposed on women who lived some distance away from an abortion provider). The Court in *Gonzales* likewise observed that an abortion regulation would be unconstitutional if it “subject[ed] [women] to significant health risks.” *Gonzales*, 550 U.S. at 161.

137. *See Casey*, 505 U.S. at 894 (“[T]he significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.”).

138. *See Hellerstedt I*, 136 S. Ct. 2292, 2312, 2316 (2016) (noting that the district court had determined that the admitting privileges requirement caused the number of facilities to drop “from about 40 to about 20” and that the parties stipulated that the ambulatory surgery center requirement would cause the number of facilities to decrease to seven or eight).

139. *Id.* at 2313.

140. *See id.* (indicating that the increased traveling distances were “but one additional burden”).

141. *Id.* at 2317. *See also id.* at 2316–18 (finding the record sufficient to support the district court’s conclusion regarding the ability to meet demand).

142. *See id.* at 2318 (indicating that a reduction in the number of available abortion facilities could deprive women of “individualized attention, serious conversation, and emotional support”).

the number of abortion facilities available—that drove the Court in *Casey* and *Hellerstedt I* to strike down abortion regulations at issue in those cases under the undue burden test were of significant scale. It is with this in mind that one must evaluate fetal remains disposition requirements.

### III. THE CONSTITUTIONALITY OF MODERN FETAL REMAINS DISPOSITION REQUIREMENTS

Despite the substantial freedom that *Casey* and *Gonzales* offer, two courts recently concluded that measures regulating the disposition of fetal remains do not meet, or are unlikely to meet, the requirements of the Fourteenth Amendment. In *PPINK*, the Seventh Circuit struck down an Indiana statute providing that, if a woman having an abortion does not exercise her right to determine how the aborted fetus is to be disposed of, the facility in which the abortion is performed must ensure that the fetus is interred or cremated separately from other tissue extracted during surgery.<sup>143</sup> And in *Hellerstedt II*, a Texas federal district court enjoined amended Texas Department of State Health Services (DSHS) regulations and a subsequently-enacted Texas statute, both of which reduced the number of permissible means of disposing of tissue from abortions and miscarriages, eliminating the least expensive options and permitting only burial or cremation, regardless of the gestational age of the fetus.<sup>144</sup>

While both the Seventh Circuit and the Texas district court reached similar conclusions, they got there in different ways. In *PPINK*, the court did not even mention *Casey*'s undue burden test when evaluating Indiana's fetal remains disposition statute, but instead determined that the statute could not survive the very deferential rational basis standard of

---

143. See *PPINK*, 888 F.3d at 303–04 (describing the effects of the Indiana statute). While the Indiana statute does not allow a fetus to be cremated with other “surgical byproducts,” it does allow for fetuses to be cremated collectively. *Id.* at 304.

144. See *Hellerstedt II*, 231 F. Supp. 3d 218, 223–25 (W.D. Tex. 2017) (describing the amendments and their effect); see generally *Hellerstedt II (order)*, 2018 BL 30317, at \*1-2 (describing the Texas statute). The amended regulations state that the methods of disposition are limited to “interment, incineration followed by interment, or steam disinfection followed by interment,” and the definition of the term “interment” includes “the process of cremation followed by placement of the ashes in a niche, grave, or scattering of ashes.” *Hellerstedt II*, 231 F. Supp. 3d at 224. While the provisions of both the DSHS regulations and the Texas statute extend both to abortions and miscarriages, the regulations and statute only apply to fetal tissue expelled or delivered at a health care facility. *Hellerstedt II*, 231 F. Supp. 3d at 224 (“[T]he Amendments except ‘human tissue, including fetal tissue, that is expelled or removed . . . once the person is outside of a healthcare facility.’”); *Hellerstedt II (order)*, 2018 BL 30317, at \*2 (“[A] Texas health care facility . . . must dispose of [embryonic and fetal tissue remains] passed or delivered at the facility.”); 25 TEX. ADMIN. CODE § 1.138.3(c)(5) (West 2017) (exempting “human tissue, including embryonic and fetal tissue, that is expelled or removed from the human body once the person is outside of a health care facility”).

review.<sup>145</sup> The court in *Hellerstedt II*, in contrast, employed the undue burden test as explained in *Hellerstedt I* and found that the Texas regulations and statute likely fell short.<sup>146</sup>

### A. PPINK

The parties in *PPINK* agreed that Indiana's fetal remains disposition requirement did not implicate a fundamental right and therefore was subject to rational basis review, a standard that merely requires that a challenged law "be rationally related to legitimate government interests."<sup>147</sup> Under the rational basis standard, the plaintiff bears the burden of proof, and to be successful, she must prove that "there is [no] conceivable state of facts that supports" the law.<sup>148</sup> According to the Seventh Circuit, the plaintiff had done so.<sup>149</sup>

In reaching its conclusion, the *PPINK* court determined that the state's purported interest in "'the humane and dignified disposal of fetal remains'"<sup>150</sup> is not a legitimate one because a fetus is not a person for purposes of the Fourteenth Amendment.<sup>151</sup> And the court rejected the State's argument that its interest must be legitimate because other state and federal laws treat fetuses as "human beings."<sup>152</sup> Those other laws, the court asserted, are designed to foster respect for potential life and "no potential life [is] at stake" when Indiana's fetal remains disposition statute applies.<sup>153</sup> Moreover, the Seventh Circuit dismissed the State's argument that *Gonzales* recognized an interest in "fetal human dignity," noting that *Gonzales* "'involved a 'ban on abortions that involve partial delivery of a living fetus.'"<sup>154</sup>

145. See *PPINK*, 888 F.3d at 309–10 (concluding that the Indiana statute is not rationally related to any legitimate government interest).

146. See *Hellerstedt II*, 231 F. Supp. 3d at 227–32 (finding that the Texas regulations likely fail the undue burden test); *Hellerstedt II (order)*, 2018 BL 30317, at \*5 (finding that the Texas statute likely fails the undue burden test).

147. *PPINK*, 888 F.3d at 307 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997)).

148. *Id.* at 308 (quoting *Hayden ex rel. A.H. v. Greensburg Community Sch. Corp.*, 743 F.3d 569, 576 (7th Cir. 2014)). While the plaintiffs asserted both substantive due process and equal protection claims, because the court determined that the law was invalid on due process grounds, it did not consider the equal protection claims. See *id.* at 307–08.

149. See *id.* at 309 ("[W]e cannot identify a rational relationship between the State's interest . . . and the law as written . . . . Accordingly, the fetal disposition provisions violated substantive due process.").

150. *Id.* at 308.

151. See *id.* ("Simply put, the law does not recognize that an aborted fetus is a person. . . . As such, the State's interest in requiring abortion providers to dispose of aborted fetuses in the same manner as human remains is not legitimate.").

152. See *id.* at 308–10.

153. *Id.* at 308.

154. *Id.*

The court also distinguished the Eighth Circuit's decision in *Planned Parenthood of Minnesota*, emphasizing that that court's recognition of a legitimate interest in "protecting public sensibilities" was mere dicta because Planned Parenthood had conceded the interest's legitimacy.<sup>155</sup> In addition, the Seventh Circuit insisted, the interest recognized in the Eighth Circuit case was "meaningfully different" from the interest Indiana cited in *PPINK* because the stated purpose of Minnesota's fetal remains disposition law was protection of "public health and welfare," not protection of the fetus.<sup>156</sup>

Finally, the court declared that even if Indiana had a legitimate interest "in the humane and dignified disposal of aborted fetuses," an interest that would "require[] recognizing that the fetus is legally equivalent to a human," the state's disposition requirement was not rationally related to that interest because it did not treat fetal remains in the same manner as human remains.<sup>157</sup> According to the court, the disposition requirement allows a woman to determine how to dispose of her aborted fetus, and Indiana law does not otherwise allow a person to dispose of human remains in whatever way she wishes.<sup>158</sup> Moreover, the court pointed out, the disposition statute broadly permits simultaneous cremation of the remains of different fetuses, a practice that is restricted when disposing of other human remains.<sup>159</sup>

## B. Hellerstedt II

Unlike the court in *PPINK*, whose rigorous application of the rational basis standard led to the demise of Indiana's fetal remains disposition law, the Texas district court in *Hellerstedt II* looked to *Casey*'s undue burden standard—and the *Hellerstedt I* Court's interpretation of it—to enjoin the amendments to the DSHS regulations and Texas statute governing the disposition of fetal remains.<sup>160</sup> And consistent with

---

155. *Id.* at 309. See also notes 50–62 and accompanying text (discussing *Planned Parenthood of Minnesota*).

156. *PPINK*, 888 F.3d at 309. See also notes 50–62 and accompanying text (discussing *Planned Parenthood of Minnesota*).

157. *PPINK*, 888 F.3d at 309.

158. See *id.* (describing laws governing burial and cremation).

159. See *id.* (discussing when simultaneous cremation is permitted).

160. See *Hellerstedt II*, 231 F. Supp. 3d 218, 232 (W.D. Tex. 2017) (deciding that the plaintiffs were likely to succeed in claiming that the Texas amendments violate the undue burden test); *Hellerstedt II (order)*, 2018 BL 30317 at \*5 ("Plaintiff [sic] . . . establish a substantial likelihood of success on their claim Chapter 697 imposes an undue burden on . . . [a woman's] right to decide whether to terminate her pregnancy."). Although DSHS claimed that the Texas statute superseded the earlier amended regulations, the court declined to consider the earlier regulations moot because DSHS had not provided evidence that the statute replaced the regulations and because, if not invalid themselves, the regulations would apply in the event the

*Hellerstedt I*, the *Hellerstedt II* court claimed that to survive the undue burden test, an abortion regulation must serve a legitimate state interest and the burdens the regulation imposes on a woman's ability to choose abortion must not outweigh the regulation's benefits.<sup>161</sup>

The DSHS regulations and the Texas statute, the court found, failed at every turn. First, while acknowledging that *Casey* recognizes that the state has an interest in protecting potential life, the court determined that the amendments to the DSHS regulations did not further that interest because the DSHS regulations apply after an abortion occurs, when no potential life is left to protect.<sup>162</sup> Similarly, in considering the Texas legislation, the district court stated that "there is no precedent showing [that there is a legitimate state interest in] expressing respect for the unborn by restricting [embryonic and fetal tissue remains] disposal after the potential for life no longer exists."<sup>163</sup> Moreover, the court in *Hellerstedt II* observed that both the amendments to the DSHS regulations and the later-adopted Texas law suggest that human life begins at conception and thereby might interfere with a woman's constitutionally-protected right to her own personal beliefs.<sup>164</sup>

Second, the court decided that the benefits associated with the DSHS regulations and the Texas statute were insignificant. With respect to the statute, the court stated that "the only identified benefit is the expression of the State's respect for the unborn."<sup>165</sup> And the court rejected the assertion that the amendments to the DSHS regulations would "confer[] dignity on the unborn," questioning how DSHS's recommendation that

---

statute is invalid. See *Hellerstedt II (order)*, 2018 BL 30317 at \*4 (discussing the mootness of the DSHS regulations).

161. See *Hellerstedt II*, 231 F. Supp. 3d at 228 (indicating that the Supreme Court in *Hellerstedt I*, "confirmed that a state must act on a legitimate interest" and that a court must weigh the benefits and burdens of the law in determining whether it violates a woman's constitutional rights); *Hellerstedt II (order)*, 2018 BL 30317, \*5–6 (describing the undue burden test as explained in *Hellerstedt I*).

162. *Hellerstedt II*, 231 F. Supp. 3d at 229.

163. *Hellerstedt II (order)*, 2018 BL 30317, at \*6.

164. See *Hellerstedt II*, 231 F. Supp. 3d at 229 (noting *Casey*'s reference to a person's right to "define [her] own concept of the mystery of human life."); *Hellerstedt II (order)*, 2018 BL 30317, at \*7 (noting the same *Casey* reference to a person's right to define the concept of human life). The court also pointed out that, based on the timing of publication of the amendments in relation to the decision in *Hellerstedt I* and given the fact that DSHS only considered the financial impact with respect to abortion (and not the impact in other circumstances under which disposal of fetal tissue would be required), it could conclude that the regulations were unconstitutional because they were designed to restrict access to abortion. *Hellerstedt II*, 231 F. Supp. 3d at 229–30. Because the statutory disposition requirements at one point had been part of a larger bill that prohibit certain abortions, the court similarly speculated that the underlying purpose of the statute might be to restrict abortion. *Hellerstedt II (order)*, 2018 BL 30317, at \*6.

165. *Hellerstedt II (order)*, 2018 BL 30317, at \*7.

fetal remains from separate procedures be placed in a single container and frozen until disposal better protected dignity than the current regulations.<sup>166</sup> In addition, the court indicated that the fact that the DSHS regulations did not apply to fetal remains expelled or removed outside a medical facility weakened the benefit DSHS suggested.<sup>167</sup>

Finally, the *Hellerstedt II* court recited a series of burdens that the amended regulations and the Texas statute might impose on a woman's ability to have an abortion. For example, the court stated that the regulations and law would cause health care providers to incur additional costs and that DSHS had underestimated the costs associated with the regulations by failing to take into account Texas's size and population, as well as "transportation costs, administrative costs, [and] . . . vendor availability."<sup>168</sup> The court also suggested that a lack of vendor availability might lead to facility closures.<sup>169</sup> In addition, according to the court, the amended regulations and the Texas statute would present logistical challenges for medical facilities with respect to "sorting procedure, storage, transportation, and ultimate disposal and might cause women to experience "grief and shame," thereby deterring them from seeking appropriate medical care.<sup>170</sup> Although the court acknowledged that the Texas legislature had attempted to ameliorate some of the potential problems associated with the DSHS regulations—by mandating a registry accessible to physicians and health care facilities that identifies parties willing to provide free or low-cost burial or financial assistance to defray the costs of cremation or burial, and by directing the development of a grant program to assist with the costs arising from disposition of fetal

---

166. *Hellerstedt II*, 231 F. Supp. 3d at 230.

167. *Id.* at 230.

168. *Id.* See *Hellerstedt II (order)*, 2018 BL 30317, at \*6 (citing increased costs as a burden).

169. See *Hellerstedt II*, 231 F. Supp. 3d at 231 (noting testimony that one "center was nearly forced to close after two successive medical waste disposal vendors dropped the healthcare facility" and concluding that "there may be insufficient vendors to handle the disposal of fetal tissue in compliance with the Amendments, which would be a major, if not fatal, blow to healthcare providers performing abortions."). DSHS had identified two possible vendors who might provide for disposal—a funeral home and the Texas Catholic Conference of Bishops. See *Hellerstedt II*, 231 F. Supp. 3d at 231. The court discounted both, indicating that neither appeared to have the appropriate permits, that the funeral home was inexperienced and would impose a specific requirement that could increase costs, and that use of the Texas Catholic Conference of Bishops might "distress[] patients who have different religious views or do not see fetal tissue as a person." *Hellerstedt II*, 231 F. Supp. 3d at 231.

170. *Hellerstedt II*, 231 F. Supp. 3d at 230. See *Hellerstedt II (order)*, 2018 BL 30317, at \*7 (indicating that it was "unclear" as to whether the Texas statute resolved the logistical difficulties associated with the DSHS regulations and that evidence indicated that the fetal remains disposition requirements might result in "grief and shame").

remains as required by law—<sup>171</sup> the *Hellerstedt II* court assigned little weight to those measures because it could identify no evidence that they would have an appreciable impact when the Texas statute was set to become effective.<sup>172</sup>

Having considered both the potential benefits and burdens of the DSHS amendments, the court in *Hellerstedt II* decided that the increased costs, the possible “stigma” on women, and the “potentially devastating logistical challenges for abortion providers” were likely to “substantially outweigh” the questionable benefit of protecting the dignity of the unborn.<sup>173</sup> Likewise, the court determined that the burdens it had identified with respect to the Texas statute exceeded the sole identified benefit of expressing respect for life.<sup>174</sup> Thus, within the space of about a year, the court had granted preliminary injunctions against both the DSHS amendments and the later-adopted Texas legislation.<sup>175</sup>

### C. Examining PPINK and *Hellerstedt II*

Although the Seventh Circuit in *PPINK* and the Texas district court in *Hellerstedt II* took different paths, they have in common some serious flaws that undermine their conclusions. Contrary to what the two courts found, the Indiana statute at issue in *PPINK* and the DSHS amendments and Texas statute at issue in *Hellerstedt II* all serve the same legitimate, important, substantial, and profound governmental interest—the interest in protecting potential life.<sup>176</sup> The three measures therefore easily satisfy the rational basis standard of review.

In addition, the fetal remains disposition requirements in Indiana and Texas offer benefits sufficient to meet the extremely low standard that applies under *Casey*’s undue burden test for abortion regulations designed to advance the state’s interest in protecting potential life. Thus, if *Casey*’s undue burden standard applies as the Texas district court decided in *Hellerstedt II*, the real question for the requirements is whether they impose burdens of the magnitude that led the Court to strike down the Pennsylvania spousal notification requirement in *Casey* and the Texas admitting privileges and ambulatory surgery center requirements in *Hellerstedt I*. When viewed in light of the history of fetal remains

---

171. See TEX. HEALTH & SAFETY CODE ANN. §§ 697.005–.006 (West 2017) (requiring DSHS to establish a registry to help reduce costs associated with the disposition requirements and directing DSHS to establish a grant program).

172. See *Hellerstedt II (order)*, 2018 BL 30317, at \*7 (giving little credit to the registry and grant program).

173. *Hellerstedt II*, 231 F. Supp. 3d at 232.

174. See *Hellerstedt II (order)*, 2018 BL 30317, at \*7 (concluding that the burdens associated with the law surpassed the benefit).

175. *Hellerstedt II*, 231 F. Supp. 3d at 232–33; *Hellerstedt II (order)*, 2018 BL 30317, at \*8.

176. See *supra* note 174 and accompanying text (reciting the various ways in which the Court has described the interest in protecting potential life).

disposition requirements, this seems very unlikely. Thus, the Indiana statute, the DSHS amendments, and the Texas legislation are apt to survive a substantive due process challenge irrespective of whether rational basis review or the undue burden test represents the proper standard. And when one examines the *PPINK* and *Hellerstedt II* opinions closely, it is easy to see the mistakes that took the Seventh Circuit and the Texas district court in the opposite direction.

### 1. The State's Interest in Protecting Potential Life

Regardless of whether rational basis review or *Casey's* undue burden test is the appropriate measure to use in assessing the constitutionality of a fetal remains disposition requirement, a court must consider whether the government has a legitimate interest that will sustain the requirement. Neither the Seventh Circuit in *PPINK* nor the Texas district court in *Hellerstedt II* found one.<sup>177</sup> The court in *PPINK* found inapplicable the asserted governmental interests in “the humane and dignified disposal of fetal remains,” “promoting respect for potential life,” upholding “fetal human dignity,” and “protecting public sensibilities.”<sup>178</sup> Similarly, when considering the DSHS amendments, the court in *Hellerstedt II* rejected interests in “afford[ing] the level of protection and dignity to the unborn children as state law afford [sic] to adults and children,” “respecting [the] ‘life and dignity of the unborn,’” and protecting potential life.<sup>179</sup> Finally, with respect to the Texas fetal remains disposition statute, the *Hellerstedt II* court claimed that “there is no precedent showing expressing respect for the unborn by restricting [embryonic and fetal tissue remains] after the potential for life no longer exists is a valid state interest.”<sup>180</sup>

Whatever one might conclude about the other interests the two courts considered, their dismissal of Indiana's and Texas's interest in protecting potential life reflects a fundamental misunderstanding of the nature of that interest and what a state might do to advance it. *Roe*, *Casey*, and *Gonzales* are clear that the state has a profound, important, substantial, and legitimate interest in protecting potential life,<sup>181</sup> and the courts in *PPINK* and *Hellerstedt II* incorrectly attempted to confine that interest by

177. See *PPINK*, 888 F.3d 300, 309 (7th Cir. 2018); *Hellerstedt II*, 231 F. Supp. 3d at 230.

178. *PPINK*, 888 F.3d at 308–09.

179. *Hellerstedt II*, 231 F. Supp. 3d at 229.

180. *Hellerstedt II (order)*, 2018 BL 30317, at \*6.

181. See *Gonzales v. Carhart*, 550 U.S. 124, 126 (2007) (“A central premise of *Casey's* joint opinion [is] that the government has a legitimate, substantial interest in preserving and promoting fetal life . . . .”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (“The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted.”); *id.* at 878 (noting “the State's profound interest in potential life”); *Roe v. Wade*, 410 U.S. 113, 162 (1973) (observing that the state has an “important and legitimate interest in protecting the potentiality of human life”).

concluding that it could not justify a regulation that applies most directly to a fetus that no longer has the potential for life.<sup>182</sup> Either a state has a legitimate interest in some end or it does not, and the *Roe* Court did not limit the interest in protecting potential life to particular points in time; instead, the Court described the relative strength of the interest as a pregnancy progresses: “[The interest] grows in substantiality as the woman approaches term . . . .”<sup>183</sup> And while *Casey* and *Gonzales* describe the state’s interest in potential life as it relates to a particular woman’s pregnancy, they do not indicate that regulations affecting women who are not pregnant (or no longer are pregnant) cannot be founded on that interest. Indeed, the Court in *Michael M. v. Superior Court of Sonoma County*<sup>184</sup> implies that a law affecting men may be justified based on the state’s interest in protecting potential life. In that case, the Court determined that a state’s interest in preventing abortion would justify a California “statutory rape” law:

The justification for the statute offered by the State . . . is that the legislature sought to prevent illegitimate teenage pregnancies. . . . And although our cases establish that the State’s asserted reason for the enactment of a statute may be rejected, if it ‘could not have been a goal of the legislation,’ this is not such a case. . . . We are satisfied not only that the prevention of illegitimate pregnancy is at least one of the “purposes” of the statute, but also that the State has a strong interest in preventing such pregnancy. . . . Of particular concern to the State is that approximately half of all teenage pregnancies end in abortion.<sup>185</sup>

Moreover, concluding that a state has no legitimate interest in protecting potential life with respect to a regulation that affects a woman who is no longer pregnant is entirely inconsistent with the Court’s approval of post-abortion reporting and recordkeeping requirements based on the state’s interest in safeguarding maternal health. Such reporting and recordkeeping requirements apply to abortions that have been completed and do nothing to make safer the abortions to which they apply. Yet, it is clear from *Danforth* and *Casey*

---

182. *PPINK*, 888 F.3d at 308 (“The fetal disposition provisions differ because there is no potential life at stake.”); *Hellerstedt II*, 231 F. Supp. 3d at 229 (“The Amendments regulate . . . activities that occur when there is no potential life to protect.”); *Hellerstedt II (order)*, 2018 BL 30317, at \*6 (“*Gonzalez* merely confirmed ‘the government may use its voice and its regulatory authority to show its profound respect for the life *within* the woman.’” (emphasis in original)).

183. *Roe*, 410 U.S. at 162.

184. 450 U.S. 464 (1981).

185. *Id.* at 470–71.

that the state's legitimate interest in safeguarding maternal health will justify post-abortion reporting and recordkeeping requirements.<sup>186</sup> The very same logic applies to fetal remains disposition requirements. The fact that the requirements apply most directly to fetuses whose potential lives no longer can be protected does not mean that the state's interest in protecting potential life is no longer relevant.

Thus, the appropriate question with respect to a fetal remains disposition requirement is not whether a state has a legitimate interest in protecting potential life, but whether the requirement might advance that interest. And considering the far-reaching effect that a fetal remains disposition requirement may have, the answer is yes.

When the district court in *Hellerstedt II* evaluated the possible benefits associated with Texas's fetal remains disposition requirement, it narrowly focused on whether the requirement advanced the dignity of a fetus who has been aborted.<sup>187</sup> In so doing, the court wrongly ignored the requirement's broader effect of discouraging abortion in general by causing women—and society as a whole—to reflect on the nature of a fetus. In this way, a fetal remains disposition requirement serves the state's interest in protecting potential life in a manner similar to requiring an abortion provider to inform a woman about information regarding the development of a fetus.<sup>188</sup> And a fetal remains disposition requirement even more closely resembles the federal partial-birth abortion ban, which the *Gonzales* Court upheld over Justice Ginsberg's claim that the availability of alternative methods of abortion meant that the ban would "not [save] a single fetus from destruction."<sup>189</sup> For the majority in *Gonzales*, the very fact that knowledge of the ban might influence some women to choose childbirth over abortion was enough:

The Act expresses respect for the dignity of human life. . . . It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus

---

186. See *Casey*, 505 U.S. at 900–01 (“Although [the recordkeeping and reporting provisions] do not relate to the State’s interest in informing the woman’s choice, they do relate to health. The collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult.”); *Danforth*, 428 U.S. at 81 (“Recordkeeping of this kind, if not abused or overdone, can be useful to the State’s interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment.”).

187. See *Hellerstedt II*, 231 F. Supp. 3d at 230 (evaluating the benefits of Texas’s fetal remains disposition requirements).

188. See *Casey*, 505 U.S. at 881 (upholding a Pennsylvania statute that requires “the physician [who is to perform an abortion] or a qualified nonphysician [to] inform the woman of the availability of printed materials published by the State describing the fetus”).

189. *Gonzales*, 550 U.S. at 181 (Ginsberg, J., dissenting).

reducing the absolute number of late-term abortions. . . . The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.<sup>190</sup>

The same thing easily can be said of a fetal remains disposition requirement. By requiring that fetal remains be disposed of in a manner similar to the disposal of remains of a human body that was born, the state expresses its view that both a fetus and a person who is born are human, that they share the same dignity, and that their lives therefore should be protected in the same way. As the dissenting judge in *Planned Parenthood Association of Cincinnati, Inc. v. Cincinnati*<sup>191</sup> explained with respect to a Cincinnati fetal remains disposition ordinance, the state's ability to express its view is important: "Insofar as the ordinance may serve as an indirect reminder that there is a school of thought that equates such termination of a pregnancy with termination of a life, the ordinance may conceivably make for slightly more thoughtful decisions on whether to terminate or not to terminate."<sup>192</sup> Thus, a fetal remains disposition requirement serves the state's interest in protecting potential life by attempting to ensure that women make informed decisions about whether to choose abortion.

Moreover, the Court in *Casey* and *Gonzales* stressed that knowledge of the effect of an abortion on a fetus is a critical aspect of a woman's being informed.<sup>193</sup> The *Casey* Court emphasized what is at stake: "In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."<sup>194</sup> And the Court in *Gonzales* said likewise: "While we find no reliable data to measure the phenomenon, it seems unexceptionable

---

190. *Gonzales*, 550 U.S. at 157, 160.

191. 822 F.2d 1390 (1987).

192. *Id.* at 1405 (Nelson, J., dissenting). In *Planned Parenthood Association of Cincinnati*, the Sixth Circuit upheld an injunction against a fetal remains disposition requirement on the grounds of vagueness and did consider whether the requirement impermissibly infringed on a woman's ability to choose abortion. *See id.* at 1399 (granting a preliminary injunction against a fetal remains requirement based on a claim that the requirement was unconstitutionally vague).

193. *See Casey*, 505 U.S. at 882 ("Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision."); *Gonzales*, 550 U.S. at 159–60 (indicating that the state has an interest in making sure that a woman makes informed decisions and that knowing how her fetus was aborted may intensify grief if she comes to regret her abortion).

194. *Casey*, 505 U.S. at 882.

to conclude some women come to regret their choice to abort the infant life they once created and sustained.”<sup>195</sup> Indeed, what *Gonzales* states about the possible effect on a woman when she learns about how her abortion was performed is easily modified to make the point with respect to a woman’s being informed about the manner of disposal of an aborted fetus:

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used [to dispose of a woman’s aborted fetus]. . . . It is, however, precisely this lack of information concerning the way in which the fetus will be [disposed of] that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to [dispose of the body] of her unborn child, a child assuming the human form [by grinding and discharging the child’s body to a sewer system].<sup>196</sup>

In addition to inappropriately confining the governmental interest in protecting potential life and ignoring the potential role fetal remains disposition requirements may play in informing a woman’s decision about abortion, the Seventh Circuit in *PPINK* and the Texas district court in *Hellerstedt II* failed to appreciate that the Supreme Court’s determination that a fetus is not a person for purposes of the Fourteenth Amendment<sup>197</sup> in no way prevents a state from treating fetal remains as it would the remains of a person who had been born.<sup>198</sup> Importantly, the

---

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

196. *Id.* at 160. See *Hellerstedt II*, 231 F. Supp. 3d at 223 (noting that “grinding and discharging to a sanitary sewer system” historically had been a permitted means for disposing of an aborted or miscarried fetus).

197. See *Roe*, 410 U.S. at 158 (“[T]he word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

198. See *PPINK*, 888 F.3d at 308 (“[T]he Supreme Court has concluded that ‘the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.’ . . . As such, the State’s interest in requiring abortion providers to dispose of aborted fetuses in the same manner as human remains is not legitimate.”); *Hellerstedt II*, 231 F. Supp. 3d at 229 (“[B]y seeking to respect life and the dignity of the unborn regardless of gestational age, DSHS appears to be inferentially establishing the beginning of human life as conception . . .”).

Fetal remains disposition requirements are not the only way in which states treat prenatal life in a manner consistent with how they treat a person who has been born. More than two-thirds of the states, including Indiana and Texas, have homicide laws that apply to fetuses. See NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> [<https://perma.cc/2GGQ-B4DT>] (discussing fetal homicide laws and listing the states

Court in *Roe* stated: “Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth.”<sup>199</sup> And less than five years later, the Court in *Maher v. Roe* stressed: “[T]he right [to an abortion] protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion . . . .”<sup>200</sup>

Furthermore, if *Roe* and *Maher* aren’t clear enough, the Court’s decision in *Webster* leaves no doubt that regardless of who is considered a person for purposes of the Fourteenth Amendment, a state may take a position on when life begins. The *Webster* Court considered a challenge to a Missouri law whose preamble stated plainly that “[t]he life of each human being begins at conception.”<sup>201</sup> And in determining that the preamble did present a constitutional issue, the Court observed:

[T]he meaning of the *Akron* dictum . . . was only that a State could not “justify” an abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the State’s view about when life begins. . . . The Court has emphasized that *Roe v. Wade* “implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.” The preamble can be read simply to express that sort of value judgment.<sup>202</sup>

According to the Court, the state’s view of when life begins only takes on constitutional significance when it actually affects a woman’s ability

---

that have them). Notwithstanding the Court’s recognition in *Roe* that a fetus or embryo is not a person for the purposes of the Fourteenth Amendment, the Seventh Circuit has explained that the Supreme Court’s abortion jurisprudence does not preclude states from adopting these laws. *See* *Coe v. County of Cook*, 162 F.3d 491, 497 (7th Cir. 1998) (“States remain free to punish feticide so long as they don’t try to punish a woman who exercises her constitutional right to abort her fetus, the physician who performs the abortion, or the hospital or other facility, even if public, in which the abortion is performed.”). *See also* *DeGasperin v. Ballard*, No. 16-0133, 2017 WL 663577, at \*16 (“This Court finds and concludes that neither *Roe v. Wade* nor its progeny prevent a state legislature from making an unborn fetus or embryo the victim of any of the above crimes.”); *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990) (“*Roe v. Wade* protects the woman’s right of choice; it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus.”).

199. *Roe*, 410 U.S. at 150.

200. *Maher*, 432 U.S. at 473–74. *See also* *Harris v. McRae*, 448 U.S. 297, 314 (“But the constitutional freedom recognized in *Wade* and its progeny, the *Maher* Court explained, did not prevent Connecticut from making ‘a value judgment favoring childbirth over abortion’ . . . .”).

201. *Webster v. Reproductive Health Services*, 492 U.S. 490, 504 (1989).

202. *Id.* at 506.

to choose to terminate her pregnancy.<sup>203</sup> The very fact that a regulation evidences a particular view on personhood—one that is contrary to what the Court has determined for purpose of the Fourteenth Amendment—is inapposite.

## 2. Rational Basis Review

If one avoids the errors that the Seventh Circuit and the Texas district court made with respect to a state's interest in protecting potential life, it is easy to see that fetal remains disposition requirements like those in Indiana and Texas survive rational basis review. As the Seventh Circuit explained, when a measure is subject to rational basis review, the legislature is entitled to broad deference and the plaintiff's burden is a high one: "So long as there is any conceivable state of facts that supports the policy, it passes muster under the due process clause; put another way, only if the policy is patently arbitrary would it fail."<sup>204</sup> Furthermore, the Supreme Court has stressed that "rational-basis review . . . 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices[,]'" and "a legislature . . . need not 'actually articulate at any time the purpose or rationale supporting [the choices it makes].'"<sup>205</sup>

With these principles in mind, applying the rational basis standard to fetal remains disposition requirements like those in Indiana and Texas is very straightforward. First, as discussed above, at least since *Roe*, the Court has recognized that a state has an "important and legitimate" interest in protecting potential life.<sup>206</sup> Second, the Court in both *Casey* and *Gonzales* pointed out that a state may advance this interest by "express[ing] profound respect for the life of the unborn."<sup>207</sup> Third, the Court in *Gonzales* emphasized that a government can express its respect through the mere adoption of an abortion regulation: "[T]he government may use its voice and its regulatory authority to show its profound respect for the life within [a] woman." . . . "[A] necessary effect of [an abortion] regulation and *the knowledge it conveys* [may] be to encourage some women to carry the infant to full term."<sup>208</sup> Finally, Indiana and Texas

---

203. *See id.* at 506 ("It will be time enough for federal courts to address the meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way.").

204. *PPINK*, 888 F.3d at 308 (quoting *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 576 (7th Cir. 2014)).

205. *Heller v. Doe*, 509 U.S. 312, 319–20 (1993).

206. *Roe*, 410 U.S. at 162.

207. *Casey*, 505 U.S. at 877. *See Gonzales*, 550 U.S. at 146 (emphasizing *Casey*'s recognition that "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted . . .").

208. *Gonzales*, 550 U.S. at 157, 160 (emphasis added).

certainly could have believed that, just as a ban on partial-birth abortion might cause a pregnant woman to see the fetus as a person, so might requiring a health care facility to dispose of an aborted or miscarried fetus in a manner similar to that in which a born human body is disposed. Indeed, even the Seventh Circuit testified as to the unmistakable message a fetal remains disposition requirement sends: “[T]he humane and dignified disposal of aborted fetuses requires recognizing that the fetus is . . . equivalent to a human.”<sup>209</sup> A pregnant woman who comes to recognize that equivalence might choose childbirth over abortion, and under rational basis review, this possibility is sufficient.<sup>210</sup> As the Court emphasized in *H.L. v. Matheson*, “State action ‘encouraging childbirth except in the most urgent circumstances’ is ‘rationally related to the legitimate governmental objective of protecting potential life.’”<sup>211</sup> Satisfaction of the rational basis standard is just that simple, and the Seventh Circuit in *PPINK* was wrong to complicate it by dismissing Indiana’s interest in protecting potential life and going through a means-ends test that more closely resembles intermediate or strict scrutiny.<sup>212</sup>

### 3. *Casey*’s Undue Burden Standard

While the Supreme Court has used rational basis review for some regulations touching on abortion—such as a Connecticut regulation that denied Medicaid funding for nontherapeutic abortions and the federal Hyde Amendment, which bars the use of Medicaid funds for certain abortions—a key point that led the Court to apply the deferential standard in those cases was that the regulations did not impose any barriers to abortion.<sup>213</sup> In contrast, the plaintiffs in *Hellerstedt II* insisted that the

---

209. *PPINK*, 888 F.3d at 309. See also *Hellerstedt II*, 231 F. Supp. 3d 218, 222 (W.D. Tex. 2017) (“The Amendments inferentially establish the beginning of life . . . .”); *Margaret S. v. Edwards*, 488 F. Supp. 181, 222 (E.D. La. 1980) (“Such a question equates the abortion process with the taking of a human life . . . .”); *Margaret S. v. Treen*, 597 F. Supp. 636, 669 (E.D. La. 1984) (“Underlying this requirement, plaintiffs argue, is the belief that the aborted fetus is a ‘baby,’ and therefore entitled to the same kind of ritual upon death as are other human beings.”).

210. See *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955) (“It is enough that there is [problem requiring] correction, and that it *might be thought* that the particular legislative measure [is] a rational way to correct it.” (emphasis added)); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (“[T] he Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.”).

211. *H.L. v. Matheson*, 450 U.S. 398, 413 (1981) (quoting *Harris v. McRae*, 448 U.S. 297, 325 (1980)).

212. See *PPINK*, 888 F.3d at 308–09 (analyzing whether the statute required fetal remains to be treated in the same manner that human remains must be treated under other Indiana law).

213. See *Maher v. Roe*, 432 U.S. 464, 474, 478 (1977) (indicating that the regulation at issue “place[d] no obstacles—absolute or otherwise—in the pregnant woman’s path to an abortion” and that the issue was “whether [the] regulation [could] be sustained under the less demanding test of rationality”); *McRae*, 448 U.S. at 315, 324 (stating that “[t]he Hyde Amendment, like the

Texas fetal remains disposition requirements place obstacles in the path of a woman seeking an abortion by increasing the cost of the procedure, creating logistical challenges for abortion providers, and potentially causing women to experience “grief and shame.”<sup>214</sup> Thus, it was not unreasonable for the *Hellerstedt II* court to assess Texas’s fetal remains disposition requirements under *Casey*’s undue burden test. Even under this more rigorous test, however, fetal remains disposition requirements like those adopted in Indiana and Texas should survive constitutional challenge.

The *Hellerstedt I* Court stated that the undue burden standard requires a court to balance the benefits and burdens of an abortion regulation, but as discussed in Part II.B, *Casey* and *Gonzales* teach that, for a regulation designed to protect potential life to satisfy the undue burden test, it need only be plausible that the regulation would cause a woman to choose childbirth over abortion.<sup>215</sup> If a partial-birth abortion ban and a requirement that a physician merely inform a pregnant woman that she has the right to review materials describing fetal development satisfy this requirement, so does a regulation mandating disposition of the body of a dead fetus in the same manner that is required for the disposition of a body that has been born. At least “in theory,”<sup>216</sup> “a necessary effect” of requiring disposal of fetal remains as one would of a body of a person who was born will be to cause “some women” to see that the two share

---

Connecticut welfare regulation at issue in *Maher*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy” and then asking “whether the Hyde Amendment is rationally related to a legitimate governmental objective”).

214. *Hellerstedt II*, 231 F. Supp. 3d at 230; *Hellerstedt II (order)*, 2018 BL 30317 \*1, \*7 (W.D. Tex. 2018). See *Hellerstedt II*, 231 F. Supp. 3d at 230–32 (discussing burdens associated with the DSHS regulations); *Hellerstedt II (order)*, 2018 BL 30317, at \*6–7 (discussing burdens associated with the Texas statute). The plaintiffs in *PPINK* likely would have had difficulty asserting that the challenged statute created the potential for “grief and shame” because existing Indiana law required that a woman be told of her right to dispose of the fetus and that she inform the abortion facility in writing of her decision regarding disposition. See IND. CODE § 16-34-2-1.1(a)(2)(H) & (I) (2018) (requiring notification of woman’s right to direct disposition); IND. CODE § 16-34-3-2(b) (requiring woman to inform abortion facility in writing of her decision regarding disposition). And while one of the plaintiffs in *PPINK* suggested at the district court level that Indiana’s statute would increase the costs of abortion providers, see *PPINK*, 194 F. Supp. 3d 818, 825 (S.D. Ind. 2016) (“*PPINK* produced evidence that compliance with the new fetal tissue disposition provisions will result in a meaningful increase in its expenses.”), the Seventh Circuit did not address this point, perhaps because it is irrelevant under rational basis review.

215. See *supra* Part II.B (discussing the minimal benefit required for regulations designed to advance the State’s interest in protecting potential life).

216. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885 (1992).

the same dignity, thereby “encourag[ing] [those women] to carry the infant to full term.”<sup>217</sup> That is enough for the undue burden test.

In finding that the admitting privileges and ambulatory surgery center requirements at issue in *Hellerstedt I* yielded no appreciable benefit from the standpoint of maternal health, the Court asserted that abortion was already an “extremely safe” procedure in Texas, and “[t]hus, there was no significant health-related problem that the new law helped to cure.”<sup>218</sup> With significant numbers of abortions being performed across the United

---

217. *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007).

218. *Hellerstedt I*, 136 S. Ct. 2292, 2311 (2016). In discussing the absence of a health-related benefit attributable to Texas’s ambulatory surgery center requirement, the Court pointed out that Texas did not require facilities in which liposuction and colonoscopies are performed to meet the standards for ambulatory surgery centers, notwithstanding the evidence that those procedures are safer than abortion. *See id.* at 2315 (discussing other procedures). Given the relative safety of the other procedures, the Court concluded that the differential treatment of abortion facilities could not be justified based on the state’s interest in protecting maternal health. *See id.* at 2315 (“These facts indicate that the surgical-center provision imposes ‘a requirement that simply is not based on differences’ between abortion and other surgical procedures ‘that are reasonably related to’ preserving women’s health, the asserted ‘purpos[e] of the Act . . . .’”). When the state is seeking to advance its interest in protecting potential life, however, treating the abortion procedure differently from other medical procedures is permissible given the presence of the fetus. *See Casey*, 505 U.S. at 852 (“Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; . . . and, depending on one’s beliefs, for the life or potential life that is aborted.”); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 66–67 (1976) (permitting an informed consent requirement for abortion even though similar requirements do not apply to most other surgeries and indicating that “[t]he decision to abort . . . is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences”); *cf. Roe v. Wade*, 410 U.S. 113, 159 (1973) (“She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education . . . .” (citation omitted)). Therefore, imposing requirements for the disposition of fetuses that are different from those applicable to other tissue does not, without more, create a constitutional problem. Moreover, imposing the same or similar requirements for the disposition of the remains of miscarried fetuses, as the DSHS amendments, the new Texas statute, and a separate Indiana law do, delivers a consistent message regarding the value of pre-natal life. *See Hellerstedt II*, 231 F. Supp. 3d at 223 (indicating that Texas’s regulations regarding the disposition of fetal remains applied to miscarried fetuses); TEX. HEALTH & SAFETY CODE ANN. § 697.004(a) (West 2017) (applying broadly to embryonic and fetal tissue remains); IND. CODE § 16-21-11-6(b) (2018) (requiring cremation or interment of a miscarried fetus). Notably, since 2014, Indiana has required health care facilities to notify the parents of a miscarried fetus of their right to determine the disposition of the fetus. IND. CODE § 16-21-11-5 (2017).

The Texas district court in *Hellerstedt II* suggested that not imposing the DSHS fetal remains disposition requirements when a miscarried or aborted fetus is delivered at home “reduces the strength of the asserted benefit” of “conferring dignity on the unborn.” *Hellerstedt II*, 231 F. Supp. 3d at 230. Whether the exception undermines that benefit or not, the *Hellerstedt II* court failed to recognize that “privacy concerns implicit in activity in one’s home” offer a legitimate basis for the differential treatment. *Planned Parenthood of Minn.*, 910 F.2d 479, 488 (8th Cir. 1990).

States (including in Texas and in Indiana),<sup>219</sup> however, the same cannot be said with respect to the state's interest in protecting potential life. So long as there is abortion, the state will have a reason to express its view regarding pre-natal life, and laws like fetal remains disposition requirements that express that view will offer a benefit sufficient to satisfy *Casey*'s undue burden test.

As a result, whether a fetal remains disposition requirement passes the undue burden test depends on the requirement's burdens—specifically, on whether the requirement imposes “a substantial obstacle in the path of women seeking an abortion.”<sup>220</sup> Under existing precedent, though—unless the logistical challenges the *Hellerstedt II* court noted lead to a significant number of clinic closures—none of the potential burdens the plaintiffs in *Hellerstedt II* highlighted are likely to be fatal.

The potential for “grief and shame”<sup>221</sup> that the *Hellerstedt II* court cites as a possible burden seems unlikely to be invalidating when considered in light of *Casey* and *Gonzales*. The Court's concern in those cases was the potential effect on a woman's psychological health if the applicable regulations were *not* in place.<sup>222</sup> In fact, in overruling its earlier decision in *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>223</sup> the *Casey* Court apparently abandoned its fear that state-mandated information regarding fetal development might “serve only to confuse and punish [a woman] and to heighten her anxiety.”<sup>224</sup> Rather than focusing on the potentially negative psychological effects of providing information to a woman seeking an abortion, the Court has feared what might occur if the state were not permitted to do so—that a woman might suffer severe anguish if she has an abortion and later

---

219. See Rachel Jones and Jenna Jerman, *Abortion Incidence and Service Availability In the United States, 2014*, 49 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 17, 21 (2017), available at <http://onlinelibrary.wiley.com/doi/10.1363/psrh.12015/full> [<https://perma.cc/3SCZ-XKKC>] (indicating that more than 900,000 abortions were performed in the United States in 2014, including over 55,000 in Texas and over 8,000 in Indiana).

220. *Hellerstedt I*, 136 S. Ct. at 2316. See also *Hellerstedt I*, 136 S. Ct. at 2312 (“[T]he record evidence indicates that the admitting privileges requirement places a ‘substantial obstacle in the path of a woman’s choice.’” (quoting *Casey*, 505 U.S. at 877)); *Casey*, 505 U.S. at 893–94 (“The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. . . . [F]or many women, it will impose a substantial obstacle.”).

221. *Hellerstedt II*, 231 F. Supp. 3d at 230; *Hellerstedt II (order)*, 2018 BL 30317, at \*7.

222. See, e.g., *Casey*, 505 U.S. at 882 (“In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”).

223. 476 U.S. 747, 762–63 (1986).

224. See *Casey*, 505 U.S. at 882 (overruling *Thornburgh* in part, because it was “inconsistent with *Roe*'s acknowledgement of an important interest in potential life”).

concludes that she was not fully informed.<sup>225</sup> As the Court stated in *Gonzales*:

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used [to perform an abortion], . . . . From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. . . . It is, however, precisely this lack of information . . . that is of legitimate concern to the State.<sup>226</sup>

In addition, the mere fact that an abortion regulation has an adverse effect on abortion providers will not render it unconstitutional. The Court in *Whalen v. Roe* explained this point:

The constitutional right vindicated in *Doe* was the right of a pregnant woman to decide whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion procedures were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision. If those obstacles had not impacted upon the woman's freedom to make a constitutionally protected decision, if they had merely made the physician's work more laborious or less independent without any impact on the patient, they would not have violated the Constitution.<sup>227</sup>

Therefore, increased costs and logistical difficulties that abortion providers may suffer as a result of a fetal remains disposition requirement are relevant under *Casey*'s undue burden test only to the extent that they adversely affect a woman's access to abortion.

Indeed, *Casey* emphasizes that “[w]hat is at stake is the woman's right to make the ultimate decision.”<sup>228</sup> In this regard, the Court's principal concern in *Hellerstedt I* was the fact that Texas's admitting privileges and

---

225. See *Gonzales*, 550 U.S. at 159 (“[I]t seems unexceptionable to conclude some women come to regret their choice to abort . . . . Severe depression and loss of esteem can follow.”); *Casey*, 505 U.S. at 882 (“In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”).

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

227. *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977).

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

ambulatory surgery center requirement would result in a dramatic decrease in the number of abortion facilities.<sup>229</sup> And when invalidating Pennsylvania's spousal notification requirement, the Court in *Casey* concluded that it would represent a practical ban on abortion in some cases, thereby preventing some women from making the decision to have an abortion.<sup>230</sup> On the other hand, the *Casey* Court stressed that "numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care" and "[t]he 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."<sup>231</sup>

Particularly in light of the experience with Minnesota's 30-year-old fetal remains disposition requirement, it seems much more likely that requirements such as those in Indiana and Texas will have a relatively minor and incidental effect on a woman's ability to choose abortion, rather than result in the severe consequences that led the Court to strike down abortion regulations in *Casey* and *Hellerstedt I*. The district court in *Hellerstedt II* rejected the state's estimate of the cost associated with the DSHS amendments and the state's assumption that "the ash from all abortions across the State of Texas could be buried at one time for only \$300 per year"<sup>232</sup> and, with respect to the Texas fetal remains disposition statute, cited evidence that the cost per hospital could "range between \$228,400–\$655,200."<sup>233</sup> But the notes accompanying the implementing regulations for the Texas statute cite testimony from an economist for the *Hellerstedt II* plaintiffs that "the cost would range between \$0.52 and \$1.56 per patient."<sup>234</sup> Moreover, the statute mandates the creation of a registry that identifies parties that will provide free or low-cost burial or will provide financial assistance to defray the costs of cremation or burial and a grant program to assist with the costs arising from disposition of fetal remains as required by law.<sup>235</sup> And when the Eighth Circuit in *Planned Parenthood of Minnesota* upheld a Minnesota fetal remains

---

229. See *supra* notes 92 and 97 and accompanying text (describing the effect of the regulations at issue in *Hellerstedt I*).

230. See *Casey*, 505 U.S. at 894 ("We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.").

231. *Id.* at 874.

232. *Hellerstedt II*, 231 F. Supp. 3d at 230

233. *Hellerstedt II (order)*, 2018 BL 30317, at \*6.

234. 43 Tex. Reg. 466 (Jan. 26, 2018).

235. See TEX. HEALTH & SAFETY CODE ANN. §§ 697.005–.006 (West 2018) (requiring DSHS to establish a registry to help reduce the costs likely associated with the disposition requirements and directing DSHS to establish a grant program).

disposition requirement in 1990, the court credited evidence that hospitals had been disposing of remains at a cost of approximately \$40–60 per month. According to the appeals court, “[e]ven if a portion of that cost [were] passed along to the woman obtaining the abortion,” it would not be impermissible given the Supreme Court’s previous conclusion in *Planned Parenthood Association of Kansas City v. Ashcroft* that “costs of up to \$19.40 per patient [would] not create a burden sufficient to strike down an abortion regulation.”<sup>236</sup> Thus, while the *Hellerstedt II* court found that the costs associated with the Texas fetal remains disposition requirements were likely burdensome, there certainly is evidence that suggests that the burdens may not be of such magnitude that the requirements run afoul of the Fourteenth Amendment.

The court in *Hellerstedt II* added, however, that the DSHS amendments could deal “a major, if not fatal blow to health care providers performing abortions.”<sup>237</sup> And admittedly, if a fetal remains disposition requirement were to result in clinic closures in numbers comparable to

---

236. *Planned Parenthood of Minn.*, 910 F.2d at 487 (citing *Planned Parent Ass’n of Kan. City v. Ashcroft*, 462 U.S. 476, 489–90 (1983)).

237. *Hellerstedt II*, 231 F. Supp. 3d at 232. See *Hellerstedt II (order)*, 2018 BL 30317, at \*6 (indicating that, if there are a limited number of vendors, the Texas statute “would threaten the continued availability of abortion services”). The court noted that “one women’s healthcare provider testified its center was nearly forced to close after two successive medical waste vendors dropped the healthcare facility as a client following harassment by anti-abortion activists.” *Hellerstedt II*, 231 F. Supp. 3d at 231; *Hellerstedt II (order)*, 2018 BL 30317, at \*6–7. The court, however, doesn’t take into account the possibility that the opposition was motivated by the way in which fetal remains then were being disposed of and that abortion foes who favor fetal remains disposition requirements may be less likely to pressure those who are disposing of remains as Texas now would require. In fact, the court notes that the Texas Catholic Conference of Bishops had offered to assist in interment of fetal tissue, and it “exhausts credulity” to believe that the Texas bishops would experience the hostility that the Texas district court feared. *Hellerstedt II*, 231 F. Supp. 3d at 231.

The district court in *Hellerstedt II* also expressed concern about the number of vendors who would be available to provide for disposition. See *Hellerstedt II*, 231 F. Supp. 3d at 231 (indicating that the two possible vendors that the parties identified had permitting problems); *Hellerstedt II (order)*, 2018 BL 30317, at \*6 (suggesting there may be a “limited number of vendors” available to dispose of fetal remains as required by the Texas statute). And a spokesman for the Texas State Funeral Directors contended that the DSHS amendments created much uncertainty for funeral homes in the state. See Wade Goodwyn, *Funeral Directors Weigh in on Texas Rule Requiring Burial of Fetal Remains*, NPR, Dec. 12, 2016 (“When Gov. Greg Abbott first proposed the new regulations . . . , funeral home directors went to Austin to convey their apprehensions.”). Funeral directors and cemeteries in Indiana also have indicated concern about what it would take to implement Indiana’s law, but representatives of the Indiana Funeral Directors Association and an organization of the state’s cemeteries have expressed support for the law. See Emma Green, *State-Mandated Mourning for Aborted Fetuses*, THE ATLANTIC, May 14, 2016, <https://www.theatlantic.com/politics/archive/2016/05/state-mandated-mourning-for-aborted-fetuses/482688/> [<https://perma.cc/8DBC-5KDM>] (discussing various reactions to Indiana fetal remains disposition statute).

those that led the Supreme Court in *Hellerstedt I* to strike down Texas's admitting privileges and ambulatory surgery center requirements,<sup>238</sup> there would be serious questions about whether the disposition requirement could survive a constitutional challenge. But what occurred in the years following Minnesota's 1987 adoption of a fetal remains disposition requirement similar to those in Indiana and Texas is instructive on this point. Rather than decreasing, the number of abortion providers in Minnesota actually increased from 13 to 14 between 1988 and 1992, a period in which the abortion rate in the state was decreasing.<sup>239</sup> Thus, while the impact of fetal remains disposition requirements may vary from state to state, if the experience of Minnesota is representative, such requirements would not be expected to affect abortion access in the way that troubled the Court in *Hellerstedt I*.

#### D. *The Louisiana Statute*

Like the DSHS regulations and the Indiana and Texas statutes, the Louisiana statute currently subject to challenge in the United States District Court for the Middle District of Louisiana requires physicians to dispose of aborted fetuses by burial and interment.<sup>240</sup> It does so, however, in substantially same way as the Louisiana law that the United States District Court for the Eastern District of Louisiana struck down in *Edwards*.<sup>241</sup>

For the most recent Louisiana statute, though, the advent of *Casey*'s undue burden test solves some of the problems that plagued the fetal remains disposition requirement at issue in *Edwards* and the later Louisiana requirement the Eastern District declared unconstitutional in *Treen*. For example, regardless of whatever other interests the new

---

238. See *supra* notes 92 & 97 and accompanying text (discussing *Hellerstedt I*).

239. See Stanley K. Henshaw and Jennifer Van Vort, *Abortion Services in the United States, 1991 and 1992*, 26 FAMILY PLANNING PERSPECTIVES 102, 105 (May-June 1994), available at <https://www.jstor.org/stable/pdf/2136033.pdf?refreqid=excelsior%3Ae032bff485be2469b41902474589be66> [<https://perma.cc/Q4FX-WCY6>] (indicating that the number of abortion providers in Minnesota in 1992 was 14 and had increased by 1 since 1988 and that the abortion rate per 1,000 women aged 15-44 in Minnesota was 18.2 in 1988 and 15.6 in 1992).

240. See LA. STAT. ANN. § 40:1061.25(A) (2016) (requiring abortion providers to ensure that fetal remains are disposed of in the same manner as other human remains); LA. STAT. ANN. (2018) § 8:651 (requiring that human remains be “decently interred or cremated”).

241. See *supra* notes 28–32 and accompanying text (discussing *Edwards*). Compare *Margaret S. v. Edwards*, 488 F. Supp. 181, 221 n.129 (E.D. La. 1980) (indicating that the statute at issue in the case stated: “Any physician who shall perform or induce an abortion upon a pregnant woman shall insure that the remains of the unborn child are disposed of in a manner consistent with the disposal of human remains as provided by R.S. 8:651 through 8:662.”); LA. STAT. ANN. § 40:1061.25(A) (2016) (“Each physician who performs or induces an abortion which does not result in a live birth shall insure that the remains of the child are disposed of by interment or cremation, in accordance with the provisions of R.S. 8:651 *et seq.*”).

Louisiana law might serve, the state's interest in protecting potential life stands as a firm foundation for the law.<sup>242</sup> Moreover, *Webster*, *Casey*, and *Gonzales* all make clear that the ruling in *Roe* that a fetus does not constitute a person for purposes of the Fourteenth Amendment does not bar the state from expressing its view about when life begins in an effort to encourage childbirth over abortion.<sup>243</sup> Finally, in *Casey* and *Gonzales*, the Court emphasized its concern over the psychological harm a woman might suffer if she chooses to have an abortion and later regrets that choice, rather than focusing on the psychological harm that might result from regulating abortion in a particular way.<sup>244</sup>

A couple of collateral consequences from Louisiana's 2016 fetal remains disposition requirement as originally enacted, though, presented potential problems under *Casey*'s undue burden standard.<sup>245</sup> In 2018, the Louisiana legislature fixed one problem; the other one, however, persists.

In contrast to the DSHS regulations and the Indiana and Texas statutes, an abortion provider's obligations under Louisiana's statute, as originally enacted, were not limited to cases in which an aborted fetus is removed outside the provider's facility.<sup>246</sup> Without amendment, therefore, the statute might have operated as an effective ban on medication abortions in which a woman delivers the fetus at home, where disposition of the remains very likely would be out of the physician's

---

242. See *supra* Part III.C.1 (discussing the interest in protecting potential life as it relates to the Indiana and Texas fetal remains disposition requirements).

243. See *supra* notes 65, 71, & 198–99 and accompanying text (discussing a state's ability to encourage a woman to continue her pregnancy).

244. See *supra* notes 219–22 and accompanying text (discussing the Court's concerns in *Casey* and *Gonzales* with respect to the potential for psychological harm).

245. The Louisiana statute applies to fetal remains resulting from an abortion, but not those associated with a miscarriage. While disparate treatment of abortion may be permitted, the *Hellerstedt I* Court indicated that the omission of medical treatment of miscarriages from Texas's ambulatory surgery center requirement undermined the reasonableness of the requirement. See *Hellerstedt I*, 136 S. Ct. 2292, 2315 (2016) (noting that “[m]edical treatment after an incomplete miscarriage often involves a procedure identical to that involved in a nonmedical abortion, but it often takes place outside a hospital or surgical center,” thereby suggesting that the ambulatory surgery center requirement was not “‘reasonably related to’ preserving women’s health, the asserted ‘purpos[e] of the Act in which it is found.’”). See also *Complaint* at 16, *June Med. Servs. LLC v. Gee*, 136 S. Ct. 1354 (2016) (No. 16-CV-00444/BAJ-RLB) (claiming that Louisiana's fetal remains disposition requirement imposes obligations only on physicians performing abortions and not on those providing medical care for miscarriages).

246. *Contra* IND. CODE § 16-41-16-7.6(a) (2017) (only requiring a health care facility to comply with the disposition requirements if it is in possession of an aborted or miscarried fetus); TEX. HEALTH & SAFETY CODE ANN. § 697.004(a) (West 2017) (applying to “embryonic and fetal tissue remains that are passed or delivered” at a health care provider's facility); 25 TEX. ADMIN. CODE § 1.133(a)(2)(G) (West 2017) (exempting from the disposition requirements “human tissue, including fetal tissue, that is expelled or removed from the human body once the person is outside of a healthcare facility”).

control.<sup>247</sup> And a ban of this type could represent an unconstitutional burden to the extent that the procedure may be “necessary, in appropriate medical judgment, for the preservation of the . . . health of the mother.”<sup>248</sup> Of course, banning a particular abortion method is not necessarily unconstitutional, as *Gonzales* attests, but sustaining such a ban would likely require Louisiana to make a determination that the procedure is never medically necessary.<sup>249</sup> In any event, Louisiana’s fetal remains disposition requirement no longer presents this problem because the state amended the requirement to exclude fetal remains associated with a medication abortion that is completed outside of the health care facility in which the physician administered the medication and at a time when the physician is not present.<sup>250</sup>

The legislature, however, has not taken action to fix a second potential problem. Similar to the measure at issue in *Edwards*, the Louisiana statute requires disposition of fetal remains in compliance with the state’s laws governing human remains generally,<sup>251</sup> and those laws give the “surviving parents” of a deceased child the right to control the disposition of the child’s body.<sup>252</sup> Thus, one might argue that compliance would require notification of the father and raise the same concerns that led the *Casey* Court to strike down Pennsylvania’s spousal notification requirement.<sup>253</sup>

---

247. See *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1053 (E.D. Ark. 2017) (noting the plaintiff’s claim that an Arkansas fetal remains disposition law would require him to stop performing medication abortions); Complaint at 16, *June Med. Servs. LLC v. Gee*, 136 S. Ct. 1354 (2016) (No. 16-CV-00444/BAJ-RLB) (asserting that Louisiana’s fetal remains disposition requirement may bar “first trimester medication abortion[s].”).

248. *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007).

249. See *id.* at 166–67 (“The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman’s health, given the availability of other abortion procedures that are considered to be safe alternatives.”).

250. See H.B. 273, 2018 Leg., Reg. Sess. (La. 2018) (amending Louisiana’s fetal remains disposition statute).

251. See LA. STAT. ANN. § 40:1061.25(A) (2016) (requiring interment or cremation in compliance with statute generally providing for disposal of human remains). Apparently, requiring disposition in like manner as other human remains would have satisfied the court in *PPINK*, assuming it had determined that Indiana had a legitimate interest in doing so. See *PPINK*, 265 F. Supp. 3d 859, 872 (S.D. Ind. 2017) (emphasizing ways in which Indiana’s fetal remains disposition requirement treats fetal tissue in a manner that is different from how Indiana law treat other human remains).

252. LA. STAT. ANN. § 8:655(A)(5) (2016).

253. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887–98 (1992) (evaluating and ultimately determining unconstitutional a Pennsylvania statute requiring pre-abortion notification of a pregnant woman’s husband); *Hopkins*, 267 F. Supp. 3d at 1104 (determining that a fetal remains disposition requirement effectively required “notice to the other ‘parent’” and thereby created an unconstitutional burden on a woman’s ability to choose to have an abortion). The Louisiana statute allows for a court to determine the disposition of human remains “if the

## CONCLUSION

In the wake of *Hellerstedt I*, fetal remains disposition requirements like those adopted in Indiana, Louisiana, and Texas may become increasingly popular among states that want to reduce the incidence of abortion. Whether these statutes unconstitutionally infringe on a woman's right to choose abortion, as recognized by *Roe*, is not a question to which *Hellerstedt I* provides a direct answer. The *Hellerstedt I* Court did not consider whether and how the balancing test it found in *Casey* might apply when a state seeks to protect potential life. Consequently, to understand how to evaluate the constitutionality of a regulation founded on that interest, one must look through *Hellerstedt I* to *Casey* itself and to the Court's decision to uphold the federal partial-birth abortion ban in *Gonzales*.

When doing so, it becomes apparent that the mere possibility that an abortion regulation could encourage a woman to choose childbirth over abortion is sufficient to sustain the regulation under *Casey*'s undue burden standard and that such a regulation will not violate that standard unless the burdens the regulation imposes constitute a "substantial obstacle" to a woman's ability to choose to have an abortion.<sup>254</sup> The district courts in *PPINK* and *Hellerstedt II* correctly pointed out that a fetal remains disposition requirement can do nothing to protect the life of an aborted fetus, but those courts miss the point. By requiring health care facilities to treat the remains of aborted and miscarried fetuses in a manner similar to how the remains of born human beings are treated, the state expresses its view of when life begins and thus advances its interest in protecting potential life by contributing to a "dialogue that [will] better inform[] the political and legal systems, the medical profession, expectant

---

authorization of the person or persons with the right to control disposition cannot be obtained." LA. STAT. ANN. § 8:655(E) (2016). Given that *Casey* bars spousal notification requirements, one might argue that the right of the father "cannot be obtained," but even so, a court might find that the risk that notification may be required could "deter [some women] from procuring an abortion as surely as if [Louisiana] had outlawed abortion in all cases." *Casey*, 505 U.S. at 894.

Similar to the Louisiana statute, Indiana's fetal remains requirement incorporates by reference other statutes that give "surviving parents" rights as to the disposition of the remains of a deceased child, with one parent who is present being able to decide if reasonable efforts were made to notify the other. See IND. CODE § 16-34-3-4(c) (2017) (providing for the application of certain laws "concerning the authorization of disposition of human remains," which laws grant rights to the parents of a deceased child), *invalidated by* Planned Parenthood of Ind. and Ky. v. Comm'r, 888 F.3d 300, 301 (7th Cir. 2018). Given that the Indiana law specifically gives "[a] pregnant woman who has an abortion . . . the right to determine the final disposition of the aborted fetus," however, the more specific statute should override the general ones incorporated by reference, thereby reducing the potential that the law will be interpreted to require consultation with the father. IND. CODE § 16-34-3-2(a) (2017).

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

mothers, and society as a whole of the consequences that follow from a decision to elect . . . abortion.<sup>255</sup> Indeed, the very existence of fetal remains disposition requirements like those adopted in Indiana, Texas, and Louisiana might cause a woman to choose not to have an abortion, and, so long as they do not operate in a manner that would preclude a woman from making the “ultimate decision,”<sup>256</sup> the *Hellerstedt I* balance—if applicable—should tip in the state’s favor.

By their very nature, fetal remains disposition requirements apply only to fetuses who have died. But this is of no moment for constitutional purposes. To serve its interest in protecting potential life, a state may proclaim life after death.

---

255. *Gonzales v. Carhart*, 550 U.S. 124, 129 (2007).

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