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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

E. SCOTT PRUITT
Oklahoma Attorney General
PATRICK R. WYRICK
Solicitor General
Counsel of Record
313 NE 21st Street
Oklahoma City, OK 73105
Telephone (405) 522-4448
Fax (405) 522-0669
patrick.wyrick@oag.ok.gov

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OR CALL COLLECT (402) 342-2831

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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,

E. SCOTT PRUITT
Oklahoma Attorney General
PATRICK R. WYRICK
Solicitor General
Counsel of Record
313 NE 21st Street
Oklahoma City, OK 73105
Telephone (405) 522-4448
Fax (405) 522-0669
patrick.wyrick@oag.ok.gov