OKLAHOMA CITY UNIVERSITY
LAW REVIEW

VOLUME 38 FALL 2013 NUMBER 3

ARTICLES

CONFUSED BY CASEY?
THE OKLAHOMA SUPREME COURT’S PUZZLING
ABORTION RIGHTS DECISION

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I. INTRODUCTION

In *Nova Health Systems v. Pruitt*, the Oklahoma Supreme Court addressed a controversial Oklahoma law.¹ This law not only required women to undergo ultrasounds, but it also required that the resulting images be displayed to them before they could receive an abortion in Oklahoma. When the Court issued its decision, which invalidated this controversial law by declaring it unconstitutional, it did so in a three-paragraph memorandum opinion.² Interestingly, the Court’s opinion—the embodiment of brevity—relied almost entirely on the United States Supreme Court’s *Planned Parenthood of Southeastern Pennsylvania v. Casey* decision, which many have interpreted to expand a state’s ability to regulate abortion.³

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Unfortunately, the Oklahoma Supreme Court’s treatment of the law produced a result that is both frustrating for pro-choice advocates and disappointing for pro-life supporters. At best, the Court did little to advance the dialogue on abortion policy at a volatile time. At worst, the Court may have misinterpreted the precedents it purported to maintain. This Article explains Oklahoma’s much debated Ultrasound Act and compares it to policies enacted in 22 other states. It also explores Casey and the two other state supreme court decisions cited in Nova Health Systems. It examines the Ultrasound Act in light of these authorities and concludes that the Oklahoma Supreme Court may have misapplied established law. Additionally, the Court’s failure to analyze the Ultrasound Act resulted in a decision that confounded the public and frustrated both abortion supporters and opponents. Unfortunately, this action contributed little to abortion jurisprudence and policy at a time when these issues are in desperate need of clarity.

II. OKLAHOMA’S ULTRASOUND ACT

In April 2010, the Oklahoma Legislature enacted House Bill 2780, which revised the informed-consent requirements for abortion procedures.4 Among other things, the Ultrasound Act mandated that abortion providers perform an obstetric ultrasound on each patient and display the resulting images so that the patient could view them5 if she chose to do so.6 During the scan, providers were also required to describe the fetus including the presence of cardiac activity, external members, and internal organs, if any were detectable.7 The Act necessitated that the

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5. Id. § 2(B)(1), (B)(3).

6. “Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes from the ultrasound images required to be provided . . . . Neither the physician nor the pregnant woman shall be subject to any penalty if she refuses to look at the presented ultrasound images.” Id. § 2(C).

7. Id. § 2(B)(4). Additionally, the Ultrasound Act required abortion providers to obtain a written certification of compliance from patients, which would be kept in the patient’s file. Id. § 2(B)(5).
procedure be performed at least one hour prior to commencing an abortion unless a woman’s physical health was at risk. Providers who violated the Act faced threats of fines, license revocation, and civil lawsuits.

The Ultrasound Act was one of several similar—and equally divisive—abortion ultrasound policies enacted throughout the country in recent years. Currently, according to information gathered by the Guttmacher Institute, there are 22 states with laws mandating some form of pre-abortion ultrasound. Of these, Louisiana, Texas, and Wisconsin have laws that require providers to perform an ultrasound, display the ultrasound images, and give a description of the fetus to the patient; women in these states, however, are not forced to view the ultrasound images. Some states have laws that also allow a woman to decline hearing an explanation about her fetus. Seven states (Alabama, Arizona, Florida, Indiana, Kansas, Mississippi, and Virginia) have laws that mandate pre-abortion ultrasounds, but only require providers to offer a woman an opportunity to view the images. In some states (e.g., Arkansas, Georgia, Idaho, Michigan, Nebraska, Ohio, South Carolina, and West Virginia), laws require that a provider afford a woman an opportunity to view ultrasound images but only when the provider utilizes an ultrasound in preparation for an abortion. Other states’ laws (e.g., Missouri, North Dakota, South Dakota, and Utah) merely give providers the option to offer a woman the opportunity to view the woman’s ultrasound.

Pre-abortion ultrasound laws have faced heavy backlash. For instance, Wisconsin enacted an ultrasound law on July 5, 2013, and

8. Id. § 2(D).
9. Id. § 3. Under the previous informed-consent law in Oklahoma, abortion providers were required to disclose risks associated with childbirth and abortion, the probable gestational age of a patient’s fetus, and the availability of materials detailing imaging-services facilities. Physicians, or their agents, were mandated to furnish this information at least 24 hours before the abortion procedure, either in person or by telephone. These requirements could be bypassed in the event of a medical emergency. OKLA. STAT. tit. 63, § 1-738.2 (OSCN through 2005 Leg. Sess.).
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
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immediately drew the attention of groups, such as Planned Parenthood, that sought to invalidate the law in federal court. Texas’s ultrasound law was upheld in 2012 but only after an appeal to the Fifth Circuit. Also, the Virginia Legislature rewrote its policy to mandate abdominal ultrasounds after the Legislature had received criticism regarding a proposed transvaginal ultrasound law. Similarly, Alabama State Senator, Clay Scofield, faced criticism after proposing a bill requiring transvaginal ultrasounds, but the bill never became law. The North Carolina Legislature recently passed an ultrasound law by overriding the governor’s veto; however, this law is currently being challenged in federal court. Despite such tension, state legislatures in Kentucky, Michigan, Missouri, Tennessee, Wisconsin, and Wyoming have


recently considered (or are now considering) similar pre-abortion ultrasound policy.

In Oklahoma, lawmakers fiercely debated the Ultrasound Act. Democratic Governor Brad Henry ultimately vetoed the law after it passed,\(^29\) but the Republican-dominated legislature overwhelmingly overrode his veto.\(^30\) Despite the override, Governor Henry remarked that the Act was unconstitutional and would force Oklahoma into a potentially “futile legal battle.”\(^31\) In concurrence, State Senator Judy Eason McIntyre maintained that abortion choices should not be governed by lawmakers. She noted that, even “[i]f [abortion is] the wrong decision, [women] live with it.”\(^32\) Her colleague, State Senator Andrew Rice, questioned how the State would care for the increased number of children born as a result of newly enacted abortion regulations.\(^33\)

The Act’s sponsor, State Representative Lisa Johnson-Billy, described the ultrasound requirement as “empowering” and clarified that


\(\text{33. Id.} \)
the Act did not require patients to view such images. She also dismissed criticism of mandated ultrasounds and explained that many abortion providers already perform such procedures. The law’s co-author, physician, and State Representative, Dr. Mike Ritze, asserted that the Ultrasound Act provided an opportunity to visualize a developing child, which allowed women to fully understand an abortion decision. 

As expected, this feud extended beyond the state capitol. Abortion supporters attacked the “‘cruel,’” “hostile” policy as discouraging women from seeking abortions. Commentators also noted that the information provided by the law could “bias the listener into believing that the fetus is a baby.” The Center for Reproductive Rights objected to the Oklahoma Legislature’s “audacious” efforts to enact “the most


39. Amanda Terkel, Oklahoma’s Assault on Women’s Rights: Legislature Reapproves Bill Posting Abortion Details Online, THINK PROGRESS (May 11, 2010, 2:54 PM), http://thinkprogress.org/politics/2010/05/11/96271/oklahoma-abortion-website2/ (deriding the Ultrasound Act, and asserting that “[t]he Oklahoma legislature is one of the most hostile elective bodies to women’s rights in the nation”).


42. Julie Bisbee, New Abortion Laws Draw Fans, Foes in Oklahoma, NEWSOK (May
extreme ultrasound law in the country," and the national media opined that the “restrictive” law would force sexual assault victims to “undergo a second trauma.” Despite such heavy criticism, however, evidence suggests that pre-abortion ultrasound laws fail to fulfill such draconian prophesies.

III. EFFECTS OF PRE-ABORTION ULTRASOUND

In a legal sense, the effectiveness of mandatory ultrasound laws in educating abortion patients "is a separate question from whether such laws are constitutional." Nonetheless, it is helpful to consider these laws in the context of their application. At first glance, many understandably believe that women who consider abortion would feel uncomfortable if forced to view images of their developing children. However, accounts and studies of the practice suggest that pre-abortion ultrasounds impose less severe burdens than one may think.

Evidence seems to dispel the notion that informed-consent laws

45. James, supra note 34.
47. See BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES 37 (2d ed. 2011) (noting that some women are offended by mandated-ultrasound laws, which may imply that women have not considered their abortion decision); Maya Dusenbery, Why Virginia’s Mandatory Ultrasound Law Still Sucks, MOTHER JONES (Mar. 3, 2012, 4:00 AM), http://www.motherjones.com/mojo/2012/03/why-virginias-new-mandatory-ultrasound-law-still-sucks (claiming mandatory-ultrasound laws are unnecessary and are intended to emotionally pressure women into childbirth); Carolyn Jones, ‘We Have No Choice’: One Texas Woman’s Ordeal with Texas’ New Sonogram Law, TEX. OBSERVER (Mar. 15, 2012, 8:03 AM), http://www.texasobserver.org/we-have-no-choice-one-womans-ordeal-with-texas-new-sonogram-law ("What good is a law that adds only pain and difficulty to perhaps the most painful and difficult decision a woman can make?").
coerce or intimidate women.\textsuperscript{48} For instance, most physicians interviewed by Medical Professor Tracy Weitz suggested that pre-abortion ultrasounds have only minimal impact on a patient’s abortion decision.\textsuperscript{49} Accordingly, Professor Weitz believes women should have the opportunity to view ultrasound images of their fetuses.\textsuperscript{50} She noted, “I don’t think people should be afraid that a woman [will want to see the ultrasound]. For some women, it’s an important experience.”\textsuperscript{51} Indeed, the recent Wisconsin ultrasound legislation was named Sonya’s Law after a woman who had reversed her abortion decision once she viewed an ultrasound image of her seven-week-old fetus.\textsuperscript{52}

Likewise, clinical research has debunked the notion that pre-abortion ultrasounds threaten or coerce women. For example, a Canadian study, published in 2009, indicated that nearly three-fourths of abortion patients had asked to see ultrasound images of their fetuses.\textsuperscript{53} Further, 83.6\% of those same women responded that the experience did not make their decision more emotionally difficult.\textsuperscript{54} Rather than feeling compelled to change their minds, all 254 women who viewed the images proceeded with their abortions.\textsuperscript{55} Abortion providers in states that have implemented ultrasound laws report similar responses. In Alabama, where women have a choice to view ultrasound images, an estimated

\begin{thebibliography}{99}
\bibitem{Devins} See Devins, supra note 3, at 1350 (“Evidence on informed consent laws, for example, suggests that these laws do not dissuade women from following through on their choice to terminate a pregnancy.” (citations omitted)).
\bibitem{Weitz3} \textit{Id.}
\bibitem{Wiebe} Ellen R. Wiebe & Lisa Adams, Women’s Perceptions About Seeing the Ultrasound Picture Before an Abortion, 14 EUR. J. CONTRACEPTION & REPROD. HEALTH CARE 97, 99 (2009).
\bibitem{Wiebe2} \textit{Id.}
\bibitem{Wiebe3} \textit{Id.} at 99, 101.
\end{thebibliography}
30% to 70% of patients asked to view images of their fetuses. Of those women, none reportedly felt compelled to change their decisions. In fact, a Virginia abortion provider indicated that only about 10% of patients expressed emotional distress during the ultrasound procedure, and a Texas abortion provider explained that his clinic’s abortion rates had not changed since Texas had enacted a mandatory ultrasound law. Another Texas practitioner found that patients were more upset with the law’s 24-hour waiting period than the ultrasound requirement.

IV. CHALLENGE TO THE ULTRASOUND ACT AND RELATED LAWS

After Oklahoma passed the Ultrasound Act, abortion providers, Nova Health Systems and Dr. Larry Burns, quickly challenged it in state district court. They claimed, among other things, that the Act was void for vagueness, constituted an impermissible special law, violated the right to equal protection and free speech, and unduly burdened a woman’s abortion right. In response, the district court temporarily enjoined the Act.

On March 28, 2012, Oklahoma County District Court Judge, Bryan C. Dixon, granted the plaintiffs’ Motion for Summary Judgment and struck down the Ultrasound Act. The court held that the Act violated two provisions of the Oklahoma Constitution. First, the Act was an

56. STEINBOCK, supra note 47, at 37.
57. Id.
62. Id. at 11, 13.
64. Id.
65. Id. at 1.
impermissible special law\textsuperscript{66} that affected only abortion providers and patients where a general law could have been enacted.\textsuperscript{67} Second, it improperly granted a private right of action to only a limited class.\textsuperscript{68} Because the court deemed the Act unconstitutional, the court declined to consider the plaintiffs’ other arguments.\textsuperscript{69}

\protect\color{red}A. Nova Health Systems v. Pruitt

Oklahoma Attorney General, E. Scott Pruitt, appealed the ruling to the Supreme Court of Oklahoma. In a brief memorandum opinion, all eight Justices\textsuperscript{70} affirmed the district court but on different grounds.\textsuperscript{71} In an effort to show the extent of the opinion’s abruptness, the entire opinion is reproduced below:

Per [Curiam]

This is an appeal of the trial court’s summary judgment which held House Bill 2780 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 \textit{Planned Parenthood v. Casey}, which was applied in this Court’s recent decision of \textit{In re Initiative No. 395, State Question No. 761}.

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:

\begin{quote}
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
\end{quote}

\textsuperscript{66} “Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted.” OKLA. CONST. art. V, § 59.

\textsuperscript{67} Order Granting Permanent Injunction, \textit{supra} note 63, at 1.

\textsuperscript{68} Id.

\textsuperscript{69} Id. at 2.


\textsuperscript{71} Id. ¶ 3, 292 P.3d at 28–29.
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.

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.” 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[.]

The challenged measure is facially unconstitutional pursuant to 

The Court’s treatment of the Ultrasound Act is bewildering. While memorandum opinions are known to be cursory, \(^{73}\) the Oklahoma Supreme Court Rules suggest they should only be used when disposing of insignificant matters or in cases involving well-settled law. \(^{74}\) However, as discussed throughout this Article, the jurisprudence surrounding abortion regulation is quite complex. Nevertheless, without

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72. Id. ¶¶ 1–3, 292 P.3d at 28–29 (citations omitted).
74. According to the Oklahoma Supreme Court Rules:

An opinion shall be prepared in memorandum form unless it:

(1) Establishes a new rule of law or alters or modifies an existing rule;
(2) Involves a legal issue of continuing public interest;
(3) Criticizes or explains existing law;
(4) Applies an established rule of law to a factual situation significantly different from that in published opinions of the courts of this state;
(5) Resolves an apparent conflict of authority; or
(6) Constitutes a significant and non-duplicative contribution to legal literature:
   (a) by an historical review of law; or
   (b) by describing legislative history.

much explanation, the Oklahoma Supreme Court declared the Act unconstitutional, and used support from Casey as well as two other state supreme court decisions that had applied Casey.\textsuperscript{75}

Although Casey reaffirmed the right to an abortion, it also strongly emphasized a state’s right to regulate the practice of abortion and to protect fetal life.\textsuperscript{76} Further, the Oklahoma Supreme Court decisions (the Initiative Petition decisions) cited by the Court are arguably inapplicable to the Ultrasound Act because the Initiative Petitions had involved proposals to essentially outlaw abortion.\textsuperscript{77} Accordingly, an analysis of the Ultrasound Act in the context of such authority reveals that the Oklahoma Supreme Court’s decision raised more questions than it answered.

B. Planned Parenthood of Southeastern Pennsylvania v. Casey

Casey is best known for amending Roe v. Wade\textsuperscript{78} and establishing the undue burden standard for abortion regulation. Casey involved several abortion providers’ challenge to the Pennsylvania Abortion Control Act of 1982 (the Pennsylvania Act).\textsuperscript{79} Like the Ultrasound Act, the Pennsylvania Act mandated the conveyance of certain information to women who sought abortions.\textsuperscript{80} It also implemented a 24-hour waiting period before an abortion could occur.\textsuperscript{81} Additionally, the law forced wives to notify their husbands before terminating a pregnancy and required minors to secure the consent of at least one parent before obtaining an abortion.\textsuperscript{82}

The Casey plurality began its analysis by upholding Roe v. Wade based on concepts of individual liberty and stare decisis.\textsuperscript{83} It explained that abortion, like other recognized conduct regarding family

\textsuperscript{75} Nova Health Sys., 2012 OK 103, ¶¶ 1–2, 292 P.3d at 28.
\textsuperscript{78} Roe v. Wade, 410 U.S. 113 (1973).
\textsuperscript{79} Casey, 505 U.S. at 844.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 899.
\textsuperscript{83} Id. at 853–55.
development, is protected by the Fourteenth Amendment.\textsuperscript{84} Regardless of the Justices’ personal feelings toward abortion, adherence to precedent was vital because there was no valid reason to overturn \textit{Roe}.\textsuperscript{85} Notably, the Court preserved what it referred to as \textit{Roe}’s essential, three-part holding.\textsuperscript{86} First, a woman may elect to have an abortion without undue governmental interference before her fetus is reasonably expected to survive outside of the uterus.\textsuperscript{87} Second, a state may regulate abortion after the point at which the fetus is reasonably expected to survive outside of the uterus as long as the state’s law has exceptions for those pregnancies that “endanger the woman’s life or health.”\textsuperscript{88} Third, states have a legitimate interest throughout a woman’s pregnancy in protecting her health “and the life of the fetus that may become a child.”\textsuperscript{89}

The Court emphasized that these precepts must coexist;\textsuperscript{90} however, it criticized \textit{Roe}’s trimester framework, which allowed only minimal regulation during the first months of pregnancy.\textsuperscript{91} While states could act to protect a woman’s health during the second trimester, they could not advance an interest in fetal life.\textsuperscript{92} Throughout the third trimester, when a fetus is viable, states could enact laws to prohibit abortion, so long as they provided exceptions to protect a woman’s life and health.\textsuperscript{93} The plurality found this structure to be incorrect because it constrained a state’s interest in fetal life.\textsuperscript{94} Instead, it explained the right to an abortion

\begin{itemize}
  \item \textsuperscript{84} \textit{Id.} at 849.
  \item \textsuperscript{85} \textit{See id.} at 857–59.
  \item \textsuperscript{86} \textit{Id.} at 845–46.
  \item \textsuperscript{87} \textit{Id.} at 846.
  \item \textsuperscript{88} \textit{Id.}
  \item \textsuperscript{89} \textit{Id.}
  \item \textsuperscript{90} \textit{See id.} (“These principles do not contradict one another; and we adhere to each.”).
  \item \textsuperscript{91} \textit{Id.} at 872.
  \item \textsuperscript{92} \textit{Id.}
  \item \textsuperscript{93} \textit{Id.}
  \item \textsuperscript{94} The Court explained:

    Though the woman has a right to choose [abortion], it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. 

\textit{Id.; see also id.} at 869 (“The woman’s liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn . . . .”)
\end{itemize}
as “the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”95 Thus, states may regulate abortion at all times, so long as they do not impose an undue burden on the right to abort a pre-viable fetus.96 In other words, regulations must be calculated to inform, rather than hinder, the abortion decision.97 Statutes that present a “substantial obstacle” between a woman and an abortion are an undue burden and consequently are not permissible.98

In reaching its ultimate decision, the Court first construed the Pennsylvania Act’s definition of “medical emergency,” which read:

[T]hat condition which, on the basis of the physician’s good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.99

The abortion providers argued that this definition ignored several specific medical conditions, thus it was unconstitutional because it failed to provide exceptions for a woman’s health and safety.100 The plurality deferred to the Third Circuit Court of Appeals, which previously found that the term “serious risk” addressed such conditions.101 Consequently, the Court deemed the definition acceptable.102

Next, the plurality addressed the law’s informed-consent provisions, which mandated that physicians, or qualified non-physicians, convey certain information—including health risks of abortion and childbirth and the “probable gestational age” of a woman’s fetus—at least 24 hours before performing an abortion.103 Further, patients were to be notified of state-published materials that described the fetus and resources regarding

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95. *Id.* at 877.
96. *Id.* at 874.
97. *Id.* at 877.
98. *Id.*
99. *Id.* at 879 (quoting 18 PA. CONS. STAT. § 3203 (1990)).
100. *Id.* at 880.
101. *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 701 (3d Cir. 1991)).
102. *Id.*
103. *Id.* at 881 (quoting 18 PA. CONS. STAT. § 3205) (internal quotation marks omitted).
medical assistance, child support, and adoption agencies. The Court explained that such disclosures were not designed to dissuade an abortion choice; rather, they constituted the “giving of truthful, nonmisleading information,” which many women consider vital to their decision. Thus, the requirement to supply information under the Act was a permissible way for states to encourage well-informed abortion choices, even if such efforts espoused the state’s preference for childbirth.

Likewise, the plurality found the Act’s 24-hour waiting period reasonable, especially considering the importance of the underlying decision. The delay did not produce any identifiable health risks since the Act allowed physicians to perform an immediate abortion if a woman’s health were in danger. The Court recognized that the provision may prove arduous for some patients, such as those who live farther from abortion facilities or those with limited finances, but such difficulties did not render the waiting period a substantial obstacle to an abortion. Accordingly, the Court deemed the stipulation a reasonable exercise of a state’s interest in protecting fetal life.

At the same time, the Court struck down the Act’s provision that required married women to certify that they had informed their husbands prior to receiving an abortion, even though the Act allowed limited exceptions to this requirement, including instances of abuse and medical emergencies. In its analysis, the Court considered some of the extensive facts established by district court testimony: most women in healthy relationships consult their partners regarding abortion, family violence occurs in millions of households and is prevalent at all levels of society, the Act did not exempt situations where women believed their husbands may harm their children or other family members as a result of

104. Id.
105. Id. at 882.
106. Id.
107. Id. at 883 (“[W]e permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.”).
108. Id. at 885–87.
109. Id. at 885.
110. Id. at 885–86 (citations omitted). “A particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group.” Id. at 887.
111. Id. at 887.
112. Id. at 898.
113. Id. at 887.
the abortion, and battered women were unlikely to seek exceptions to the provision.\footnote{Id. at 888–90.}

Given these facts, the plurality found that the provision created a substantial obstacle between many abused women and abortion as opposed to a mere hassle.\footnote{Id. at 893–94.} Because thousands of women would be forced to risk serious danger in order to comply with the stipulation, the requirement would essentially serve as a bar to their abortion right.\footnote{Id. at 898.} Accordingly, the Court deemed the notification requirement an undue burden and found it unconstitutional.\footnote{Id. ¶ 10, 838 P.2d at 6.}

\section*{C. \textit{In re} Initiative Petition No. 349, State Question No. 642}

Weeks after the United States Supreme Court issued \textit{Casey}, the Oklahoma Supreme Court evaluated a proposed ballot measure known as Initiative Petition No. 349.\footnote{\textit{In re} Initiative Petition No. 349, State Question No. 642, 1992 OK 122, 838 P.2d 1.} Oklahoma law allows citizens to make legislative proposals through petition if the petition receives a required number of signatures, and if the petition appears on a statewide ballot.\footnote{\textit{Id} at 899.} Initiative Petition No. 349 aimed to criminalize abortions in Oklahoma unless a pregnancy was a result of rape or incest, a fetus suffered from a “grave physical or mental defect,” or a pregnancy would harm a woman’s physical or mental health.\footnote{\textit{Id}. ¶ 11, 838 P.2d at 6 (footnote omitted).}

The majority analyzed the petition largely in light of \textit{Casey} and quoted the three-part holding of \textit{Roe}, which recognized a state’s interest in protecting fetal life.\footnote{\textit{Id}. ¶ 10, 838 P.2d at 6.} However, portions of the Initiative Petition opinion present \textit{Casey} as a decision that expanded abortion rights. For instance, the Court highlighted that \textit{Casey}

reiterates, and perhaps strengthens, the central premise of \textit{Roe}—
that women, may for some time period, make independent decisions to obtain nontherapeutic abortions. . . . Casey reaffirmed the central premise of Roe v. Wade, that the right of privacy founded in the Fourteenth Amendment’s concept of personal liberty includes a woman’s right to have an abortion. Five members of the Casey Court’s precedential inquiry joined in part IIIA of the opinion which found that “Roe’s underpinnings were unweakened in any way affecting its central principle” and that Roe was not “unworkable.”

After noting its obligation to respect United States Supreme Court precedent, the majority held the petition unconstitutional because it sought to prohibit abortion procedures in circumstances beyond the holding of Casey.123

D. In re Initiative Petition No. 395, State Question No. 761

Similarly, in April 2012, the Oklahoma Supreme Court invalidated Initiative Petition No. 395, also known as the “Personhood Amendment.”124 This law would have amended the Oklahoma Constitution to define “person” as “any human being from the beginning of the biological development of that human being to natural death”125 and granted legal rights to these “persons.”126

In a concise opinion, a unanimous Oklahoma Supreme Court recognized that such proposals must comply with duly enacted federal law even though the Oklahoma Constitution grants citizens the power to amend state laws.127 The Court found the petition to be facially unconstitutional under Casey and struck the measure from the ballot.128

Although the Court did not fully explain its reasoning, it is fair to assume

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122. Id. ¶ 7, 838 P.2d at 5 (citations omitted).
123. Id. ¶ 14, 838 P.2d at 7. The Court also forbade the petition from appearing on the ballot because, even if the measure were enacted, it would be unable to withstand a Casey-based challenge, and would thus result in a futile gesture. Id. ¶ 34, 838 P.2d at 12.
126. Id.
127. In re Initiative Petition No. 395, 2012 OK 42, ¶ 1, 286 P.3d at 637 (quoting OKLA. CONST. art. 2, § 1).
128. Id. ¶ 1, 286 P.3d at 637–38.
the Court deemed the petition unconstitutional because it would have given legal rights to fetuses and essentially banned abortions in violation of Casey.

V. ANALYSIS OF THE ULTRASOUND ACT IN LIGHT OF CASEY AND THE INITIATIVE PETITION DECISIONS

When viewed in the context of Casey, the Oklahoma Supreme Court correctly invalidated the initiative petitions that sought to prohibit most forms of abortion; those proposals would have violated even the broadest reading of Casey. However, as argued by pro-life groups, the Court’s analysis of the Ultrasound Act is questionable, as the law did not seek to prohibit abortion. Since the Oklahoma Supreme Court did not cite any specific language or reference any particular part of Casey to support its holding, we are unable to determine with certainty why it found the Act unconstitutional. Because the proposed law did not proscribe abortion, we are left to surmise that the Court found one or more provisions to be an undue burden on a woman’s right to the procedure. However, an analysis of the Ultrasound Act under Casey suggests that such a conclusion is difficult to draw.

First, the Ultrasound Act’s definition of “medical emergency” is substantially similar to the provision upheld in Casey. Under the Act, the term 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

129. “State purposes that strike directly at the right to choose abortion were identified by the [Casey] Court as explicitly illegitimate.” Tholen & Baird, supra note 3, at 989.
function arising from continued pregnancy.\(^\text{132}\)

Except for the Ultrasound Act’s exclusion of emotional, psychological, and mental conditions, the definitions are essentially identical.\(^\text{133}\) Despite the failure to include such factors, the meaning appears to comport with \textit{Casey} because it provides exceptions to generally protect women’s health and safety.\(^\text{134}\) As the \textit{Casey} plurality recognized, abortion carries inherent psychological burdens for almost everyone affected by the procedure.\(^\text{135}\) Thus, it is unlikely that the exclusion of emotional or mental factors renders the law unconstitutional. In fact, the Act’s definition of medical emergency is the same definition used in the current Oklahoma pre-abortion informed-consent law,\(^\text{136}\) which has stood in similar form since 2005.\(^\text{137}\)

Second, the Ultrasound Act’s informed-consent procedures appear to be permissible. At the outset, it is important to note that this analysis must ignore objections to the Act’s ultrasound mandate. While outrage surrounding forced ultrasounds has dominated public discourse,\(^\text{138}\)


\[^{13}\text{133}.\text{Compare H.B. 2780, 52nd Leg. § 1.5, with Casey, 505 U.S. at 879.}\]

\[^{14}\text{134}.\text{See Casey, 505 U.S. at 879–80.}\]

\[^{15}\text{135}.\text{The United States Supreme Court explained:}\]

\[^{16}\text{17}.\text{The United States Supreme Court explained:}\]

\[^{18}\text{18}.\text{The United States Supreme Court explained:}\]

\[^{19}\text{19}.\text{The United States Supreme Court explained:}\]

\[^{136}.\text{See OKLA. STAT. tit. 63, § 1-738.1A(5) (OSCN through 2013 Leg. Sess.) (“‘Medical emergency’ means the existence of any physical condition, not including any emotional, psychological, or mental condition, which a reasonably prudent physician, with knowledge of the case and treatment possibilities with respect to the medical conditions involved, would determine necessitates the immediate abortion of the pregnancy of the female to avert her death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy.”).}\]


abortion providers across the nation routinely employ such procedures to accurately date their patients’ pregnancies.\textsuperscript{139} For instance, Nova Health Systems confirmed that its pre-abortion examination “always includes an ultrasound.”\textsuperscript{140} Planned Parenthood similarly admits that it subjects women to standard ultrasounds before performing abortions.\textsuperscript{141} Accordingly, some pro-choice supporters have cautioned against disparaging these methods.\textsuperscript{142} Therefore, because ultrasound examinations play a role in nearly every abortion, the validity of the

\textsuperscript{139} See VIMEE BINDRA \& BHASKAR PAUL, PRACTICAL MANUAL OF OBSTETRICS AND GYNECOLOGY FOR RESIDENTS AND FELLOWS 214 (2011) (“First trimester ultrasound is recommended prior to pregnancy termination.”); see also Kathy Fisher \& Sarah R. Goff, Health and Medical Aspects of Abortion, in INTERDISCIPLINARY VIEWS ON ABORTION 34, 43 (Susan A. Martinelli-Fernandez et al. eds., 2009) (“Any physician who provides medical abortions must have the capability of assessing the gestational age of a pregnancy via an ultrasound or sonogram . . . .”); John A. Robertson, Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis, 14 U. PA. J. CONST. L. 327, 337 (2011) (“It is a central part of abortion and other medical practice to confirm pregnancy, gestational age, the number of fetuses, fetal anomalies, fetal position, and much more.”). Interestingly, one textbook warns that, while pre-abortion ultrasounds are often necessary to correctly date a pregnancy, practitioners should be careful not to let a woman view the images of the fetus, lest she be caused additional distress. DANIELLE MAZZA, WOMEN’S HEALTH IN GENERAL PRACTICE 95–96 (Carol Natsis ed., 2d. ed. 2011).

\textsuperscript{140} Amended Petition, supra note 61, at 8.


\textsuperscript{142} According to pro-choice advocate, Carol Joffe:

I have considerable concerns about what calling these ultrasounds “rape” and “unnecessary” will mean for abortion patients and providers. The reality is that most abortion patients do receive an ultrasound to date their pregnancies. Since most abortions take place in the first trimester of pregnancy, many of these ultrasounds are performed with a transvaginal probe, the most effective method for viewing early-stage pregnancies.

Act’s informed-consent provisions hinges on the knowledge conveyed to patients.

Such knowledge does not appear to impose an undue burden on the right to an abortion. Like the material provided under the Pennsylvania Act, the Ultrasound Act’s requirements that abortion providers display ultrasound images (which patients may ignore) and explain medical facts equate to the “giving of truthful, nonmisleading information,” which Casey championed. Both methods allow patients to better understand their fetuses and the abortion procedure. They also encourage women to reflect for a period of time before making an irreversible decision that affects a developing child. As recognized in Casey, this process advances a state’s legitimate interest in protecting women’s health as well as fetal life. Recently, the Fifth Circuit Court of Appeals applied similar reasoning in upholding Texas’s pre-abortion ultrasound law. In doing so, the panel largely followed Casey and found the process mandated by the Texas law to be the “epitome” of factual information described by the Supreme Court.

It is possible that the Oklahoma Supreme Court found the Ultrasound Act’s informed-consent requirements comparable to the spousal-notification laws in the Pennsylvania Act. However, such a comparison is problematic because the effects of the two provisions are starkly different. Under the Pennsylvania Act, thousands of women—and possibly their family members—risked violence if they were required to notify an abusive spouse about an intended abortion. The Casey plurality found that such a barrier was no different than a ban on the practice. By contrast, the only “obstacle” patients face under the Ultrasound Act is additional information regarding their bodies and the abortion procedure.

As discussed previously in this Article, evidence shows that pre-abortion ultrasounds do not impose substantial obstacles to abortion. The fact that a vast majority of women who view such images nonetheless terminate their pregnancies proves that such laws do not

144. See id.
145. See Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 572 (5th Cir. 2012). For further analysis of the Texas law, see generally Vargo, supra note 18.
146. Lakey, 667 F.3d at 578.
147. Casey, 505 U.S. at 893–94.
148. See id.
149. See supra Part III.
Confused by Casey?

harass or coerce women into altering their decisions. Therefore, the only way to characterize the Ultrasound Act’s informed-consent provision as an undue burden is to adopt the specious reasoning that providing additional facts about a procedure is akin to denying it.

Moreover, an argument could be made that opposition to the informed-consent mandate has little to do with the disclosures themselves. For instance, we can safely presume that most women have no objection to seeing an ultrasound image of a developing baby. Depending on the relation of the viewer to the fetus, such images often evoke joy, curiosity, amazement, and, in some cases, indifference. The same can be said about hearing biological descriptions of fetuses, much of which is covered in a basic health or science class. However, many pro-choice advocates staunchly oppose exposing women to information about fetuses the women might abort. Since the only difference between the prior examples is that the latter fetuses might be destroyed, such apprehension seems aimed entirely at the abortion procedure.

In other words, hostility toward the Act’s informed-consent requirement appears to stem from the graphic reality of abortion and not from any animus towards scientific facts. Likewise, the claim that such medical information is unduly burdensome to some women implies that these patients lack confidence in their abortion choices. Understanding that abortion is often a distressing process, the Casey plurality held that states are fully justified in encouraging women to become as educated as possible before making such an important and permanent decision. Otherwise, developing children may be destroyed based on incomplete information or willful ignorance, which is counterintuitive and ignores a state’s interest in protecting fetal life.

Perhaps the Nova Health Systems Court found the Act’s informed-consent provisions to be unduly burdensome based on its Initiative Petition No. 349 decision, which interpreted Casey’s “central premise” as upholding abortion rights and appeared to downplay a state’s role in protecting fetal life. This notion, however, is unlikely. As previously discussed, Initiative Petition No. 349 essentially sought to proscribe

150. See Steinbock, supra note 47, at 37 (suggesting that patients may be offended by mandated ultrasound laws because they may not have adequately considered abortion).

151. Casey, 505 U.S. at 873 (“States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.”).

152. See In re Initiative Petition No. 349, State Question No. 642, 1992 OK 122, ¶ 6, 838 P.2d 1, 5.
abortion, and it posed a much more drastic threat to the practice than the Ultrasound Act. Also, the authors of the Initiative Petition No. 349 opinion were certainly aware that *Casey* afforded states much power to regulate abortion.  

While the Initiative Petition No. 349 Court appeared to deemphasize a state’s role in abortion regulation, it may have done so because discussing this balance in the context of Initiative Petition No. 349 was unnecessary. In that instance, the emphasis of *Casey’s* abortion-rights language appears to be a summary of Supreme Court precedent rather than a rigid interpretation of *Casey*.

VI. REACTION TO THE RULING

Of course, the Oklahoma Supreme Court could have found the Ultrasound Act unconstitutional based on other reasons that were not included in its memorandum opinion. But regardless of the Court’s ultimate decision, its failure to seriously analyze the law only confounds the national abortion debate. This confusion was evident soon after the Court issued *Nova Health Systems*, and it affected reproductive-rights experts and the public alike.

As expected, abortion supporters cheered the ruling, although many struggled to explain the Court’s reasoning. Michelle Movahed, a staff attorney for the Center of Reproductive Rights, called the ruling a “‘sweeping and unequivocal’ rejection of . . . [an] attempt to restrict the reproductive rights of women.”  

According to the organization’s CEO, Nancy Northrup, “courts have consistently rejected” laws such as the Ultrasound Act, which she deemed an “extreme assault[ ] on reproductive freedom.”  

She also opined that the decision “resoundingly affirmed . . . that government has no place in [a woman’s reproductive] decisions.”  

Another staff attorney, Stephanie Toti, hoped the ruling would convince state lawmakers “that women are equal citizens who are entitled to the full spectrum of reproductive rights, including access to

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153. See *Casey*, 505 U.S. at 845–46.


contraception, abortion, fertility treatments and prenatal care."\(^{157}\)

Likewise, much of the public and media had difficulty articulating the Court’s rationale, and largely relied on emotional attacks and clichés to explain the Court’s decision. Editorial writers from the Tulsa World noted that the Oklahoma Supreme Court invalidated a “misogynistic” and “misguided” law, “without a single dissenting vote.”\(^{158}\) One Oklahoma physician penned an op-ed that scolded the Attorney General for “stubbornly trying to challenge unanimous Oklahoma Supreme Court decisions.”\(^{159}\) The physician further asserted that lawmakers should be forced to consult a constitutional attorney before introducing similar legislation.\(^{160}\) Other commentators and politicians categorized the Ultrasound Act as part of the “war on women.”\(^{161}\) While several websites celebrated the decision, most either ignored the Court’s rationale\(^{162}\) or repeated the Court’s vague obligation to follow the Supreme Court’s precedent.\(^{163}\)


\(^{160}\) Id.


Unfortunately, these responses (and others) vastly oversimplified—if not completely misrepresented—established abortion jurisprudence. Despite being joined by nearly every Oklahoma Supreme Court justice, *Nova Health Systems* is a far cry from the unequivocal, consistent mandate many claim it to be. As discussed throughout this Article, courts have upheld laws similar to the Ultrasound Act based on the ideal that states may influence abortion decisions to protect fetal life. However, such reactions are also understandable. Because the *Nova Health Systems* Court largely left the public to speculate about its reasoning, perhaps we should not be surprised that society has interjected its own rationale for that of the Court’s.

After the Court issued *Nova Health Systems*, the case was appealed to the United States Supreme Court, and the Justices denied the petition on November 12, 2013. While the Supreme Court made no comment regarding the case, Nancy Northrup misleadingly asserted that the denial was a “clear message” that such laws are “patently unconstitutional and will not be allowed to stand.”

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165. Indeed, some may even contend that the Court violated its duty by not fully explaining its rationale. Regarding judicial opinions, it has been noted that

[llitigants, especially losing litigants, want to be assured that the court considered the issues and engaged in a reasoned and fair analysis. The public wants to be assured that if it relies on the judiciary, then cases will be decided fairly. Judges and lawyers want an opinion to be well-reasoned so that it has some precedential value.


The failure of many to understand why the Oklahoma Supreme Court declared the Ultrasound Act unconstitutional, coupled with inaccurate explanations of the law, underscores the desperate need for clear judicial clarification of American abortion policy. Unfortunately, the vague Nova Health Systems opinion is a disappointment for all sides of the abortion debate at a time when guidance is sorely needed. For the pro-life crowd, the decision marks a defeat in Oklahoma’s attempt to save lives and educate the public. Conversely, abortion advocates received a victory, albeit one that insufficiently articulates women’s rights and may have misconstrued precedent.

As a result, the heated abortion battle in Oklahoma and across the nation remains chaotic as neither supporters nor detractors of reproductive laws have clear direction as to the future of such regulation. While its decision does not bind other states, the Nova Health Systems Court had a rare opportunity to advance the narrative of reproductive policy by explaining how United States Supreme Court precedent applies to a growing trend of abortion laws. Regrettably, the Oklahoma Supreme Court’s dismissive treatment only adds uncertainty to an increasingly hostile dispute.

168. Professor Neal Devins recognized that similar dissatisfaction was seen after Casey, which disappointed both abortion supporters and pro-life activists. Devins, supra note 3, at 1351.