# THE COURT TREADS LIGHTLY: WHY MANDATORY PRE-ABORTION ULTRASOUND LAWS DEMAND A MORE CONCRETE LEGAL ANALYSIS BY COURTS

***Rebecca Bucchieri***

*George Mason University School of Law, J.D. Candidate, May 2015; American University, B.A. Law and Society, Magna Cum Laude, 2012.* *I would like to thank my family and friends for their invaluable feedback and loving support.*

## INTRODUCTION

The doctor tells Ms. Jones, "Here I see a well-developed diaphragm and here I see four healthy chambers of the heart."[1] Words that should sound uplifting instead feel like punishment. The doctor continues to describe the size and shape of the fetus as he shows Ms. Jones the image on the ultrasound machine. Ms. Jones is not at a prenatal care appointment. She is at an abortion clinic undergoing a mandatory pre-abortion ultrasound. Ms. Jones is not listening to each of the doctor's words in joyful anticipation of the next. She is clenching her eyes shut and wishing she could shut off the machine resonating the fetus's heartbeat.

Ms. Jones waits for it to stop, "as one waits for the car to stop rolling at the end of a terrible accident."[2] But even when the ultrasound ends, Ms. Jones knows she will have to wait twenty-four more hours to obtain the State's statutory stamp of approval to responsibly proceed with her abortion. Ms. Jones is thirty, married, and has a two-year old child. Most importantly, she has already reached an informed decision about her own body. However, the required pre-abortion ultrasound law implies that the State still doubts Ms. Jones's ability to choose what is best for herself and her future. Ms. Jones wants to keep the fetus with all her heart, but she has decided to abort to save him from the irreversible and painful birth defects revealed through an

[1] The following fact pattern is closely based on actual events, as related by Carolyn Jones, the recipient of a mandatory ultrasound for her abortion in Texas; *See* Carolyn Jones, *'We Have No Choice': One Woman's Ordeal with Texas' New Sonogram Law*, TEXAS OBSERVER (Mar. 15, 2012), http://www.texasobserver.org/we-have-no-choice-one-womans-ordeal-with-texas-new-sonogram-law/.
[2] *Id.*

earlier ultrasound—an ultrasound that, unlike this one, was performed with her consent.

The Supreme Court intended to guarantee abortion care for all women, in all circumstances, without exception.[3] In considering whether mandatory pre-abortion ultrasound laws are constitutional, the standard applied must protect each woman equally, regardless of her justification for terminating the pregnancy.[4] Although the Supreme Court affirmatively held in *Roe v. Wade* that women have a fundamental right to access abortions,[5] the Court in *Planned Parenthood v. Casey*[6] blurred the boundary of how far states may restrict that right.[7] Under *Casey*, a state may regulate abortion until an "undue burden" is placed upon the woman's access to the procedure.[8] The court will find an undue burden when "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[9] Laws requiring women to undergo invasive ultrasounds prior to their abortion reveal how states have stretched the undue burden standard past its constitutional limits.[10] Broad interpretation of the undue burden standard allows state lawmakers to condition abortion access on agreeing to receive medically unnecessary and expensive procedures. The effect of these

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[3] *See* Planned Parenthood v. Casey, 505 U.S. 833, 837 (1992) ("Adoption of the undue burden standard does not disturb *Roe*'s holding that regardless of whether exceptions are made for particular circumstances, a State may not prohibit *any* woman from making the ultimate decision to terminate her pregnancy before viability.") (emphasis added).

[4] *See Casey*, 505 U.S. at 837 ("[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.").

[5] *See* Roe v. Wade, 410 U.S. 113, 169–70 (1973).

[6] *Casey*, 505 U.S. at 874 ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

[7] Scott W. Gaylord & Thomas J. Molony, *Casey And A Woman's Right To Know: Ultrasounds, Informed Consent, And The First Amendment*, 45 CONN. L. REV. 595, 599 (2012) (discussing how the courts in Texas, Oklahoma, and North Carolina all employed different analyses of the undue burden standard when considering the constitutionality of mandatory pre-abortion ultrasounds). *See also* Michael F. Moses, *Casey And Its Impact On Abortion Regulation*, 31 FORDHAM URB. L.J. 805, 808 (2004) (quoting Casey, 505 U.S. at 877) ("The Supreme Court defined [an undue burden] as a 'substantial obstacle,' but those words seem as vague as the words they define.")

[8] *See Casey*, 505 U.S. at 874. Black's Law Dictionary defines "undue burden" as "[a] substantial and unjust obstacle to the performance of a duty or enjoyment of a right." Black's Law Dictionary (9th ed. 2009).

[9] *Casey*, 505 U.S. at 877.

[10] *See* Nova Health Systems v. Pruitt, 292 P.3d 28, 28-29 (2012).

laws in placing a substantial obstacle in the woman's path is purposeful rather than incidental.[11] The drafters of these laws believe that requiring a woman to see and hear the fetus will convince her to discontinue abortion care.[12]

Arguments in the mandatory ultrasound debate range from positions deeply entrenched in the Constitution[13] to those animated by ideology.[14] These arguments have engendered a largely distorted public and legal discourse concerning the intersection of these laws with the Constitution.[15] In the short time since its legalization, abortion law has been subject to scrupulous and repeated revision.[16] These revisions left exposed various legal questions concerning the extent to which states may regulate abortion before such regulations constitute encroachments upon a woman's right to terminate her pregnancy.[17] One such legal question that recently split circuit courts is the lack of constitutional clarity surrounding mandatory pre-abortion ultrasounds with speech and display requirements.[18] Although the movement to propose mandatory ultrasound laws emerged concurrently with the *Casey* decision in the 1990s,

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[11] *See infra* Part II.B.2.
[12] *See infra* Part II.B.2; *see* Carol Sanger, *Seeing And Believing: Mandatory Ultrasound And The Path To A Protected Choice*, 56 UCLA L. REV 351, 362 (2008).
[13] *Compare Pruitt*, 292 P.3d at 28-29 (holding that the Oklahoma mandatory ultrasound is facially unconstitutional under the undue burden standard), *and* Gaylord & Molony, *supra* note 7, at 600 (arguing that the undue burden standard requires rational basis review which, when applied, upholds mandatory ultrasound laws as constitutional).
[14] *Casey*, 505 U.S. at 850 ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define liberty of all, not to mandate our own moral code."); Sanger, *supra* note 12, at 362 (quoting *Roe*, 410 U.S. at 150, 154, 156, 163) ("[T]he ultrasound is meant to establish or simply to reinforce the state's position that the fetus is not just 'potential life,' to use the U.S. Supreme Court's phrase in Roe v. Wade, but 'actual life,' with all the ideological and emotional force that word now comprises and exerts.").
[15] *Supra* note 13 and accompanying text. *See* Tracy Weitz, *What We Are Missing in the Trans-vaginal Ultrasound Debate*, RH REALITY CHECK (Mar. 1, 2013), http://rhrealitycheck.org/article/2013/03/01/challenges-in-the-trans-vaginal-ultrasound-debate/ ("The public discourse about mandated trans-vaginal ultrasounds for abortion patients is completely out of control—among both abortion rights opponents and abortion rights supporters. The facts are slim and distorted on all sides.").
[16] *See generally* Gonzales v. Carhart, 550 U.S. 124, 147 (2007); Stenberg v. Carhart, 530 U.S. 914 (2000); Mazurek v. Armstrong, 520 U.S. 968 (1997); *Casey,* 505 U.S. at 874 (1992); *Roe* , 410 U.S. at 138-40 (1973) (all of which evidence the various changes the Supreme Court has made to abortion law).
[17] Gaylord & Molony, *supra* note 7, at 599 (discussing how the courts in Texas, Oklahoma, and North Carolina all employed different analyses of the undue burden standard when considering the constitutionality of mandatory pre-abortion ultrasounds); Moses, *supra* note 7, at 808 and accompanying text.
[18] *See*, *e.g.*, Tex. Med. Providers Performing Abortion Services v. Lakey, 667 F.3d 570, 572 (5th Cir. 2012); Nova Health Systems v. Pruitt, 292 P.3d 28, 28-29 (Okla. 2012).

such laws gained broad legislative traction only recently.[19] In fact, lawmakers passed more abortion restrictions in the period spanning 2011-2013 than in the entire previous decade.[20] This onslaught of abortion restrictions can largely be attributed to the anti-choice movement's strategic drafting of laws that cloak abortion legislation under the pretense of promoting women's health and safety.[21] Twenty-three states now have active abortion laws with ultrasound mandates and several states have legislation pending approval.[22]

State lawmakers used the same deceptive strategy to successfully pass a mandatory pre-abortion ultrasound law in Oklahoma. However, the Oklahoma Supreme Court in *Nova Health Systems v. Pruitt* identified the true intentions behind the law, striking it down as facially unconstitutional.[23] Adhering to Oklahoma precedent, the *Pruitt* court interpreted an undue burden to unequivocally include the unnecessary medical treatment of mandatory pre-abortion ultrasounds.[24] Although the court faithfully applied *Casey*'s undue burden standard, the brevity of the opinion left many questions unanswered—questions that remain unresolved, as the Supreme Court of the United States denied certiorari to review the judgment in *Pruitt.*[25]

This Note argues that, although the court decided *Pruitt* correctly, the court neglected to analyze and expound the legal parameters of *Casey* as applied to mandatory pre-abortion

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[19] *See* GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND (2014), http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf (hereinafter GUTTMACHER, REQUIREMENTS FOR ULTRASOUND).

[20] ELIZABETH NASH ET AL., GUTTMACHER INST., LAWS AFFECTING REPRODUCTIVE HEALTH AND RIGHTS: 2013 STATE POLICY REVIEW (2013), http://www.guttmacher.org/statecenter/updates/2013/statetrends42013.html.

[21] Stealth Attack: What You Need to Know About the New Abortion Laws, ACLU, available at https://www.aclu.org/reproductive-freedom-womens-rights/stealth-attack-what-you-need-know-about-new-abortion-laws (last visited Sep. 20, 2014).

[22] *See* GUTTMACHER, REQUIREMENTS FOR ULTRASOUND, *supra* note 19; GUTTMACHER INSTITUTE, MONTHLY STATE UPDATE: MAJOR DEVELOPMENTS IN 2014, http://www.guttmacher.org/statecenter/updates/index.html (last updated July, 1, 2014). So far in 2014, legislators have introduced new mandatory pre-abortion ultrasound legislation in 12 states (IL, KY, MA, MD, MI, MO, NJ, NY, OH, OK, RI and TN). *Id.*

[23] *See Pruitt* 292 P.3d at 28-29.

[24] *Id.* ("The mandate of Casey remains binding on this Court until and unless the United States Supreme Court holds to the contrary.").

[25] *Id.* at 28 (Okla. 2012), *cert. denied*, 134 S.Ct. 617 (2013).

ultrasounds. Consequently, the court missed an important opportunity to distill the current discourse on this controversial area of law and to influence other courts across the nation.[26] To clarify the limits of abortion jurisprudence, litigation that challenges mandatory pre-abortion ultrasounds must offer more than a mere cursory analysis of the issues. Rather, courts must consider the constitutional issues raised by these restrictive laws, both to provide more robust analysis for lawmakers to use moving forward, as well as to ensure that the Supreme Court has sufficient material to analyze circuit splits and grant certiorari in the future. This shift to conducting more in-depth review will compel the Supreme Court to finally revisit abortion law and more accurately define the parameters of the undue burden standard in relation to mandatory pre-abortion ultrasounds—a legal review that has become increasingly urgent as these laws further encroach upon women's reproductive rights.

## I. Background

This Note highlights the most relevant court decisions upon which the *Pruitt* court relied in reaching its final judgment. Section A will analyze the development of the undue burden standard in *Casey*. Section B will examine House Bill 2780, the Oklahoma mandatory pre-abortion ultrasound law, in light of the precedent upon which the court relied.

### A. *Legal Framework for Analysis of Abortion Laws*

In *Pruitt*, the Oklahoma Supreme Court narrowly applied *Casey*'s undue burden standard by invoking state precedent that dealt with similarly restrictive abortion measures.[27] The court's decision relied almost entirely on its analysis of *Casey* in the Oklahoma Supreme Court decision of *In re Initiative Petition No. 349, State Question No. 642*, a case that examined the legality of a

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[26] *Id.*
[27] *See* Pruitt, 292 P.3d at 28–29 ("The mandate of Casey remains binding on this Court until and unless the United States Supreme Court holds to the contrary.").

restrictive abortion ballot initiative.[28]

1. Federal Precedent: The Undue Burden Standard

Twenty years after the landmark abortion decision, the Court in *Casey* diverged from *Roe* to create the foundation of abortion law today.[29] Although the Court upheld *Roe*'s core premise that women have a constitutionally protected right to an abortion under the Due Process clause, the Court significantly weakened the legal protections afforded to this right in two ways.[30]

First, the *Casey* Court discarded *Roe*'s trimester framework[31] and instead held that the state has a legitimate interest in the fetus throughout the entirety of the pregnancy.[32] Second, in its most significant disparaging of the *Roe* decision, the *Casey* Court held that the appropriate standard for assessing the state's legitimate interest in regulating abortion before viability is the more ambiguous undue burden standard.[33] Taken together, the *Casey* Court allowed lawmakers to place earlier and more restrictive limitations on when women may have abortions.[34]

The *Casey* Court did provide some clarification about the application of this new undue burden standard.[35] It explained that unduly burdensome regulations are unconstitutional because, "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."[36] In other words, any law enacted with the

[28] *See* In re Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 7 (Okla. 1992).
[29] *See* Casey, 505 U.S. at 870.
[30] *Id.* at 871 ("The woman's right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. It is a rule of law and a component of liberty we cannot renounce.").
[31] *Roe,* 410 at 163-65. The trimester framework is as follows: within the first trimester, the woman has an unconditional right to abort because the state's interest in regulating the procedure has yet to become compelling enough to survive strict scrutiny; within the second trimester, the state may only regulate abortions insofar as the laws serve the compelling interest of protecting the woman's health; by the third trimester the fetus has reached the point of viability, and the state may regulate and ban abortions how they see fit.
[32] *See Casey*, 505 U.S. at 876.
[33] *See id.*
[34] *See* Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 Yale J.L. & Feminism 317, 330-32 (2006).
[35] *See Casey*, 505 U.S. at 877.
[36] *Id.*

intent to advance the state's interest in the fetus, while also inflicting an undue burden on the woman's choice to abort prior to viability, is unconstitutional.[37]

The *Casey* Court spoke broadly about abortion for much of the opinion, but briefly did consider how the new undue burden standard should be applied to distinct situations of state regulation.[38] For instance, the court held that spousal notification laws are unconstitutional because, "[t]he effect of state regulation on women's protected liberty is doubly deserving of scrutiny," especially when "the State has touched not only upon the private sphere of the family, but upon the very bodily integrity of the pregnant woman."[39] By striking down spousal notification laws as unduly burdensome, the Court fortified an important protection supported by *Roe,*[40] that an encroachment upon the bodily integrity of a woman obtaining an abortion constitutes an undue burden.[41]

2. State Precedent: The Oklahoma Personhood Ballot Initiatives

In 2012, the Center for Reproductive Rights, one of the groups involved in filing the lawsuit in *Pruitt*,[42] filed jointly with the American Civil Liberties Union to challenge a ballot initiative that aimed to amend the Oklahoma constitution.[43] The Oklahoma Personhood Ballot Initiative sought to define a fertilized egg at any point in the pregnancy as a "person" afforded

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[37] *Id.*
[38] *See id.* at 898.
[39] *Id.* at 896.
[40] *See id.*
[41] *See Casey*, 505 U.S. at 896. This sentiment, regarding the important of protecting bodily integrity, was later espoused by other courts. *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.").
[42] *Pruitt*, 292 P.3d 28 (2012).
[43] CENTER FOR REPRODUCTIVE RIGHTS, IN RE INITIATIVE PETITION 395, STATE QUESTION NO. 761 (OK PERSONHOOD) (2012), http://reproductiverights.org/en/case/in-re-initiative-petition-395-state-question-no-761-ok-personhood [hereinafter CENTER FOR REPRODUCTIVE RIGHTS].

full constitutional protections.[44] If passed, the initiative would have effectively banned all abortions, fertility treatments, and most forms of contraception.[45] The Center for Reproductive Rights argued that the initiative would violate the Constitution, specifically the Fourteenth Amendment, by usurping women's constitutionally protected right to reproductive freedom under *Casey*.[46] Before the ballot initiative reached the polls, the Oklahoma Supreme Court struck it down as "clearly unconstitutional" and "void on its face" in light of the court's invalidation of an earlier analogous petition filed in 1992.[47]

The 1992 Oklahoma Supreme Court struck down this analogous petition in *Initiative Petition No. 349* by reasoning that the petition was unconstitutional as it attempted to ban and criminalize abortions altogether except when the woman fell within four narrow exceptions.[48] The 1992 court declared that it would "uphold the law of the land whatever it may be."[49] The "law of the land" in 1992, as it still is now, was *Casey*.[50] Following that precedent, the 1992 court argued that, "[b]ecause viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions," the 1992 abortion restriction initiative must be invalidated as unconstitutional.[51]

By citing the 1992 decision as binding precedent, the 2012 court invoked this earlier court's constitutional analysis and treated it as binding authority in deciding to strike down the

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[44] On Petition for Writ of Certiorari to the Supreme Court of Oklahoma at 2, *cert. denied*, In Re Initiative Petition, No. 395 State Question No. 761, 2012 WL 3109490 (Okla. July 30, 2012).
[45] *See* CENTER FOR REPRODUCTIVE RIGHTS, *supra* note 43.
[46] Nancy J. Moore, *Oklahoma Court Blocks Ultrasound Rule As Unconstitutional Under State Law*, 21 HEALTH L. REP. (BNA) No. 14, at 521 (April 5, 2012).
[47] In re Initiative Petition No. 395, State Question No. 761, 286 P.3d 637, 637–38 (Okla. 2012). *See also* Patrick B. McGuigan, *State Court Slaps Down Personhood Initiative*, CAPITAL BEAT OK, May 1, 2012, http://capitolbeatok.com/reports/state-court-slaps-down-personhood-initiative.
[48] See *In re Initiative Petition No. 349*, 838 P.2d at 6. These exceptions were: (1) if the woman suffered from serious mental health problems, (2) if the pregnancy resulted from rape, (3) if the pregnancy resulted from incest, or (4) if the fetus showed serious physical or mental defects. *See id.* at 7.
[49] *Id.* at 6.
[50] *See generally Casey*, 505 U.S. 833.
[51] *In re Initiative Petition No. 349*, 838 P.2d at 7.

Oklahoma Personhood Ballot Initiative.[52] The two ballot initiatives, although twenty years apart, demonstrate the Oklahoma Supreme Court's consistent interpretation of *Casey*.[53]

## B. Statement Of The Case*:* Nova Health Systems v. Pruitt

Later that same year the court also struck down Oklahoma's mandatory pre-abortion ultrasound law, affirming the district court's ruling that it is facially unconstitutional under *Casey*.[54] The court's 2012 decision in *Nova Health Systems v. Pruitt* generated a circuit split on the constitutional question of mandatory pre-abortion ultrasound laws.[55]

### 1. The Mandatory Pre-Abortion Ultrasound Law of Oklahoma House Bill 2780

Legislators introduced House Bill 2780 "[i]n order for the woman to make an informed decision" about whether to continue with her abortion.[56] To proceed with an abortion under this bill, the woman must undergo either a trans-vaginal or abdominal ultrasound, whichever will produce a clearer image of the fetus.[57] The ultrasound must occur at least one hour before the abortion and the patient must listen to the doctor's explicit description of the image, including the dimensions, internal organs, and cardiac activity of the fetus.[58] If, after these steps, she still wishes to proceed, the woman must obtain written testimony stating that she has met these requirements.[59] The provision requiring the physician to choose whichever ultrasound procedure will produce a clearer image effectively requires most women to undergo the most intrusive form

[52] *See In re Initiative Petition No. 395*, 286 P.3d at 637–38.
[53] *See In re Initiative Petition No. 349*, 838 P.2d at 6.
[54] *Pruitt*, 292 P.3d at 28–29.
[55] *See*, *e.g.*, *id;* Tex. Med. Providers Performing Abortion Services v. Lakey, 667 F.3d 570, 572 (5th Cir. 2012).
[56] OKLA. STAT. ANN. tit. 63, § 1-738.3d (West 2013).
[57] *Id.*
[58] *Id.*
[59] *Id.*

of ultrasound—the trans-vaginal ultrasound.[60]

The Oklahoma Representative who authored the bill attested, "The bill is necessary to provide women all of the information before they make an irrevocable decision. This bill actually provides her a choice—she does not have to view that screen."[61] The Representative was technically correct: the law states that "[n]othing in this section shall be construed to prevent a pregnant woman from averting her eyes from the ultrasound images required to be provided to and reviewed with her."[62] However, a woman wishing to completely forego the visualization of the fetus is still required to listen to the physician's detailed description of the fetus even if her eyes are shut.[63]

2. The Development of *Nova Health Systems v. Pruitt* and the Court's Legal Analysis

Wasting no time, Nova Health Systems, a local Oklahoma reproductive services provider directly affected by this new bill,[64] and the Center for Reproductive Rights[65] filed a suit challenging House Bill 2780 the same day the bill became law.[66] In December 2012, the Oklahoma Supreme Court affirmed the district court's ruling that the state's mandatory pre-abortion ultrasound law is facially unconstitutional.[67] However, it held the law unconstitutional

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[60] *See* Weitz, *supra* note 15 ("Because trans-vaginal ultrasounds provide higher quality images at earlier gestational stages, these laws by definition require abortion providers to perform trans-vaginal ultrasounds.").
[61] Michael Mcnutt, *Oklahoma House OKs Ultrasound Bill*, NEWS OK, (Mar. 23, 2010), http://newsok.com/oklahoma-house-oks-ultrasound-bill/article/3443446.
[62] OKLA. STAT. ANN. tit. 63, § 1-738.3d (West 2013).
[63] *Id.* The only way a woman may bypass the ultrasound prior to an abortion is if a medical emergency threatens her life. *Id.*
[64] *Reproductive Services: Your Body, Your Choice*, REPRODUCTIVE HEALTH SERVICES, https://reproductiveservices.com/tulsa-ok-abortion-clinic/ (last visited Dec. 28, 2013) ("Nova Health Systems" does business as "Reproductive Services")..
[65] *About Us*, CENTER FOR REPRODUCTIVE RIGHTS, http://reproductiverights.org/en/about-us (last visited Dec. 28, 2013).
[66] Amended Petition for Plaintiffs, Nova Health Systems v. Pruitt, No. 2:12-CV-00395, 2012 WL 1034022 (Okla. Dist. Ct. Okla. Cnty.) (Mar. 28, 2012), 2011 WL 1821702.
[67] *See Pruitt,* 292 P.3d at 28–29; Nova Health Systems v. Pruitt, No. 2:12-CV-00395, 2012 WL 1034022 (Okla. Dist. Ct. Okla. Cnty. Mar. 28, 2012) (Order Granting Summary Judgment Declaring Ultrasound Act As an Unconstitutional Special Law and Permanent Injunction Preventing the Enforcement of the Ultrasound Act). The

under the United States Constitution rather than Oklahoma's state constitution.[68] The most relevant portion of the court's brief opinion is as follows:

> [T]his matter is controlled by the United States Supreme Court decision in [*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 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.[69]

The court's citation to *In re Initiative No. 395, State Question No. 761* refers to the previously discussed 2012 case that struck down the Oklahoma Personhood Ballot Initiative as facially unconstitutional under *Casey*.[70] That 2012 opinion relied entirely on the analysis and reasoning of *Initiative No. 349*, the 1992 opinion that held an analogous abortion restriction ballot initiative unconstitutional under *Casey* twenty years earlier.[71] Thus, by citing to the most recent 2012 case overturning the Oklahoma Personhood Ballot Initiative, the Oklahoma Supreme Court in *Pruitt* effectively invoked the 1992 court's analysis of Casey in *Initiative No. 349*.[72]

In light of the split *Pruitt* created between the Oklahoma Supreme Court and the Fifth Circuit[73] and the high stakes of the ruling for supporters of pre-abortion mandatory ultrasound laws in the future, the Oklahoma Attorney General filed a petition for writ of certiorari to the United States Supreme Court.[74] He urged the Supreme Court to reverse the court's holding and find that *Casey*'s undue burden standard permits states to condition women's access to abortions

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district court judge held, that the law is, "improperly . . . addressed only to patients, physicians and sonographers concerning abortions and does not address all patients, physicians and sonographers concerning other medical care where a general law could clearly be made applicable." *Id.*

[68] *Id.*

[69] *Id.*

[70] *See In re Initiative Petition No. 395*, 286 P.3d at 637–38; *supra* Part I.A.2.

[71] *See supra* Part I.A.2.

[72] *See supra* Part I.A.2.

[73] *See infra* Part I.B.3.

[74] Petition for Writ of Certiorari, *cert. denied*, Nova Health Systems v. Pruitt, 292 P.3d 28, (Okla. 2012) (No. 12-1170), 2013 WL 1225690. The Attorney General at the time was Scott Pruitt. *Id.*

on first agreeing to undergo a descriptive ultrasound.[75]

In November 2013, the Supreme Court denied certiorari in the *Pruitt* appeal, allowing the *Pruitt* court's decision striking down ultrasound laws to stand.[76] The denial left in place a circuit split that promises to further develop as an increasing number of states are introducing similar ultrasound laws.[77] Because the Supreme Court holds a compelling interest in resolving circuit splits, the more divisive this area of law becomes, the more pressure the Court will be under to grant certiorari on this issue.[78]

3. The Circuit Split and Developing Cases

Around the same time, Texas enacted a mandatory pre-abortion law similar to the one struck down in Oklahoma. In the legal challenge to the Texas law, *Texas Medical Providers Performing Abortion Services v. Lakey*, the Fifth Circuit unanimously held that mandating pre-abortion ultrasounds for women seeking abortions was constitutional under *Casey*—a ruling that directly conflicted with *Pruitt*.[79] Although the Oklahoma and Texas laws were nearly identical, certain provisions made the Texas law even more intrusive than the one struck down in *Pruitt*.[80]

The *Lakey* court primarily analyzed whether mandatory pre-abortion ultrasounds violate

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[75] *Id.* at 7. Nova Health Systems filed a brief in opposition to the Attorney General's petition, arguing that the decision was correct and should be undisturbed by plenary Supreme Court review. *See* Brief in Opposition On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma at 1, *cert. denied*, Nova Health Systems v. Pruitt, No. 12-1170, 292 P.3d 28, (Okla. 2012), 2013 WL 2428980.
[76] *Pruitt*, 292 P.3d at 28, *cert. denied*, 134 S.Ct. 617, 617 (2013).
[77] *See* Richard Wolf, *Steady Stream of Abortion Cases Headed Toward High Court*, USA TODAY (Nov. 12, 2013), http://www.usatoday.com/story/news/politics/2013/11/12/supreme-court-abortion-ultrasound-oklahoma/3466467/.
[78] SUP. CT. R. 10 at 5-7, available at http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf; *see also* Wolf, *supra* note 77.
[79] *Id.*
[80] TEX. HEALTH & SAFETY CODE ANN. § 171.0122 (West 2011). In addition to the ultrasound, the visual image of the fetus, and the description of the dimensions and fetal organs, the Texas law also mandates that the physician make the fetal heartbeat audible to the woman and requires that she then wait an additional twenty-four hours before proceeding with the elective procedure. *Id.* Although the law permits the woman to decline the option of viewing the image of the fetus and of hearing the heartbeat, she may only forego the physician's explicit depiction of the embryo or fetus if she falls within three narrow medical exceptions: (1) if the pregnancy was a result of incest or rape, (2) if the patient is a minor, or (3) if the fetus has an irreversible medical condition. *Id.* at § 171.0122(d).

the First Amendment by compelling speech that has no other purpose than to endorse the state's ideological anti-choice message.[81] In vacating the district court's ruling, which held that the mandatory pre-abortion law was unconstitutional under the First Amendment as construed in *Casey*, the *Lakey* court clarified its interpretation of *Casey*.[82] The court asserted that *Casey* permits informed-consent laws under the First Amendment as long as the purpose of these laws is to offer "truthful and non-misleading information" pertinent to the woman making a final decision about whether to continue with her abortion.[83]

The *Lakey* court felt it was "belabor[ing] the obvious and conceded point [that] the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information."[84] Upon further elaboration, the *Lakey* court emphasized that "[t]hey are not different in kind, although more graphic and scientifically up-to-date, than the disclosures discussed in *Casey*—probable gestational age of the fetus and printed material showing a baby's general prenatal development stages."[85] Because the *Lakey* court ultimately upheld the law based on *Casey*, this decision conflicts with the holding in *Pruitt*, creating a split on the same constitutional issue.[86]

The circuit splits leaves the constitutionality of mandatory pre-abortion ultrasounds unresolved, prompting continued litigation in this area and further division among states. For example, in December 2011, a U.S. district judge in North Carolina preliminarily enjoined part of the state's mandatory pre-abortion ultrasound law in *Stuart v. Huff*.[87] The North Carolina law, entitled "A Women's Right to Know," is nearly identical to the ultrasound law upheld in

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[81] *See Lakey*, 667 F.3d at 572, 574–80.
[82] *See* Tex. Med. Providers Performing Abortion Services v. Lakey, 806 F.Supp.2d 942, 972 (W.D. Tex. 2011), vacated in part (Tex. Med. Providers Performing Abortion Services v. Lakey, 667 F.3d 570 (5th Cir. 2012)).
[83] Tex. Med. Providers Performing Abortion Services v. Lakey, 667 F.3d 570, 577 (5th Cir. 2012).
[84] *Id.* at 578.
[85] *Id.*
[86] *See id.* at 572.
[87] *See* Stuart v. Huff, 834 F.Supp.2d 424, 433 (D. N.C. 2011).

Texas.[88] The district judge held that the ultrasound requirements, which required the physician to provide both an auditory and visual description of "the dimensions of the embryo or fetus and the presence of external members and internal organs,"[89] violated the First Amendment by compelling physicians to advance the state's content-based speech to dissuade women from choosing an abortion.[90] Although the judge only preliminarily enjoined the speech and display requirements of the law, she also emphasized that these requirements were not only unconstitutional under the First Amendment, but were also medically unnecessary and beyond the scope of the informed consent requirements upheld as constitutional in *Casey*.[91]

In January 2014, the same district judge made the preliminary injunction final, striking down the Act as an unconstitutional violation of doctors' rights to free speech under the First Amendment.[92] The district judge again emphasized the underlying purpose of the law as one that compels doctors to further North Carolina's ideological beliefs rather than to provide informed consent to the woman and increase the safety of the abortion procedure.[93]

Relying on *Casey*'s interpretation of the First Amendment,[94] the district judge reasoned that "[t]o the extent the Act is an effort by the state to require health care providers to deliver information in support of the state's philosophic and social position discouraging abortion and encouraging childbirth, it is content-based, and it is not sufficiently narrowly tailored to survive

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[88] N.C. GEN. STAT. ANN. § 90-21.85 (West 2011). The North Carolina law provides no exceptions for women who were victimized by rape, incest, or who receive a prior diagnosis that their pregnancy will suffer medical complications if brought to term. There is also a waiting period of four hours between the ultrasound and being able to obtain an abortion. *Id.*
[89] *See* § 90-21.85.
[90] *See Huff*, 834 F.Supp.2d at 429.
[91] *See id.* at 431.
[92] Stuart v. Loomis, No. 1:11–CV–804, 2014 WL 186310, slip op. at 1 (M.D.N.C. Jan. 17, 2014) (The Supreme Court has never held that a state has the power to compel a health care provider to speak, in his or her own voice, the state's ideological message in favor of carrying a pregnancy to term, and this Court declines to do so today.).
[93] *Id.*
[94] *Id.* at 7 (quoting Wooley v. Maynard, 430 U.S. 705 (1977)) ("In *Casey,* the Court explicitly recognized a physician's First Amendment rights . . . [holding that] the state cannot compel a person to speak the state's ideological message.")(alteration in original).

strict scrutiny."[95] The district judge further held that even if there were a health-related purpose behind the law, it would fail heightened scrutiny because the law is not enforced in a way that is substantially related to the state's purported interest.[96] Mandatory pre-abortion ultrasound laws continue to be introduced around the country, triggering legal challenges, furthering the rift between the circuits, and imploring the Supreme Court to grant certiorari in the future.[97]

## II. ANALYSIS

Although the *Pruitt* court construed *Casey* correctly, the court ultimately erred when it adopted an earlier court's analysis rather than explaining the application of *Casey* and its undue burden standard to the particular law at issue.[98] In a legal domain where the constitutionality of mandatory pre-abortion laws is highly contested, where a circuit split has developed,[99] and where the Supreme Court has rejected the opportunity to clarify abortion law,[100] the Oklahoma Supreme Court could have taken the opportunity as one of the first high courts to rule on this issue to explain exactly how *Casey*'s undue burden standard necessitates the rejection of mandatory pre-abortion ultrasound laws. A detailed analysis of the undue burden standard in

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[95] *Id.* at 1.
[96] *Id.* ("[T]he state has not established that the speech-and-display provision directly advances a substantial state interest in regulating health care, especially when the state does not require the patient to receive the message and the patient takes steps to avoid receipt of the message. Thus, it does not survive heightened scrutiny.").
[97] MONTHLY STATE UPDATE, *supra* note 22 and accompanying text. *See*, *e.g.*, Edwards v. Beck, 946 F. Supp. 2d 843, 850-51 (E.D. Ark. 2013) (where a U.S. District Judge granted a preliminary injunction enjoining enforcement of a mandatory pre-abortion ultrasound, an order that is currently pending appeal with the 8th Circuit); Complaint, Hope Med. Grp. for Women et al v. Caldwell et al, 2010 WL 3269282 (M.D.La. 2010) (3:10-CV-00511) (arguing that the mandatory pre-abortion ultrasound law was unconstitutionally vague, a challenge that is no longer being pursued in lieu of an internal agreement reached among the challenging abortion clinic and other state officials which is explained in *Parts of Louisiana Abortion Ultrasound Law Blocked*, CENTER FOR REPRODUCTIVE RIGHTS, http://reproductiverights.org/en/press-room/parts-of-louisiana-abortion-ultrasound-law-blocked (last visited Aug. 8, 2014)); Complaint, Preterm-Cleveland, Inc. v. Kasich, Ohio Ct. Com. Pl., No. (CV-815214), *available at* http://www.dispatch.com/content/downloads/2013/10/PretermVKasichComplaint2013_1009.pdf (challenging the constitutionality of the recently enacted House Bill 59, which includes a mandatory pre-abortion ultrasound requirement).
[98] *See Pruitt,* 292 P.3d at 28–29.
[99] *See, e.g.*, *Lakey,* 667 F.3d at 578. *See also Pruitt*, 292 P.3d at 28–29.
[100] *Pruitt*, 292 P.3d at 28–29, *cert. denied*, 134 S.Ct. 617 (2013).

relation to these laws would have provided much needed clarity, especially in light of the Supreme Court's decision not to review *Pruitt*.[101]

A. Pruitt's Cursory but Correct Application of Casey

The *Pruitt* court struck down the state's mandatory pre-abortion law as unconstitutional under *Casey*, issuing a cursory, but correct opinion.[102] First, the holding was legally sound as the court cited to and invoked the robust analysis of *Casey* in *Initiative Petition No. 349*.[103] Second, the holding recognized that Oklahoma's ultrasound laws violate the *Casey* Court's intention to prevent states from unnecessarily intruding into this particular zone of a woman's privacy.[104]

1. Invoking Prior Precedent: *Pruitt*'s Adoption of the Legal Analyses Used to Strike Down the Oklahoma Ballot Initiatives

Indeed, in the petition for writ of certiorari to the United States Supreme Court, the Attorney General described the *Pruitt* court's opinion as "cursory."[105] He further claimed that the court's "refusal to engage with *Casey*'s reasoning or to conduct any analysis returned Oklahoma to the legal theory *Casey* explicitly rejected," as the opinion indicated that the state still retains interest in the potential future life of the fetus.[106] Although the Attorney General was correct that the court's opinion lacked substantial legal analysis, this deficiency does not diminish the legitimacy of the court's holding or the application of *Casey* to the present issue, especially when understood in light of the legal precedent upon which the *Pruitt* court relied.

The *Pruitt* court's opinion was so concise because it relied entirely on the analysis it

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[101] *See id.*
[102] *Pruitt*, 292 P.3d at 28–29.
[103] *See In re Initiative Petition No. 349*, 838 P.2d at 7.
[104] *See Casey*, 505 U.S. at 896.
[105] Petition for Writ of Certiorari, *cert. denied*, Nova Health Systems v. Pruitt, 292 P.3d 28, 28 (Okla. 2012) (No. 12-1170), 2013 WL 1225690.
[106] Petition for Writ of Certiorari, Nova Health Systems, *supra* note 105 at 14–15.

employed when striking down both the 1992 and the 2012 ballot initiatives.[107] Although it would have been wise for the *Pruitt* court to develop a broader legal analysis adjusted to the specific legal issue of mandatory pre-abortion ultrasound laws, the legal reasoning underlying the court's judgment was well founded. To invalidate the Oklahoma Personhood Ballot, the 2012 court relied heavily on the legal analysis of the 1992 court.[108] Thus, when the *Pruitt* court cited to the more recent 2012 case as the basis of its legal analysis, it implicitly extended the legal reasoning employed by the 1992 court to the issues presented in *Pruitt*.[109]

The 1992 court rejected the Oklahoma abortion restriction ballot initiative because, under *Casey*, any law that has the effect of banning abortion and contraceptive use altogether is unconstitutional as it comes too close to defining a fetus as a person.[110] In adopting this prior precedent, the *Pruitt* court found that the mandatory pre-abortion ultrasound laws in House Bill 2780 crossed the same threshold denounced by the 1992 court.[111] In other words, because mandatory pre-abortion ultrasounds serve no medical purpose for the mother seeking an abortion or for the physician performing the procedure,[112] the *Pruitt* court grouped the ultrasound's purpose in the same category as the 1992 and 2012 ballot initiatives—one that serves the interest of the fetus as a recognized person.[113] Furthermore, by choosing to cite to the 2012 Oklahoma Personhood Ballot Initiative case instead of any number of other recent Oklahoma abortion related cases, the *Pruitt* court equated the issues entangled in mandatory pre-abortion ultrasound

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[107] *See Pruitt*, 292 P.3d at 28–29 (2012) (citing *In re Initiative Petition No. 349*, 838 P.2d at 2).
[108] *See infra* Part I.2.B (explaining the relationship between the two ballot initiatives and how they interact to form the precedent relied upon in *Pruitt*).
[109] *See Pruitt*, 292 P.3d at 28–29 (citing *In re Initiative Petition No. 349*, 838 P.2d at 2).
[110] *See In re Initiative Petition No. 349*, 838 P.2d at 7.
[111] *See Pruitt*, 292 P.3d at 28–29.
[112] *See* Serena Marshall, *Virginia Likely to Require Ultrasound for Abortion*, ABC NEWS (Feb. 18, 2012), http://abcnews.go.com/blogs/politics/2012/02/virginia-likely-to-require-ultrasound-for-abortion/ ("Requiring them to have this specific kind of ultrasound prior to an abortion can be stressing, can be unnecessary… and, in my opinion, should not be mandated in such a way that it might not be medically necessary for a particular patient.").
[113] *See Pruitt*, 292 P.3d at 28-29 (citing *In re Initiative Petition No. 349*, 838 P.2d at 2).

laws with the extreme and unequivocally unconstitutional personhood ballot amendment.[114] This reference to both ballot initiatives suggests that the *Pruitt* court viewed mandatory ultrasound laws as the type of state regulation *Casey* intended to explicitly prohibit.[115]

2. *Pruitt's* Recognition That Mandatory Pre-Abortion Ultrasound Laws Violate the Bodily Integrity Protected in *Casey*

*Casey* reiterated that "the 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.'"[116] This right was a core premise of *Roe* and one that the *Casey* Court did not disturb.[117] In striking down the mandatory pre-abortion ultrasound law, the *Pruitt* court held that forcing a woman to undergo an intrusive medical procedure as a prerequisite for abortion care violates the woman's bodily autonomy and unduly burdens her fundamental right to terminate a pregnancy.[118]

As mentioned in the previous section, the *Casey* Court struck down spousal notification requirements as unconstitutional, because when "the State has touched . . . upon the very bodily integrity of the pregnant woman," the state has placed a substantial obstacle in the path of a woman seeking an abortion, amounting to an undue burden.[119] If a requirement that the woman must first tell her spouse about an abortion constitutes an unconstitutional intrusion into the bodily integrity of the woman, then a vaginal transducer that quite literally invades the most intimate areas of a woman's body must also amount to an unconstitutional and unduly burdensome intrusion under *Casey*.[120] Spousal notification and mandatory ultrasound laws

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[114] *See id.*
[115] *See id.*
[116] *Casey*, 505 U.S. at 875 (1992).
[117] *Id.*
[118] *See* discussion *supra* Part I, Section A; *see also Casey*, 505 U.S. at 846.
[119] *See Casey*, 505 U.S. at 896.
[120] *See id.*

impose similar undue burdens because neither requirement is elective.[121] The undue burden arises because these requirements negate the woman's personal choice in the matter, depriving her control over her own bodily integrity. House Bill 2780 falls under this category because the choice between using a vaginal or abdominal transducer is conditioned on whichever machine will produce the clearest photograph of the fetus. This is almost always the most invasive vaginal transducer. Thus, because of how these laws are drafted, the physician is almost always required to choose the more intrusive ultrasound procedure.[122]

B. *Pruitt* Neglected to Address the Various Ways in Which Mandatory Pre-Abortion Ultrasounds Deteriorate Reproductive Rights

The *Pruitt* court, however, failed to develop its analysis, thus bypassing the significant opportunity to clarify this area of the law, influence the direction of future legal discourse, and demand Supreme Court review. Through a more in-depth analysis, the court could have considered other implications of these laws, such as the effect they have on minority women and questions about medically necessity.

1. The Effect of Mandatory Ultrasound Laws on Minority Women

The Oklahoma ultrasound law had a minimum one-hour wait-time between the ultrasound and the abortion, requiring many women to come back the following day for the

[121] *Id*. ("[N]o physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion."). *See also* OKLA. STAT. ANN. tit. 63, § 1-738.3d (West 2013) (framing the ultrasound requirement as a condition to obtaining an abortion).
[122] OKLA. STAT. ANN. tit. 63, § 1-738.3d (West 2013). This implicit requirement results because around 62 percent of women have abortions prior to their ninth week of pregnancy, KAREN PAZOL, ET AL., CENTERS FOR DISEASE CONTROL & PREVENTION, ABORTION SURVEILLANCE—UNITED STATES: MORBIDITY & MORTALITY WEEKLY REPORT 1 (Nov. 27, 2009), and at a, "gestational age of seven weeks or less, a vaginal transducer generally permits better visualization of the pregnancy. Petition for Writ of Certiorari at 7, *cert. denied*, *Pruitt,* 292 P.3d (No. 12-1170), 2013 WL 1225690. (also noting, "[p]atients typically prefer use of an abdominal transducer because it is less invasive than a vaginal probe.").

procedure.[123] This time requirement would require physicians to be available at the abortion clinic on two consecutive days, which, in turn, increases the cost of their services.[124] This increase in cost becomes a substantial obstacle in the path of many women struggling financially because "[i]n most states, low-income women have to come up with between $500 and $1000 in cash to pay for [a first-trimester] abortion. For a woman living at or below the poverty level this is equivalent to a month's income."[125] This number grows even larger with the additional cost of an ultrasound, which can range from around $150-$2,500 depending on the type of ultrasound the law requires and the facility at which the ultrasound is performed.[126]

Laws that negatively and disparately impact a vulnerable group of people often receive higher levels of scrutiny in court because they have the potential to subjugate an already suspect class. Courts review laws that discriminate against a suspect class—persons belonging to a group historically discriminated against based upon race, alienage, or national origin—with strict scrutiny.[127] The impoverished are not considered a suspect class.[128] However, due to ingrained societal and economic disparities as well as disparities in access to sex education, contraceptives, and reproductive health care,[129] an overlap often exists between lower income women seeking

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[123] *See* Weitz, *supra* note 15.
[124] *See id.*
[125] *Id.*
[126] *See* Rachel Zimmerman, *My Ultrasound: Three Tests, Three Pricetags*, WBUR'S COMMON HEALTH (Aug. 17, 2011), http://commonhealth.wbur.org/2011/08/my-ultrasound-three-tests-three-pricetags (offering a personal account of a woman comparing three different ultrasound prices in Boston, Massachusetts). *See also* Jeffrey Young, *Hospital Procedure Prices Vary Greatly, New Data Show*, HUFFINGTON POST (June, 6, 2013), http://www.huffingtonpost.com/2013/06/06/hospital-procedure-prices_n_3393158.html (highlighting the difference in ultrasound pricing between three different facilities in New York).
[127] Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985) (explaining a suspect class); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting) (citing Korematsu v. United States, 323 U.S. 214, 65 (1944)) ("If a statute invades a 'fundamental' right or discriminates against a 'suspect' class, it is subject to strict scrutiny. If a statute is subject to strict scrutiny, the statute always, or nearly always, is struck down.").
[128] *Id.*
[129] SUSAN A. COHEN, GUTTMACHER INSTITUTE, ABORTION AND WOMEN OF COLOR: THE BIGGER PICTURE, 11 Guttmacher Pol'y Rev. 2, 3 (2008), available at http://www.guttmacher.org/pubs/gpr/11/3/gpr110302.pdf.

abortion care and women in the racial minority.[130] Moreover, the historical discrimination and marginalization of minorities continues to unjustly impact their socioeconomic status today to the extent that minority women are twice as likely to be living in poverty.[131] Therefore, mandatory pre-abortion ultrasound laws gravely affect a class of women historically discriminated against, as the oppressive costs of these laws function as an additional obstacle that minority women must overcome in order to claim a supposedly fundamental right.[132]

Restrictions on abortion access raise a unique threat, not only to an immediate suspect class, but also to suspect classes in the future. Because low-income minority women seeking abortion care may be unable to afford the mandatory ultrasound, these ultrasound requirements repress and immobilize a suspect class, and lead to more unintended pregnancies among families living below the poverty line.[133] However, the Supreme Court has consistently held that statutes which have a disparate impact on a suspect class are only unconstitutional if the statute has a clearly discriminatory and invidious intent.[134] Thus, it is unlikely mandatory pre abortion ultrasound laws would be struck down on the basis of disparate impact alone. However, although these laws circumvent the disparate impact standard, they nonetheless result in the imposition of an undue burden on the expansive class of women that the laws disparately affect. This is a valid legal concern under *Casey*, and a disparate impact line of analysis uniquely shows the breadth of the disparately impacted class—women who are equally as entitled to the

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[130] *See* GUTTMACHER INSTITUTE, FACTS ON UNINTENDED PREGNANCY IN THE UNITED STATES (2013), http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.pdf. ("In 2006, black women had the highest unintended pregnancy rate of any racial or ethnic groups. At 91 per 1,000 women aged 15–44, it was more than double that of non-Hispanic white women (36 per 1,000).") ("The rate of unintended pregnancy among poor women (those with incomes at or below the federal poverty level) in 2006 was 132 per 1,000 women aged 15–44, more than five times the rate among women at the highest income level (24 per 1,000).").
[131] *Id; The Straight Facts on Women in Poverty*, CTR. FOR AM. PROGRESS, http://www.americanprogress.org/issues/women/report/2008/10/08/5103/the-straight-facts-on-women-in-poverty/ (last visited Aug. 8, 2014); *Ethnic and Racial Minorities & Socioeconomic Status*, AM. PSYCHOLOGICAL ASS'N, *available at* http://www.apa.org/pi/ses/resources/publications/factsheet-erm.pdf (last visited Aug. 8, 2014).
[132] *See* FACTS ON UNINTENDED PREGNANCY IN THE UNITED STATES, *supra* note 130 and accompanying text.
[133] Cohen, *supr*a note 129 at 3.
[134] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 322 (1980); Maher v. Roe, 432 U.S. 464, 464 (1977).

constitutional right to an abortion protected by *Casey*.

2. Unnecessary Medical Procedures as Unduly Burdensome in the Abortion Context

Whether it is medically necessary for every woman to undergo an ultrasound before obtaining an abortion is highly contested.[135] As the district court in *Pruitt* noted, mandatory pre-abortion ultrasound laws are "improperly . . . addressed only to patients, physicians and sonographers concerning abortions and do [] not address all patients, physicians and sonographers concerning other medical care where a general law could clearly be made applicable."[136] The district judge in *Stuart* also shared this sentiment, noting that there is "uncontradicted" evidence that mandatory pre-abortion ultrasounds serve no medical purpose.[137]

In unearthing the primarily anti-choice agenda behind these laws, the laws' true purpose comes to light. Americans United for Life is an anti-choice organization with a transparent mission of securing "legal protection for human life from conception to natural death."[138] If Americans United for Life succeeded in this pursuit, they would overrule *Roe,* making abortions illegal without exceptions.[139] The spokeswoman for Americans United for Life confirmed that the organization authored a model bill for states to use in drafting mandatory pre-abortion ultrasound legislation.[140] A number of states have used the model bill to draft their own

[135] *See* Marshall, *supra* note 112.
[136] Nova Health Systems v. Pruitt, No. 2:12-CV-00395, 2012 WL 1034022 (Okla. Dist. Ct. Okla. Cnty.) (Mar. 28, 2012).
[137] *Huff*, 834 F.Supp.2d at 432 n.7.
[138] *AUL's History - Americans United for Life: Defending Life in Law Since 1971*, AMERICAN'S UNITED FOR LIFE, http://www.aul.org/about-aul/history/ (last visited Dec. 29, 2013).
[139] *See generally* Clarke D. Forsythe, *Can* Roe v. Wade *be overturned After 40 Years?*, AMERICANS UNITED FOR LIFE, (2013) *available at* http://www.aul.org/wp-content/uploads/2013/04/RoeAt40-6_RoeOverturned.pdf (discussing the difficulties in succeeding in their mission of overturning *Roe* and offering suggestions for future success).
[140] *See* Ryan Sibley, *Virginia Ultrasound Law is the Image of a Few Others*, SUNLIGHT FOUNDATION REPORTING GROUP (Mar. 7, 2012), http://reporting.sunlightfoundation.com/2012/virginia-ultrasound-law-image-few-others/.

mandatory pre-abortion ultrasound laws.[141]

It is common for organizations to create model legislation that reflects their social and political postures. However, the integration of the Americans United for Life's model bill into states' existing abortion laws is alarming because the organization's purpose—to ban abortion and grant fetuses' personhood—is at odds with the Supreme Court's holding that abortions are a fundamental right until fetal viability.[142] Thus, when reviewing these laws, the Supreme Court should pay careful attention to the anti-choice purpose they conspicuously reflect.[143]

The sponsors of these bills claim that the laws protect women's health, but neglect to explain why the procedures they support are medically necessary.[144] The same spokesperson from Americans United for Life argued that "ultrasounds are absolutely vital for protecting woman's health, for determining how far along is the pregnancy."[145] However, if that were the true purpose of these laws, they could be written in a way that required far less invasive procedures without any visual or auditory requirements.[146] Moreover, individuals with extensive medical experience and training in ultrasounds and abortions admonish the laws for lacking a medical purpose. A trained gynecologist and abortion provider attested that "[r]equiring [women] to have this specific kind of ultrasound prior to an abortion can be stressing, can be

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[141] WOMEN'S ULTRASOUND RIGHT TO KNOW ACT: MODEL LEGISLATION & POLICY GUIDE FOR THE 2011 LEGISLATIVE YEAR, AMERICAN'S UNITED FOR LIFE, http://www.aul.org/wp-content/uploads/2010/12/Ultrasound-Requirement-2011-LG-_2_.pdf (last visited on Dec. 29, 2013). *See also* Sibley, *supra* note 140.

[142] *See Legal Recognition of the Unborn & Newly Born*, AMERICAN'S UNITED FOR LIFE, http://www.aul.org/issue/legal-recognition/ ("In addition to their work to end abortion, AUL's attorneys work to protect the unborn and provide legal recognition for unborn and newly born children . . . .) (last visited Dec. 29, 2013).

[143] *Compare Legal Recognition of the Unborn & Newly Born*, AMERICAN'S UNITED FOR LIFE, http://www.aul.org/issue/legal-recognition/ ("In addition to their work to end abortion, AUL's attorneys work to protect the unborn and provide legal recognition for unborn and newly born children . . . .) (last visited Dec. 29, 2013), *and* 2014 Clinical Policy Guidelines, NAT'L ABORTION FED'N, 2014, at 8, *available at* https://www.prochoice.org/documents/2014NAFCPGs.pdf (recommending limited use of ultrasounds during abortion care after the first trimester and without auditory and display requirements for the woman).

[144] *See* Marshall, *supra* note 112.

[145] *Id.*

[146] *See id.*

unnecessary… and, in my opinion, should not be mandated in such a way that it might not be medically necessary for a particular patient."[147]

Additionally, the first ultrasound has become a celebrated step in pregnancy that elevates a fetus to the status of a child about to become part of a traditional family.[148] Americans United for Life used this logic to support their model bill, explaining that "[m]edical evidence indicates that women feel bonded to their children after seeing them on the ultrasound screen. Once that bond is established . . . a woman no longer feels ambivalent toward her pregnancy and actually begins to feel invested in her unborn child."[149] Evidence that ultrasound imagery has this effect on women is minimal.[150] Yet, mandatory ultrasound laws were nonetheless enacted against this backdrop, suggesting ulterior motives based on anti-choice bias rather than medical necessity.[151]

## CONCLUSION

Mandatory ultrasound laws are host to a handful of constitutional questions. In *Pruitt*, the Oklahoma Supreme Court ruled that House Bill 2780, a mandatory pre-abortion ultrasound law with restrictive speech and display requirements, was facially unconstitutional under *Casey*.[152] Even though the *Pruitt* court's decision was correct, the court disregarded the constitutional questions implicated in the mandatory pre-abortion ultrasound debate and which are currently being contested in courts across the country. By neglecting to expand their analysis

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[147] *Id.*

[148] Sanger, *supra* note 12, at 362-63 (quoting K. Dykes & K. Stjernqvist, *The Importance of Ultrasound to First-Time Mothers' Thoughts About Their Unborn Child*, 19 J. Reprod. & Infant Psychol. 95 (2001)) ("Women who undergo ultrasound perceive their baby as being 'more real, more vivacious, more familiar, stronger and more beautiful.'").

[149] *See* Weitz, *supra* note 15.

[150] *Id.* (discussing how the evidence Americans United For Life relied upon is derived from only one study that looked at an account of only two women).

[151] *See* Sanger, *supra* note 12, at 362 ("The word encourage does not quite capture the purpose of mandatory ultrasound. Rather, the requirement is meant to bend a woman's will once she has already made up her mind to seek an abortion.").

[152] *Pruitt*, 292 P.3d at 28–29.

and to apply *Casey* to the particulars of these ultrasound laws, the court discarded an opportunity to clarify how these laws inevitably chip away at the fundamental right preserved in *Casey*.

In light of the Supreme Court's denial of certiorari for *Pruitt*, future circuits will be tasked with analyzing mandatory pre-abortion ultrasound laws without a clear legal framework. The *Pruitt* court's opinion aptly recognized the need for Supreme Court direction on this complex issue when they struck down the mandatory pre-abortion ultrasound law as unconstitutional under *Casey*, "until and unless the United States Supreme Court holds to the contrary."[153] Although the Supreme Court denied this opportunity to clarify United States abortion law, the legal ambiguity of mandatory pre-abortion ultrasounds will continue to grow as circuits across the country interpret these laws. Eventually, the Supreme Court will have to clarify the confines of the law.

In anticipation of this future grant of certiorari, and to ameliorate the insufficiencies within the *Pruitt* court's concise opinion, circuit courts and state supreme courts should offer more robust opinions explaining their application of the undue burden standard to mandatory pre-abortion ultrasound laws. A more detailed analysis will likely increase the potential that Supreme Court review will arrive sooner rather than later, as it will evidence the nation's legal divide. Such analysis will bring much needed clarity to the application of the undue burden standard and demonstrate the unreasonable obstacles that mandatory pre-abortion ultrasounds and similarly restrictive laws pose to women's constitutional right to abortion.

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[153] *Id.*