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The Creation of an Undue Burden: Arizona House Bill 2036 and State Abortion Regulations Post-Casey

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THE CREATION OF AN UNDUE BURDEN:
ARIZONA HOUSE BILL 2036 AND STATE ABORTION
REGULATIONS POST-CASEY

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*It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.*¹

—Supreme Court Justice Louis D. Brandeis

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

1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

*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.*²

INTRODUCTION

Arizona has a reputation for having some of the most restrictive abortion laws in the United States.³ In recent years, Arizona has passed increasingly novel legislation, and has pushed the boundaries of post-*Casey* abortion limitations.⁴ While most states have molded their regulations after the Pennsylvania laws at issue in *Casey*,⁵ some, like Arizona, have explored uncharted territory by implementing laws outside of the traditional *Casey* categories of informed consent, waiting periods, and regulations of medical facilities.⁶ Although outside of the *Casey* realm, most of these experimental laws, from targeted regulation of abortion providers, or “TRAP laws,”⁷ to wholesale bans on partial birth abortions,⁸ have been upheld as constitutional.

Arizona House Bill 2036, however, contains regulations that stretch the currently expanded post-*Casey* limitations, such as a provision *combining* a time requirement with a pre-existing ultrasound requirement, and regulation further expanding TRAP laws.⁹ At the same time the bill stretches the present boundaries of abortion law, it shatters the existing mold, in the form of a time requirement that bans abortion before viability and by implementing restrictions that the Supreme Court has expressly prohibited.¹⁰

This Note will argue that the recently passed Arizona House Bill 2036 contains restrictions that step too far from the *Casey* framework, constitute an undue burden on a woman's right to have an abortion, as well as expressly violate the *Casey* standard by prohibiting abortion

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

3. See Jeffrey Roseberry, Note, *Undue Burden and the Law of Abortion in Arizona*, 44 ARIZ. ST. L.J. 391, 391 (2012).

4. *Id.*

5. Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled The Abortion Wars*, 118 YALE L.J. 1318, 1336 (2009).

6. *State Facts About Abortion: Arizona*, GUTTMACHER INST. (Oct. 2012), <http://www.guttmacher.org/pubs/sfaa/pdf/arizona.pdf>.

7. See *infra* Part IV.A.

8. Gonzalez v. Carhart, 550 U.S. 124, 168 (2006).

9. H.B. 2036, 50th Leg., 2d Sess. (Ariz. 2012).

10. *Carhart*, 550 U.S. at 146 (“Before viability, a State ‘may not prohibit any woman from making the ultimate decision to terminate her pregnancy.’”) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992)).

during pre-viability of the fetus. Part I will provide background regarding abortion law, Part II will briefly comment on state abortion restrictions post-*Casey*, Part III will detail Arizona House Bill 2036, and Part IV will outline how House Bill 2036 conforms to post-*Casey* regulations and will argue that the restrictions imposed constitute an undue burden and therefore breach the viability standard.

I. DEVELOPMENT OF THE *ROE* AND *CASEY* FRAMEWORK

In *Roe v. Wade*, the Supreme Court first recognized that a woman's implied right to privacy under the Constitution included her ability to have an abortion.¹¹ However, the Court placed limitations on this right. During the first trimester of the pregnancy, a state was not permitted to regulate abortion, and the matter was between the woman and her doctor.¹² After the first trimester, but before the fetus could viably live outside of the mother, the State was permitted to regulate, but not prohibit, abortion.¹³ Any state regulation, however, would be held to a strict scrutiny standard and would thus only be permissible if there was a compelling state interest.¹⁴ Finally, the Court decided that the State had a compelling interest in protecting the life of a viable fetus,¹⁵ and thus could entirely ban the procedure at that stage of the pregnancy.¹⁶

States reacted divisively to the majority opinion in *Roe v. Wade*. Louisiana, Mississippi, North Dakota, and South Dakota enacted "trigger" laws that would immediately criminalize abortion if the Supreme Court overturned *Roe*.¹⁷ Fourteen states continued to retain now unenforceable laws banning abortion.¹⁸ Louisiana went so far as to enact an unenforceable ban on abortion *after* the Court's decision in *Roe*.¹⁹ Between the Court's decision in *Roe* and 1989, forty-eight states enacted some regulation on abortion.²⁰ Because the laws were held to a strict scrutiny standard requiring a compelling state interest, they were mostly struck down as a violation of *Roe* protections.²¹

11. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

12. *Id.* at 164.

13. *Id.*

14. *Id.* at 155.

15. *Id.* at 163 ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability.").

16. *Id.* at 163-64 (The State "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.").

17. *Near-Total Abortion Bans*, NARAL PRO-CHOICE AMERICA, <http://www.prochoiceamerica.org/what-is-choice/fast-facts/near-total-abortion-bans.html> (last visited Nov. 3, 2013).

18. *Id.*

19. *Id.*

20. Devins, *supra* note 5, at 1326.

21. *Id.*

In 1992, the Supreme Court examined a set of abortion regulations from Pennsylvania in *Planned Parenthood v. Casey*.²² Although the regulations at issue in *Casey* were of the same type that had previously been invalidated under the *Roe* strict scrutiny standard,²³ the Supreme Court upheld all but one of the abortion restrictions.²⁴ In doing so, the Court pivoted from the tough strict scrutiny standard in *Roe* while affirming *Roe*'s essential holding that abortion was covered under the implied right to privacy in the Constitution.²⁵

The *Casey* Court did, however, abandon the trimester framework used in *Roe*.²⁶ Rather than completely disallowing State regulation of abortion during the first trimester, and holding subsequent pre-viability restrictions to strict scrutiny, the Court applied an "undue burden" standard to regulations on abortion.²⁷ *Casey* adopted the "viability" requirement that *Roe* placed on prohibiting the abortion procedure, but said that any regulation short of a complete ban would be constitutional as long as it did not create an "undue burden" on the woman's ability to receive an abortion.²⁸

In addition, the Court further defined the date of viability. During *Roe*, a fetus was commonly viable at around twenty-eight weeks,²⁹ but due to improvements in medical technology, fetal viability began at around twenty-four weeks when *Casey* was decided.³⁰ The Court noted that although the moment of viability had changed from that in *Roe*, the standard of viability remained intact as the earliest "time at which there is a *realistic* possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of State protection that now overrides the rights of the woman."³¹ After the moment of viability, defined as indicated by the moment there was a realistic possibility of the fetus surviving outside of the womb, the State was permitted to regulate abortion, including prohibiting the procedure.³²

Under *Casey*, laws that regulated abortion before viability would no longer be viewed with strict scrutiny. Instead, the Court said a law

22. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

23. Devins, *supra* note 5, at 1318.

24. *Casey*, 505 U.S. at 898.

25. *Id.* at 871, 878–79.

26. *Id.* at 878 ("We reject the rigid trimester framework of *Roe v. Wade*.").

27. *Id.* at 874.

28. *Id.* ("Only where state regulation imposes an *undue burden* on a woman's ability to make this decision does the power of the State reach into the heart of liberty protected by the Due Process Clause." (emphasis added)).

29. *Id.* at 860.

30. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992).

31. *Id.* at 870 (emphasis added).

32. *Id.* at 846 (stating that a State may prohibit abortion after viability as long as there is an exception for endangering the woman's health).

would be invalid if it placed an undue burden on a woman's ability to have an abortion.³³ The Court applied this undue burden test to the Pennsylvania State regulations at issue and found that a twenty-four hour waiting period, a requirement that doctors provide women with information about the alternatives of the procedure, and a requirement for parental consent in the case of a minor seeking an abortion (with a judicial bypass procedure) were all restrictions that did not place an undue burden on abortion rights.³⁴

The Court did find, however, that a provision requiring women to notify their spouses prior to obtaining abortion constituted an undue burden.³⁵ The Court decided that this provision would be a substantial obstacle³⁶ to women seeking abortions because of potential issues with domestic violence.³⁷ In its determination of whether the law created an undue burden on a woman's right to an abortion, the Court noted that the spousal notification requirement might affect as little as one percent of women seeking abortions.³⁸ Commenting on this fact, the Court wrote that "[t]he analysis does not end with the one percent of women. . . . Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . [The spousal notification provision] will operate as a substantial obstacle . . . is an undue burden, and therefore invalid."³⁹ In other words, when determining whether a law is an undue burden, the Court instructs that we look to those whom the legislation will affect, rather than the population as a whole, to determine if it is likely to place a substantial obstacle in the way of a woman seeking an abortion and constitute an undue burden.

Under the undue burden test, any law regulating abortion must pass a "two-pronged test" in order to be considered a permissible law.⁴⁰ First, the law must not place an undue burden on the woman.⁴¹ The Supreme Court used the phrase undue burden as "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

33. *Id.* at 874.

34. *Id.* at 885 (expressly overturning the decision in *Akron I* by validating the twenty-four hour waiting requirement, an example of the increased leniency of the undue burden standard over the *Roe* framework).

35. *Id.* at 893–94.

36. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 893–94 (1992).

37. *Id.* at 888–93 (detailing data on spousal abuse as it relates to the spousal notification requirement).

38. *Id.* at 894.

39. *Id.* at 894–95.

40. Elizabeth A. Schneider, *Workability of the Undue Burden Test*, 66 TEMP. L. REV. 1003, 1021 (1993).

41. *Id.*

a nonviable fetus.’”⁴² Second, if the law does not place an undue burden on the woman, then the law must have a rational purpose relating to the state’s legitimate interest in protecting life.⁴³ Essentially, if a law is found to have the effect or purpose of placing a substantial obstacle in front of the woman’s access to abortion pre-viability, it is invalid. If a state restriction does not place a substantial obstacle in front of the woman’s ability to obtain an abortion pre-viability, then it is acceptable as long as it is rationally related to the state’s interest in protecting life.

II. STATE ABORTION LAWS POST-CASEY

Most state restrictions on abortion post-*Casey* have been very similar to the laws that the Supreme Court upheld in *Casey*.⁴⁴ These have included laws requiring informed consent, parental consent for minors, waiting periods, and providing information about the fetus.⁴⁵ This may be due to the fact that because these laws were expressly held as constitutional in *Casey*, states feel comfortable enacting them without the threat of a judicial veto.⁴⁶ However, some restrictions have stretched, or have even broken out of, the *Casey* mold. For example, seven states have enacted laws that force a woman seeking an abortion to first undergo an ultrasound.⁴⁷ Three of these seven states, Louisiana, Texas, and Wisconsin, require that an image of the fetus be displayed during the ultrasound.⁴⁸ The woman may look away from the image, but the doctor is required, with some exceptions, to describe the image of the fetus to the woman.⁴⁹ Louisiana is the only state, apart from H.B. 2036’s modification of Arizona abortion law, to require that an ultrasound take place at least twenty-four hours in advance of the abortion.⁵⁰

The justification for this regulation is that the ultrasound requirement helps the woman to make an informed decision, but these laws

42. *Id.*

43. *Id.*

44. Devins, *supra* note 5, at 1336 (“With the exception of partial-birth abortion, post-*Casey* legislation is generally modeled after Pennsylvania’s statutory provisions.”).

45. *Id.* at 1320, 1328, 1340.

46. *See id.* at 1335 (“*Casey* both added legitimacy to those provisions it upheld and signaled to lawmakers that there were identifiable boundaries to how far they could constitutionally regulate abortion.”).

47. *State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INST. (Oct. 1, 2013), http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf.

48. *Id.*

49. *Id.*

50. *Id.*

can also be seen as an attempt to personify the fetus.⁵¹ This author argues that personification of the fetus is a break from traditional *Casey* laws regarding informed consent and time, place, and manner restrictions. The established *Casey* time, place, and manner distinctions regulate the circumstances of an abortion, in at least a superficially neutral manner. However, an attempt to personify the fetus for the mother seems based on morality. Fetal personification bears little on the condition of the abortion procedure, and walks the line of “informed consent” very tightly. If placed under the informed consent category, the “information” supposedly communicated has troubling connotations if based on the morality of abortion rather than the effects of the medical procedure.

Another realm in which states have arguably departed from the traditional *Casey* laws is in the enactment of fetal pain laws.⁵² These require doctors to inform a woman seeking an abortion twenty-two weeks into the pregnancy about the possibility of fetal pain.⁵³ While these laws clearly fit into the informed consent category of traditional *Casey* regulations, they may be contrary to the decision in *Casey*, which requires that the information given to the mother be “truthful and not misleading.” First, the information may be an attempt to personify the fetus, suggesting a moral rather than medical component to the information. Second, the information may be considered misleading and not truthful because most medical evidence suggests that fetal pain is not likely to occur until the twenty-ninth week.⁵⁴

A similar example of a stretch of the “truthful and not misleading” requirement is a law in South Dakota that requires the doctor to inform the woman that the fetus inside her is a living being and suggests that abortion will cause posttraumatic stress disorder.⁵⁵ Whereas the ultrasound requirements are arguably an attempt to personify the fetus, the South Dakota law informing the woman that the fetus is a living being is a clear attempt to personify the fetus and inject morality into the “informed consent” regulation. The requirement can appear more like a judgment on the woman rather than a regulation of a medical procedure. South Dakota further requires that women seeking abortions be told that the procedure carries with it an increased risk of suicide.⁵⁶ This is in spite of the fact that “[e]very

51. Devins, *supra* note 5, at 1341.

52. *Id.* at 1342.

53. *Id.*

54. *Id.* (“Fetal pain laws . . . push slightly at the boundaries of *Casey*’s ‘truthful and not misleading’ requirement. . . . [T]he weight of medical evidence suggests that fetal pain is not likely to occur until roughly the twenty-ninth week . . .”).

55. *Id.*

56. Laura Bassett, *South Dakota Law Linking Abortion, Suicide Upheld In Court*, HUFFINGTON POST (June 24, 2012, 6:27 PM), http://www.huffingtonpost.com/2012/07/24/south-dakota-abortion-suicide-law-appeals-court_n_1699615.html.

reputable researcher and medical organization has determined that there is no sound scientific evidence that shows a cause and effect relationship between abortion and suicide.”⁵⁷ While the Supreme Court has not yet ruled on this South Dakota provision, the Eighth Circuit Court of Appeals has upheld the law as truthful and not misleading.⁵⁸ In doing so, they interpreted the language “increased risk,” extremely broadly,⁵⁹ essentially acknowledging the evidence for any increase is virtually non-existent.

The final outliers of post-*Casey* abortion regulations are Targeted Regulation of Abortion Providers, or TRAP laws.⁶⁰ TRAP laws are facially neutral regulations of places that perform abortions. These laws regulate everything from required equipment, to a specified size of the abortion clinic, to zoning restrictions. Some TRAP laws combine to create a maze of requirements.⁶¹

TRAP laws can generally be placed into three categories: (1) health facility licensing schemes, (2) ambulatory surgical center requirements, and (3) hospitalization requirements.⁶² Health facility licensing requirements are the broadest category of TRAP laws. These are the laws that specify how large or small the building must be, how to add licensing fees to abortion providers, and sometimes even how to permit warrantless searches of abortion clinics.⁶³ Around twenty-two states have some laws that would fit into the category of health facility licensing requirements.⁶⁴

A second category of TRAP laws is ambulatory surgical center requirements. These laws equate abortion providers with ambulatory surgical centers and force abortion providers to follow the same laws regulating ambulatory surgical centers.⁶⁵ These are less common than health licensing schemes, with only about ten states forcing abortion providers to meet these requirements.⁶⁶

57. *Id.* (quoting Sarah Stoesz).

58. *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889, 905 (8th Cir. 2012) (“Accordingly we hold that the suicide advisory is non-misleading and relevant to the patient’s decision to have an abortion.”).

59. *See id.* at 900–05.

60. Devins, *supra* note 5, at 1342.

61. *See id.* at 1343 (“[A] Missouri law mandating that an abortion provider be licensed as an ambulatory surgical center, be located within thirty miles of a hospital, and adhere to physical plant requirements (including lighting, room dimension, even the number of wall outlets and windows).”).

62. *See Targeted Regulation of Abortion Providers (TRAP): Avoiding the Trap*, CTR. FOR REPROD. RIGHTS (Nov. 1, 2007), <http://reproductiverights.org/en/document/targeted-regulation-of-abortion-providers-avoiding-the-trap>.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

The final and most controversial categories of TRAP laws are hospitalization requirements. These laws usually require that after the second trimester, the abortion must be done in a hospital, rather than an abortion clinic.⁶⁷ These laws are different from other TRAP provisions in that they place an outright ban on abortion clinics performing abortions past a certain gestational age.⁶⁸ It poses an additional problem for women seeking abortions because many hospitals are not equipped to perform abortions.⁶⁹ Only about four states have enforceable hospitalization requirements.⁷⁰ However, as of 2007, twelve states have hospitalization requirements that have been rendered unenforceable by State officials or court decisions.⁷¹

While facially neutral, the laws have likely the intent,⁷² and often effect, of forcing medical facilities to stop providing abortions. For example, due to TRAP laws in Arizona, Planned Parenthood was forced to stop providing abortions in the city of Flagstaff.⁷³ After the TRAP laws, Planned Parenthood was only able to perform abortions in Maricopa and Pima Counties, which comprise the Phoenix and Tucson metropolitan areas, respectively, leaving out about a million and a half inhabitants of Arizona.⁷⁴ While some TRAP laws have been

67. *Id.*

68. *Id.*

69. See *Jackson Women's Health Organization v. Amy (MS)*, CTR. FOR REPROD. RIGHTS (Dec. 9, 2008), <http://reproductiverights.org/en/case/jackson-womens-health-organization-v-amy-ms> (summarizing a court ruling of Mississippi law requiring second trimester abortions be performed in hospitals that would have effectively banned abortion past the second trimester because no hospital in the state provided abortions).

70. See *Targeted Regulation of Abortion Providers (TRAP): Avoiding the Trap*, *supra* note 62 (referring to Alaska, Arkansas, North Carolina, and Nevada).

71. *Id.*; see also *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983) (pre-*Casey* Supreme Court decision invalidating as unconstitutional a Missouri statute requiring that after twelve weeks of pregnancy, abortions must be performed in a hospital rather than abortion clinic); *Jackson Women's Health Org. v. Amy*, 330 F. Supp. 2d 820 (S.D. Miss. 2004) (invalidating state hospitalization requirement because it would effectively ban abortions before viability).

72. Barry Yeoman, *The Quiet War on Abortion*, MOTHER JONES (Oct. 2001), <http://www.motherjones.com/politics/2001/09/quiet-war-abortion> ("The real motive for TRAP laws, say Grimes and others, is to force clinics to spend money on costly renovations for fear of being shut down by the state. This drives up the cost of abortions, placing them out of reach for some women. It could even force providers to shut down entirely.")

73. Howard Fischer, *Planned Parenthood to End Abortions in Flagstaff*, AZDAILY SUN .COM (Aug. 18, 2011), available at http://azdailysun.com/news/local/govt-and-politics/planned-parenthood-to-end-abortions-in-flagstaff/article_ad6e4b5a-c9d3-11e0-a709-001c4c002e0.html.

74. Compare *Arizona State & County QuickFacts*, U.S. CENSUS BUREAU (June 27, 2013), <http://quickfacts.census.gov/qfd/states/04000.html> (stating the 2012 population of Arizona was 6,553,255), with United States Census Bureau, *Maricopa County State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/04/04013.html> (last visited Nov. 3, 2013) (stating the estimated population of the Phoenix metropolitan area is 3,880,244), *State & Pima County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/04/04019.html> (last visited Nov. 3, 2013) (stating the estimated

interpreted by the courts as creating a *de facto* ban on abortion under certain circumstances, and thus invalid under the Constitution,⁷⁵ most TRAP laws have not been interpreted by the courts as creating an “undue burden.” Therefore, although TRAP laws are outside the realm of the laws expressly upheld in *Casey*, their continued presence suggests that, at least in most circumstances, they are a valid state restriction on abortion procedure.

III. ARIZONA HOUSE BILL 2036

A. *The Law*

Arizona Governor Jan Brewer signed Arizona House Bill 2036 (H.B. 2036) into law in April 2012,⁷⁶ and it was set to go into effect in August of 2012.⁷⁷ The bill makes several changes to abortion law in Arizona. Notably, the bill contains provisions regarding abortion facilities (TRAP laws), time requirements, ultrasounds, informed consent, how early into the pregnancy a woman can receive an abortion, and punishments for physicians who perform abortions contrary to the State regulation.⁷⁸

The bill requires that abortion clinics post visible signs in the waiting, consultation, and procedure rooms which state that it is unlawful for a person to force a woman to have an abortion.⁷⁹ Before H.B. 2036, it was mandatory in Arizona that before a woman had an abortion she underwent an ultrasound procedure.⁸⁰ H.B. 2036 adds the requirement that the ultrasound must be done at least twenty-four hours before the abortion,⁸¹ necessitating an additional visit to a medical facility or an overnight stay.

If a woman wishes to seek an abortion because the fetus has been diagnosed with a terminal condition, H.B. 2036 requires that she be informed at least twenty-four hours before the abortion of all perinatal

population of the Tucson metropolitan area is 989,469). Subtracting the combined populations of Tucson and Phoenix, 4,869,713, from the population of Arizona, 6,553,255, leaves 1,683,542 people remaining.

75. *Jackson Women's Health Organization v. Amy (MS)*, *supra* note 69.

76. Alia Beard Rau, *Brewer Signs Bill Banning Most Abortions After 20 Weeks*, AZ CENTRAL (Apr. 12, 2012), available at <http://www.azcentral.com/news/politics/articles/2012/04/12/20120412arizona-abortion-bill-20-weeks-law-brewer.html>.

77. Kelly Cozzone, *New Law in Arizona States Pregnancy Begins Two Weeks Before Conception*, EXAMINER.COM (Aug. 25, 2012), <http://www.examiner.com/article/new-law-arizona-states-pregnancy-begins-two-weeks-before-conception> (discussing the law which would have gone into effect in August of 2012).

78. H.B. 2036, 50th Leg., 2d Reg. Sess. (Ariz. 2012).

79. *Id.*

80. *State Policies in Brief: Requirements for Ultrasound*, *supra* note 47.

81. Ariz. H.B. 2036.

hospice services available.⁸² If a woman wishes to seek an abortion because the fetus has a *non*-terminal condition, H.B. 2036 requires that the doctor give the woman up-to-date medical information regarding the potential outcomes of the condition.⁸³

H.B. 2036 also requires that the gestational age of the fetus be determined before an abortion is performed.⁸⁴ In order to determine the gestational age, the doctor is permitted to ask any question of the woman.⁸⁵ This could require women seeking abortions to dredge up painful or embarrassing memories. Under the broad language, the doctor would be permitted to ask about the exact date of conception or even the exact circumstances under which the fetus was conceived.

For example, if someone were the victim of repeated sexual abuse, the doctor could ask about each specific instance of rape to determine which incident was most likely the date of conception. It would also be possible for the doctor to ask extremely intimate questions regarding the nature of the sexual conduct in order to determine which instance most likely resulted in conception.

One of the most glaring departures from the *Casey* and even the *Roe* molds is that H.B. 2036 departs completely from the standard of viability. Rather than the viability standard, H.B. 2036 stipulates that if the gestational age of the fetus is more than twenty weeks, abortion is prohibited.⁸⁶ Finally, H.B. 2036 permits the woman upon whom the abortion was performed, the husband of the woman, and the mother's parents, if the mother is a minor, to sue the physician in the event that an abortion is provided in violation of State law.⁸⁷ If the physician is found liable, he/she is subject to a Class 1 Misdemeanor and may have his/her medical license suspended or even revoked.⁸⁸

B. *Isaacson v. Horne*

Soon after Governor Brewer signed H.B. 2036 into law, opponents sued the Attorney General of Arizona seeking a preliminary injunction and declaratory judgment under the grounds that the law was unconstitutional.⁸⁹ The plaintiff argued that by prohibiting abortion before twenty weeks, the law abandoned the viability standard of *Casey*.⁹⁰

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Ariz. H.B. 2036.

88. *Id.*

89. *Isaacson v. Horne*, 884 F. Supp. 2d 961, 962 (D. Ariz. 2012), *rev'd*, 716 F.3d 1216 (9th Cir. 2013).

90. *Id.* at 966–67.

The District Court disagreed, finding that the law was merely a “limit on some previability abortions between 20 weeks gestational age and viability.”⁹¹ The court found that the law did not present a substantial burden to pre-viability abortions because it still permitted women to obtain abortions before twenty gestational weeks, reasoning, “while H.B. 2036 may prompt a few women, who are considering abortion as an option, to make the ultimate decision earlier than they might otherwise have made it, H.B. 2036 is nonetheless constitutional because it does not ‘prohibit any woman from making the ultimate decision to terminate her pregnancy.’”⁹² The court ruled in favor of the state and denied injunctive and declaratory relief.⁹³

On May 21, 2013, the Court of Appeals for the Ninth Circuit reversed the district court’s decision and ruled H.B. 2036 unconstitutional.⁹⁴ Reasoning “a prohibition on abortion at and after twenty weeks does not merely ‘encourage’ women to make a decision regarding abortion earlier than Supreme Court cases require; it forces them to do so,”⁹⁵ the court found the restriction on abortion after twenty gestational weeks was an unconstitutional violation of the right to obtain a pre-viability abortion.⁹⁶ The court emphasized, “[u]nder controlling Supreme Court precedent, a woman has the right to choose to terminate her pregnancy *at any point* before viability—not just before twenty weeks gestational age,”⁹⁷ finding that H.B. 2036 was, “unconstitutional under an unbroken stream of Supreme Court authority, beginning with *Roe* and ending with *Gonzales*.”⁹⁸

IV. LEGAL ANALYSIS OF HOUSE BILL 2036

A. *House Bill 2036 Compared to Other Post-Casey State Laws*

While H.B. 2036 is in several ways a novel piece of legislation, it still has ties to the Pennsylvania restrictions upheld in *Casey*. This is reflective of states’ desire to craft provisions similar to those expressly upheld as constitutional by the Supreme Court. Additionally, the areas in which H.B. 2036 departs from typical post-*Casey* legislation mostly conform to other states’ departures. This is also possibly due

91. *Id.* at 968.

92. *Id.* at 969 (quoting *Gonzalez v. Carhart*, 550 U.S. 124, 146 (2006)).

93. *Id.* at 972.

94. *Isaacson v. Horne*, 716 F.3d 1213, 1231 (9th Cir. 2013), *rev’d*, 884 F. Supp. 2d 961 (D. Ariz. 2012).

95. *Id.* at 1227.

96. *Id.*

97. *Id.*

98. *Id.* at 1231.

to a desire to not stand out too far from existing norms. However, the twenty-four hour waiting period attached to the already strong ultrasound requirement makes Arizona and Louisiana the only states to have such a comprehensive ultrasound requirement package.⁹⁹

H.B. 2036's biggest departure, however, is its prohibition on abortions for fetuses that are older than twenty gestational weeks. As this Note will show, because of current medical technology and incentives in other parts of the bill for the doctor to overestimate rather than underestimate the age of the fetus, in practice there will be a prohibition on fetuses older than *eighteen* weeks rather than twenty weeks.¹⁰⁰ Eighteen weeks is well before the average time of viability, which is currently at around twenty-four weeks, with only around 30% of children born at twenty-three weeks surviving, and slightly more than half surviving at twenty-four weeks.¹⁰¹

1. *The Timed Ultrasound Requirement*

H.B. 2036's requirement for a twenty-four hour waiting period after the ultrasound is a departure from typical post-*Casey* regulations. Waiting periods alone are not new or novel. In fact, they fit exactly in the mold of *Casey* restrictions, as a waiting period was one of the laws expressly upheld in *Casey*.¹⁰² The rationale behind the waiting period was to allow the woman to properly contemplate her decision.¹⁰³ However, the waiting period can take on a slightly different rationale when combined with the ultrasound.

As previously mentioned, it is possible that the ultrasound is an attempt to personify the fetus.¹⁰⁴ If that is the case, then the waiting period is an attempt to force the woman to contemplate the *personification* of the fetus, or at the very least, contemplate the abortion in light of any new feelings of personification she may have for the fetus.

The law is also different from typical waiting requirements in that it requires women to review individualized information. The law upheld in *Casey* required patients to wait a day after receiving generalized abortion information,¹⁰⁵ which is entirely different from a patient receiving her own results from a medical procedure. H.B. 2036 ignores this distinction by creating a requirement that a woman wait after

99. *State Policies in Brief: Requirements for Ultrasound*, *supra* note 47.

100. *See infra* Part IV.A.4.

101. *Neonatal Death*, MARCH OF DIMES, <http://www.marchofdimes.com/loss/neonatal-death.aspx> (last visited Nov. 3, 2013).

102. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 886–87 (1992).

103. *Id.* at 885.

104. *State Policies in Brief: Requirements for Ultrasound*, *supra* note 47.

105. *Casey*, 505 U.S. at 881.

receiving the results of her own ultrasound, rather than after receiving generalized information on the abortion procedure. Viewed in this light, H.B. 2036 is different from the simple dissemination of information and the ability to ponder that information at issue in *Casey*.

2. *Facilities Providing Abortion Must Post Certain Signs*

One provision in H.B. 2036 requires that signs stating that it is unlawful to force a woman to have an abortion be posted in the waiting, operating and consultation rooms. This can be viewed as an extension of the informed consent approved in *Casey*. It can also be seen as a TRAP provision, which although outside of the traditional *Casey* restrictions, is common.¹⁰⁶

TRAP provisions range in how idiosyncratic they are, from imposing certain fees on abortion clinics, to requiring that janitor closets in abortion clinics be a certain size.¹⁰⁷ Most TRAP laws have been upheld as Constitutional restrictions on abortion rights, and those that have been struck down usually require that abortions of a certain gestational age be performed in a hospital, rather than an abortion clinic.¹⁰⁸

The posted sign requirements in H.B. 2036 are outside of the restrictions that *Casey* expressly permitted.¹⁰⁹ They fit in well with many of the TRAP provisions that states have enacted post-*Casey*. This is one of the few examples in which a regulation may be outside of the *Casey* framework, but is still a legal restriction on abortion.

There is a possibility that the law may be seen as too high a burden, and therefore unconstitutional, similar to the requirements that certain abortions be performed in a hospital. On the other hand, if TRAP provisions are seen on a spectrum from least to most restrictive, the posted sign requirements would be closer to the least restrictive, as it does not directly affect the abortion procedure and would not cost the abortion clinic a significant amount of time or money.

3. *The Doctor Must Inform the Woman of the Medical Prognosis of the Fetus*

Under H.B. 2036, if a woman wishes to have an abortion because the fetus has a terminal condition, the doctor is required to inform her

106. See *And Then There Was One*, ECONOMIST (Sept. 8, 2012), available at <http://www.economist.com/node/21562215> (explaining how pro-life advocates have turned to TRAP laws as a method of regulating abortion out of existence).

107. TRAP Bills, NAT'L ABORTION FED'N, http://www.prochoice.org/policy/states/trap_laws.html (last visited Nov. 3, 2013).

108. See *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000); see also *Targeted Regulation of Abortion Providers (TRAP): Avoiding the Trap*, *supra* note 62.

109. *Casey*, 505 U.S. at 881–87.

of prenatal hospice services available.¹¹⁰ If the woman wishes to have an abortion because of a non-lethal condition, the doctor is required to tell the woman the current medical outlook for that condition.¹¹¹ All of this must take place at least twenty-four hours before the procedure.¹¹²

At first glance, these restrictions are in the same mold as the informed consent and time requirements of *Casey*.¹¹³ However, H.B. 2036 breaks again from the requirements in *Casey* by requiring the woman to *state a reason* for obtaining an abortion.

Of note is that the law does not explain how the doctor is to determine the reason the woman is seeking an abortion.¹¹⁴ Combined with the other provisions in H.B. 2036 allowing either the husband or parents, if the woman is a minor, to sue a doctor for violation of these rules,¹¹⁵ it is possible to imagine the following scenario: A doctor performs an abortion on a woman. The woman neglects to tell the doctor that she is seeking the abortion because the fetus will be born with a non-fatal illness. Because she did not know of the motivation, the doctor did not inform the woman of the current medical outlook regarding the disease twenty-four hours before the procedure. The husband of the woman, knowing that she sought the abortion because of the fetus's non-fatal illness, is now able to sue the doctor in civil court, and the doctor may have his license suspended or revoked.

This section of H.B. 2036 is an example of how states have tried to stretch the existing *Casey* regulations. This fits well within the mold of "informed consent" regulations, however it is not simply information about the abortion procedure, like the Pennsylvania law at issue in *Casey*. The trouble with this section of H.B. 2036 is its application alongside the rest of the bill. The patient would be required to inform the doctor performing the abortion that the fetus has a certain illness, and if she did not, the doctor would be liable. However, because the information given in return appears to be a truthful prognosis and outlook for the particular disease, it would not likely run afoul of the *Casey* requirement that information be truthful and not misleading.

4. The Gestational Age of the Fetus Must Be Less than Twenty Weeks

Of all the provisions in H.B. 2036, the largest departure from the *Casey* framework is the requirement that abortions may not be

110. H.B. 2036, 50th Leg., 2d Reg. Sess. (Ariz. 2012).

111. *Id.*

112. *Id.*

113. *Casey*, 505 U.S. at 882–85.

114. Ariz. H.B. 2036.

115. *Id.*

performed on a fetus that is older than twenty weeks.¹¹⁶ This is an express prohibition of abortion past a certain date, rather than a regulation of abortion procedures. While the letter of H.B. 2036 states that abortions may not be performed after twenty weeks, in practice the cutoff date is likely to be eighteen weeks.¹¹⁷ This is because the bill determines the gestational age of the fetus as beginning from the last menstrual cycle,¹¹⁸ and it imposes harsh penalties on doctors for breaking any of the State regulations.¹¹⁹ Therefore, there is an incentive for the doctor to overestimate the age of the fetus.

Even if the age of the fetus were restricted to twenty weeks rather than eighteen, H.B. 2036 would be a departure from the framework in every Supreme Court decision regarding abortion dating back to *Roe*, which permitted abortion to be prohibited post-viability.¹²⁰ Most states have interpreted viability to be a flexible standard, and they have decided it begins at around twenty-four weeks.¹²¹ Some of the more experimental states, such as Alabama, Arkansas, Indiana, Idaho, Nebraska, Kansas, Louisiana, North Carolina, North Dakota, and Oklahoma have determined viability as beginning as early as twenty weeks.¹²² Eighteen weeks, by comparison, is an unprecedented encroachment on the time a woman is allowed to seek an abortion.

Not only is this time frame earlier than any state in the union, it is also a departure from the viability standard because it is a wholesale ban on abortion during a time in which the fetus is not viable. The earliest that a child has been born in the United States and survived outside of the mother is at twenty-one weeks.¹²³ It questionable

116. *Id.*

117. John Celock, *Arizona Abortion Bill: Legislators Pass Three Bills, Including One That Redefines When Life Begins*, HUFFINGTON POST (Apr. 12, 2012, 4:56 PM), http://www.huffingtonpost.com/2012/04/10/az-abortion-bills-arizona-gestational-age_n_1415715.html; David Edwards, *Arizona Bill Would Declare Pregnancy 2 Weeks Before Conception*, RAW STORY (Apr. 4, 2012, 12:25 PM), <http://www.rawstory.com/rs/2012/04/04/arizona-bill-would-declare-pregnancy-2-weeks-before-conception/>.

118. Ariz. H.B. 2036.

119. *Id.*

120. *Gonzalez v. Carhart*, 550 U.S. 124, 146 (2007) (“Before viability, a State ‘may not prohibit any woman from making the ultimate decision to terminate her pregnancy.’” (quoting *Casey*, 505 U.S. at 879)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992) (“We conclude the line should be drawn at viability.”); *Webster v. Reproductive Health Services*, 492 U.S. 490, 520 (1989) (“viable—an end which all concede is legitimate.”); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (“With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability.”).

121. *State Policies in Brief: An Overview of Abortion Laws*, *supra* note 47.

122. *Id.*

123. Amanda Cable, *The Tiniest Survivor: How the ‘Miracle’ Baby Born Two Weeks Before the Legal Abortion Limit Clung to Life Against All Odds*, DAILY MAIL ONLINE (May 22, 2008), available at <http://www.dailymail.co.uk/femail/article-1021034/The-tiniest-survivor-How-miracle-baby-born-weeks-legal-abortion-limit-clung-life-odds.html>.

therefore, that some states consider viability to start as early as twenty weeks, and it certainly calls into question how well H.B. 2036 conforms to the required standard of not prohibiting abortion before viability. If the earliest a fetus has *ever* survived outside of the womb is twenty-one weeks, and on average, most fetuses do not survive earlier than twenty-four weeks,¹²⁴ a fetus born at eighteen or even twenty gestational weeks cannot be said to have a realistic standard for surviving. H.B. 2036 therefore moves the cutoff date for abortions too early, and encroaches upon the viability standard laid out in *Casey*.

5. The Woman, the Woman's Spouse, and the Woman's Parents, if She Is a Minor, May Sue a Doctor for Violating These Restrictions

H.B. 2036 increases the number of people who can sue a doctor for violation of state restrictions on abortion.¹²⁵ While expanding *who* can sue a doctor for performing an abortion in violation of regulations, H.B. 2036 simultaneously makes a doctor in violation of Arizona abortion law potentially liable for a class-one misdemeanor and subject to license suspension or revocation.¹²⁶ This type of legislation is entirely apart from the typical *Casey* mold of abortion restrictions as it focuses on the doctor rather than the woman receiving the abortion. Other states, such as Tennessee, have laws that place similar penalties on physicians performing abortions in violation of State law.¹²⁷ While it is outside of the laws expressly upheld under *Casey*, it is not likely that these laws place an undue burden on a woman's ability to obtain an abortion. It can be seen, however, as acting in parity with the rest of the State's abortion laws, as a means of ensuring that it will be carried out in its strictest sense, and perhaps even further than the law requires.

For example, because current medical technology does not allow for a doctor to determine the gestational age inside of two weeks,¹²⁸ the increased penalty incentivizes doctors to overestimate rather than underestimate the twenty-week gestational period. The penalties also leave the doctor open to potential lawsuits in the case when a woman seeking an abortion because the fetus has been diagnosed with a fatal or non-fatal disease, but neglects to tell the doctor.

124. *Id.*

125. H.B. 2036, 50th Leg., 2d Sess. (Ariz. 2012).

126. *Id.*

127. TENN. CODE ANN. § 39-15-202 (2011).

128. Celock, *supra* note 117.

B. The Restrictions that House Bill 2036 Places on Access to Abortion Constitute an Undue Burden on a Woman's Right to Seek an Abortion

The restrictions that H.B. 2036 places on women's access to abortion are enough to constitute an undue burden within the two-step *Casey* framework. The timing requirement on the ultrasound necessitates an additional visit to the doctor, the requirement that a woman seeking an abortion because of a fatal or non-fatal health concern regarding the fetus be informed of the medical outlook twenty-four hours before the procedure could further necessitate another doctor visit, and finally the gestational age requirement expressly prohibits abortion pre-viability.

1. The Ultrasound Requirement

Laws regarding ultrasounds have existed in several states¹²⁹ for a number of years,¹³⁰ so it is unlikely that the Supreme Court will consider them an undue burden. While only eight states *require* women to get an ultrasound,¹³¹ the Supreme Court has not decided whether these requirements have the purpose or effect of deterring abortions. It could be argued that they are simply an extension of *Casey* regulations regarding information. This could be countered, however, by the fact that they have the purpose of deterring abortions because their sole purpose is an attempt to personify the fetus for the woman and thereby stop her from receiving an abortion. Another argument could be that they have the effect of preventing abortions; however, this does not appear to be the case.¹³²

The addition of the time requirement creates a host of further problems that constitute an undue burden. Under the *Casey* definition, an undue burden exists if the law has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."¹³³ The requirement that the ultrasound

129. *State Policies in Brief: Requirements for Ultrasound*, *supra* note 47.

130. See Erik Eckholm, *Ultrasound: A Pawn in the Abortion Wars*, N.Y. TIMES (Feb. 25, 2012), available at <http://www.nytimes.com/2012/02/26/sunday-review/ultrasound-a-pawn-in-the-abortion-wars.html> (stating that states have passed ultrasound restrictions since 2005).

131. *State Policies in Brief: Requirements for Ultrasound*, *supra* note 47.

132. Eckholm, *supra* note 130 ("Women are having abortions because of the conditions of their lives, their economic situation, their partner situation, their age . . . and the ultrasound doesn't change that.") (quoting sociologist Tracy Weitz regarding a study indicating the ultrasound does not change women's minds).

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

must be performed at least one day before the abortion necessitates that the woman make at least two appointments with the physician.

This additional appointment will have the effect of placing a substantial obstacle in the path of women who are not able to take the time off work, women who wish their abortion to remain secret, women who cannot financially afford an additional doctor visit, uninsured women who cannot afford an ultrasound procedure and a doctor visit, and women who live in rural areas. It is important to note that many of these groups overlap, thereby exacerbating just how “substantial” this obstacle is.

While the Supreme Court upheld a twenty-four hour time requirement for the information given to the mother in *Casey*,¹³⁴ in spite of several of these same objections,¹³⁵ the ultrasound, rather than the simple dissemination of information, presents stronger obstacles in several key ways. First, in *Casey*, the Court noted the problems a poorer woman might face by having to visit the doctor twice, but did not find that it was sufficiently problematic to constitute an undue burden.¹³⁶ However, in the case of H.B. 2036, the added visit is not simply a meeting with a doctor; it is a much more costly medical procedure.¹³⁷ This has the effect of placing a substantial obstacle in the way of women seeking abortions by requiring a large expenditure.

Furthermore, because there was already an ultrasound requirement in place before H.B. 2036 went into effect,¹³⁸ the purpose of the added time requirement appears to place an obstacle for the woman in obtaining her abortion. It can be argued that the purpose is to give women time to think about the decision to abort, thereby fitting in with the informed consent model of *Casey* regulations, but, as previously stated, the motivations for waiting periods after ultrasound are suspect.¹³⁹

Second, largely due to pre-existing TRAP laws, abortion clinics in Arizona only exist in the two largest metropolitan areas in the states:

134. *Id.* at 887.

135. *Id.* at 885–86.

136. *Id.*

137. See Maggie Fox, *Survey Shows Americans Pay A Lot More for Health Care*, NAT'L J. (Mar. 4, 2012), available at <http://www.nationaljournal.com/healthcare/survey-shows-americans-pay-a-lot-more-for-health-care-20120304> (reporting survey findings that routine doctor visits average \$89); Stephen Rampur, *Ultrasound Cost*, BUZZLE, <http://www.buzzle.com/articles/ultrasound-cost.html> (May 12, 2010) (explaining the average cost of an ultrasound is approximately \$200).

138. See Associated Press, *Ariz. Panel Endorses Abortion Ultrasound Mandate*, AZ CAPITOLTIMES.COM (Feb. 3, 2011), available at <http://azcapitoltimes.com/news/2011/02/03/ariz-panel-endorses-abortion-ultrasound-mandate/> (discussing the enactment of the 2011 law requiring an ultrasound before an abortion).

139. See *infra* Part II.

Phoenix and Tucson.¹⁴⁰ This means that if a woman living Flagstaff, a city with a population of roughly 65,000,¹⁴¹ wishes to have an abortion, she would have to drive around one hundred and fifty miles just to obtain the procedure. With the introduction of the twenty-four hour ultrasound waiting period, that woman would now be required to make that trek twice. The distance alone is a difficult obstacle to overcome, but if the woman were poor, the cost of transportation combined with the cost of the two procedures would be a substantial obstacle in front of her ability to undergo the procedure.

2. The Requirement that the Gestational Age of the Fetus Be Under Twenty Weeks

It is helpful at this stage to revisit the wording of the Supreme Court's definition of an undue burden. In *Casey*, the Court said that an undue burden would have, "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."¹⁴² A woman seeking to abort a *viable* fetus may be subject to substantial obstacles, up to and including outright prohibition, without suffering a violation of her constitutional rights.

H.B. 2036, however, breaks away from the viability standard. Not only does it specify a cutoff date regardless of viability,¹⁴³ but that cutoff date is weeks before viability. As previously stated, the record for earliest surviving born child is twenty-one weeks.¹⁴⁴ Even using the most generous definition possible and saying that this "miracle baby"¹⁴⁵ should set the standard for viability, it would still put H.B. 2036 in the position of prohibiting abortion a full three weeks before viability. Even if it were assumed that the doctor would not overestimate the gestational period as he is incentivized to do and the abortion is permitted after twenty weeks of pregnancy, the law would *still* prohibit abortion of a nonviable fetus. This is directly contrary to the specific language of the Supreme Court in *Casey*, and the entire framework of the viability standard.¹⁴⁶

140. Howard Fischer, *Planned Parenthood to End Abortions in Flagstaff*, AZDAILYSUN.COM (Aug. 18, 2011), available at http://azdailysun.com/news/local/govt-and-politics/planned-parenthood-to-end-abortions-in-flagstaff/article_ad6e4b5a-c9d3-11e0-a709-001c4c002e0.html.

141. Census Facts, CITY OF FLAGSTAFF, <http://www.flagstaff.az.gov/index.aspx?NID=1095> (last visited Nov. 3, 2013).

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

143. H.B. 2036, 50th Leg., 2d Reg. Sess. (Ariz. 2012).

144. Cable, *supra* note 123.

145. *Id.*

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

One of the reasons cited by legislators for prohibiting abortion after twenty weeks is that after twenty weeks a fetus can feel pain.¹⁴⁷ However, this evidence has been disputed by major medical societies.¹⁴⁸ Without this justification, there does not even appear to be a rational basis for the pre-viability restriction. Therefore, even if the law was not found to create an undue burden, it would still fail the two-pronged *Casey* test.

The gestational restriction in H.B. 2036 poses additional problems for women seeking abortions. A motivating factor in many abortions are medical complications;¹⁴⁹ however, many of these medical complications cannot be detected until twenty weeks or later in the gestation period.¹⁵⁰ Therefore, it may force women to carry fetuses to term even if it is clear that they will die shortly after birth.¹⁵¹

CONCLUSION

Arizona House Bill 2036 is an example of how states have tried to craft abortion restrictions in the mold of *Casey*, while simultaneously attempting to push those boundaries. In stretching those boundaries, H.B. 2036 has gone too far and created an undue burden for women seeking abortions.

Notably, the bill has added a twenty-four hour waiting period to the already restrictive ultrasound procedures.¹⁵² This will necessitate a second visit to the doctor's office. Combined with the TRAP provisions currently in effect in Arizona that have forced abortion providers to consolidate to the areas of Tucson and Phoenix, it leaves women seeking an abortion who live in other cities, such as Yuma or Flagstaff, with the prospect of making two trips of a few hundred miles each. While a waiting period is one of the more traditional *Casey* regulations, it takes on a new meaning as applied to the ultrasound requirement.

The time requirements in *Casey* were justified by giving the woman the ability to process the general information about abortion that she received in order to make an informed decision about her

147. Ariz. H. B. 2036.

148. Erik Eckholm, *Lawsuit Tries to Block New Arizona Abortion Law*, N.Y. TIMES (July 12, 2012), available at <http://www.nytimes.com/2012/07/13/us/arizona-abortion-law-is-challenged.html>.

149. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 112 (citing a study that showed 13% of women have an abortion because of concerns about the health of the fetus, and 12% of women have abortions because of concerns about their own health).

150. Argyro Syngelaki et al., *Challenges in the Diagnosis of Fetal Non-Chromosomal Abnormalities at 11–13 Weeks*, 31 PRENATAL DIAGNOSIS 90, 98, 100 (2011).

151. *Neonatal Death*, *supra* note 101.

152. H.B. 2036, 50th Leg., 2d Reg. Sess. (Ariz. 2012).

medical operation. However, the waiting period for the ultrasound requirement forces the woman to wait after receiving results from a medical examination of her own body rather than general information regarding abortion.

It also imposes a much more substantial financial burden on women, especially those living in rural areas. Before H.B. 2036, women had to pay for transportation to and from the abortion clinic, as well as an ultrasound and the abortion procedure itself. Now, because of H.B. 2036, women will have to pay for transportation to and from the doctor's office *twice*, potentially facing higher costs due to increased distances, an ultrasound, potentially an overnight stay, and the abortion procedure. While likely not an undue burden on their own, the TRAP provisions of H.B. 2036 may contribute to rising costs of the abortion procedure and place additional costs on women seeking abortions in Arizona.

Finally, permitting the time requirement would be a slippery slope to moving far from the intent of informed consent. It is easy to see a more conservative state such as South Dakota with its strong abortion regulations implementing the twenty-four hour waiting period for abortions. If this were combined with its other TRAP laws regarding abortion—among other provisions, that the woman be told the fetus is a living being—the requirements seem more like moral judgments on the woman rather than allowing a patient to make an adequately informed medical decision. Importantly for the *Casey* analysis, H.B. 2036 places a substantial obstacle in front of a woman seeking an abortion, with seemingly no other purpose than deterring them from undergoing the procedure.

The bill also departs from every Supreme Court precedent regarding abortion in that it entirely abandons the standard of viability. By expressly prohibiting abortion after twenty weeks on paper, and potentially eighteen weeks in practice, Arizona H.B. 2036 prohibits abortion before a fetus is not only reasonably viable, but before any fetus has ever survived outside of the mother's womb.¹⁵³ This is a direct violation of the often-repeated standard of viability. Supreme Court cases from *Roe* to *Casey* to *Carhart* have sometimes dramatically changed the Court's approach to abortion regulations, but *every single case* has affirmed that the state may not prohibit abortion until the moment of viability.¹⁵⁴ As *Casey* noted, viability will change over time as

153. Cable, *supra* note 123.

154. *Gonzalez v. Carhart*, 550 U.S. 124, 146 (2006) ("Before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'") (quoting *Casey*, 505 U.S. at 879); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) ("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.").

medical technology progresses. There may one day be a time when a fetus can be said to be reasonably viable at twenty or even eighteen weeks. Presently however, this is not the case.¹⁵⁵

While viability is meant to be a flexible standard, the generally accepted standard of twenty-four weeks more accurately reflects current medical technology, as it is the point that a fetus is more likely than not to survive outside of the mother's womb. Even taking a narrow view of "reasonably likely to survive," as less than half, but still a significant amount, the cut-off for viability should be twenty-three weeks, at which point the fetus has around a thirty-percent chance of surviving outside of the mother.¹⁵⁶ By either definition, the Arizona Bill goes far over the line into the realm of viability. If abortions can be prohibited earlier than any fetus has ever survived outside of the womb, the viability framework has been abandoned.

The timed ultrasound requirement and gestational age limitation of H.B. 2036 stretch the boundaries of post-*Casey* abortion restrictions too far, creating a substantial burden for women seeking abortions. The TRAP laws contained in H.B. 2036, are an example of laws outside of the *Casey* mold, but do not likely constitute an undue burden. However, like the harsher penalties for doctor's performing abortions in violation of state law, they may create an undue burden when combined with the other elements of H.B. 2036. The gestational age limitation and timed ultrasound requirements of H.B. 2036 should be invalidated, as they are clear constitutional violations. Any reviewing court should closely examine the remaining provisions, with special consideration given to their combined effect.

States will continue to experiment with new and novel abortion legislation. It remains to be seen where the exact limits are for TRAP laws, timing requirements, and other time, place, and manner restrictions. However, from *Roe* to *Casey* to *Carhart*, the Supreme Court has been explicitly clear that abortion may not be prohibited before viability. Arizona House Bill 2036 prohibits abortion before viability. The law is therefore an unconstitutional restriction on a woman's right to receive an abortion.

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155. *Casey*, 505 U.S. at 846.

156. *Neonatal Death*, *supra* note 101.

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