No. 12-1170

IN THE

Supreme Court of the United States

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

Petitioners,

v.

NOVA HEALTH SYSTEMS D/B/A REPRODUCTIVE SERVICES, ON BEHALF OF ITSELF AND ITS PATIENTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Oklahoma law prohibits a woman from having an abortion unless her physician first subjects her to an ultrasound examination, typically requiring the insertion of a vaginal probe; displays the resulting images; describes the images in a manner prescribed by statute; and observes a one-hour waiting period. This process is mandatory except in medical emergencies, even if the woman objects, and even if the doctor believes that delivering the compelled narration would violate medical ethics or cause harm to the patient.

The question presented is whether the Oklahoma Supreme Court correctly concluded that this statute imposes an undue burden on the decision whether to terminate a pregnancy under *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992).

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INTRODUCTION

The decision below meets none of this Court's traditional criteria for review. It concerns an Oklahoma law that is rare if not unique in the nation, and an issue that has not split lower courts.

This is no garden-variety "informed consent" law. It does not merely make information available to a woman who wishes to terminate her pregnancy; it compels women to undergo an invasive medical examination and listen to a state-scripted narrative even if they object. Oklahoma already had extensive informed-consent requirements in effect when this law was enacted, including a requirement that women seeking abortions be informed of the availability of ultrasound imaging should they choose to utilize it. Under its revised law, Oklahoma now *requires* a woman to undergo an ultrasound examination and, while she is physically exposed during this often invasive and uncomfortable procedure, to listen to a narrative designed to discourage her from proceeding with an abortion. The ultrasound is required even when the doctor deems the procedure medically unnecessary (for instance, if a referring physician has already performed an ultrasound examination), or detrimental to the patient. The woman may avert her *eyes* from the ultrasound images, but the law does not allow her to avoid listening to the required narration while on the examination table.

Largely because few if any states have enacted extraordinary laws like this one, there is no conflict of authority. Tellingly, Petitioners (hereinafter, "Pruitt") devote only secondary attention to this

principal criterion for plenary review. Late in his Petition, Pruitt asserts (Pet. 23) that the decision below "directly conflicts" with the Fifth Circuit. But the Fifth Circuit addressed only a First Amendment challenge, whereas the decision below concluded that the Oklahoma statute poses an undue burden in violation of the Due Process Clause. No other federal court of appeals has addressed a mandatory ultrasound law, much less one like Oklahoma's—which is why even Pruitt can only assert (Pet. 27) that the decision below is "in tension" with the Eighth Circuit, which it is not.

The issue presented by the Petition is unsuitable for review for other reasons too. *First*, there is a serious impediment to review because the Oklahoma trial court relied upon an adequate and independent state-law ground for invalidating the statute—namely, Oklahoma's constitutional prohibition against "special laws." That decision remains in place, undisturbed by the Oklahoma Supreme Court, and at a minimum this Court would have to address this threshold jurisdictional question before it could reach the merits. *Second*, the decision below was correct. Oklahoma's unusual law imposes serious burdens on a woman's decision whether to terminate a pregnancy. It is difficult to imagine a requirement more physically invasive than the state-mandated insertion of a medical device into one's body even when the patient and the doctor think it unnecessary. This requirement is made all the more intrusive by the mandate that while this procedure is occurring, the health-care provider must describe the ultrasound images—regardless what other information already was provided to the patient; regard-

less whether the patient objects to this visceral description; and regardless whether the doctor believes that proceeding over the patient's objection violates medical ethics or may even be harmful to the patient.

The decision of the Oklahoma Supreme Court was correct, and presents no issue of broader significance meriting this Court's review. The Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Oklahoma, like various other states, regulates the information to be provided to medical patients, including those about to undergo an abortion. This case concerns only House Bill 2780, enacted by Oklahoma in 2010, which added a mandatory ultrasound procedure to the numerous other requirements already in place under state law.

1. a. Oklahoma common law requires physicians to fully inform their patients about any medical procedure, its material risks, and any alternatives prior to performing the procedure. *See Parris v. Limes*, 277 P.3d 1259, 1263-65 (Okla. 2012); *Scott v. Bradford*, 606 P.2d 554, 556-57 (Okla. 1979). Ordinarily, however, a physician need not provide such information if doing so would not be in the patient's best interest. *Scott*, 606 P.2d at 558 ("[T]he primary duty of a physician is to do what is best for his patient and where full disclosure would be detrimental to a patient's total care and best interests a physician may withhold such disclosure, for example, where

disclosure would alarm an emotionally upset or apprehensive patient.").

b. In 2005, the Oklahoma legislature enacted an informed-consent law additionally specifying information that a physician must provide to a woman before she obtains an abortion. In particular, the doctor must provide information regarding

- "the medical risks associated with the particular abortion procedure";
- "the probable gestational age of the unborn child at the time the abortion is to be performed";
- the availability of "ultrasound imaging and heart tone monitoring that enable the pregnant woman to view her unborn child or listen to the heartbeat of the unborn child";
- the fact that "medical assistance benefits may be available for prenatal care, childbirth, and neonatal care";
- the fact that "the father is liable to assist in the support of her child"; and
- the availability of a state-created website and printed materials with information about facilities that perform ultrasounds at no cost, and which "describe the unborn child and list agencies that offer alternatives to abortion."

Okla. Stat. tit. 63, § 1-738.2(B)(1)-(B)(2) (2008). The 2005 statute also imposed a mandatory 24-

hour waiting period except in case of a medical emergency. *Id.* § 1-738.2(B)(1). The constitutionality of this law was not challenged and is not at issue here.

c. In 2010, the Oklahoma legislature enacted House Bill 2780. *See* 2010 Okla. Sess. Laws ch. 36 (codified at Okla. Stat. tit. 63, §§ 1-738.1A, 1-738.3d, 1738.3e) ("H.B. 2780" or "the Act")); Pet. App. 7-15. Its stated purpose was to enable a "woman [seeking an abortion] to make an informed decision." *Id.* § 1-738.3d(B). Above and beyond the requirements of the 2005 law, H.B. 2780 specifies that, before an abortion may be performed, the doctor must do the following:

> 1. Perform an obstetric ultrasound on the pregnant woman, using either a vaginal transducer or an abdominal transducer, whichever would display the embryo or fetus more clearly;
>
> 2. Provide a simultaneous explanation of what the ultrasound is depicting;
>
> 3. Display the ultrasound images so that the pregnant woman may view them; [and]
>
> 4. Provide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus, the presence of cardiac activity, if present and viewable, and the presence of external members and internal organs, if present and viewable.

Pet. App. 10-11 (Okla. Stat. tit. 63, § 1-738.3d(B)). The statute permits a woman to "avert[] her eyes from the ultrasound images," and forgives the woman and her physician of "any penalty if she refuses to look at the presented ultrasound images." *Id.* § 1-738.3d(C). The Act contains no similar opt-out from its other requirements, for instance, if the woman declined to listen to the mandated description. The Act imposes a waiting period of at least one hour between the narrated ultrasound and the abortion, *id.* § 1-738.3d(B), in addition to the 24-hour waiting period already required by Oklahoma law. The Act contains a carveout for a "medical emergency," *id.* § 1-738.3d(D), but that carveout expressly does not apply to any "emotional, psychological, or mental condition," *id.* § 1-738.1A(5). The Act also contains no exception for victims of rape or incest or for women seeking to terminate a pregnancy because of a fetal anomaly.

A doctor who knowingly violates the Act is subject to civil, criminal, and administrative sanctions. The doctor is guilty of a felony; his or her license to practice medicine may be revoked; and he or she is subject to an injunction, civil contempt, large monetary fines, and actual and punitive damages. *Id.* §§ 1-738.3e(B)-(E), 1-738.5(D).

2. H.B. 2780 is principally focused on ultrasound. An ultrasound is a useful tool for confirming the presence of an intrauterine pregnancy and the gestational age of the pregnancy. This information also may be obtained through other means, such as patient history, physical examination, and biochemical testing. R. on Appeal: Tab 11, Ex. 7, ¶¶ 9, 13. An

ultrasound is not necessary to safely provide abortion services. *Id.* ¶¶ 10-12 (collecting sources). Even physicians who routinely perform pre-abortion ultrasounds do not do so in every case. This is true not just when the patient objects, *see* R. on Appeal: Tab 11, Ex. 2, ¶ 6; R. on Appeal: Tab 11, Ex. 1, ¶ 8, but also when the procedure is unnecessary because a patient's referring physician already performed it, R. on Appeal: Tab 11, Ex. 2, ¶ 6.[1]

A pre-abortion ultrasound may be performed using a vaginal transducer (probe), which is inserted into a woman's vagina, or an abdominal transducer, which is pressed against a woman's abdomen. R. on Appeal: Tab 11, Ex. 7, ¶ 14. At a gestational age of seven weeks or less, a vaginal transducer generally permits better visualization of the pregnancy. *Id.* Patients typically prefer use of an abdominal transducer because it is less invasive than a vaginal probe. *Id.* ¶ 16. Under some circumstances, a physician may determine that use of a vaginal transducer is medically appropriate. *Id.* ¶ 14; R. on Appeal: Tab 16, App. 3, ¶ 10.

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[1] The documents relied upon by Petitioners' experts agree that an ultrasound should not be needlessly repeated. R. on Appeal: Tab 16, App. 3, Exs. C at 6 & F at 10; R. on Appeal: Tab 17, App. 5, Exs. B at 6 & E at 10. The Clinical Management Guidelines for Obstetrician-Gynecologists caution that "[u]ltrasonography should be performed only when there is a valid medical indication…. The use of … ultrasonography only to view the fetus … without a medical indication is inappropriate and contrary to responsible medical practice." R. on Appeal: Tab. 16, App. 3, Ex. C at 6.

3. Shortly after H.B. 2780 went into effect, Respondents Nova Health Systems and Dr. Burns (who operate two of three licensed abortion facilities in Oklahoma) and Oklahoma Coalition for Reproductive Justice (a membership organization of Oklahoma taxpayers) sought to enjoin its enforcement as violative of the Oklahoma Constitution. R. on Appeal: Tab 6, ¶¶ 49-64. Specifically, the challengers argued that H.B. 2780 violates the Oklahoma Constitution's prohibition on "special laws," *see* Okla. Const. art. V, §§ 46, 59; its guarantee of free speech, *id.* art. II, § 22; its guarantees of due process and equal protection, *id.* art. II, § 7; and its protection of inherent and fundamental rights, *id.* art. II, §§ 2, 7. R. on Appeal: Tab 6, ¶¶ 49-62.

On May 3, 2010, the Oklahoma trial court temporarily enjoined enforcement of the Act. R. on Appeal: Tab 22, ¶ 3. Following discovery, the parties cross-moved for summary judgment. The court concluded that the Act was an unconstitutional special law, issued a declaration to that effect, permanently enjoined its enforcement, and dismissed the remaining claims as moot. Pet. App. 5-6. Provisions of the Oklahoma Constitution, which have no federal analog, forbid a "special law" where a general law would suffice,[2] as well as special laws "[r]egulating the prac-

[2] *See* Okla. Const. art. V, § 59; *Reynolds v. Porter*, 760 P.2d 816, 822 (Okla. 1988) ("A statute relating to all persons or things of a class is a general law," whereas a special law "single[s] out less than an entire class of similarly affected persons or things for different treatment."); *see also, e.g.*, *Grant v. Goodyear Tire & Rubber Co.*, 5 P.3d 594, 598 (Okla. 2000).

tice or jurisdiction of … the courts."[3] The trial court determined the Act to be an unconstitutional special law in both regards. The Act unnecessarily and improperly singles out abortion patients, physicians, and sonographers with special informed-consent standards when "a general law could clearly be made applicable," and impermissibly grants a private right of action to only a subclass of medical malpractice cases. Pet. App. 5.

The Oklahoma Supreme Court affirmed "[t]he judgment of the trial court holding the enactment unconstitutional." Pet. App. 3. "Upon review of the record and the briefs of the parties," the court "determine[d that] this matter is controlled by the United States Supreme Court decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)." Pet. App. 2.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT OF AUTHORITY.

Pruitt asserts (Pet. 23-30) that the decision below conflicts with the Fifth Circuit's interlocutory decision in *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012), and is "in tension" with the Eighth Circuit's decisions in *Rounds*. *See Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (*en banc*)

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[3] Okla. Const. art. V, § 46; *Reynolds*, 760 P.2d at 822-23; *see also, e.g.*, *Zeier v. Zimmer*, 152 P.3d 861, 868-69 (Okla. 2006).

(*Rounds II*); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 653 F.3d 662 (8th Cir. 2011) (*Rounds III*); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (*en banc*) (*Rounds IV*).

A conflict this shallow does not ordinarily warrant this Court's review, even if it existed, and in fact there is no conflict at all. *Lakey* dealt exclusively with the First Amendment, not the Due Process Clause; a "conflict" does not arise merely because one court strikes a statute on one theory when another court upheld it against a different challenge. As to *Rounds*, there is good reason that even Pruitt suggests only "tension"; that statute was very different from the Oklahoma statute in ways that are directly pertinent here. There is no conflict, and certainly none warranting this Court's attention.

A. Pruitt catalogues supposed similarities between the Oklahoma Act and the Texas statute at issue in *Lakey* (Pet. 23-24); notes that the Fifth Circuit "upheld the constitutionality of the Texas ultrasound law" (Pet. 24); and asserts that "the Oklahoma Supreme Court ruled directly opposite" (Pet. 25). What he does not say, however, is that in *Lakey*, the claim before the Fifth Circuit was that Texas's mandatory ultrasound act violated the First Amendment, whereas the decision below concerned the Due Process Clause.[4]

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[4] Indeed, in at least one place, Pruitt insinuates that *Lakey* resolved a Due Process challenge as well. Pet. 29 ("*As in Lakey*, the plaintiffs in *Rounds* contended that the disclosures … unduly burdened a woman's right to have an abortion." (emphasis added)).

Specifically, the argument in *Lakey* was that compelling physicians to display ultrasound images and describe the embryo or fetus to the pregnant woman amounted to unconstitutional coercion of speech. 667 F.3d at 574; *see generally id.* at 575-76 (discussing the parameters of the physician's right not to speak, and the scope of the government's own "voice and regulatory authority"). The Fifth Circuit held, on the limited evidentiary record before it, that the plaintiffs had not demonstrated "a likelihood of success on the merits" of their First Amendment claim sufficient to justify a preliminary injunction. *Id.* at 580.[5] But the Fifth Circuit expressly declined to address the Due Process Clause, because the plaintiffs did "not contend that the [challenged] disclosures inflict an unconstitutional burden on a woman's substantive due process right to obtain an abortion." *Id.* at 577. Here, the Oklahoma Supreme Court did not address the First Amendment; rather, on a full evidentiary record, it determined that the challenged statute imposed an undue burden on the decision to terminate a pregnancy in violation of the Due Process Clause. Pet. App. 2 ("[T]his matter is controlled by … *Planned Parenthood v. Casey*.").[6] An

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[5] The Fifth Circuit also rejected a vagueness challenge. *Lakey*, 667 F.3d at 584.

[6] That the Oklahoma Supreme Court was invoking *Casey*'s Due Process holding is confirmed by its citation to *In re Initiative No. 395*, 2012 OK 42, *cert. denied sub nom. Personhood Okla. v. Barber*, 81 U.S.L.W. 3065 (U.S. Oct. 29, 2012) (No. 12-145). That case concerned Oklahoma's "personhood" amendment, and the legal challenge to that provision arose under the Due Process Clause. *See* Pet. for Writ of Certiorari at 5, *Personhood Okla. v. Barber*, 133 S. Ct. 528 (2012) (No. 12-145).

interlocutory decision under the First Amendment does not conflict with a final decision under the Due Process Clause.[7]

Any potential conflict is further diminished by key differences between the Oklahoma and Texas statutes. The Texas law at issue in *Lakey* is less onerous than H.B. 2780 in critical respects. For example, unlike the Oklahoma Act, the Texas law does not mandate the use of a vaginal probe. *See* Tex. Health & Safety Code Ann. § 171.012(a)(4) (West 2011). Also, Texas's law provides exceptions for women in particularly sensitive circumstances, such as victims of rape, minors, and women who have received a fetal anomaly diagnosis. *Id.* § 171.0122(d). Oklahoma provides no such exceptions.

B. The supposed "tension" between the decision below and the Eighth Circuit's decisions in *Rounds* also provides no basis for review. *Rounds* concerned a South Dakota law that requires physicians to provide certain information in writing to women seeking abortions—*viz.*, that the abortion will terminate the life of a living human being; that the woman has a relationship with that human being that is protected under the United States Constitution and South Dakota law; and, that by having an abortion, that relationship and the woman's constitutional rights

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[7] Pruitt's invocation of *Stuart v. Huff*, 834 F. Supp. 2d 424 (M.D.N.C. 2011), is unavailing for the same reason. Pet. 30-33. As Pruitt acknowledges, that district court decision concerns the First Amendment. Pet. 31. It also was an interlocutory decision concerning a preliminary injunction, which was not appealed, and the North Carolina litigation remains ongoing.

regarding it will terminate. It also requires the abortion provider to disclose all known medical risks. *See Rounds II*, 530 F.3d at 726-27.

The Eighth Circuit concluded that these written disclosure requirements do not violate the First or Fourteenth Amendments because they are analogous to the written disclosure requirements upheld in *Casey*. *See Rounds II*, 530 F.3d at 736-38; *Rounds III*, 653 F.3d at 669; *Rounds IV*, 686 F.3d at 892-93 (describing procedural history); *id.* at 906. The Oklahoma law, however, imposes requirements that are completely different, and far more burdensome, in nature. It requires a woman seeking an abortion to submit to a procedure that involves physical touching and in many cases, a deeply invasive touching of a most sensitive nature. Further, she must listen, while partially disrobed on an examination table, to an unwarranted, medically unnecessary narration even if she objects. That is utterly different from requiring a woman to accept a written document that she is free to read, or not, at her discretion. Accordingly, the Eighth Circuit's holding—that the law at issue in *Rounds* does not impose an undue burden—is not at all "in tension" with the Oklahoma Supreme Court's holding that the mandatory ultrasound law does.

* * *

As matters currently stand, few states have enacted ultrasound statutes that require an examination combined with mandatory narration, and to our knowledge, none is as onerous as Oklahoma's. Only Oklahoma, Louisiana, Texas, and North Carolina

require that women be given verbal descriptions of ultrasound images during a mandatory examination, and of those four states, only Oklahoma requires use of a vaginal probe.[8] These statutes have given rise to little litigation, and no square conflict of authority. Accordingly, at this time, the Court should follow its ordinary course and await meaningful development of the law in the lower courts.

II. THE PETITION SHOULD BE DENIED BECAUSE THIS CASE IS AN UNSUITABLE VEHICLE FOR REVIEW.

This case also presents a poor vehicle for review because it is burdened by a threshold jurisdictional defect—namely, that the judgment below rests on adequate and independent state-law grounds. *See, e.g.*, *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 502 (2012) (per curiam) (this Court has "no jurisdiction" when a state-court decision "rests on adequate and independent state grounds"); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). As noted above, the Oklahoma trial court invalidated the Act under the Oklahoma Constitution's prohibition against "special laws" and class-specific private rights of action. *Supra* at 8-9; *see* Pet. App. 5 (discussing Okla. Const. art V, §§ 46, 59). The doctrinal analysis under these state constitutional provisions is independent of federal law, and Pruitt has never suggested otherwise. Having made its state-law de-

[8] *Compare* Okla. Stat. tit. 63 § 1-738.3d, *with* La. Rev. Stat. Ann. § 40:1299.35.2(D)-(E) (2012); N.C. Gen. Stat. § 90-21-85(a) (2011); Tex. Health & Safety Code Ann. § 171.012 (West 2011).

terminations, the trial court entered a declaratory judgment that the Act "is unconstitutional under the Oklahoma Constitution and is unenforceable." Pet. App. 6.

The Oklahoma Supreme Court left that state-law judgment—the "final determination of the rights of the parties"—undisturbed. *State v. Laughlin*, 277 P.2d 683, 685 (Okla. 1954). It did not vacate the trial court's judgment, or give any indication that it had rejected the trial court's conclusions in favor of its own alternative approach. When that is what the Oklahoma Supreme Court wants to do, it says so plainly.[9] Instead, the court "affirmed" "[t]he judgment of the trial court." Pet. App. 3. True, the court opined—correctly—that the Act runs afoul of *Casey*. *Id.* But this Court "reviews judgments, not statements in opinions" and does "not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds." *Black v. Cutter Labs.*, 351 U.S. 292, 297-98 (1956); *see also FCC v. Pacifica Found.*, 438 U.S. 726, 734 (1978) (the "admonition [against reviewing statements in opinions rather than judgments] has special force when the statements raise constitutional questions, for it is our settled practice to avoid the unnecessary decision of such issues").

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[9] *See, e.g.*, *State ex rel. Fent v. State ex rel. Okla. Water Res. Bd.*, 66 P.3d 432, 435 (Okla. 2003) ("[W]e disagree with the appellate court's decision to resolve the critical issue on [state] constitutional grounds when legal relief is available on an alternative, nonconstitutional basis. We hence vacate the appellate court's opinion and affirm the summary disposition of taxpayers' claims.").

Oklahoma law confirms this understanding of the decision below. When an Oklahoma appellate court "affords no corrective relief" from the ruling of a trial court on an issue tendered for review, the trial court's ruling is "deemed to have survived appellate scrutiny and ripened into settled law." *Allen v. Lynn Hickey Dodge, Inc.*, 39 P.3d 781, 788 & n.19 (Okla. 2001) (Opala, J., concurring); *cf. Handy v. City of Lawton*, 835 P.2d 870, 873 (Okla. 1992) ("An appellate court's decision settles and determines, not only all questions actually presented, but all questions existing in the record and involved in the decision by implication."). Thus, under state law, the Oklahoma Supreme Court's overt reliance on *Casey* also brings with it acceptance of the ruling that the Act fails for the independent state constitutional reasons identified by the district court.

To the extent there is any ambiguity about the basis for the decision below, such ambiguity undermines rather than supports the case for review. Ordinarily, the Court takes cases when issues have been fully aired. Pruitt complains that the decision of the Oklahoma Supreme Court was "cursory," Pet. 12, and did not "engage with *Casey*'s reasoning," *id.* at 14. But this Court does not sit as a schoolmarm to supervise courts that fail to show their work, and particularly not the highest court of a sovereign state. The Oklahoma Supreme Court has proven willing to apply *Casey*'s undue-burden standard both to uphold and to overturn statutes of that state. *Compare Davis v. Fieker*, 952 P.2d 505, 515 (Okla. 1998) (holding that plaintiffs failed to demonstrate that a statute requiring previability abortions to be performed in licensed medical facilities imposes an

undue burden), *with In re Initiative Petition No. 349, State Question No. 642*, 838 P.2d 1, 6-7 (Okla. 1992) (holding that a complete ban on previability abortion subject only to narrow exceptions violates the U.S. Constitution). And here, "[u]pon review of the record and the briefs of the parties," Pet. App. 2, the court determined that Oklahoma's statute is unconstitutional. Not only does this ruling create no conflict of authority, and not only is the decision burdened by a jurisdictional defect that may foreclose review; as discussed next, it was entirely correct.

III. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS.

Review also is unwarranted because Oklahoma's intrusion into a woman's bodily autonomy unconstitutionally burdens the determination whether to terminate a pregnancy.

"[T]he right recognized by *Roe* is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Casey*, 505 U.S. at 875 (plurality) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). Accordingly, the Due Process Clause protects the freedom "to choose to have an abortion before viability and to obtain it without undue interference from the State." *Id.* at 846. Such an undue burden will be created by "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." *Id*. at 878.

Of particular pertinence here, "[t]he effect of state regulation on women's protected liberty is doubly deserving of scrutiny" when "the State has touched not only upon the private sphere of the family, but upon the very bodily integrity of the pregnant woman." *Casey*, 505 U.S. at 896. Such heavy scrutiny is consistent with a long line of this Court's cases, not limited to the domain of abortion, recognizing the foundational right to bodily integrity free from physical intrusion by the state except in limited and extraordinary circumstances.[10]

The Oklahoma Act mandates a direct invasion of a woman's body. In most cases, complying with the Act will require inserting a medical instrument into the woman's vagina. Unique among state statutes compelling pre-abortion ultrasound, the Act mandates that the ultrasound must be performed "using either a vaginal transducer or an abdominal transducer, whichever would display the embryo or fetus

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[10] *See Missouri v. McNeely*, 133 S. Ct. 1552, 1565 (2013) (plurality) ("We have never retreated … from our recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests."); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992) ("[F]orcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness."); *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 269 (1990) ("At common law, even the touching of one person by another without consent and without legal justification was a battery…. This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment."); *Rochin v. California*, 342 U.S. 165, 172 (1952) ("forcible extraction of [criminal suspect's] stomach's contents" "shocks the conscience" and violates due process).

more clearly." Okla. Stat. tit. 63, § 1-738.3d(B)(1). Approximately 62% of abortions occur before the ninth week of pregnancy, *see* Centers for Disease Control & Prevention, *Abortion Surveillance—United States, 2006*, Morbidity & Mortality Weekly Report, Nov. 27, 2009, at 1, and at gestational ages of seven weeks or less, a vaginal transducer typically will "display the embryo or fetus more clearly," *see supra* at 7.

Thus, under Oklahoma law, the woman will have to undergo a procedure in which she is required to undress from the waist down and then lie on a table with her knees bent, her feet likely in stirrups. The doctor or technician will cover the probe with a condom and gel, insert it into the woman's vagina, and then move the probe "around the area" to get the clearest image of the pelvic organs. *See* NIH.gov, *Transvaginal Ultrasound*, http://www.nlm.nih.gov/medlineplus/ency/article/003779.htm. Abdominal ultrasound, while less invasive than the vaginal procedure, also involves a physical probe of a private area. The woman must lie down and expose her abdomen. The doctor or technician then applies gel to her abdomen and moves the tranducer over it. *See* NIH.gov, *Abdominal Ultrasound*, http://www.nlm.nih.gov/medlineplus/ency/article/003777.htm.

This Court has explained in another context that "an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely*, 133 S. Ct. at 1558, 1568. The relatively more minor intrusion of a warrantless blood draw, *see id.*, pales in comparison to the procedure at issue here. Oklahoma's requirements are an

affront to a woman's autonomy and bodily integrity, and "calculated to … hinder" her "free choice" at the earliest stages of her pregnancy. *Casey*, 505 U.S. at 877 (plurality).

The constitutional violation is compounded by the fact that, not only does the Act require a woman to submit to an invasive probe, even when medically unnecessary; it also compels her, during this physical intrusion, to listen "simultaneously" to a narration of the ultrasound image, and then wait an hour before undergoing the abortion procedure. Okla. Stat. tit. 63, § 1-738.3d(B). An ultrasound conducted without the narrative does not suffice under the plain text of the statute because the "simultaneous[]" narration is mandatory: Whereas the Act provides that a pregnant woman may "avert[] her eyes from the ultrasound images," and will not "be subject to any penalty" if she does so, Pet. App. 11 (Okla. Stat. tit. 63, § 1-738.3d(C)), it contains no such exception for the narrative. The Petition states (at 8) that some of Respondents' patients "chose not to listen to the medical description given by the physicians," but this inaccurately characterizes the record. Rather, one physician testified that her patients were so disturbed by the procedure that they stuck their fingers in their ears in an attempt to avoid hearing more. R. on Appeal: Tab 17, App. 21, at 102:11-14.

The Act also provides no exception for circumstances in which a doctor believes that the procedure would damage a woman's "emotional, psychological, or mental" well-being. Okla. Stat. tit. 63, § 1-738.1A(5); *compare Casey*, 505 U.S. at 882 ("It cannot be questioned that psychological well-being is a

facet of health."). Some women decide to terminate pregnancies because they were raped, or learned that the fetus has severe developmental problems. In these circumstances and others, the emotional toll that a narrated ultrasound places on a woman who has decided to terminate her pregnancy can be severe:

> Had I been required to listen to a sonographer describe my baby's image in detail—that her heart was beating, that she had ten fingers and ten toes—while knowing all the time that she had severe brain anomalies and could exist only in a chronic vegetative state, I would have been emotionally devastated. Since the anomalies couldn't be viewed by sonogram technology, the ultrasound would have misleadingly represented what appeared to be a healthy baby. Having to listen to a detailed description of the ultrasound images would have caused me to experience the shock of the diagnosis all over again, and would have intensified the feelings of grief and disappointment that I was struggling to cope with. In my opinion, such a requirement is cruel, inhuman, and degrading.

R. on Appeal: Tab 11, App. 9, ¶¶ 7-8. Unlike the regulations at issue in *Casey*, the Act "prevent[s] the physician from exercising his or her medical judgment." 505 U.S. at 884. The physical and emotional burdens imposed by this statute are not, as Pruitt puts it, "[n]on-substantial incidental effects." Pet.

14. They are precisely the sorts of "substantial obstacles" that the state cannot validly place in a woman's path, particularly during the earliest days of her pregnancy. *Casey*, 505 U.S. at 877 (plurality).

The burdens that the Act imposes on a woman's right to seek an abortion are so severe as to suggest that they have not just the effect, but indeed "the *purpose* … of presenting a substantial obstacle to a woman seeking an abortion." *Casey*, 505 U.S. at 878 (plurality) (emphasis added). That this is the Act's purpose is confirmed by the transparent claim that the statute is about "consent." Pruitt contends the Act is simply an "informed consent law substantially similar" to the one upheld in *Casey*, Pet. 14, but the Act provides little information that existing Oklahoma law (both the 2005 statute and underlying common law) did not already require doctors to provide or make available. *See supra* at 4. Oklahoma law already imposed extensive disclosure requirements, *see id.*, and indeed specifically required abortion providers to advise patients of the availability of "ultrasound imaging and heart tone monitoring that enable [her] to view her unborn child or listen to the heartbeat of the unborn child." Okla. Stat. tit. 63, § 1-738.2(B)(1)(a)(5). The classification of the Act as an "informed consent" law is particularly disingenuous in light of the fact that a woman may not withhold consent to the ultrasound for any reason.

If any law imposes an undue burden on a woman's decision whether to terminate a pregnancy, surely it is one that places the woman in a vulnerable physical state—partially naked, lying on a table, in many cases with a probe inserted into her—and

then requires her to hear a gratuitous, medically unnecessary description of the ultrasound image. Given the extreme nature of this statute, Pruitt is mistaken when he says that the decision below effectively "announce[s] … that *Casey* bars consideration of all abortion regulations, no matter how medically sound or minimally burdensome of the right recognized in *Roe v. Wade*." Pet. 18. This statute is quite unlike other abortion regulations, and the Oklahoma Supreme Court correctly concluded that "[t]he challenged measure is facially unconstitutional pursuant to *Casey*." Pet. App. 3.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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