

OKLAHOMA CITY UNIVERSITY  
LAW REVIEW

VOLUME 38

FALL 2013

NUMBER 3

ARTICLES

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

Michael P. Vargo\*

I. INTRODUCTION..... 292

II. THE ULTRASOUND ACT ..... 293

III. EFFECTS OF PRE-ABORTION ULTRASOUND ..... 298

IV. CHALLENGE TO THE ULTRASOUND ACT AND RELATED LAWS .300

    A. Nova Health Systems v. Pruitt..... 301

    B. Planned Parenthood of Southeastern Pennsylvania v. Casey ..... 303

    C. *In re* Initiative Petition No. 349, State Question No. 642 .... 307

    D. *In re* Initiative Petition No. 395, State Question No. 761 .... 308

V. ANALYSIS OF THE ULTRASOUND ACT IN LIGHT OF *CASEY* AND THE INITIATIVE PETITION DECISIONS..... 309

VI. REACTION TO THE RULING..... 314

VII. CONCLUSION ..... 317

## I. INTRODUCTION

In *Nova Health Systems v. Pruitt*, the Oklahoma Supreme Court addressed a controversial Oklahoma law.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

---

\* J.D., South Texas College of Law, 2010; B.B.A., Texas A&M University, College Station, Texas, 2006. The Author would like to thank his wife, Alison, and his family, for their help and support throughout his career.

1. 2010 Okla. Sess. Laws 598 (codified at OKLA. STAT. tit. 63, §§ 1-738.1A, 1-738.3d, 1-738.3e (OSCN through 2010 Leg. Sess.)) [hereinafter *Ultrasound Act or Act*].

2. *Nova Health Sys. v. Pruitt*, 2012 OK 103, 292 P.3d 28 (per curiam).

3. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) (noting that *Casey* “struck a balance” between a woman’s right to abortion and the state’s interest in protecting fetal life, which had not previously existed); John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 329 (2011) (“With its looser undue burden test, *Casey* opened the door to more regulation than had been acceptable under *Roe*.”); Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1329 (2009) (describing how both pro-life and pro-choice supporters believed *Casey* would inspire many new laws to restrict abortion); Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. U. L. REV. 1, 5 (2008) (“Consequently, *Casey* is typically read as narrowly upholding a woman’s right to an abortion, but also as giving more flexibility to the State in its effort to persuade her not to exercise that right.”); Michael F. Moses, *Casey and Its Impact on Abortion Regulation*, 31 FORDHAM URB. L.J. 805, 805 (2004) (noting that the *Casey* decision set forth a more lenient judicial-review standard for abortion regulations when compared to *Roe v. Wade*); Elizabeth A. Cavendish, *Casey Reflections*, 10 AM. U. J. GENDER SOC. POL’Y & L. 305, 307 (2002) (“[A]s a practical matter [*Casey*] has been read by anti-choice legislators as an open invitation to enact restrictive [abortion] legislation.”); Sandra Lynne Tholen & Lisa Baird, Note, *Con Law Is as Con Law Does: A Survey of Planned Parenthood v. Casey in the State and Federal Courts*, 28 LOY. L.A. L. REV. 971, 975–77 (1995) (recognizing the undue burden test as a “significant” change by the *Casey* Court, which allowed it to “uphold state regulation to an extent that clearly would have been prohibited under *Roe*”); John Nivala, *Planned Parenthood v. Casey: The Death of Repose in Reproductive Decisionmaking*, 4 SETON HALL CONST. L.J. 47, 47–50 (1993) (describing how *Casey* upheld a woman’s right to choose abortion but also allowed government intrusion into such decisions); Mark H. Woltz, Note, *A Bold Reaffirmation? Planned Parenthood v. Casey Opens the Door for*

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.<sup>4</sup> 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 them<sup>5</sup> if she chose to do so.<sup>6</sup> 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.<sup>7</sup> The Act necessitated that the

---

*States to Enact New Laws to Discourage Abortion*, 71 N.C. L. REV. 1787, 1788 (1993) ("The Supreme Court in *Casey* reaffirmed the basic right to abortion, but indicated that it will tolerate greater limits on its availability than at any time since *Roe*."); Sydney Lupkin, *Abortion 40 Years After Roe v. Wade*, ABC NEWS (Jan. 18, 2013), <http://abcnews.go.com/Health/roe-wade-abortion-america-40-years/story?id=18242770> (explaining how *Casey* allowed for increased abortion regulation).

4. H.B. 2780, 52nd Leg. §§ 1–3 (Okla. 2010) (codified at OKLA. STAT. tit. 63, §§ 1-738.1A, 1-738.3d, 1-738.3e (OSCN through 2010 Leg. Sess.)).

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.<sup>8</sup> Providers who violated the Act faced threats of fines, license revocation, and civil lawsuits.<sup>9</sup>

The Ultrasound Act was one of several similar—and equally divisive—abortion ultrasound policies enacted throughout the country in recent years.<sup>10</sup> Currently, according to information gathered by the Guttmacher Institute, there are 22 states with laws mandating some form of pre-abortion ultrasound.<sup>11</sup> 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.<sup>12</sup> Some states have laws that also allow a woman to decline hearing an explanation about her fetus.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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.).

10. See *State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INST. (Dec. 1, 2013), [https://www.guttmacher.org/statecenter/spibs/spib\\_RFU.pdf](https://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

immediately drew the attention of groups, such as Planned Parenthood, that sought to invalidate the law in federal court.<sup>17</sup> Texas's ultrasound law was upheld in 2012 but only after an appeal to the Fifth Circuit.<sup>18</sup> Also, the Virginia Legislature rewrote its policy to mandate abdominal ultrasounds after the Legislature had received criticism regarding a proposed transvaginal ultrasound law.<sup>19</sup> Similarly, Alabama State Senator, Clay Scofield, faced criticism after proposing a bill requiring transvaginal ultrasounds, but the bill never became law.<sup>20</sup> The North Carolina Legislature recently passed an ultrasound law by overriding the governor's veto;<sup>21</sup> however, this law is currently being challenged in federal court.<sup>22</sup> Despite such tension, state legislatures in Kentucky,<sup>23</sup> Michigan,<sup>24</sup> Missouri,<sup>25</sup> Tennessee,<sup>26</sup> Wisconsin,<sup>27</sup> and Wyoming<sup>28</sup> have

---

17. *Wis. Gov. Signs Abortion Bill Requiring Ultrasound*, USA TODAY (July 5, 2013, 3:10 PM), <http://www.usatoday.com/story/news/nation/2013/07/05/wisconsin-abortion-ultrasound-bill/2493013>; see also PPWI to File Federal Lawsuit Against SB 206, PLANNED PARENTHOOD OF WIS., INC. (July 5, 2013), <http://www.plannedparenthood.org/Wisconsin/lawsuit-sb206-41584.htm>.

18. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 584 (5th Cir. 2012); see also Michael P. Vargo, *The Right to Informed Choice: A Defense of the Texas Sonogram Law*, 16 MICH. ST. U. J. MED. & L. 457 (2012).

19. See Matthew Ward, *Virginia Senate Passes Ultrasound Law Minus Vaginal Probe*, REUTERS (Feb. 29, 2012, 1:16 AM), <http://www.reuters.com/article/2012/02/29/us-abortion-virginia-idUSTRE81S0DR20120229>; see also ALAN COLMES, THANK THE LIBERALS FOR SAVING AMERICA (AND WHY YOU SHOULD) 119 (2012).

20. See David White, *Senator Plans to Rewrite Bill in Alabama Legislature that Would Require Ultrasounds Before Abortions*, AL.COM (Feb. 27, 2012, 5:36 PM), [http://blog.al.com/spotnews/2012/02/senator\\_plans\\_rewrite\\_of\\_ultra.html](http://blog.al.com/spotnews/2012/02/senator_plans_rewrite_of_ultra.html); see also S. 12, 2012 Leg., Reg. Sess. (Ala. 2012), available at <http://openbama.org/bill/5216>.

21. Woman's Right to Know Act, 2011 N.C. Sess. Laws 2105 (codified at N.C. GEN. STAT. § 90-21.80 to .92 (2011)), available at <http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H854v6.pdf>.

22. See, e.g., *Stuart v. Huff*, 834 F. Supp. 2d. 424 (M.D.N.C. 2011).

23. Associated Press, *Senate Passes Pair of Abortion Bills on Friday*, WBKO (Feb. 8, 2013, 10:56 AM), <http://www.wbko.com/home/headlines/Senate-Passes-Pair-of-Abortion-Bills-on-Friday--190386111.html>. But see Beth Musgrave, *Ky. House Committee Rejects Abortion Bills Senate Had Approved*, KENTUCKY.COM (Feb. 28, 2013), <http://www.kentucky.com/2013/02/28/2536358/ky-house-committee-rejects-several.html>.

24. Dan Hirschhorn, *Anti-Abortion Michigan Republicans Push for Transvaginal Ultrasound Bill*, NY DAILY NEWS (Feb. 7, 2013, 10:57 AM), <http://www.nydailynews.com/news/politics/mich-gopers-push-transvaginal-ultrasound-bill-article-1.1257778>.

25. Sam Levin, *Abortion: Democrat Keith English Wants All Women to Hear Heartbeat*, See *Ultrasound*, RIVERFRONT TIMES (Feb. 11, 2013, 8:50 AM), [http://blogs.riverfronttimes.com/dailyrft/2013/02/abortion\\_democrat\\_keith\\_english\\_ultrasound\\_bill.php](http://blogs.riverfronttimes.com/dailyrft/2013/02/abortion_democrat_keith_english_ultrasound_bill.php).

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,<sup>29</sup> but the Republican-dominated legislature overwhelmingly overrode his veto.<sup>30</sup> Despite the override, Governor Henry remarked that the Act was unconstitutional and would force Oklahoma into a potentially “futile legal battle.”<sup>31</sup> 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.”<sup>32</sup> 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.<sup>33</sup>

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

---

26. Cara Kumari, *Tenn. Bill Would Force Women to View Ultrasound Before Abortion*, WTVR.COM (Feb. 8, 2013, 12:19 PM), <http://wtvr.com/2013/02/08/tenn-bill-would-force-women-to-view-ultrasound-before-abortion>.

27. Associated Press, *Wisconsin Governor Signs Abortion Bill Requiring Ultrasound*, FOXNEWS.COM (July 5, 2013), <http://www.foxnews.com/politics/2013/07/05/wisconsin-governor-signs-abortion-bill-requiring-ultrasound/>.

28. Laura Hancock, *Wyoming Abortion Bills Focus on Heartbeats*, TRIB.COM (Jan. 13, 2013, 11:00 AM), [http://trib.com/news/state-and-regional/govt-and-politics/Wyoming-abortion-bills-focus-on-heartbeats/article\\_4402196b-fecf-539a-8704-21614ec4669d.html](http://trib.com/news/state-and-regional/govt-and-politics/Wyoming-abortion-bills-focus-on-heartbeats/article_4402196b-fecf-539a-8704-21614ec4669d.html). Both the Senate Bill and the House Bill failed to garner the necessary votes after going through a Motion to Do Pass. *Wyoming Senate Bill 88*, LEGISCAN, <http://legiscan.com/WY/bill/SF0088/2013> (last visited Dec. 16, 2013); *Wyoming House Bill 97*, LEGISCAN, <http://legiscan.com/WY/bill/HB0097/2013> (last visited Dec. 16, 2013).

29. Letter from Joel G. Kintsel, Chief Clerk, House of Representatives, to M. Susan Savage, Sec’y of State, Okla. (Apr. 27, 2010), available at <https://www.sos.ok.gov/documents/legislation/52nd/2010/2R/HB/2780.pdf>.

30. Letter from Brad Henry, Governor, Okla., to House of Representatives, Okla. (Apr. 23, 2010), available at <https://www.sos.ok.gov/documents/legislation/52nd/2010/2R/HB/2780.pdf>; see also James C. McKinley, Jr., *Oklahoma Legislature Overrides Governor’s Vetoes to Approve Anti-Abortion Bills*, N.Y. TIMES, Apr. 28, 2010, at A14, available at <http://www.nytimes.com/2010/04/28/us/28abortion.html>. At the same time, the Oklahoma Legislature also overrode a veto regarding a bill that would protect doctors who knowingly withheld information about a patient’s pregnancy. *Id.*

31. Joe Sterling & Catherine E. Shoichet, *Oklahoma Senate Overrides Governor’s Vetoes to Pass Abortion Laws*, CNN (Apr. 27, 2010, 11:27 PM), <http://www.cnn.com/2010/POLITICS/04/27/oklahoma.abortion/index.html>.

32. Julie Bisbee, *New Oklahoma Abortion Law Faces Battle*, NEWSOK (last modified Apr. 28, 2010, 6:13 AM).

33. *Id.*

the Act did not require patients to view such images.<sup>34</sup> She also dismissed criticism of mandated ultrasounds and explained that many abortion providers already perform such procedures.<sup>35</sup> 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.<sup>36</sup>

As expected, this feud extended beyond the state capitol.<sup>37</sup> Abortion supporters attacked the "cruel,"<sup>38</sup> "hostile"<sup>39</sup> policy as discouraging women from seeking abortions.<sup>40</sup> Commentators also noted that the information provided by the law could "bias the listener into believing that the fetus is a baby."<sup>41</sup> The Center for Reproductive Rights objected to the Oklahoma Legislature's "audacious"<sup>42</sup> efforts to enact "the most

34. Susan Donaldson James, *Oklahoma Abortion Law: No Exceptions, Even Rape*, ABC NEWS (Apr. 29, 2010), <http://abcnews.go.com/Health/okla-abortion-law-exceptions-rape/story?id=10507849>; see also JANICE SHAW CROUSE, CHILDREN AT RISK: THE PRECARIOUS STATE OF CHILDREN'S WELL-BEING IN AMERICA 74 (2010) (describing how ultrasound procedures provide "increased awareness of the humanity of those babies in the womb" and often change women's minds regarding abortion).

35. Associated Press, *Judge Strikes Down Oklahoma Ultrasound Law*, CBS NEWS (Mar. 28, 2012, 6:26 PM), [http://www.cbsnews.com/8301-250\\_162-57406036/judge-strikes-down-oklahoma-ultrasound-law](http://www.cbsnews.com/8301-250_162-57406036/judge-strikes-down-oklahoma-ultrasound-law).

36. Karla Dial, *Oklahoma Judge Blocks Ultrasound Law*, CITIZENLINK (Mar. 29, 2012), <http://www.citizenlink.com/2012/03/29/oklahoma-judge-blocks-ultrasound-law>; see also R. ALBERT MOHLER, JR., CULTURE SHIFT: THE BATTLE FOR THE MORAL HEART OF AMERICA 105 (2011) (explaining how a woman changed her mind about abortion after viewing an ultrasound image of her fetus).

37. See, e.g., Rachel Benson Gold & Elizabeth Nash, *Troubling Trend: More States Hostile to Abortion Rights as Middle Ground Shrinks*, 15 GUTTMACHER POL'Y REV. 14, 17 (2012) (noting that Oklahoma is now "among the states most hostile to abortion rights"), available at <https://www.guttmacher.org/pubs/gpr/15/1/gpr150114.pdf>.

38. Kevin Sack, *In Ultrasound, Abortion Fight Has New Front*, N.Y. TIMES, May 28, 2010, at A1, available at <http://www.nytimes.com/2010/05/28/health/policy/28-ultrasound.html>.

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").

40. James C. McKinley, Jr., *Strict Abortion Measures Enacted in Oklahoma*, N.Y. TIMES, Apr. 28, 2010, at A14, available at [http://www.nytimes.com/2010/04/28/us/28abortion.html?\\_r=0](http://www.nytimes.com/2010/04/28/us/28abortion.html?_r=0).

41. James Rocha, *Autonomous Abortions: The Inhibiting of Women's Autonomy Through Legal Ultrasound Requirements*, 22 KENNEDY INST. ETHICS 35, 45 (2012), available at [http://muse.jhu.edu/journals/kennedy\\_institute\\_of\\_ethics\\_journal/v022/22.1.rocha.pdf](http://muse.jhu.edu/journals/kennedy_institute_of_ethics_journal/v022/22.1.rocha.pdf).

42. Julie Bisbee, *New Abortion Laws Draw Fans, Foes in Oklahoma*, NEWSOK (May

extreme ultrasound law in the country,<sup>43</sup> and the national media opined that the “restrictive”<sup>44</sup> law would force sexual assault victims to “undergo a second trauma.”<sup>45</sup> 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.”<sup>46</sup> 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.<sup>47</sup> 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

---

30, 2010), <http://newsok.com/new-abortion-laws-draw-fans-foes-in-oklahoma/article/3464976>.

43. *Center for Reproductive Rights Files Lawsuit Against Oklahoma’s Ultrasound Requirement*, CENTER FOR REPROD. RTS. (Apr. 27, 2010), <http://reproductiverights.org/en/press-room/center-for-reproductive-rights-files-lawsuit-against-oklahoma%E2%80%99s-ultrasound-requirement>.

44. Gabriela Resto-Montero, *Controversial Abortion Ultrasound Law Struck Down*, MSNBC (Dec. 5, 2012, 11:52 AM), <http://tv.msnbc.com/2012/12/05/controversial-abortion-ultrasound-law-struck-down>.

45. James, *supra* note 34.

46. Scott W. Gaylord & Thomas J. Molony, *Ultrasound Laws Are Constitutional*, PHILLY.COM (Mar. 25, 2012), [http://articles.philly.com/2012-03-25/news/31236850\\_1\\_ultrasound-images-abortion-fetal-images](http://articles.philly.com/2012-03-25/news/31236850_1_ultrasound-images-abortion-fetal-images). For additional discussion regarding the constitutionality of such laws, see the editorial written by Professors Gaylord and Molony. *Id.*

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.<sup>48</sup> 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.<sup>49</sup> Accordingly, Professor Weitz believes women should have the opportunity to view ultrasound images of their fetuses.<sup>50</sup> 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."<sup>51</sup> 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.<sup>52</sup>

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.<sup>53</sup> Further, 83.6% of those same women responded that the experience did not make their decision more emotionally difficult.<sup>54</sup> Rather than feeling compelled to change their minds, all 254 women who viewed the images proceeded with their abortions.<sup>55</sup> 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

---

48. 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)).

49. *Ongoing Study: Mandatory Ultrasounds Have Very Little Impact on Abortion Decisions*, WOMEN'S LAW PROJECT (Mar. 13, 2012, 12:45 PM), <http://womenslawproject.wordpress.com/2012/03/13/ongoing-study-mandatory-ultrasounds-have-very-little-impact-on-abortion-decisions>.

50. Sofia Resnick, *Ongoing Study Shows Ultrasounds Do Not Have Direct Impact on Abortion Decision*, AM. INDEP. (Feb. 6, 2012, 9:00 AM), <http://americanindependent.com/210411/ongoing-study-shows-ultrasounds-do-not-have-direct-impact-on-abortion-decision>; see also TRACY A. WEITZ, *THE MISUSE OF SCIENCE IN ABORTION RESTRICTIONS* (Aug. 31, 2010), [http://www.ansirh.org/\\_documents/research/Weitz.HastingsTalk.8.30.10.pdf](http://www.ansirh.org/_documents/research/Weitz.HastingsTalk.8.30.10.pdf).

51. *Id.*

52. Dee J. Hall, *Legislation Requiring Ultrasounds Before Abortion Multiply, but Their Impact Is Disputed*, WIS. ST. J. (June 14, 2013, 6:15 PM), [http://host.madison.com/news/local/govt-and-politics/legislation-requiring-ultrasounds-before-abortion-multiply-but-their-impact-is/article\\_7f93646b-dd79-5db5-9baa-02e2b550ad3e.html](http://host.madison.com/news/local/govt-and-politics/legislation-requiring-ultrasounds-before-abortion-multiply-but-their-impact-is/article_7f93646b-dd79-5db5-9baa-02e2b550ad3e.html).

53. 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).

54. *Id.*

55. *Id.* at 99, 101.

30% to 70% of patients asked to view images of their fetuses.<sup>56</sup> Of those women, none reportedly felt compelled to change their decisions.<sup>57</sup> In fact, a Virginia abortion provider indicated that only about 10% of patients expressed emotional distress during the ultrasound procedure,<sup>58</sup> and a Texas abortion provider explained that his clinic's abortion rates had not changed since Texas had enacted a mandatory ultrasound law.<sup>59</sup> Another Texas practitioner found that patients were more upset with the law's 24-hour waiting period than the ultrasound requirement.<sup>60</sup>

#### 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.<sup>61</sup> 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.<sup>62</sup> In response, the district court temporarily enjoined the Act.<sup>63</sup>

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.<sup>64</sup> The court held that the Act violated two provisions of the Oklahoma Constitution.<sup>65</sup> First, the Act was an

---

56. STEINBOCK, *supra* note 47, at 37.

57. *Id.*

58. Reilly Moore, *Virginia Forced Ultrasound Law Interferes with Health Services, Clinic Director Says*, RH REALITY CHECK (Aug. 16, 2012, 8:34 PM), <http://www.rhrealitycheck.org/article/2012/08/16/ultrasound-law-interferes-with-health-services-clinic-says>.

59. James Eng, *Texas Begins Enforcing Strict Anti-Abortion Sonogram Law*, NBC NEWS (Feb. 8, 2012, 6:49 PM), [http://usnews.nbcnews.com/\\_news/2012/02/08/10355099-texas-begins-enforcing-strict-anti-abortion-sonogram-law](http://usnews.nbcnews.com/_news/2012/02/08/10355099-texas-begins-enforcing-strict-anti-abortion-sonogram-law).

60. Alex Branch, *Patients Often Unhappy with New Texas Sonogram Law, Abortion Providers Say*, MOM2MOMDFW.COM (Mar. 1, 2012), <http://www.star-telegram.com/2012/02/29/3774079/patients-often-unhappy-with-new.html>.

61. See Amended Petition at 2, *Nova Health Sys. v. Pruitt*, No. CV-2010-533 (Dist. Ct. Okla. Cnty. May 27, 2011).

62. *Id.* at 11, 13.

63. Order Granting Summary Judgment Declaring Ultrasound Act as an Unconstitutional Special Law and Permanent Injunction Preventing the Enforcement of the Ultrasound Act at 2, *Nova Health Sys. v. Pruitt*, CV-2010-533 (Dist. Ct. Okla. Cnty. May 27, 2011) [hereinafter Order Granting Permanent Injunction].

64. *Id.*

65. *Id.* at 1.

2013]

*Confused by Casey?*

301

impermissible special law<sup>66</sup> that affected only abortion providers and patients where a general law could have been enacted.<sup>67</sup> Second, it improperly granted a private right of action to only a limited class.<sup>68</sup> Because the court deemed the Act unconstitutional, the court declined to consider the plaintiffs' other arguments.<sup>69</sup>

#### 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<sup>70</sup> affirmed the district court but on different grounds.<sup>71</sup> 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 *Planned Parenthood v. Casey*, which was applied in this Court's recent decision of *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:

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

---

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.

67. Order Granting Permanent Injunction, *supra* note 63, at 1.

68. *Id.*

69. *Id.* at 2.

70. Justice Gurich recused herself from the case. *Nova Health Sys. v. Pruitt*, 2012 OK 103, ¶ 3, 292 P.3d 28, 29 (per curiam).

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 *Casey*. 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.<sup>72</sup>

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

---

72. *Id.* ¶¶ 1–3, 292 P.3d at 28–29 (citations omitted).

73. JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 237–38 (4th ed. 2000).

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.

Okla. Sup. Ct. R. 1.200(a).

2013]

*Confused by Casey?*

303

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*.<sup>75</sup>

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.<sup>76</sup> 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.<sup>77</sup> 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*<sup>78</sup> 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).<sup>79</sup> Like the Ultrasound Act, the Pennsylvania Act mandated the conveyance of certain information to women who sought abortions.<sup>80</sup> It also implemented a 24-hour waiting period before an abortion could occur.<sup>81</sup> 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.<sup>82</sup>

The *Casey* plurality began its analysis by upholding *Roe v. Wade* based on concepts of individual liberty and stare decisis.<sup>83</sup> It explained that abortion, like other recognized conduct regarding family

---

75. *Nova Health Sys.*, 2012 OK 103, ¶¶ 1–2, 292 P.3d at 28.

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

77. See Associated Press, *Oklahoma Court Says Abortion Laws Unconstitutional*, USA TODAY (Dec. 4, 2012, 7:33 PM), <http://www.usatoday.com/story/news/nation/2012/12/04/court-abortion-laws-unconstitutional/1747115> (outlining reaction to *Nova Health Systems* by pro-life groups).

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

79. *Casey*, 505 U.S. at 844.

80. *Id.*

81. *Id.*

82. *Id.* at 899.

83. *Id.* at 853–55.

development, is protected by the Fourteenth Amendment.<sup>84</sup> Regardless of the Justices' personal feelings toward abortion, adherence to precedent was vital because there was no valid reason to overturn *Roe*.<sup>85</sup> Notably, the Court preserved what it referred to as *Roe*'s essential, three-part holding.<sup>86</sup> 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.<sup>87</sup> 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."<sup>88</sup> 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."<sup>89</sup>

The Court emphasized that these precepts must coexist;<sup>90</sup> however, it criticized *Roe*'s trimester framework, which allowed only minimal regulation during the first months of pregnancy.<sup>91</sup> While states could act to protect a woman's health during the second trimester, they could not advance an interest in fetal life.<sup>92</sup> 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.<sup>93</sup> The plurality found this structure to be incorrect because it constrained a state's interest in fetal life.<sup>94</sup> Instead, it explained the right to an abortion

---

84. *Id.* at 849.

85. *See id.* at 857–59.

86. *Id.* at 845–46.

87. *Id.* at 846.

88. *Id.*

89. *Id.*

90. *See id.* ("These principles do not contradict one another; and we adhere to each.").

91. *Id.* at 872.

92. *Id.*

93. *Id.*

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.

*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 . . .").

2013]

*Confused by Casey?*

305

as “the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”<sup>95</sup> 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.<sup>96</sup> In other words, regulations must be calculated to inform, rather than hinder, the abortion decision.<sup>97</sup> Statutes that present a “substantial obstacle” between a woman and an abortion are an undue burden and consequently are not permissible.<sup>98</sup>

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.<sup>99</sup>

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.<sup>100</sup> The plurality deferred to the Third Circuit Court of Appeals, which previously found that the term “serious risk” addressed such conditions.<sup>101</sup> Consequently, the Court deemed the definition acceptable.<sup>102</sup>

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.<sup>103</sup> Further, patients were to be notified of state-published materials that described the fetus and resources regarding

---

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.<sup>104</sup> The Court explained that such disclosures were not designed to dissuade an abortion choice;<sup>105</sup> rather, they constituted the “giving of truthful, nonmisleading information,” which many women consider vital to their decision.<sup>106</sup> 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.<sup>107</sup>

Likewise, the plurality found the Act’s 24-hour waiting period reasonable, especially considering the importance of the underlying decision.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> Accordingly, the Court deemed the stipulation a reasonable exercise of a state’s interest in protecting fetal life.<sup>111</sup>

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,<sup>112</sup> even though the Act allowed limited exceptions to this requirement, including instances of abuse and medical emergencies.<sup>113</sup> 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.

2013]

*Confused by Casey?*

307

the abortion, and battered women were unlikely to seek exceptions to the provision.<sup>114</sup>

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.<sup>115</sup> 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.<sup>116</sup> Accordingly, the Court deemed the notification requirement an undue burden and found it unconstitutional.<sup>117</sup>

C. *In re* Initiative Petition No. 349, State Question No. 642

Weeks after the United States Supreme Court issued *Casey*, the Oklahoma Supreme Court evaluated a proposed ballot measure known as Initiative Petition No. 349.<sup>118</sup> 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.<sup>119</sup> 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.<sup>120</sup>

The majority analyzed the petition largely in light of *Casey* and quoted the three-part holding of *Roe*, which recognized a state’s interest in protecting fetal life.<sup>121</sup> However, portions of the Initiative Petition opinion present *Casey* as a decision that expanded abortion rights. For instance, the Court highlighted that *Casey*

reiterates, and perhaps strengthens, the central premise of *Roe*—

---

114. *Id.* at 888–90.

115. *Id.* at 893–94.

116. *Id.*

117. *Id.* at 898. The Court also upheld a provision of the Pennsylvania Act, which mandated that unemancipated minors obtain consent from at least one of their parents before having an abortion. *Id.* at 899. However, because the Ultrasound Act does not contain a similar requirement, this aspect of the Pennsylvania Act will not be discussed in this Article.

118. *In re* Initiative Petition No. 349, State Question No. 642, 1992 OK 122, 838 P.2d 1.

119. See OKLA. CONST. art. V, §§ 1–2.

120. *In re Initiative Petition No. 349*, 1992 OK 122, ¶ 11, 838 P.2d at 6 (footnote omitted).

121. *Id.* ¶ 10, 838 P.2d at 6.

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."<sup>122</sup>

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*.<sup>123</sup>

*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."<sup>124</sup> 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"<sup>125</sup> and granted legal rights to these "persons."<sup>126</sup>

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.<sup>127</sup> The Court found the petition to be facially unconstitutional under *Casey* and struck the measure from the ballot.<sup>128</sup> Although the Court did not fully explain its reasoning, it is fair to assume

---

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.

124. *In re Initiative Petition No. 395, State Question No. 761*, 2012 OK 42, 286 P.3d 637.

125. State Question No. 761, Initiative Petition No. 395 (Okla. 2012), available at <https://www.sos.ok.gov/documents/questions/761.pdf>.

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.

2013]

*Confused by Casey?*

309

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*.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup> 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.

130. In response to the Oklahoma Supreme Court's ruling, Tony Lauinger, Oklahomans for Life's chairman, asserted that the *Nova Health Systems* opinion misinterpreted *Casey* because "[t]he [Ultrasound Act] does not prohibit abortion. It regulates abortion." Associated Press, *Oklahoma Court Says Abortion Laws Unconstitutional*, USA TODAY (Dec. 4, 2012, 7:33 PM), <http://www.usatoday.com/story/news/nation/2012/12/04/court-abortion-laws-unconstitutional/1747115>.

131. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

function arising from continued pregnancy.<sup>132</sup>

Except for the Ultrasound Act's exclusion of emotional, psychological, and mental conditions, the definitions are essentially identical.<sup>133</sup> Despite the failure to include such factors, the meaning appears to comport with *Casey* because it provides exceptions to generally protect women's health and safety.<sup>134</sup> As the *Casey* plurality recognized, abortion carries inherent psychological burdens for almost everyone affected by the procedure.<sup>135</sup> 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,<sup>136</sup> which has stood in similar form since 2005.<sup>137</sup>

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,<sup>138</sup>

---

132. H.B. 2780, 52nd Leg. § 1.5 (2010) (codified at OKLA. STAT. tit. 63, § 1-738.1A (OSCN through 2010 Leg. Sess.)), available at <http://www.oscn.net/applications/oscn/DeliverDocument.asp?citeid=460488>.

133. Compare H.B. 2780, 52nd Leg. § 1.5, with *Casey*, 505 U.S. at 879.

134. See *Casey*, 505 U.S. at 879–80.

135. The United States Supreme Court explained:

[Abortion] is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.

*Id.* at 852.

136. 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.”).

137. H.B. 1686, 50th Leg. § 6.4 (2005) (codified at OKLA. STAT. tit. 63, § 1-738.1A), available at <http://www.oscn.net/applications/oscn/DeliverDocument.asp?citeid=450160>.

138. For example, the National Organization for Women's president, Terry O'Neill, has equated mandatory ultrasound laws to “state-sponsored rape.” Terry O'Neill, *Mandatory Ultrasound Laws Violate Women's Rights and Bodies*, HUFFINGTON POST (Feb. 22, 2012, 10:03 AM), [http://www.huffingtonpost.com/terry-oneill/mandatory-ultrasound-laws\\_b\\_1300219.html](http://www.huffingtonpost.com/terry-oneill/mandatory-ultrasound-laws_b_1300219.html).

2013]

*Confused by Casey?*

311

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

---

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).

140. Amended Petition, *supra* note 61, at 8.

141. Alana Goodman, *Planned Parenthood Says It Won't Do Abortions Without Ultrasound*, COMMENT. MAG. (Feb. 22, 2012, 3:32 PM), <http://www.commentarymagazine.com/2012/02/22/planned-parenthood-abortion-ultrasounds>. Planned Parenthood of Central North Carolina spokeswoman, Paige Johnson, explained that the organization requires an ultrasound before every abortion procedure. *NC Abortion Ultrasound Law at Issue in Campaign Ad*, WRAL.COM (Oct. 11, 2012), <http://www.wral.com/n-c-abortion-ultrasound-law-at-issue-in-campaign-ad/11648211>. The Planned Parenthood website indicates that patients must undergo a physical exam during a clinical abortion, "which may include an ultrasound." *In-Clinic Abortion Procedures*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.asp> (last visited Dec. 18, 2013).

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.

Carole Joffe, *Crying Rape: Pro-Choice Advocates Should Quit Calling Ultrasounds Rape*, SLATE (Feb. 29, 2012, 12:30 PM), [http://www.slate.com/articles/double\\_x/doublex/2012/02/transvaginal\\_ultrasounds\\_why\\_pro\\_choice\\_advocates\\_shouldn\\_t\\_call\\_them\\_rape.html](http://www.slate.com/articles/double_x/doublex/2012/02/transvaginal_ultrasounds_why_pro_choice_advocates_shouldn_t_call_them_rape.html).

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.<sup>143</sup> 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.<sup>144</sup> Recently, the Fifth Circuit Court of Appeals applied similar reasoning in upholding Texas's pre-abortion ultrasound law.<sup>145</sup> 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.<sup>146</sup>

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.<sup>147</sup> The *Casey* plurality found that such a barrier was no different than a ban on the practice.<sup>148</sup> 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.<sup>149</sup> The fact that a vast majority of women who view such images nonetheless terminate their pregnancies proves that such laws do not

---

143. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

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.

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.<sup>150</sup> 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.<sup>151</sup> 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.<sup>152</sup> 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.<sup>153</sup> 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."<sup>154</sup> 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."<sup>155</sup> She also opined that the decision "resoundingly affirmed . . . that government has no place in [a woman's reproductive] decisions."<sup>156</sup> 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

---

153. See *Casey*, 505 U.S. at 845–46.

154. Tim Talley, *Oklahoma Abortion Laws Unconstitutional, State Supreme Court Rules*, HUFFINGTON POST (Dec. 4, 2012, 6:46 PM), [http://www.huffingtonpost.com/2012/12/04/oklahoma-abortion-laws\\_n\\_2240761.html](http://www.huffingtonpost.com/2012/12/04/oklahoma-abortion-laws_n_2240761.html).

155. Talley, *supra* note 154.

156. *Oklahoma Supreme Court Strikes Down State Law Requiring Ultrasound Prior to Abortion*, CHRISTIAN NEWS NETWORK (Dec. 7, 2012), <http://christiannews.net/2012/12/07/oklahoma-supreme-court-strikes-down-state-law-requiring-ultrasound-prior-to-abortion>.

2013]

*Confused by Casey?*

315

contraception, abortion, fertility treatments and prenatal care.”<sup>157</sup>

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.”<sup>158</sup> One Oklahoma physician penned an op-ed that scolded the Attorney General for “stubbornly trying to challenge unanimous Oklahoma Supreme Court decisions.”<sup>159</sup> The physician further asserted that lawmakers should be forced to consult a constitutional attorney before introducing similar legislation.<sup>160</sup> Other commentators and politicians categorized the Ultrasound Act as part of the “war on women.”<sup>161</sup> While several websites celebrated the decision, most either ignored the Court’s rationale<sup>162</sup> or repeated the Court’s vague obligation to follow the Supreme Court’s precedent.<sup>163</sup>

---

157. Jerry Bohnen, *The Next Move: Both Sides in the Abortion Debate Consider Their Options After Recent Rulings by the Oklahoma Supreme Court*, OKLA. GAZETTE (Feb. 6, 2013), <http://www.okgazette.com/oklahoma/article-17523-the-next-move.html>.

158. *Oklahoma High Court Tosses Two Abortion Laws*, TULSA WORLD (Dec. 6, 2012, 3:18 AM), [http://www.tulsaworld.com/article.aspx/Oklahoma\\_high\\_court\\_tosses\\_two\\_abortion\\_laws/20121206\\_11\\_a16\\_itcome838177](http://www.tulsaworld.com/article.aspx/Oklahoma_high_court_tosses_two_abortion_laws/20121206_11_a16_itcome838177).

159. Eli Resheef, *OKC Doctor: Lawmakers Should Check with Constitutional Lawyers First*, NEWSOK (Dec. 16, 2012), <http://newsok.com/okc-doctor-lawmakers-should-check-with-constitutional-lawyers-first/article/3737564>.

160. *Id.*

161. *See Week of Mar. 5th–Mar. 8th, 2012*, weekly submission to *Target States, TRUST WOMEN AND CHANGE THE WORLD*, <http://www.trustwomenpac.org/target-states/oklahoma/oklahoma-state-legislation> (last visited Dec. 19, 2013); *see also* Erin Gloria Ryan, *Oklahoma Judge Declares Awful Ultrasound Law Unconstitutional*, JEZEBEL (Mar. 19, 2012, 2:30 PM), <http://jezebel.com/5897522/oklahoma-judge-declares-awful-ultrasound-law-unconstitutional>; Tara Culp-Ressler, *Wisconsin Republicans: Forcing Women to Undergo Transvaginal Ultrasounds Is Our ‘Priority,’* THINK PROGRESS (Feb. 15, 2013, 9:00 AM), <http://thinkprogress.org/health/2013/02/15/1597701/Wisconsin-forced-transvaginal-ultrasound/?mobile=nc> (discussing the Wisconsin ultrasound law, which was introduced “at the height of the War on Women”).

162. *See* *five*, *OK Supreme Court Stops Abortion Restrictions*, DAILY KOS (Dec. 5, 2012, 10:07 AM), <http://www.dailykos.com/story/2012/12/05/1167432/-OK-Supreme-Court-Stops-Abortion-Restrictions>; *see also* Resto-Montero, *supra* note 44; Associated Press, *Oklahoma: Abortion Restrictions Struck Down*, N.Y. TIMES (Dec. 4, 2012), <http://www.nytimes.com/2012/12/05/us/oklahoma-abortion-restrictions-struck-down.html>.

163. *See* Karen Gullo, *Oklahoma High Court Says Abortion Laws Unconstitutional*, BLOOMBERG (Dec. 4, 2012, 6:47 PM), <http://www.bloomberg.com/news/2012-12-05/oklahoma-high-court-says-abortion-laws-unconstitutional.html>; Beth Brogan, *Oklahoma Supreme Court Overturns Laws Restricting Reproductive Rights: Rulings*

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.<sup>164</sup> 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.<sup>165</sup>

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.<sup>166</sup> 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.”<sup>167</sup>

---

*Represent 'a Sweeping and Unequivocal' Win for Women's Health and Pro-Choice Advocates*, COMMON DREAMS (Dec. 6, 2012), <https://www.commondreams.org/headline/2012/12/06-7>; Gene Perry, *In the Know: Oklahoma Supreme Court Rules Two Anti-Abortion Laws Unconstitutional*, OK POLICY BLOG (Dec. 5, 2012), <http://okpolicy.org/in-the-know-oklahoma-supreme-court-rules-two-anti-abortion-laws-unconstitutional>; Sarah, *Anti-Choice Laws Defeated in Oklahoma*, FEMINISTS FOR CHOICE (Dec. 5, 2012), <http://feministsforchoice.com/anti-choice-laws-defeated-in-oklahoma.htm>.

164. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 572, 578 (5th Cir. 2012).

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

[I]t is especially important for litigants, especially losing litigants, 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.

Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 *GEO J. LEGAL ETHICS* 237, 252–53 (2008).

166. SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-1170.htm> (last visited Dec. 19, 2013).

167. Greg Stohr, *Oklahoma Rejected by Top Court on Ultrasound Abortion Law*, BLOOMBERG POLITICS (Nov. 12, 2013, 12:01 PM), <http://www.bloomberg.com/news/2013-11-12/oklahoma-rejected-by-top-court-on-ultrasound-abortion-law.html>.

2013]

*Confused by Casey?*

317

## VII. CONCLUSION

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.<sup>168</sup> 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.