

No. _____

**In The
Supreme Court of the United States**

E. SCOTT PRUITT, ATTORNEY GENERAL
OF THE STATE OF OKLAHOMA, *et al.*,

Petitioners,

v.

NOVA HEALTH SYSTEMS D/B/A/ REPRODUCTIVE
SERVICES, ON BEHALF OF ITSELF AND ITS
PATIENTS, LARRY A. BURNS, D.O., ON BEHALF OF
HIMSELF AND HIS PATIENTS; AND OKLAHOMA
COALITION FOR REPRODUCTIVE JUSTICE,
ON BEHALF OF ITS MEMBERS,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Oklahoma**

PETITION FOR WRIT OF CERTIORARI

PATRICK R. WYRICK
Solicitor General
OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-0669 (Fax)
patrick.wyrick@oag.ok.gov

TERESA STANTON COLLETT
Counsel of Record
Special Assistant
Attorney General
OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
1824 Stanford Avenue
Saint Paul, MN 55403
(651) 528-7007
Teresa.S.Collett@gmail.com

Counsel for Petitioners

QUESTIONS PRESENTED

1. Did the Oklahoma Supreme Court err in declaring the Oklahoma Ultrasound Act, which requires the performance, display, and explanation of a pre-abortion ultrasound, to be facially unconstitutional under *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) in light of this Court's ruling that informational requirements further "the State's legitimate interest 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" (*id.* at 882)?
2. Did the Oklahoma Supreme Court err in interpreting *Casey* as prohibiting informed consent laws requiring the performance, display and explanation of pre-abortion ultrasounds – an interpretation that directly conflicts with that of the United States Court of Appeals for the Fifth Circuit in *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012) and the interpretation of *Casey* in the Eighth Circuit's recent decisions reviewing other informed consent requirements?
3. Does *Casey* require state courts to presume all state regulations of abortion are unconstitutional under federal law, absent controlling authority from this Court?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Tim Harris, in his official capacity as District Attorney for Tulsa County, Greg Mashburn, in his official capacity as District Attorney of Cleveland, Garvin, and McClain Counties; Lyle Kesley, in his official capacity as executive Director of the Oklahoma State Board of Medical Licensure and Supervision; and Gordon P. Laird, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, were defendants-appellants below and are petitioners in this Court.

TABLE OF CONTENTS

	Page
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE PETITION ...	9
I. THE OKLAHOMA SUPREME COURT'S DECISION BELOW DIRECTLY CON- FLICTS WITH THIS COURT'S RULING IN <i>PLANNED PARENTHOOD OF</i> <i>SOUTHEASTERN PA. V. CASEY</i> , 505 U.S. 833 (1992)	12
A. The Oklahoma Supreme Court Sum- marily Held that <i>Casey</i> Invalidated a State Informed Consent Statute	12
B. The Oklahoma Supreme Court Ap- plied <i>Casey</i> in a Way that Effectively Invalidates Almost All State Abor- tion-Related Regulations.....	17
C. The Oklahoma Supreme Court Incor- rectly Invalidated the Informed Con- sent Statute in Its Entirety.....	19
II. CORRECTING THE OKLAHOMA SU- PREME COURT'S STATEMENT OF SU- PREME COURT PRECEDENT WOULD PROTECT THE INTEGRITY OF FED- ERAL LAW AND PRESERVE IMPOR- TANT FEDERALISM INTERESTS	21

TABLE OF CONTENTS – Continued

	Page
III. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT’S RULING	23
A. The Law at Issue in <i>Texas Medical Providers Performing Abortion Services v. Lakey</i> , 667 F.3d 570 (5th Cir. 2012) is Similar to the Law in the Instant Case, and Indeed, in Some Respects, Has Greater Disclosure Requirements	23
B. The Outcome of <i>Lakey</i> and Its Interpretation of <i>Casey</i> Conflicts with the Oklahoma Supreme Court’s Decision ...	24
IV. THE OKLAHOMA SUPREME COURT’S DECISION IS ALSO IN TENSION WITH THE EIGHTH CIRCUIT’S RECENT <i>EN BANC</i> INFORMED CONSENT DECISIONS	27
V. <i>STUART V. HUFF</i> , 834 F. SUPP. 2D 424 (M.D.N.C. 2011) MAY PRESENT A CIRCUIT SPLIT OVER INFORMED CONSENT STATUTES WITH SIMILAR ULTRASOUND REQUIREMENTS.....	30

TABLE OF CONTENTS – Continued

	Page
VI. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE FOR WOMEN, PHYSICIANS, AND STATES SEEKING TO PROTECT WOMEN’S HEALTH.....	34
CONCLUSION.....	36

APPENDICES

Opinion and Mandate of the Oklahoma Supreme Court (December 4, 2012).....	App. 1
Decision and Order of the District Court for Oklahoma County (March 28, 2012).....	App. 4
Statutory Provision	App. 7

TABLE OF AUTHORITIES

Page

CASES

<i>Arizona v. Evans</i> , 514 U.S. 1 (1995).....	21, 22, 34
<i>Ayotte v. Planned Parenthood of N. New England</i> , 546 U.S. 320 (2006)	20
<i>Gonzalez v. Carhart</i> , 550 U.S. 124 (2007).....	<i>passim</i>
<i>Holmes v. South Carolina</i> , 547 U.S. 319 (2006) ...	21, 35
<i>In re Initiative Petition No. 349, State Question No. 642</i> , 838 P.2d 1 (Okla. 1992), <i>cert. den. sub nom. Oklahoma Coalition to Restrict Abortion, Inc. v. Feldman</i> , 506 U.S. 1071 (1992).....	18, 19
<i>In re Initiative Petition No. 395, State Question No. 761</i> , 286 P.3d 637 (Okla. 2012), <i>cert. den. sub nom. Personhood Okla. v. Barber et al.</i> , 81 U.S.L.W. 3065 (U.S. Oct. 29, 2012) (No. 12-145).....	17, 19
<i>Mazurek v. Armstrong</i> , 520 U.S. 968 (1997).....	16
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983).....	21, 34
<i>Missouri ex rel. Southern R. Co. v. Mayfield</i> , 340 U.S. 1 (1950).....	22
<i>Nova Health Sys. v. Pruitt</i> , 292 P.3d 28 (Okla. 2012)	<i>passim</i>
<i>Oklahoma Coalition for Reproductive Justice v. Cline</i> , 292 P.3d 27 (Okla. 2012), <i>petition for cert. filed</i> (U.S. Mar. 4, 2013) (No. 12-1094).....	18
<i>Pennsylvania v. Labron</i> , 518 U.S. 938 (1996).....	21, 35

TABLE OF AUTHORITIES – Continued

	Page
<i>Planned Parenthood Minn., N.D., S.D. v. Rounds</i> , 530 F.3d 724 (8th Cir. 2008).....	<i>passim</i>
<i>Planned Parenthood Minn., N.D., S.D. v. Rounds</i> , 653 F.3d 662 (8th Cir. 2011).....	30, 33
<i>Planned Parenthood Minn., N.D., S.D. v. Rounds</i> , 686 F.3d 889 (8th Cir. 2012)....	28, 29, 30, 33
<i>Planned Parenthood of Southeastern Pa. v. Casey</i> , 505 U.S. 833 (1992)	<i>passim</i>
<i>Roe v. Wade</i> , 410 U.S. 113 (1973).....	<i>passim</i>
<i>Stuart v. Huff</i> , 834 F. Supp. 2d 424 (M.D.N.C. 2011)	30, 31, 32, 33
<i>Texas Medical Providers Performing Abortion Services v. Lakey</i> , 667 F.3d 570 (5th Cir. 2012).....	<i>passim</i>
<i>Texas Medical Providers Performing Abortion Services v. Lakey</i> , 2012 WL 373132 (W.D. Tex. 2012)	25
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	20
<i>Zacchini v. Scripps-Howard</i> , 433 U.S. 562 (1977).....	22

STATUTES

28 U.S.C. § 1257(a).....	2
LA. REV. STAT. § 40:1299.35.2	33
OKLA. STAT. tit. 63, § 1-738.1A.....	<i>passim</i>
OKLA. STAT. tit. 63, § 1-738.3d	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
OKLA. STAT. tit. 63, § 1-738.3e	<i>passim</i>
TEX. HEALTH & SAFETY CODE § 171.012(4) (Vernon 2011)	23, 24
TEX. HEALTH & SAFETY CODE § 171.012(5) (Vernon 2011)	24

CONSTITUTIONAL PROVISIONS

OKLA. CONST. art. II, § 2	5
OKLA. CONST. art. II, § 7	4, 5
OKLA. CONST. art. II, § 22	5
OKLA. CONST. art. V, § 46	6
OKLA. CONST. art. V, § 59	5
U.S. CONST. amend. I	<i>passim</i>
U.S. CONST. amend. IV	21
U.S. CONST. amend. VI	21
U.S. CONST. amend. XIV, § 1	2, 21

LEGISLATIVE MATERIALS

2012 La. Acts No. 685, § 2A	33
-----------------------------------	----

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Centers for Disease Control and Prevention, “Abortion Surveillance – United States, 2009,” <i>Morbidity and Mortality Weekly Re- port</i> , 61 (No. 8) (Nov. 23, 2012), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6108a1. htm (visited Mar. 21, 2013).....	35
Guttmacher Institute, <i>State Policies in Brief: Requirements for Ultrasound</i> (Mar. 1, 2013)	34

PETITION FOR A WRIT OF CERTIORARI

Petitioners E. Scott Pruitt, in his official capacity as the Attorney General of Oklahoma, Tim Harris, in his official capacity as District Attorney for Tulsa County, Greg Mashburn, in his official capacity as District Attorney of Cleveland, Garvin, and McClain Counties; Lyle Kesley, in his official capacity as executive Director of the Oklahoma State Board of Medical Licensure and Supervision; and Gordon P. Laird, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, respectfully submit this petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Oklahoma.



OPINIONS BELOW

The Oklahoma Supreme Court filed its *per curiam* opinion on December 4, 2012. The state supreme court's published opinion (App., *infra* 1-3), filed on December 4, 2012, is reported at 292 P.3d 28. The relevant order of the state district court is unreported and is contained in an appendix hereto. (App., *infra* 4-6).



JURISDICTION

The Oklahoma Supreme Court filed its *per curiam* judgment on December 4, 2012. (App., *infra* 1-3). On February 25, 2013, Justice Sotomayor granted

Petitioner's application to extend the time to file a petition for a writ of certiorari until March 25, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).



STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV,
SECTION 1.

H.B. 2780, 2010 Okla. Sess. Laws ch. 36 (to be codified at OKLA. STAT. tit. 63, §§ 1-738.1A, 1-738.3d, 1-738.3e), provides, in relevant part:

At least one (1) hour prior to a woman having any part of an abortion performed or induced, and prior to the administration of any anesthesia or medication in preparation for the abortion on the woman, the physician who is to perform or induce the abortion, or the certified technician working in conjunction with the physician, shall:

1. Perform an obstetric ultrasound on the pregnant woman, using either a vaginal transducer or an abdominal transducer, whichever would display the embryo or fetus more clearly;
2. Provide a simultaneous explanation of what the ultrasound is depicting;

3. Display the ultrasound images so that the pregnant woman may view them;

4. Provide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus, the presence of cardiac activity, if present and viewable, and the presence of external members and internal organs, if present and viewable. . . .

OKLA. STAT. tit. 63, § 1-738.3d(2)(B).

The remainder of this statutory provision is reproduced in the Petition Appendix at (App., *infra* 7-15).



STATEMENT OF THE CASE

This petition arises from an Oklahoma Supreme Court decision striking down H.B. 2780, 2010 Okla. Sess. Laws ch. 36 (codified at OKLA. STAT. tit. 63, §§ 1-738.1A, 1-738.3d, 1-738.3e) (“Ultrasound Act”), on the grounds that “[t]he challenged measure is facially unconstitutional pursuant to *Casey*, 505 U.S. 833.” *Nova Health Sys. v. Pruitt*, 292 P.3d 28 ¶ 3 (Okla. 2012). The Ultrasound Act provides, in relevant part, that: “at least one (1) hour prior to a woman having any part of an abortion performed or induced, and prior to the administration of any anesthesia or medication” the doctor who is to perform the abortion or a technician must: “(1) perform an obstetric ultrasound on the pregnant woman. . . . ; (2) provide a

simultaneous explanation of what the ultrasound is depicting; (3) display the ultrasound images so the woman may view them; and (4) provide a medical description of the ultrasound images. . . .” OKLA. STAT. tit. 63, § 1-738.3d(2)(B). The Act creates potential criminal and civil liability for any abortion provider found to have violated the Act.

PROCEDURAL HISTORY

On April 27, 2010, Nova Health Systems d/b/a Reproductive Services, an abortion provider, and Larry A. Burns, D.O., a doctor in Oklahoma who performs abortions, commenced this action by filing suit in the Oklahoma District Court for Oklahoma County seeking a declaration that the Ultrasound Act was facially unconstitutional under the Oklahoma Constitution, and a temporary injunction and restraining order to enjoin its enforcement pending resolution of their claims. (R.Vol. I, Tab 2). On April 18, 2011, the state district court granted Plaintiffs’ motion of March 3, 2011 to add as a plaintiff the Oklahoma Coalition for Reproductive Justice (OCRJ). (R.Vol. I, Tab 7 at 2). On April 28, 2011, all three plaintiffs filed an Amended Petition with the state district court seeking to invalidate the Ultrasound Act on seven state law grounds. (R.Vol. I, Tab 6).

Plaintiffs claimed that the Ultrasound Act is unconstitutional under the Oklahoma Constitution because the statute (1) is unconstitutionally vague under Article II, Section 7 of the Oklahoma Constitution “because it fails to afford a person of ordinary

intelligence a reasonable opportunity to know what is prohibited by its terms,” Am. Pet. ¶ 50; (2) is “an impermissible special law in violation of OKLA. CONST. art. V, § 59 because it singles out an entire class of similarly situated persons for different treatment,” *id.* ¶ 52; (3) “violates the equal protection of the laws” pursuant to Article II, Section 7 of the Oklahoma Constitution “by subjecting Reproductive Services and Dr. Burns to an unreasonable classification,” *id.* ¶ 54; (4) “violates the equal protection of the laws” guaranteed by the Oklahoma Constitution “by subjecting the patients of Reproductive Services and Dr. Burns and members of the OCRJ to discrimination on the basis of their sex,” *id.* ¶ 56; (5) violates free speech rights guaranteed by Oklahoma Constitution Article II, Section 22 by “requir[ing] Reproductive Services and Dr. Burns to engage in unwanted, government-mandated speech”; (6) violates the free speech rights of the “patients of Reproductive Services and Dr. Burns and members of the OCRJ” guaranteed by Oklahoma Constitution Article II, Section 22 by “requir[ing them] to listen to unwelcome speech by the government while in a private setting,” *id.* ¶ 60; and (7) “violates the rights of patients of Reproductive Services and Dr. Burns and members of the OCRJ to terminate a pregnancy,” which Plaintiffs claimed is “an inherent right” and “a fundamental right” guaranteed by Oklahoma Constitution Article II, Sections 2 and 7.

At no time in this litigation did Plaintiffs assert any violation of the United States Constitution.

Thereafter, the parties proceeded with discovery and filed multiple motions and cross-motions for summary judgment on the various state law claims.

On March 28, 2012, the District Court of Oklahoma County issued an Order Granting Summary Judgment Declaring the Ultrasound Act as an Unconstitutional Special Law and Permanent Injunction Preventing the Enforcement of the Ultrasound Act. (R.Vol. VI, Tab 22, ¶ 2). The court found that the Ultrasound Act is an unconstitutional special law under the Oklahoma Constitution because it addressed patients, physicians, and sonographers concerning abortions but did not address all patients, physicians, and sonographers regarding all medical procedures. As an alternative ground for summary judgment, the court ruled that the Ultrasound Act violated Article V, § 46 of the Oklahoma Constitution, “where it grants a private right of action to only a limited class.” (*Id.*). The court found the remaining claims moot, (R.Vol. VI, Tab 22, ¶ 3), and declined Defendants’ motion to reconsider and vacate judgment on May 22, 2012. (R.Vol. VI, Tab 23); (R.Vol. VI, Tab 25); (R.Vol. VI, Tab 26).

On October 9, 2012, Defendants appealed the state district court judgment to the Oklahoma Supreme Court. On December 4, 2012, the Oklahoma Supreme Court issued a Memorandum Opinion declining to rule on any of the state law claims before it. *Nova Health Sys. v. Pruitt*, 292 P.3d 28 (Okla. 2012).

Instead, the court *sua sponte* invoked *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), which the court found to be “binding.” *Nova Health*, 292 P.3d at 28, ¶ 3. Holding that the Ultrasound Act “is facially unconstitutional pursuant to *Casey*,” *id.*, the court affirmed the judgment of the trial court exclusively on that basis.

SUMMARY OF THE RECORD

The record provides ample evidence to support Defendants-Petitioners’ argument that the Oklahoma Supreme Court erred in affirming the district court’s order of summary judgment to the Plaintiffs-Appellees.

The record demonstrates that abortion is unique among medical procedures, since it is an irrevocable act terminating the pregnancy of a woman. Seeds Decl. ¶ 25 (R.Vol. V, Tab 17, Declarations Sub-Tab 5); Burns Depo. 34:16-18 (R.Vol. V, Tab 17, Depositions Sub-Tab 3).

Further, the record demonstrates that ultrasounds are routinely performed prior to all abortions at Plaintiffs-Appellees’ abortion facilities. Am. Pet. ¶ 3 (R.Vol. 1, Tab 6); Burns Depo. 46:1-13 (R.Vol. I, Tab 7). The ultrasounds are performed to confirm the presence of an intrauterine pregnancy and determine the gestational age of the pregnancy. Amended Pet. ¶ 33 (R.Vol. I, Tab 6); Burns Depo. 51:24 through 52:23 (R.Vol. I, Tab 7, Sub-Tab A).

The record demonstrates that Plaintiff-Appellee Nova complied with the Ultrasound Act prior to the injunction. Eldridge Depo. 85:8-19 (R.Vol. V, Tab 17, Depositions Sub-Tab 13, 22). During the period of compliance at Plaintiff-Appellee Nova's facility, some women chose not to listen to the medical description given by the physicians or view the displayed ultrasound. K.G. Depo. 102:11-14 (R.Vol. V, Tab 17, Depositions Sub-Tab 21).

The record also shows that for many women, actually seeing the ultrasound images has a necessary and critical impact in their decision-making process as to whether to terminate or continue their pregnancy to term. In one 2010 study of women intending to have an abortion, of those viewing an ultrasound 66% ultimately chose to carry their pregnancies to term, compared to 43.5% of those who did not view an ultrasound. Hopkins Decl. ¶¶ 21, 22, Exh. B-C (R.Vol. IV, Tab 16, Sub-Tab 1).

In the words of one 17-year-old who had planned to have an abortion, "While doing the ultrasound, I realized how real this baby already was. I saw the little arms and legs. I saw the heartbeat. It was a little person. At that point, I knew I couldn't have an abortion. . . . I am so glad I didn't. That would have been one thing I could never forgive myself for. Now I have two beautiful daughters." Matar Decl. ¶ 14, Exh. A (R.Vol. IV, Tab 16, Sub-Tab 2). *Accord* Martin Decl. ¶¶ 2, 22-27 (R.Vol. IV, Tab 16, Sub-Tab 3); Seeds Decl. ¶ 25 (R.Vol. V, Tab 17, Declarations Sub-Tab 5).



REASONS FOR GRANTING THE PETITION

The cursory opinion of the Oklahoma Supreme Court conflicts with the opinion of the United States Court of Appeals for the Fifth Circuit in *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012) and the understanding of informed consent applied by the United States Court of Appeals for the Eighth Circuit in recent abortion cases.

The Oklahoma Supreme Court provides no explanation for its conclusion that requiring ultrasounds to be performed, displayed and explained to women prior to initiating an abortion exceeds the state's authority to protect against "the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 882 (1992).

Writing for the Court in *Gonzales v. Carhart*, 550 U.S. 124 (2007), Justice Kennedy noted:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision. . . . While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . Severe depression and loss of esteem can follow.

. . . .

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. . . .

Id. at 159-60 (citations and internal quotations omitted.)

Like the Texas statute upheld in *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012), Oklahoma’s law ensures the ultrasound images will be displayed “so that the pregnant woman may view them.” In contrast, a law that merely requires that the abortion provider offer the pregnant woman the opportunity to view an ultrasound lends itself to a practice of including a waiver of that opportunity buried in the sheaf of consent papers that patients routinely sign before medical procedures, often without reading them. Such a law “encourages evasion of the disclosures and manipulation of the woman’s statutory opt-out,” *id.* at 583, which is a vitiation of the purpose of ensuring fully informed decisions about abortion.

The Oklahoma Supreme Court’s *per curiam* opinion is conclusory in the extreme. Without analysis, the court simply declares that *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) is controlling and “the United States Supreme Court has previously determined the dispositive issue presented in this

matter.” *Nova Health Sys. v. Pruitt*, 292 P.3d 28. Yet as the Fifth Circuit noted:

[T]he required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information. They are not different in kind, although more graphic and scientifically up-to-date, than the disclosures discussed in *Casey* – probable gestational age of the fetus and printed material showing a baby’s general prenatal development stages. Likewise, the relevance of these disclosures to securing informed consent is sustained by *Casey* and *Gonzales*, because both cases allow the state to regulate medical practice by deciding that information about fetal development is “relevant” to a woman’s decision making.

Lakey, 667 F.3d at 577-78.

Because the Oklahoma Supreme Court’s decision has decided an important federal question in a way that conflicts with relevant decisions of this Court and conflicts with the decision of a United States Court of Appeals, certiorari should be granted.

I. THE OKLAHOMA SUPREME COURT'S DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S RULING IN *PLANNED PARENTHOOD OF SOUTHEASTERN PA. V. CASEY*, 505 U.S. 833 (1992).

A. The Oklahoma Supreme Court Summarily Held that *Casey* Invalidated a State Informed Consent Statute.

1. Declaring that “the United States Supreme Court ha[d] previously determined the dispositive issue presented in this matter” in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Oklahoma Supreme Court struck down Oklahoma’s Ultrasound Act as facially unconstitutional in a cursory, three-paragraph opinion containing no analysis of the statute, the evidentiary record, or the Supreme Court precedent it cited as “binding.” *Nova Health Sys. v. Pruitt*, 292 P.3d 28 (Okla. 2012). In so doing, the Oklahoma Supreme Court improperly found the Ultrasound Act unconstitutional.

2. *Casey* reaffirmed the central holding in *Roe v. Wade*, 410 U.S. 113 (1973) that a woman has a right to an abortion “before viability . . . without undue interference from the State,” but it also reaffirmed states’ “legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.” 505 U.S. at 846. The Court in *Casey* established an “undue burden” standard to determine whether

federal or state regulations unduly interfered with the abortion right established in *Roe*. *Id.* at 875-79. Under this rubric the Court struck down a spousal notification requirement, but upheld other state informed consent requirements.

3. Contrary to the Oklahoma court's ruling, *Casey* confirms the constitutional soundness of laws like Oklahoma's informed consent statute that concern states' ability to regulate the medical profession and define the standards for informed consent.

a. *Casey* held that laws requiring physicians to disclose truthful, non-misleading information to women seeking abortions do not pose a substantial obstacle to a woman's decision to terminate her pregnancy. *Casey*, 505 U.S. at 882 (plurality opinion).

(i) "A requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure." *Id.* at 884; *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (recognizing the State's valid interest in regulating the "integrity and ethics of the medical profession").

(ii) Informed consent requirements that "facilitate[] the wise exercise of [the right recognized in *Roe*] cannot be

classified as an interference” with it. *Casey*, 505 U.S. at 887 (plurality opinion).

b. *Casey* upheld provisions of an informed consent law substantially similar to that at issue here: requiring a physician to inform a woman at least 24 hours prior to an abortion of, *inter alia*, the “probable gestational age of the unborn child” and availability of printed materials “describing the fetus.” *Id.* at 881.

c. Non-substantial incidental effects of an informed consent law are not enough to constitute an undue burden on the right recognized in *Roe*.

(i) Permissible incidental effects include making an abortion more inconvenient or expensive to obtain. *Id.* at 874 (“The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.”)

(ii) The Oklahoma Supreme Court provided no analysis that the informed consent statute would impose even these minor barriers to the right recognized in *Roe*, much less “a substantial obstacle in the path of a woman seeking an abortion,” *id.* at 877.

4. The Oklahoma Supreme Court’s refusal to engage with *Casey*’s reasoning or to conduct any

analysis returned Oklahoma to the legal theory *Casey* explicitly rejected.

a. By failing to conduct the analysis *Casey* outlines, the Oklahoma Supreme Court perverted part of the “essential holding” of *Roe*: that states have “legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus that may become a child.” *Id.* at 846 (plurality opinion); *see also Roe v. Wade*, 410 U.S. 113, 162 (1973). *Casey* explicitly repudiated decisions like the Oklahoma Supreme Court’s that effectively gave no weight to these important State interests. *See, e.g., Casey*, 505 U.S. at 871 (plurality opinion) (emphasizing that the portion of *Roe* affirming a State’s interest in potential life “has been given too little acknowledgment and implementation by the Court in its subsequent cases”); *Carhart*, 550 U.S. at 157 (explaining that one of *Casey*’s “central premise[s]” was to correct prior decisions that undervalued the State’s interest in potential life).

b. The Oklahoma Supreme Court ignored the State’s interest in protecting a woman’s health.

(i) This interest includes regulations designed to ensure that a woman’s choice is “thoughtful and informed” and to protect her psychological health from the potentially devastating impact of learning later that her decision was not

fully informed. *Casey*, 505 U.S. at 872. See e.g., *Casey*, 505 U.S. at 882 (plurality opinion).

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. This is likely the case with the abortion procedures here in issue.

It is, however, precisely this lack of information . . . that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed.

Carhart, 550 U.S. at 159-60.

(ii) The Oklahoma Supreme Court gave no reason for discounting the substantial evidence in the record that the informed consent statute advances this purpose. Cf., e.g., *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (reversing the 9th Circuit in part because it failed to require evidence on the record that an abortion regulation would pose a substantial obstacle to a woman seeking an abortion).

c. The Oklahoma Supreme Court ignored the State's interest in protecting potential human life.

(i) Regulations advancing this interest do not necessarily pose an undue burden even if they are “designed to persuade [the woman] to choose childbirth over abortion,” *Casey*, 505 U.S. at 878 (plurality opinion), or take into account abortion’s effects on the fetus, not just the woman, *id.* at 882-83. *Casey* affirms that although the ultimate choice belongs to the woman, she need not be insulated from all other voices while making her decision. *Id.* at 877.

(ii) The Oklahoma Supreme Court gave no reason for discounting the substantial evidence in the record that the informed consent statute advances this purpose.

B. The Oklahoma Supreme Court Applied *Casey* in a Way that Effectively Invalidates Almost All State Abortion-Related Regulations.

1. The Oklahoma Supreme Court pointed to two of its prior cases in which it held that *Casey* invalidated proposed ballot initiatives to amend the Oklahoma State Constitution to define personhood as beginning at fertilization, and to ban most abortions, stating that the court was “duty bound by the United States Constitution to ‘follow the mandate of the United States Supreme Court on matters of federal constitutional law.’” *Nova Health Sys.*, 292 P.3d at 28 ¶ 2 (citing *In re Initiative Petition No. 395, State Question*

No. 761, 286 P.3d 637 (Okla. 2012), *cert. den. sub nom. Personhood Okla. v. Barber et al.*, 81 U.S.L.W. 3065 (U.S. Oct. 29, 2012) (No. 12-145) (personhood initiative); *In re Initiative Petition No. 349, State Question No. 642*, 838 P.2d 1 (Okla. 1992), *cert. den. sub nom. Oklahoma Coalition to Restrict Abortion, Inc. v. Feldman*, 506 U.S. 1071 (1992) (abortion ban)).

2. The Oklahoma Supreme Court, then, effectively equated the Ultrasound Act with an almost absolute ban on abortion for purposes of federal constitutional law. The only rule that this decision reasonably could be seen to announce is that *Casey* bars consideration of all abortion regulations, no matter how medically sound or minimally burdensome of the right recognized in *Roe v. Wade*.

3. Moreover, this case is the latest in a series of progressively suspect Oklahoma Supreme Court opinions that misstate *Casey*'s reach and ultimately mask the state court's refusal to consider reasonable abortion regulations under the guise of following this Court's precedent.

a. This case was decided the same day as *Oklahoma Coalition for Reproductive Justice v. Cline*, 292 P.3d 27 (Okla. 2012), *petition for cert. filed* (U.S. Mar. 4, 2013) (No. 12-1094), which challenged regulations on certain medical abortions, in a virtually identical one-and-a-half-page opinion that relied on *Casey* and cited the same two prior Oklahoma Supreme Court decisions, with no additional analysis.

b. Both prior cases involved pre-submission determination of the constitutionality of initiative petitions. Of the two, *Casey* only dictated the result in the earliest – *In re Initiative Petition No. 349*, 838 P.2d 1 (Okla. 1992), which struck down the near-total ban on abortion.

c. The more recent case, *In re Initiative Petition No. 395*, 286 P.3d 637 (Okla. 2012), was itself a cursory opinion that did nothing more than cite the earlier opinion, even though the court's conclusion that the personhood initiative violated *Casey* was less readily apparent than its determination that *Casey* precluded *direct* abortion bans.

d. Here, the Oklahoma Supreme Court has extended its pattern of citing *Casey* without any supporting analysis to strike down statutes that impose markedly less significant barriers, if any, to the *Roe* abortion right. Not only is such an approach entirely unjustified in this context, as discussed further below, but it demonstrates that the Oklahoma Supreme Court will likely reach the same result when reviewing *any* abortion regulation the Oklahoma Legislature enacts.

C. The Oklahoma Supreme Court Incorrectly Invalidated the Informed Consent Statute in Its Entirety.

1. Further, although this Court has not clarified whether a party challenging a law regulating abortion

must demonstrate that “no set of circumstances exists under which [the law] would be valid,” *United States v. Salerno*, 481 U.S. 739, 745 (1987), or whether it would suffice for a challenger to show that the law is “unconstitutional in a large fraction of relevant cases,” *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007), the Oklahoma Supreme Court’s decision does not meet either standard.

2. The decision does not address how the informed consent statute would impose an undue burden on any woman seeking an abortion, much less a large fraction of or all such women. Indeed, the record provides evidence that the informed consent statute did not impose an undue burden on women seeking abortions during the time that the statute was enforced.

3. If a case were to arise in which the statute was found to impose an undue burden on an individual woman, this Court’s precedent would instruct the Oklahoma Supreme Court to enjoin enforcement of the statute in that particular instance, rather than to invalidate it on its face. *See, e.g., Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006) (“We prefer . . . to enjoin only the unconstitutional applications of a statute while leaving other applications in force . . . or to sever its problematic portions while leaving the remainder intact. . .”).

II. CORRECTING THE OKLAHOMA SUPREME COURT'S STATEMENT OF SUPREME COURT PRECEDENT WOULD PROTECT THE INTEGRITY OF FEDERAL LAW AND PRESERVE IMPORTANT FEDERALISM INTERESTS.

1. The Supreme Court should grant certiorari because there is an “important need for uniformity in federal law.” *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). In *Long*, this Court emphasized that this “need goes unsatisfied when [the Court] fail[s] to review an opinion that rests primarily upon federal grounds.” *Id.*; see also *Arizona v. Evans*, 514 U.S. 1, 7 (1995) (explaining that correcting State high courts’ incorrect statements of federal law “preserve[s] the integrity of federal law”). This need is compelling even when the error extends – at least currently – to only one state. See, e.g., *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (correcting the Pennsylvania Supreme Court’s incorrect statement of the Supreme Court’s Fourth Amendment jurisprudence, with no cited circuit or state court split on the issue); *Holmes v. South Carolina*, 547 U.S. 319 (2006) (correcting a South Carolina Supreme Court ruling on criminal evidentiary rules that conflicted with the Sixth and Fourteenth Amendments).

2. This interest is especially grave where, as here, a State high court struck down a duly enacted law based on a flawed interpretation of Supreme Court precedent.

a. Summarily reversing the Oklahoma Supreme Court's decision would release Oklahoma from the incorrect view that federal law compelled its result. *See Zacchini v. Scripps-Howard*, 433 U.S. 562, 568 (1977) (“[I]t appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; *for if the state court erred in its understanding of our cases . . . we should so declare, leaving the state court free to decide the . . . issue solely as a matter of Ohio law.*” (emphasis added)); *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5 (1950) (declaring that if a state court “held as it did because it felt under compulsion it should be freed to decide . . . these suits according to its own local law”).

b. Reversing the Oklahoma Supreme Court's opinion would restore the State Legislature's authority to pursue policy solutions that best reflect its citizens' needs and priorities, subject only to legitimate legal boundaries. *See, e.g., Evans*, 514 U.S. at 8 (correcting the Arizona Supreme Court's flawed view of federal law “disabused [the State] of its erroneous view of what the United States Constitution requires” and left it “free to seek whatever solutions it chooses” to the issues facing the State).

III. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT'S RULING.

A. The Law at Issue in *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012) is Similar to the Law in the Instant Case, and Indeed, in Some Respects, Has Greater Disclosure Requirements.

1. Oklahoma law requires certain disclosures one hour before an abortion (OKLA. STAT. tit. 63, § 1-738.3d(B)); Texas law requires a 24-hour waiting period after the disclosures and before the abortion (TEX. HEALTH & SAFETY CODE § 171.012(4) (Vernon 2011));

2. Oklahoma requires an ultrasound to be performed (OKLA. STAT. tit. 63, § 1-738.3d(B)(1)); Texas law requires the same (TEX. HEALTH & SAFETY CODE § 171.012(4)(A) (Vernon 2011));

3. Oklahoma requires an explanation of the ultrasound, including a medical description of the ultrasound images with specific information included (OKLA. STAT. tit. 63, § 1-738.3d(B)(2) & (4)); Texas law also requires a woman hear the medical explanation of the sonogram, unless she falls within one of three

narrow statutory exceptions (TEX. HEALTH & SAFETY CODE § 171.012(4)(C) (Vernon 2011)); and

4. Oklahoma law requires the ultrasound images to be displayed so that the woman may view them, though she may avert her eyes (OKLA. STAT. tit. 63, § 1-738.3d(B)(3)); Texas law requires display of images, but allows the woman to decline to view the sonogram, while still requiring the woman to hear the medical explanation the sonogram depicts (TEX. HEALTH & SAFETY CODE § 171.012(4) (Vernon 2011)).

5. In addition to the requirements that the Oklahoma law imposes, Texas also requires the physician to make audible the heart auscultation of the fetus and provide an explanation (TEX. HEALTH & SAFETY CODE § 171.012(4) (Vernon 2011)); and requires that a woman seeking an abortion fill out a form indicating she has received the required materials, understands her rights under this law, and chooses to receive an abortion (TEX. HEALTH & SAFETY CODE § 171.012(5) (Vernon 2011)).

B. The Outcome of *Lakey* and Its Interpretation of *Casey* Conflicts with the Oklahoma Supreme Court's Decision.

1. The Fifth Circuit opinion carefully analyzed *Casey* and upheld the constitutionality of the Texas ultrasound law. *Lakey*, 667 F.3d at 580. The Fifth Circuit's decision preceded the Oklahoma Supreme

Court's decision by almost a year.¹ Yet, in spite of the striking similarities of the Texas and Oklahoma laws, the Oklahoma Supreme Court ruled directly opposite with virtually no explanation beyond a bare citation to *Casey*.

2. Moreover, the rationale underlying the Fifth Circuit's decision was diametrically opposed to that of the Oklahoma Supreme Court's: whereas the Oklahoma Supreme Court held that the sonogram law was precluded by this Court's ruling in *Casey*, the Fifth Circuit ruled that the Texas law was manifestly constitutional *because of Casey*. *Lahey*, 667 F.3d at 574 (stating that the abortion providers challenging the Texas law "must confront the Supreme Court's holding in [*Casey* that] upheld an informed-consent statute over precisely the same 'compelled speech' challenges made here.").

3. Under the Fifth Circuit's interpretation of *Casey*, the challenged Oklahoma law is constitutional:

a. The Fifth Circuit interpreted *Casey* and *Gonzalez* to establish four principles regarding informed consent laws: "First, informed consent laws that do not impose an

¹ Although the posture of the *Lahey* decision was overturning a preliminary injunction, it is evident that the holding was that, as a matter of law, Texas' informed consent statute was facially constitutional, as evidenced by the district court's eventual ruling on the case on the merits after remand. See *Texas Medical Providers Performing Abortion Services v. Lahey*, 2012 WL 373132 (W.D. Tex. 2012).

undue burden on the woman's right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures. Second, such laws are part of the state's reasonable regulation of medical practice and do not fall under the rubric of compelling 'ideological' speech that triggers First Amendment strict scrutiny. Third, 'relevant' informed consent may entail not only the physical and psychological risks to the expectant mother facing this 'difficult moral decision,' but also the state's legitimate interests in 'protecting the potential life within her.' . . . Finally, the possibility that such information 'might cause the woman to choose childbirth over abortion' does not render the provisions unconstitutional." *Id.* at 576.

b. The Fifth Circuit also rejected the position that the Oklahoma Supreme Court seemingly took in the case, which was to assume "that the facts of *Casey* represent a constitutional ceiling for regulation of informed consent to abortion, not a set of principles to be applied to the states' legislative decisions." *Id.* at 579. "On this broad level," the *Lahey* court stated, "the [Supreme] Court has admonished that federal courts are not the repository for regulation of the practice of medicine." *Id.*

c. Applying *Casey* to the sonogram performance and display requirement, which is common to both the Texas and Oklahoma laws, the Fifth Circuit stated that it is "obvious" that such a disclosure is "the epitome of

truthful, non-misleading information.” *Id.* at 577-78. “They are not different in kind, although more graphic and scientifically up-to-date, than the disclosures discussed in *Casey*. . . . Likewise, the relevance of these disclosures to securing informed consent is sustained by *Casey* and *Gonzales*, because both cases allow the state to regulate medical practice by deciding that information about fetal development is ‘relevant’ to a woman’s decision-making.” *Id.* at 578. The plaintiffs in *Lakey* even conceded as much. *Id.* at 577.

d. The plaintiffs in *Lakey* also conceded that the disclosures do *not* burden a woman’s right to obtain an abortion. *Id.* at 577. Quite the opposite, the Fifth Circuit held: “The point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances. Denying her up to date medical information is more of an abuse to her ability to decide than providing the information.” *Id.* at 579. Informed consent laws thus support a woman’s right to choose, even if such laws have the effect of discouraging abortion. *Id.*

IV. THE OKLAHOMA SUPREME COURT’S DECISION IS ALSO IN TENSION WITH THE EIGHTH CIRCUIT’S RECENT *EN BANC* INFORMED CONSENT DECISIONS.

1. The Eighth Circuit issued several *en banc* decisions in *Planned Parenthood Minn., N.D., S.D. v.*

Rounds, 530 F.3d 724 (8th Cir. 2008) (*en banc*) (*Rounds II*); and *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (*en banc*) (*Rounds IV*), which also analyze *Casey* in the context of an informed consent statute – and held *Casey* did not render informed consent statutes unconstitutional.

2. The law at issue in both *Rounds* cases required the physician performing the abortion to certify that he informed, and believes the patient understood, among other things:

a. That the abortion will terminate the life of a whole, separate, unique, living human being;

b. That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota;

c. That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated;

d. A description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including: (i) Depression and related psychological distress; (ii) Increased risk of suicide ideation and suicide. . . . *Rounds II*, 530 F.3d at 726.

3. As in *Lakey*, the plaintiffs in *Rounds* contended that the disclosures both unconstitutionally infringed on physicians' free speech rights and unduly burdened a woman's right to have an abortion. *Id.* at 727.

a. The *Rounds* Court summed up its interpretation of *Casey* and *Carhart*, with respect to the First Amendment issues, much like the Fifth Circuit later did, stating "[W]hile the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion. Therefore, Planned Parenthood cannot succeed on the merits of its claim that [the South Dakota statute] violates a physician's right not to speak unless it can show that the disclosure is either untruthful, misleading or not relevant to the patient's decision to have an abortion." *Id.* at 734-35. The Eighth Circuit, again sitting *en banc*, later reaffirmed this holding, citing approvingly the Fifth Circuit's decision in *Lakey*. *Rounds IV*, 686 F.3d at 893.

b. Ultimately, and not surprisingly, the Eighth Circuit held that the disclosures do not infringe on the physicians' First Amendment rights, *Rounds II*, 530 F.3d at 737, nor do they place an undue burden on the right to

receive an abortion, *Rounds II*, 653 F.3d 662, 668 (8th Cir. 2011).

4. Similarly, Oklahoma's statute would pass constitutional muster in the Eighth Circuit because it involves only the provision of truthful, nonmisleading information in the form of a sonogram, and such information can be relevant to a woman's deciding whether to have an abortion, thus advancing, not burdening, her rights.

a. Accordingly, with respect to informed consent laws such as the one at issue in Oklahoma, both *Rounds* cases in the Eighth Circuit and the *Lakey* case in the Fifth Circuit have interpreted *Casey* in the same manner – an interpretation that is directly contrary to the Oklahoma Supreme Court's decision in this case.

V. *STUART V. HUFF*, 834 F. SUPP. 2D 424 (M.D.N.C. 2011) MAY PRESENT A CIRCUIT SPLIT OVER INFORMED CONSENT STATUTES WITH SIMILAR ULTRASOUND REQUIREMENTS.

1. The federal district court for the Middle District of North Carolina also has addressed the constitutionality of a similar informed-consent statute in the context of issuing a preliminary injunction. *Stuart v. Huff*, 834 F. Supp. 2d 424 (M.D.N.C. 2011). Similar to the Oklahoma statute at issue here and the Texas statute at issue in *Lakey*, the North Carolina

statute requires: “that a woman undergo an ultrasound at least four hours before an abortion,” “that the physician . . . display the images produced from the ultrasound ‘so that the [patient] may view them,’” and that the physician provide “‘a simultaneous explanation of what the display is depicting, which shall include the presence, location, and dimensions of the unborn child within the uterus’ . . . and ‘a medical description of the images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable.’” *Id.* at 428 (citations omitted).

2. The plaintiffs in *Stuart* challenged the law on, among other things, First Amendment compelled speech grounds, much like the plaintiffs in *Lakey*. However, the court in *Stuart* evaluated the compelled speech claims under a strict scrutiny standard, in conflict with the approach taken by both the Fifth and Eighth Circuits. *Compare id.* at 428-30 with *Lakey*, 667 F.3d at 575; *Rounds*, 530 F.3d at 734. The court also distinguished between the requirement to “make available” materials in *Casey*, and the requirement to compel the abortion provider to “physically speak” – a distinction that the Fifth Circuit explicitly rejected. *Compare Stuart*, 834 F. Supp. 2d at 431-32 with *Lakey*, 667 F.3d at 579-80. As a result, the *Stuart* court found that plaintiffs had a substantial likelihood of success in prevailing on their First Amendment claims, stating:

Even if [the state’s interest in protecting abortion patients from psychological and

emotional distress] is a compelling interest, there is no evidence in the record supporting the state's claim that the speech-and-display requirements further this interest. Indeed, the undisputed evidence offered by the Plaintiffs establishes that these provisions are likely to harm the psychological health of the very group the state purports to protect.

Stuart, 834 F. Supp. 2d at 432.² In contrast, the record in the instant appeal provides ample evidence that Oklahoma's ultrasound requirements are useful in some women's decisions as to whether to have an abortion, and this Court in *Casey* has already recognized that such information is necessary to protect a woman's psychological health from the potentially devastating impact of learning later that her decision was not fully informed. *See Casey*, 505 U.S. at 882.³

3. North Carolina, like Oklahoma, Texas, and Louisiana, has passed a law requiring the performance, display and explanation of an ultrasound to a woman seeking an abortion. No cases regarding ultrasound laws, other than the present case and *Stuart*, are pending before either state or federal

² The court also rejected the state's contentions that advancing its interests in "preventing women from being coerced into having abortions" and in "promoting life and discouraging abortion" satisfied strict scrutiny. *Stuart*, 834 F. Supp. 2d at 432-33.

³ It is worth noting that the expedited nature of the preliminary injunction hearing in *Stuart* provided very limited time for the parties to present evidence. *Stuart*, 834 F. Supp. 2d at 433 n.10.

courts. Courts from Texas, Oklahoma, and North Carolina have ruled on the issue.⁴ Paradoxically, the courts have interpreted *Casey* to prohibit the law in two of the states, while permitting the law in Texas with its stronger informed consent requirements. The instant appeal may represent this Court's only opportunity to address the inconsistent application of its precedent in these different jurisdictions: assuming the district court's decision in *Stuart* is reversed by the Fourth Circuit, the plaintiffs may choose not to request certiorari from this Court, as the plaintiffs in *Lakey* and *Rounds* chose. In that likely scenario, this Court would be unable to review the Texas and North Carolina laws and would be unable to review the Oklahoma law because the time to file for a petition for certiorari would have expired. The legal uncertainty that would be perpetuated by denying certiorari would dissuade other states from passing legislation that is constitutional under *Casey* and invite unnecessary litigation on any such legislation that may be passed.

⁴ Louisiana's ultrasound requirements are found at La. Rev. Stat. §40:1299.35.2. These requirements were adopted after the *Lakey* decision, expressly "to conform the present Louisiana ultrasound law to the purpose and intent of a Texas statute upheld by a unanimous panel of the U.S. Court of Appeals for the Fifth Circuit in *Texas Medical Providers Performing Abortion Services v. Lakey*, No. 11-50814 (5th Cir. 2012) (rehearing *en banc* denied 2-10-2012)." 2012 La. Acts No. 685, § 2A. The Louisiana law is in effect and has not been challenged.

VI. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE FOR WOMEN, PHYSICIANS, AND STATES SEEKING TO PROTECT WOMEN'S HEALTH.

1. The consequences of this case are not confined to Oklahoma. Not only is it impossible to reconcile the decision below with the rulings of the federal courts of appeals, it also is impossible to deny that the state supreme court's misapplication of federal constitutional law implicates numerous other states' informed consent statutes and proposals. Twenty-one states regulate abortion providers' provision of ultrasound services – five of those require a woman to have an opportunity to view an ultrasound, nine require this opportunity in the event an ultrasound is offered, six require the provider to perform an ultrasound and allow the woman to view it, and two require the provider to display the ultrasound image and describe what it depicts.⁵ Guttmacher Institute, *State Policies in Brief: Requirements for Ultrasound* (Mar. 1, 2013). The highest courts of those states should not also feel bound by *Casey* to abrogate wholesale their legislatures' interests in protecting and promoting women's health and regulating the practice of medicine. *Cf. Michigan v. Long*, 463 U.S. 1032, 1040 (1983); *Arizona v. Evans*, 514 U.S. 1, 7

⁵ Although four states, Oklahoma, Texas, North Carolina, and Louisiana have laws on the books requiring the performance, display and explanation of pre-abortion ultrasounds, only Texas and Louisiana laws are enforced at this time.

(1995); *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Holmes v. South Carolina*, 547 U.S. 319 (2006). Allowing this ruling to stand would encourage or at least condone similar behavior among those courts.

2. The Centers for Disease Control and Prevention reports that more than three-quarters of a million induced abortions were performed in 2009, the most recent year for which data is available. Centers for Disease Control and Prevention, “Abortion Surveillance – United States, 2009,” *Morbidity and Mortality Weekly Report*, 61 (No. 8), p. 1 (Nov. 23, 2012), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6108a1.htm> (visited Mar. 21, 2013). The record below presents substantial evidence that women whose consent to abortion is not fully informed suffer serious and long-term harm. This Court has recognized the real danger of the absence of informed consent in the abortion context. *Casey*, 505 U.S. at 882; *Carhart*, 550 U.S. at 159. It also has recognized that states have a strong interest in promoting women’s health by obviating that danger – namely by seeking to ensure that each woman who seeks an abortion possesses all relevant medical information prior to consenting to the procedure. *Casey*, 505 U.S. at 846.

3. Given the importance and national implications of this case, the Court should consider it now, rather than wait for any other case involving ultrasound provisions of informed consent statutes to come before it.

a. It is not certain that another similar case, such as that in the Fourth Circuit, would come before the court.

b. It is not necessary for the Court to decide this case on the merits. A summary reversal would correct the state supreme court's erroneous reliance on this Court's precedent.

CONCLUSION

For these reasons, the Court should grant the petition. In the alternative, the Court should summarily vacate and remand the case to the Oklahoma Supreme Court for proper application of *Casey*.

Respectfully submitted,

PATRICK R. WYRICK
Solicitor General
OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-0669 (Fax)
patrick.wyrick@oag.ok.gov

TERESA STANTON COLLETT
Counsel of Record
Special Assistant
Attorney General
OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
1824 Stanford Avenue
Saint Paul, MN 55403
(651) 528-7007
Teresa.S.Collett@gmail.com

Counsel for Petitioners

March 22, 2013

2012 OK 103
IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Nova Health Systems,)
d/b/a Reproductive Services,)
on behalf of itself, its staff,)
and its patients; Larry Burns,)
D.O., on behalf of himself and)
his patients; and Oklahoma)
Coalition for Reproductive)
Justice, on behalf of its members,)
Plaintiffs/Appellees,)
v.) No. 110,813
E. Scott Pruitt, in his official) For Official
capacity as Attorney General) Publication
of Oklahoma; Tim Harris, in) (Filed Dec. 4, 2012)
his official capacity as District)
Attorney for Tulsa County,)
Greg Mashburn, in his official)
capacity as District Attorney)
of Cleveland, Garvin, and)
McClain Counties; Lyle Kesley,)
in his official capacity as execu-)
tive Director of the Oklahoma)
State Board of Medical Licen-)
sure and Supervision; and)
Gordon P. Laird, D.O., in his)
official capacity as President)
of the Oklahoma State Board)
of Osteopathic Examiners,)
Defendants/Appellants,)

and)
 American Victims of Abortion,)
 a national project of the)
 National Right to)
 Life Committee,)
 Defendant-Intervenor/Appellant.)

MEMORANDUM OPINION

PER CURIUM.

¶ 1 This is an appeal of the trial court’s summary judgment which held House Bill 2780, 2010 Okla. Sess. Laws ch. 36 (codified at Okla. Stat. tit. 63, §§ 1-738.1A, 1-738.3d, 1-738.3e), unconstitutional. Upon review of the record and the briefs of the parties, this Court determines this matter is controlled by the United States Supreme Court decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which was applied in this Court’s recent decision of *In re Initiative No. 395, State Question No. 761*, 2012 OK 42, cert. den. sub nom. *Personhood Okla. v. Barber et al.*, 81 U.S.L.W. 3065 (U.S. October 29, 2012) (No. 12-145).

¶ 2 Because the United States Supreme Court has previously determined the dispositive issue presented in this matter, this Court is not free to impose its own view of the law. The Supremacy Clause of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which

shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2. The Oklahoma Constitution reaffirms the effect of the Supremacy Clause on Oklahoma law by providing: “The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land.” Okla. Const. art. 1, § 1. Thus, this Court is duty bound by the United States and the Oklahoma Constitutions to “follow the mandate of the United States Supreme Court on matters of federal constitutional law” *In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶ 1, 838 P.2d 1, 2; *In re Petition No. 395*, 2012 OK 42, ¶ 2.

¶ 3 The challenged measure is facially unconstitutional pursuant to *Casey*, 505 U.S. 833. The mandate of *Casey* remains binding on this Court until and unless the United States Supreme Court holds to the contrary. The judgment of the trial court holding the enactment unconstitutional is affirmed and the measure is stricken in its entirety.

CONCUR: Taylor, C.J.; Colbert, V.C.J.; Kauger, Watt,
Winchester, Edmondson, Reif, Combs, JJ.
RECUSED: Gurich, J.

**IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

NOVA HEALTH SYSTEMS))	
D/B/A REPRODUCTIVE))	
SERVICES, on behalf of )	)	FILED IN THE
itself and its patients; )	)	DISTRICT COURT
et al, )	)	OKLAHOMA
Plaintiff(s), )	)	COUNTY, OKLA.
v. )	)	MAR 28 2012
E. SCOTT PRUITT, in )	)	PATRICIA
his official Capacity )	)	PRESLEY,
as Attorney General )	)	COURT CLERK
of Oklahoma; et al, )	)	by _____
Defendant(s) )	)	DEPUTY
And )	)	Case No.
AMERICAN VICTIMS OF )	)	CV - 2010 - 533
ABORTION, a National))	
project of the National))	
Right To Life Committee,))	
Defendant-Intervenor.))	

**ORDER GRANTING SUMMARY JUDGMENT
DECLARING ULTRASOUND ACT AS AN UN-
CONSTITUTIONAL SPECIAL LAW AND PER-
MANENT INJUNCTION PREVENTING THE
ENFORCEMENT OF THE ULTRASOUND ACT**

**NOW on this 28th day of March, 2012, the
Court, having reviewed the Motions and Cross-
Motions for Partial Summary Judgment,**

Responses and Replies filed by the parties and being fully advised in the premises, finds that said Motions can be decided without a hearing pursuant to District Court Rule 4(h) and finds that Summary Judgment should be granted to Plaintiffs on their claim that the Ultrasound Act is unconstitutional under the Oklahoma Constitution.

The Court Finds as follows:

1. Plaintiffs bring this action challenging the constitutionality of the “Ultrasound Act,” being House Bill 2780, 2010 Oklahoma Session Laws Chapter 36 and codified at 63 O.S. § 1-738.1A et seq., under the Oklahoma Constitution and raising seven (7) counts challenging said Act.

2. The Court finds that there are no material facts concerning Plaintiffs’ Claim that the Ultrasound Act is an unconstitutional special law prohibited by Article V. § 59 in that it improperly is addressed only to patients, physicians and sonographers concerning abortions and does not address all patients, physicians and sonographers concerning other medical care where a general law could clearly be made applicable. It is also unconstitutional under Article V. § 46, where it grants a private right of action to only a limited class.

3. As the Ultrasound Act is unconstitutional as a special law, the other claims raised

by Plaintiffs are moot and need not be addressed by this Court.

IT IS THEREFORE ORDERED by this Court that Plaintiffs are granted Summary Judgment that the Ultrasound Act as specifically set forth above is unconstitutional under the Oklahoma Constitution and is unenforceable.

IT IS FURTHER ORDERED by the Court that the Temporary Injunction issued on May 3, 2010, is hereby ordered to be a Permanent Injunction, without bond, and Defendants, their agents and their successors are restrained from enforcing said Act.

/s/ Bryan C. Dixon
Bryan C. Dixon,
District Judge

[Certificate Of Mailing Omitted In Printing]

AN ACT

ENROLLED HOUSE

BILL NO. 2780

By: Billy, Ritze, Reynolds,
Sullivan, Ownbey, Wright
(Harold), Tibbs, Cooksey,
Kern, Thompson, Derby,
Faught and Jones of the
House

and

Sykes, Marlatt, Schulz,
Brogdon, Newberry, Brown,
Reynolds, Barrington,
Crain, Stanislawski, Lamb,
Coffee, Justice and Ford of
the Senate

An Act relating to abortion; defining terms; requiring performance of an ultrasound and explanation of the ultrasound prior to a pregnant woman having an abortion; providing for aversion of eyes from ultrasound; excepting compliance with requirement in a medical emergency; providing for certification; requiring retention of records; providing penalty for false certification; providing for damages; authorizing injunctive relief; specifying persons who may bring action for noncompliance with act; providing penalty; providing penalties for noncompliance with injunction; authorizing private right of action; providing for revocation of license or certificate; repealing Section 6, Chapter 200, O.S.L. 2005, as last amended by Section 11, Chapter 36, O.S.L. 2008, Section 12, Chapter 36, O.S.L. 2008, as amended by Section 1,

Chapter 173, O.S.L. 2008 and Section 13, Chapter 36, O.S.L. 2008 (63 O.S. Supp. 2009, Sections 1-738.1, 1-738.3b and 1-738.3c), which relate to requiring an ultrasound be performed prior to a pregnant woman having an abortion; providing for codification; providing for severability; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION I. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-738.1A of Title 63, unless there is created a duplication in numbering, reads as follows:

As used in this section and Sections 1-738.2 through 1-738.5 of Title 63 of the Oklahoma Statutes:

1. "Abortion" means the term as defined in Section 1-730 of Title 63 of the Oklahoma Statutes;

2. "Attempt to perform an abortion" means an act, or an omission of a statutorily required act, that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance of an abortion in this state in violation of this act;

3. "Board" means the State Board of Medical Licensure and Supervision;

4. "Certified technician" means a Registered Diagnostic Medical Sonographer who is certified in obstetrics and gynecology by the American Registry for Diagnostic Medical Sonography (ARDMS), or a

App. 9

nurse midwife or Advance Practice Nurse Practitioner in obstetrics with certification in obstetrical ultrasonography;

5. “Medical emergency” means the existence of any physical condition, not including any emotional, psychological, or mental condition, which a reasonably prudent physician, with knowledge of the case and treatment possibilities with respect to the medical conditions involved, would determine necessitates the immediate abortion of the pregnancy of the female to avert her death or, to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy;

6. “Physician” means a person licensed to practice medicine in this state pursuant to Sections 495 and 633 of Title 59 of the Oklahoma Statutes;

7. “Probable gestational age of the unborn child” means what, in the judgment of the physician, will with reasonable probability be the gestational age of the unborn child at the time the abortion is planned to be performed;

8. “Stable Internet website” means a website that, to the extent reasonably practicable, is safeguarded from having its content altered other than by the State Board of Medical Licensure and Supervision;

9. “Unborn child” means the term as is defined in Section 1-730 of Title 63 of the Oklahoma Statutes; and

10. "Woman" means a female human being whether or not she has reached the age of majority.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-738.3d of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Any abortion provider who knowingly performs any abortion shall comply with the requirements of this section.

B. In order for the woman to make an informed decision, at least one (1) hour prior to a woman having any part of an abortion performed or induced, and prior to the administration of any anesthesia or medication in preparation for the abortion on the woman, the physician who is to perform or induce the abortion, or the certified technician working in conjunction with the physician, shall:

1. Perform an obstetric ultrasound on the pregnant woman, using either a vaginal transducer or an abdominal transducer, whichever would display the embryo or fetus more clearly;

2. Provide a simultaneous explanation of what the ultrasound is depicting;

3. Display the ultrasound images so that the pregnant woman may view them;

4. Provide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus, the presence of cardiac activity, if

present and viewable, and the presence of external members and internal organs, if present and viewable; and

5. Obtain a written certification from the woman, prior to the abortion, that the requirements of this subsection have been complied with; and

6. Retain a copy of the written certification prescribed by paragraph 5 of this subsection. The certification shall be placed in the medical file of the woman and shall be kept by the abortion provider for a period of not less than seven (7) years. If the woman is a minor, then the certification shall be placed in the medical file of the minor and kept for at least seven (7) years or for five (5) years after the minor reaches the age of majority, whichever is greater.

C. Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes from the ultrasound images required to be provided to and reviewed with her. Neither the physician nor the pregnant woman shall be subject to any penalty if she refuses to look at the presented ultrasound images.

D. Upon a determination by an abortion provider that a medical emergency, as defined in Section 1 of this act, exists with respect to a pregnant woman, subsection B of this section shall not apply and the provider shall certify in writing the specific medical conditions that constitute the emergency. The certification shall be placed in the medical file of the woman and shall be kept by the abortion provider for a

period of not less than seven (7) years. If the woman is a minor, then the certification shall be placed in the medical file of the minor and kept for at least seven (7) years or for five (5) years after the minor reaches the age of majority, whichever is greater.

E. An abortion provider who willfully falsifies a certification under subsection D of this section shall be subject to all penalties provided for under Section 3 of this act.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-738.3e of Title 63, unless there is created a duplication in numbering, reads as follows:

A. An abortion provider who knowingly violates a provision of Section 2 of this act shall be liable for damages as provided in this section and may be enjoined from such acts in accordance with this section in an appropriate court.

B. A cause of action for injunctive relief against any person who has knowingly violated a provision of Section 2 of this act may be maintained by the woman upon whom an abortion was performed or attempted to be performed in violation of this act; any person who is the spouse, parent, sibling or guardian of, or a current or former licensed health care provider of, the female upon whom an abortion has been performed or attempted to be performed in violation of this act; by a district attorney with appropriate jurisdiction; or by the Attorney General. The injunction shall prevent the abortion provider from

performing further abortions in violation of this act in the State of Oklahoma.

C. Any person who knowingly violates the terms of an injunction issued in accordance with this section shall be subject to civil contempt, and shall be fined Ten Thousand Dollars (\$10,000.00) for the first violation, Fifty Thousand Dollars (\$50,000.00) for the second violation, One Hundred Thousand Dollars (\$100,000.00) for the third violation, and for each succeeding violation an amount in excess of One Hundred Thousand Dollars (\$100,000.00) that is sufficient to deter future violations. The fines shall be the exclusive penalties for such contempt. Each performance or attempted performance of an abortion in violation of the terms of an injunction is a separate violation. These fines shall be cumulative. No fine shall be assessed against the woman on whom an abortion is performed or attempted.

D. A pregnant woman upon whom an abortion has been performed in violation of Section 2 of this act, or the parent or legal guardian of the woman if she is an unemancipated minor, as defined in Section 1-740.1 of Title 63 of the Oklahoma Statutes, may commence a civil action against the abortion provider for any knowing or reckless violation of this act for actual and punitive damages.

E. An abortion provider who performed an abortion in violation of Section 2 of this act shall be considered to have engaged in unprofessional conduct for which the provider's certificate or license

to provide health care services in this state may be suspended or revoked by the State Board of Medical Licensure and Supervision or the State Board of Osteopathic Examiners.

SECTION 4. REPEALER Section 6, Chapter 200, O.S.L. 2005, as last amended by Section 11, Chapter 36, O.S.L. 2008, Section 12, Chapter 36, O.S.L. 2008, as amended by Section 1, Chapter 173, O.S.L. 2008 and Section 13, Chapter 36, O.S.L. 2008 (63 O.S. Supp. 2009, Sections 1-738.1, 1-738.3b and 1-738.3c), are hereby repealed.

SECTION 5. The provisions of this act are severable and if any part or provision shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

SECTION 6. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Passed the House of Representatives the 2nd day of March, 2010.

/s/ Kris Steele
Presiding Officer of the
House of Representatives

App. 15

Passed the Senate the 19th day of April, 2010.

/s/ [Illegible]

Presiding Officer of the
Senate

OFFICE OF THE GOVERNOR

**Received by the Governor this 20th day
of April, 2010, at 2:40 o'clock PM.**

By: /s/ [Illegible] _____

**Approved by the Governor of the State of
Oklahoma the _____ day of _____,
20 __, at _____ o'clock _____ M.**

**Governor of the State of
Oklahoma**

OFFICE OF THE SECRETARY OF STATE

**Received by the Secretary of State this _____
27th day of April, 2010, at 3:10 o'clock PM.**

By: /s/ M. Susan Savage _____
