No. _____

In The
Supreme Court of the United States

TERRY CLINE, *ET AL.*,

Petitioners,

v.

OKLAHOMA COALITION FOR REPRODUCTIVE JUSTICE, *ET AL.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Oklahoma law requires that abortion-inducing drugs be administered according to the protocol described on the drugs' FDA-approved labels. The question presented is whether the Oklahoma Supreme Court erred in holding – without analysis or discussion – that this regulation is facially unconstitutional under *Planned Parenthood v. Casey*.

PARTIES TO THE PROCEEDINGS

Petitioners Terry L. Cline, Lyle Kelsey, and Catherine C. Taylor were the appellants in the court below. Respondents are Oklahoma Coalition for Reproductive Justice and Nova Health Systems, doing business as Reproductive Services, and were appellees in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Terry L. Cline, *et al.*, respectfully pray for a writ of certiorari to review the judgment of the Oklahoma Supreme Court in this case.

OPINIONS BELOW

The Oklahoma Supreme Court filed its *per curiam* opinion on December 4, 2012. App., *infra*, 1-3. That opinion is reported at 292 P.3d 27. The relevant order of the state district court is unreported, but is included in an appendix hereto. App., *infra* 4-9.

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on December 4, 2012. This petition for certiorari is filed within 90 days of the entry of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES AND REGULATIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1.

H.B. No. 1970, Section 1, Chapter 216, O.S.L. 2011 (to be codified at Okla. Stat. tit. 63, § 1-729a)

("House Bill 1970"), is set forth in an appendix to this petition. App., *infra*, 10.

STATEMENT

The Oklahoma Supreme Court is consistently misapplying this Court's decision in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). In 2012 alone, the Oklahoma court issued three opinions where, with no analysis, it declared abortion-related laws unconstitutional.[1] In each case, the Oklahoma court described *Planned Parenthood v. Casey* as being controlling and dispositive on its face with no need for further analysis. In two of the cases, the Oklahoma court's decision directly conflicted with recent decisions of federal courts of appeals. And in two of the cases the Oklahoma court struck down the regulations based on *Casey*, despite no party having raised federal claims or defenses.

1. In this case, the Oklahoma Supreme Court affirmed a summary judgment that invalidated on its face a statute that regulates – but does not prohibit – "medical" abortions.

In the simplest of terms, a surgical abortion is performed by inserting a speculum into the woman's

[1] The three decisions are: (1) the decision challenged here, App., *infra*, 1-3, (2) *Nova Health Systems v. Pruitt*, 2012 OK 103, 292 P.3d 28, and (3) *In re Initiative Petition No. 395, State Question No. 761*, 2012 OK 42, 286 P.3d 637.

vagina, dilating the cervix, and then inserting a tube into her uterus that empties the contents by suction. Side effects include bleeding and cramping. Surgical abortions have been performed for decades, and the mortality rate is quite low.

Medical abortions, on the other hand, have only been performed since about 2000, when the Food and Drug Administration ("FDA") first approved the distribution and use of the drug called "mifepristone" in the United States. (R. on Appeal: Tab 16, Ex. C at 1). Mifepristone, also called "RU-486" and marketed as "Mifeprex", is a medication that terminates a pregnancy by detaching the gestational sac from the uterine wall. (R. on Appeal: Tab 16, Ex. B at 3). Approximately 48 hours later, the woman takes a second medication, misoprostol, which induces the contractions necessary to expel the fetus. *Id*. Side effects of the procedure include bleeding, cramping, and may also include fever, diarrhea, nausea, or vomiting. *Id*. The mortality rate of medical abortions is low, but significantly higher than that of surgical abortions. *Id*. at 1.

When the FDA approved mifepristone, it did so pursuant to 21 C.F.R. § 314(H), and imposed eight heightened restrictions on the post-approval distribution of the drug to "assure safe use." (R. on Appeal: Tab 27 at 2). Additionally, the FDA placed an approved protocol for administration of the drug on the drug's label (called the "Final Printed Labeling" or "FPL"), which stated that the appropriate treatment regimen was to administer 600 mg of mifepristone

orally followed by 0.4 mg of misoprostol administered orally two days later, and that mifepristone was not to be administered after 49 days' gestation. *Id*. at 6-7.

As is often the case, once the drug was approved for use, non-approved protocols (known as "off-label" protocols) were developed. (R. on Appeal: Tab 16 at 3-4). Among other things, the off-label protocols involve administering the drugs up to 63 days' gestation, changed the manner in which the drugs were to be administered, and reduced the amount of physician oversight over the administration of the drugs. (R. on Appeal: Tab 14, App. 2 at 6).

Eight otherwise healthy, young women have died from bacterial infections following a medical abortion administered according to one of the off-label protocols. (R. on Appeal: Tab 25, Ex. O at 2). No women have died from such infections following use of the FDA-approved protocol.

2. In 2011, the Oklahoma Legislature acted to address this serious health and safety problem. House Bill 1970 amended Oklahoma's Public Health Code to require that RU-486 (mifepristone) and other abortion-inducing drugs be administered according to the FDA's prescribed protocol. The Act specifically states, "No physician who provides RU-486 (mifepristone) or any abortion-inducing drug shall knowingly or recklessly fail to provide or prescribe the RU-486 (mifepristone) or any abortion-inducing drug according to the protocol tested and authorized by the U.S. Food and Drug Administration and as authorized

in the drug label for the RU-486 (mifepristone) or any abortion-inducing drug." Okla. Stat. tit. 63, § 1-729a(C) (as amended). House Bill 1970 thus merely regulates the manner in which abortion-inducing drugs are administered; it does not ban the use of those drugs.

3. On October 5, 2011, before the Oklahoma law took effect, the Oklahoma Coalition for Reproductive Justice, an abortion rights group, and Nova Health Systems d/b/a Reproductive Services, an abortion provider (collectively "Respondents" or "NOVA") sued various state officials (collectively, "Petitioner" or "the State") alleging that House Bill 1970 on its face violated several provisions of the Oklahoma constitution. (R. on Appeal: Tab 2). NOVA did not raise federal law claims, instead seeking a declaration that Oklahoma's constitution contained a right to an abortion, even though no Oklahoma court had previously so held.

After the parties cross-motioned for summary judgment, the state district court on May 11, 2012 issued findings of fact and conclusions of law. After concluding that Oklahoma's constitution contained a right to an abortion that was coextensive with the federal right, the district court concluded that House Bill 1970's purpose was to "impose a substantial obstacle in the path of women seeking a previability abortion":

> [T]he Act's restriction of the use of the drug RU-486 or 'any other abortion inducing drug, medicine or other substance' in the manner

> and to the regimen set forth in the medication FPL when used for abortion is so completely at odds with the standard that governs the practice of medicine that it can serve no purpose other than to prevent women from obtaining abortions and to punish and discriminate against those women who do.

App., *infra*, 7.

4. The State timely appealed the district court's decision to the Oklahoma Supreme Court. On December 4, 2012, the Oklahoma Supreme Court issued a Memorandum Opinion declining to rule on any of the state law claims before it. App., *infra*, 1-3. Instead, the court *sua sponte* invoked *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), which the court found to be "binding." App., *infra*, 2-3. Holding that House Bill 1970 "is facially unconstitutional pursuant to *Casey*," *id.*, the court affirmed the judgment of the trial court exclusively on that basis.

REASONS FOR GRANTING THE PETITION

I. The Oklahoma Supreme Court is consistently misapplying this Court's abortion precedents.

1. Declaring that "the United States Supreme Court ha[d] previously determined the dispositive issue presented in this matter" in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), the Oklahoma Supreme Court struck down Oklahoma

House Bill 1970 as facially unconstitutional in a cursory, one-and-a-half-page opinion containing no analysis of the statute, the evidentiary record, or the Supreme Court precedent it cited as "binding." In so doing, the Oklahoma Supreme Court improperly found the Oklahoma regulation unconstitutional and effectively held that *Casey* categorically bars states from enacting any abortion-related regulations.

Casey reaffirmed the central holding in *Roe v. Wade*, 410 U.S. 113 (1973), that a woman has a right to an abortion "before viability . . . without undue interference from the State," but it also re-affirmed states' "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." 505 U.S. at 846. The Court in *Casey* established an "undue burden" standard to determine whether federal or state regulations violate the abortion right established in *Roe*. *Id.* at 875-79. Under this rubric the Court struck down a spousal notification requirement, but upheld other state informed consent requirements.

Properly interpreted, then, *Casey* dictates the opposite result reached in the decision below: laws like Oklahoma's medical abortion regulation are permissible. And properly applied, *Casey* requires a reviewing court to carefully consider the specific facts of the case, including any potential burden on women seeking an abortion, and must do so mindful of the state's legitimate interest in protecting the health and safety of its citizens.

By failing to conduct the analysis *Casey* requires the Oklahoma Supreme Court perverted part of the "essential holding" of *Roe*: that states have "legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Id.* at 846 (plurality opinion); *see also Roe v. Wade*, 410 U.S. at 162. *Casey* explicitly repudiated decisions like the Oklahoma Supreme Court's that effectively gave no weight to that important state interest. *See*, *e.g.*, *Casey*, 505 U.S. at 871 (plurality opinion) (emphasizing that the portion of *Roe* affirming these State interests "has been given too little acknowledgment and implementation by the Court in its subsequent cases"); *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (explaining that one of *Casey*'s "central premise[s]" was to correct prior decisions that under-valued the State's interest in preserving life).

2. Further evidence that this decision was improperly decided is that the court neglected to so much as mention this Court's decision in *Gonzales v. Carhart*. The *Gonzales* opinion amplifies the legitimate and substantial government interest in preserving and promoting maternal health. 550 U.S. at 146. The Oklahoma Supreme Court should have taken notice of the decision because in it this Court reaffirmed that "[u]nder our precedents it is clear the State has a significant role to play in regulating the medical profession." *Id*. at 157. The *Gonzales* Court in fact described a quite deferential standard of reviewing health and safety regulations like the one at issue

here, "[w]here [the state] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life." *Id*. at 158. And in reference to facial attacks on health and safety regulations, the *Gonzales* Court noted that it had "given state and federal legislatures *wide discretion* to pass legislation in areas where there is medical and scientific uncertainty." *Id*. at 163 (emphasis added).

Had the Oklahoma Supreme Court taken that deferential standard into account, it would have rejected the facial challenge to House Bill 1970, particularly since House Bill 1970 does not prohibit any type of abortion. It merely requires that abortion-inducing drugs be administered in the manner approved by the FDA – a requirement that is certainly less burdensome than the absolute ban of a certain type of abortion that was upheld in *Gonzales*. Additionally, the "wide discretion" that the *Gonzales* Court described is particularly applicable here, where the record illustrates great scientific uncertainty as to the safety of off-label use of abortion-inducing drugs.

3. As explained above, the Oklahoma Supreme Court's error was hardly an aberration. The Oklahoma Supreme Court's trend of invalidating state limitations on abortion interferes with the State's constitutional duty to regulate the public health and safety of its citizens. Additionally, the Oklahoma

Supreme Court's cursory opinions offer the Oklahoma Legislature with scant guidance as to how they might permissibly regulate in this area. In fact, what little guidance the Oklahoma Supreme Court seems to be offering is that *Casey* requires the Oklahoma court to strike down all abortion regulations. That guidance is completely at odds with this Court's precedents and leaves the State in regulatory limbo.

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

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

The Court should grant the petition, or in the alternative summarily reverse and remand. Either form of relief would release Oklahoma from the incorrect view that federal law compelled its result, and it would restore the Oklahoma Legislature's authority to pursue policy solutions that best reflect its citizens' needs and priorities, subject only to legitimate legal boundaries. *See*, *e.g.*, *Evans*, 514 U.S. at 8 (noting that correcting the Arizona Supreme Court's flawed view of federal law "disabused [the State] of its erroneous view of what the United State Constitution requires" and left it "free to seek whatever solutions it chooses" to the issues facing the State).

II. The decision below directly conflicts with the decision of the Court of Appeals for the Sixth Circuit in *Planned Parenthood v. DeWine*, 696 F.3d 490 (6th Cir. 2012).

The decision below also directly conflicts with a very recent decision of a federal circuit court of appeals. In 2004, the State of Ohio criminalized any prescription of RU-486 (mifepristone) not in accordance with the FDA-approved protocol. Specifically, the Ohio law states in relevant part:

> No person shall knowingly . . . prescribe RU-486 (mifepristone) to another for the purpose of inducing an abortion . . . unless the person . . . is a physician, the physician *satisfies all the criteria established by federal law* that a

> physician must satisfy in order to provide RU-486 (mifepristone) for inducing abortions, and the physician provides the RU-486 (mifepristone) to the other person for the purpose of inducing an abortion *in accordance with all provisions of federal law* that govern the use of RU-486 (mifepristone) for inducing abortions.

Ohio Rev. Code § 2919.123(A) (emphasis added).

As interpreted by the Ohio Supreme Court, the Ohio law "mandates that physicians providing mifepristone to patients for the purpose of inducing an abortion do so in accordance with the FDA drug approval letter and the final printed labeling it incorporates, including compliance with the 49-day gestational limitation and the treatment protocols and dosage indications expressly approved by the FDA." *Cordray v. Planned Parenthood Cincinnati Region*, 122 Ohio St.3d 361, 362, 911 N.E.2d 871. Thus, in effect, the Ohio law is virtually indistinguishable from Oklahoma House Bill 1970.

The Ohio law was challenged by Planned Parenthood, who claimed, amongst other things, that the law violated the Fourteenth Amendment by unduly burdening the right to an abortion. Planned Parenthood's arguments as to why the law created an undue burden were virtually identical to the arguments made by NOVA in this case:

> Plaintiffs argue that the Act's restrictions unduly burden the abortion right because: (1)

> by prohibiting off-label use of mifepristone, the Act essentially bans a safe and common method of abortion for women with gestational durations between 50 and 63 days LMP; (2) the cost of a mifepristone abortion will increase because the FDA-approved protocol requires additional clinic visits and a higher dosage of mifepristone than is currently being administered using an off-label regimen; and (3) women will be denied the "ability to have a safe, private procedure that they feel very strongly is the best way for them to manage their own bodies."

Planned Parenthood Southwest Ohio Region v. DeWine, Slip Copy, 2011 WL 9158009, *16 (S.D. Ohio 2011).

A federal district court granted summary judgment in favor of Ohio, and the Sixth Circuit affirmed. In a thorough, twenty-eight page opinion, the appeals court concluded that there was "no evidence that the Act would impose an undue burden on 'a woman's ability to make th[e] decision to have an abortion." *Planned Parenthood v. DeWine*, 696 F.3d at 513-14.

As to Planned Parenthood's complaint that requiring the use of the FDA-approved protocol decreased by 14 days the period of time in which a woman could opt for a medical abortion rather than a surgical abortion, the Sixth Circuit correctly concluded that:

> The abortion right as it has been described by the Supreme Court protects the "freedom to decide whether to terminate" a pregnancy.

> The Court has not extended constitutional protection to a woman's preferred method, or her "decision concerning the method" of terminating a pregnancy. Therefore, without any evidence that the Act is a substantial obstacle to the ultimate abortion decision, our own common-sense conclusions about what women may prefer do not create a genuine dispute of material fact . . . Accordingly, the district court properly granted summary judgment with regard to the method ban for women 50-63 days LMP.

Id. at 516 [citations omitted].

As to Planned Parenthood's claim that the FDA-approved protocol required a higher dosage of the medication, which correspondingly increased cost, the Sixth Circuit correctly concluded that:

> [A]ssuming the increased cost presents a substantial obstacle to choosing a medical abortion, women would still have the lower-priced option of surgical abortion available to them. Without evidence that the cost increase would create a substantial obstacle to the ultimate choice to undergo an abortion, this claim cannot survive summary judgment . . . Thus, the district court properly granted summary judgment on this claim as well.

Id. at 517-18 [citations omitted].

Remarkably, the rationale underlying the Sixth Circuit's decision was diametrically opposed to that of the Oklahoma Supreme Court's: whereas the

Oklahoma Supreme Court held that House Bill 1970 was precluded by this Court's ruling in *Casey*, the Sixth Circuit ruled that the Ohio law was manifestly constitutional *because of Casey*. *See id*. at 513-18 (citing and quoting *Casey* in multiple places).

The Sixth Circuit's opinion is significant for three reasons. First, it illustrates the outcome the Oklahoma Supreme Court *would have* reached had it properly considered this Court's precedents and had it conducted any of the thoughtful and thorough analysis required by those precedents. Second, it illustrates the irreconcilable conflict between the Oklahoma Supreme Court and Sixth Circuit decisions – a conflict this Court should resolve. Lastly, given that it was issued some two months prior to the Oklahoma Supreme Court's decision, it illustrates just how far astray the Oklahoma court has wandered. Indeed, even in the face of such directly on-point precedent, the Oklahoma court persisted in its erroneous "*Casey* creates a categorical bar" approach.

CONCLUSION

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

Respectfully submitted,

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2012 OK 102
IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

Oklahoma Coalition for Reproductive Justice, on behalf of itself and its members and Nova Health Systems, d/b/a Reproductive Services, on behalf of itself, its staff, and its patients,	)	
Plaintiffs/Appellees,	)	
v.	)	
Terry Cline, in his official capacity as Oklahoma Commissioner of Health, Lyle Kelsey, in his official capacity as Executive Director of the Oklahoma State Board of Medical Licensure and Supervision, Catherine V. Taylor, in her official capacity as the President of the Oklahoma State Board of Osteopathic Examiners,	)	No. 110,765 For Official Publication
Defendants/Appellants.	)	

MEMORANDUM OPINION

(Filed Dec. 4, 2012)

PER CURIUM

¶ 1 This is an appeal of the trial court's summary judgment which held House Bill 1970, 2011 Okla.

Sess. Laws 1276, unconstitutional. Upon review of the record and the briefs of the parties, this Court determines this matter is controlled by the United States Supreme Court decision in *Planned Parenthood v. Casey,* 505 U.S. 833 (1992), which was applied in this Court's recent decision of *In re Initiative No. 395, State Question No. 761,* 2012 OK 42, *cert. den. sub nom. Personhood Okla. v. Barber et al.,* 81 U.S.L.W. 3065 (U.S. October 29, 2012)

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

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

U.S. Const. Art. VI, cl. 2. The Oklahoma Constitution reaffirms the effect of the Supremacy Clause on Oklahoma law by providing: "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land." Okla. Const. art. 1, § 1. Thus, this Court is duty bound by the United States and the Oklahoma Constitutions to "follow the mandate of the United

States Supreme Court on matters of federal constitutional law" *In re Initiative Petition No. 349, State Question No. 642,* 1992 OK 122, ¶ 1, 838 P.2d 1, 2; *In re Petition No. 395,* 2012 OK 42, ¶ 2.

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

ALL JUSTICES CONCUR.

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

OKLAHOMA COALITION FOR REPRODUCTIVE JUSTICE, on behalf of itself and its members and NOVA HEALTH SYSTEMS, D/B/A REPRODUCTIVE SERVICES, on behalf of itself, its staff, and its patients, Plaintiffs, v. TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health, LYLE KELSEY, in his official capacity as Executive Director of the Oklahoma State Board of Medical Licensure and Supervision, CATHERINE V. TAYLOR, in her official capacity as the President of the Oklahoma State Board of Osteopathic Examiners, Defendants.	Case No. CV-2011-1722 Judge Donald L. Worthington

FINDINGS OF FACT

(Filed May 11, 2012)

1. In the year 2000 the United States Food and Drug Administration (FDA) approved the abortion

inducing drug RU-486 (also known as Mifeprex and Mifepristone) for marketing in the United States subject to a regimen of use described in the FDA final printed labeling (FPL) that accompanied the approval of the drug.

2. On May 11, 2011, Governor Mary Fallin signed into law Oklahoma House Bill 1970 (The Act) amending Section 1, Chapter 48, O.S.L. 2010 (codified as 63 O.S. Supp. 2010, § 1-729a) to become effective November 1, 2011 relating to the drug RU-486 or "any other abortion-inducing drug, medicine or other substance" prescribed or dispensed with the intent of terminating the clinically diagnosable pregnancy of a woman.

3. Plaintiffs on October 5, 2011 filed this case in this court seeking declaratory judgment that The Act violates the Oklahoma Constitution and seeking an injunction prohibiting enforcement of The Act.

4. On December 2, 2011, the Honorable Daniel L. Owens, a judge of this court entered an Order Granting Injunction temporarily enjoining the enforcement of The Act.

5. The Act provides a ban on medication abortion in the State of Oklahoma except as provided and in the manner and regimen set forth in the RU-486 FPL and it explicitly prohibits the "off label" use of RU-486 or any abortion drug or medication.

6. Good medical practice and the best interests of the patient often includes drug use that is not displayed in the FPL of that drug and requires physicians use legally available drugs according to their best knowledge and judgment.

7. Since the RU-486 FPL was issued by the FDA in 2000, a regimen different from that set forth in the FPL has been used in a great majority of cases of medication abortions in the United States demonstrated by scientific research to be safer and more effective than the regimen provided in the RU-486 FPL.

CONCLUSIONS OF LAW

1. The due process clause of the United States Constitution protects the right to bodily integrity as a fundamental right. *Washington v. Glucksberg, 521 U.S. 702 (1997)*; *Planned Parenthood v. Casey 505 U.S. 833 (1992)*.

2. Rights that are protected as fundamental by the United States Constitution are protected as fundamental rights by the Oklahoma Constitution to at least the same extent, *Eastern Oklahoma Building and Construction Trades Council v. Pitts, 2003 OK 113, 82 P.3d 1008*; *Messenger v. Messenger, 1992 OK 27, 827 P.2d 865 (Okla 1992)*.

3. The due process clause of the United States. Constitution protects the right to terminate a pregnancy as a fundamental right, *Roe V. Wade, 410 U.S. 113 (1973)*.

4. The due process clause of the Oklahoma Constitution protects the right to terminate a pregnancy as a fundamental right. *Article II § 7*, *Oklahoma Constitution*; *Roe v. Wade, ante*; *Eastern Oklahoma Building and Construction Trades Council v. Pitts, ante*; *Messenger v. Messenger, ante.*

5. A state regulation that has the effect of placing a substantial obstacle in the path of a woman seeking an abortion creates an "undue burden" on her ability to make that decision. *Planned Parenthood v. Casey, ante*; *Jane L V. Bangerter, 102 F.3d 1112 (10th Cir. 1995)*; *Davis v. Fieker, 1997, OK 156, 952 P.2d 505.*

6. A law violates the undue burden standard if its purpose is to impose a substantial obstacle in the path of women seeking a previable abortion. *Planned Parenthood v. Casey, ante*; *Jane L. V Bangerter, ante*

7. The Act's restriction of the use of the drug RU-486 or "any other abortion inducing drug, medicine or other substance" in the manner and to the regimen set forth in the medication FPL when used for abortion is so completely at odds with the standard that governs the practice of medicine that it can serve no purpose other than to prevent women from obtaining abortions and to punish and discriminate against those women who do. *Planned Parenthood v. Casey, ante.*

8. No material fact is in dispute in this case and Plaintiffs are entitled to judgment as a matter of law.

ORDER

The Motions for Summary Judgment of Plaintiffs and of Defendants come on this date for decision. The court heard argument of the attorneys on April 27, 2012, has reviewed and considered that argument, and the authority and material submitted by the parties, has found the facts as set forth herein and has reached the conclusions of law above noted.

It is therefore ordered that the Motion for Summary Judgment of Plaintiffs is sustained and the Motion for Summary Judgment of Defendants is overruled.

It is further ordered that Plaintiffs are granted judgment that Oklahoma House Bill 1970, 2011 Session Laws 1276 is an unconstitutional law in violation of the fundamental rights of women to privacy and bodily integrity guaranteed by Article II, § 7 of the Constitution of the State of Oklahoma.

It is further ordered that the Temporary Injunction issued by this court on December 2, 2011 is converted into a Permanent Injunction without bond and Defendants, their employees, agents and successors in office are restrained and prohibited from enforcing the said Oklahoma House Bill 1970, 2011 Sessions Law 1276.

The clerk is directed to send a copy of this order to the attorneys for the parties.

Dated this 11th day of May, 2012.

/s/ Donald L. Worthington
Donald L. Worthington
Judge of the District Court

An Act

ENROLLED HOUSE
BILL NO. 1970

By: Grau, Trebilcock, Cockroft, Reynolds, Faught, Ownbey, Kern, Ritze, Cooksey, Roberts (Dustin) and Peterson of the House

and

Treat, Brecheen and Allen of the Senate

An Act relating to public health and safety; amending Section 1, Chapter 48, O.S.L. 2010 (63 O.S. Supp. 2010, Section 1-729a), which relates to RU-486 for the purpose of inducing abortions; adding definitions; requiring that physicians prescribe certain drugs according to certain protocol; modifying duties of certain physicians; requiring physician to examine woman and document gestational age prior to administering certain drugs; requiring follow-up appointment to be scheduled for certain patient; providing for severability; and providing an effective date

SUBJECT: Abortion

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

SECTION 1. AMENDATORY Section 1, Chapter 48, O.S.L. 2010 (63 O.S. Supp. 2010, Section 1-729a), is amended to read as follows:

Section 1-729a. A. As used in this section:

1. *"Abortion-inducing drug" means a medicine, drug, or any other substance prescribed or dispensed with the intent of terminating the clinically diagnosable pregnancy of a woman, with knowledge that the termination shall with reasonable likelihood cause the death of the unborn child. This includes off-label use of drugs known to have abortion-inducing properties, which are prescribed specifically with the intent of causing an abortion, such as misoprostol (Cytotec), and methotrexate. This definition does not apply to drugs that may be known to cause an abortion, but which are prescribed for other medical indications, such as chemotherapeutic agents or diagnostic drugs;*

2. "Drug label" or "drug's label" means the pamphlet accompanying an abortion-inducing drug which outlines the protocol tested and authorized by the U.S. Food and Drug Administration (FDA) and agreed upon by the drug company applying for FDA authorization of that drug. Also known as "final printing labeling instructions", it is the FDA document which delineates how a drug is to be used according to the FDA approval;

3. "Federal law" means any law, rule, or regulation of the United States or any drug approval letter of the U.S. Food and Drug Administration that governs or regulates the use of RU-486 (mifepristone) *or any abortion-inducing drug* for the purpose of inducing abortions;

~~2.~~ *4.* "Personal identifying information" means any information designed to identify a person and any information commonly used or capable of being used alone or in conjunction with any other information to identify a person; and

~~3.~~ *5.* "Physician" means a doctor of medicine or osteopathy legally authorized to practice medicine in the state.

B. No person shall knowingly or recklessly give, sell, dispense, administer, prescribe, or otherwise provide RU-486, also known as mifepristone, *or any abortion-inducing drug* for the purpose of inducing an abortion in a pregnant female, unless the person who gives, sells, dispenses, administers, prescribes, or otherwise provides the RU-486 (mifepristone) *or any abortion-inducing drug* is a physician who:

1. Has the ability to assess the duration of the pregnancy accurately;

2. Has the ability to diagnose ectopic pregnancies;

3. Has the ability to provide surgical intervention in cases of incomplete abortion or severe bleeding, or has made and documented in the patient's medical record plans to provide such care through other qualified physicians;

4. Is able to assure patient access to medical facilities equipped to provide blood transfusions and resuscitation, if necessary; and

5. Has read and understood the prescribing information for the use of RU-486 (mifepristone) *or any abortion-inducing drug* as provided by the drug manufacturer in accordance with the requirements of the U.S. Food and Drug Administration.

C. *No physician who provides RU-486 (mifepristone) or any abortion-inducing drug shall knowingly or recklessly fail to provide or prescribe the RU-486 (mifepristone) or any abortion-inducing drug according to the protocol tested and authorized by the U.S. Food and Drug Administration and as authorized in the drug label for the RU-486 (mifepristone) or any abortion-inducing drug.*

D. No physician who provides RU-486 (mifepristone) *or any abortion-inducing drug* for the purpose of inducing an abortion shall knowingly or recklessly fail to:

1. Provide each patient with a copy of the drug manufacturer's medication guide *and drug label* for RU-486 (mifepristone) *or any abortion-inducing drug being used*;

2. Fully explain the procedure to the patient, including, but not limited to, explaining ~~whether the physician is using~~ *that* the drug *is being used* in accordance with *the protocol tested and authorized by* the U.S. Food and Drug Administration ~~regimen or an evidence based regimen, and, if using an evidence based regimen, specifying that the regimen differs from the U.S. Food and Drug Administration regimen and providing detailed information on the evidence~~

~~based regimen being used~~ *and as outlined in the drug label for RU-486 (mifepristone) or any abortion-inducing drug*;

3. Provide the female with a copy of the drug manufacturer's patient agreement and obtain the patient's signature on the patient agreement;

4. Sign the patient agreement; and

5. Record the drug manufacturer's package serial number in the patient's medical record.

~~D.~~ *E. Because the failure and complications from medical abortion increase with increasing gestational age, because the physical symptoms of medical abortion can be identical to the symptoms of ectopic pregnancy, and because RU-486 (mifepristone) or any abortion-inducing drug does not treat ectopic pregnancies but rather is contraindicated in ectopic pregnancies, the physician giving, selling, dispensing, administering, or otherwise providing or prescribing RU-486 (mifepristone) or any abortion-inducing drug shall first examine the woman and document, in the woman's medical chart, gestational age and intrauterine location of the pregnancy prior to giving, selling, dispensing, administering, or otherwise providing or prescribing RU-486 (mifepristone) or any abortion-inducing drug.*

F. When RU-486 (mifepristone) *or any abortion-inducing drug* is used for the purpose of inducing an abortion, the drug must be administered ~~by or~~ in the same room and in the physical presence of the

physician who prescribed, dispensed, or otherwise provided the drug to the patient. The physician inducing the abortion, or a person acting on behalf of the physician inducing the abortion, shall *schedule the patient for a follow-up appointment and* make all reasonable efforts to ensure that the patient returns twelve (12) to eighteen (18) days after the administration or use of RU-486 (mifepristone) *or any abortion-inducing drug* for a follow-up visit so that the physician can confirm that the pregnancy has been terminated and assess the patient's medical condition. A brief description of the efforts made to comply with this subsection, including the date, time, and identification by name of the person making such efforts, shall be included in the patient's medical record.

~~E.~~ G. 1. If a physician provides RU-486 (mifepristone) *or any abortion-inducing drug* for the purpose of inducing an abortion and if the physician knows that the female who uses the RU-486 (mifepristone) *or any abortion-inducing drug* for the purpose of inducing an abortion experiences within one (1) year after the use of RU-486 (mifepristone) *or any abortion-inducing drug* an incomplete abortion, severe bleeding, or an adverse reaction to the RU-486 (mifepristone) *or any abortion-inducing drug* or is hospitalized, receives a transfusion, or experiences any other serious event, the physician shall, as soon as is practicable, but in no case more than sixty (60) days after the physician learns of the adverse reaction or serious event, provide a written report of the

incomplete abortion, severe bleeding, adverse reaction, hospitalization, transfusion, or serious event to the drug manufacturer. If the physician is a doctor of medicine, the physician shall simultaneously provide a copy of the report to the State Board of Medical Licensure and Supervision. If the physician is a doctor of osteopathy, the physician shall simultaneously provide a copy of the report to the State Board of Osteopathic Examiners. The relevant Board shall compile and retain all reports it receives pursuant to this subsection. All reports the relevant Board receives under this subsection are public records open to inspection pursuant to the Oklahoma Open Records Act; however, absent an order by a court of competent jurisdiction, neither the drug manufacturer nor the relevant Board shall release the name or any other personal identifying information regarding a person who uses or provides RU-486 (mifepristone) *or any abortion-inducing drug* for the purpose of inducing an abortion and who is the subject of a report the drug manufacturer or the relevant Board receives under this subsection.

2. No physician who provides RU-486 (mifepristone) *or any abortion-inducing drug* to a pregnant female for the purpose of inducing an abortion shall knowingly or recklessly fail to file a report required under paragraph 1 of this subsection. Knowing or reckless failure to comply with this subsection shall subject the physician to sanctioning by the licensing board having administrative authority over such physician.

~~F.~~ *H.* Any female upon whom an abortion has been performed, the father of the unborn child who was the subject of the abortion if the father was married to the woman who received the abortion at the time the abortion was performed, or a maternal grandparent of the unborn child, may maintain an action against the person who performed the abortion in knowing or reckless violation of this section for actual and punitive damages. Any female upon whom an abortion has been attempted in knowing or reckless violation of this section may maintain an action against the person who attempted to perform the abortion for actual and punitive damages.

~~G.~~ *I.* If a judgment is rendered in favor of the plaintiff in any action described in this section, the court shall also render judgment for a reasonable attorney fee in favor of the plaintiff against the defendant. If a judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney fee in favor of the defendant against the plaintiff.

~~H.~~ *J.* No pregnant female who obtains or possesses RU-486 (mifepristone) *or any abortion-inducing drug* for the purpose of inducing an abortion to terminate her own pregnancy shall be subject to any action brought under subsection ~~F~~ *H* of this section.

K. If some or all of the language in this section is ever temporarily or permanently restrained or enjoined by judicial order, then this section shall be

enforced as though such restrained or enjoined provisions had not been adopted; provided, however, that whenever such temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.

SECTION 2. This act shall become effective November 1, 2011.

Passed the House of Representatives the 4th day of May, 2011.

/s/ Don L. Armes
Presiding Officer of the
House of Representatives

Passed the Senate the 26th day of April, 2011.

/s/ Gary Stanislawski
Presiding Officer
of the Senate

OFFICE OF THE GOVERNOR

Received by the Governor this 5th day of May, 2011, at 12:08 o'clock PM.

By: /s/ Jessica R. Rogers

Approved by the Governor of the State of Oklahoma the 11th day of May, 2011, at 2:59 o'clock PM

/s/ Mary Fallin
Governor of the
State of Oklahoma

OFFICE OF THE
SECRETARY OF STATE

Received by the Secretary of State this 11th day of May, 2011, at 4:50 o'clock PM.

By: /s/ Michelle R. Day