



Supreme Court

OF THE OKLAHOMA INTERCOLLEGIATE LEGISLATURE

CHIEF JUSTICE: Amy Vanderveer
VICE CHIEF JUSTICE: Izaak Thompson
ASSOCIATE JUSTICES, By Seniority:
Matthew Nieman
Will Flanagan
Benn Garrett
Kathryn Kleiner
Sophie Machalec
Cathryn Massing



MOOT COURT CASE

Fall 2018

**Oklahoma Intercollegiate Legislature
Fall 2018**

Andrea Sommerville and William DeNolf, Petitioner

V.

The State of Olympus, Respondent

On writ of certiorari to the Supreme Court of the State of Olympus

ORDER OF THE COURT ON SUBMISSION

IT IS THEREFORE ORDERED that counsel appear before the Supreme Court to present oral arguments on the following issues:

1. Whether the transvaginal ultrasound requirement in Proposition 417 poses an undue burden in violation of the Fourteenth Amendment to the United States Constitution?
2. Whether Proposition 417 violates the free speech rights of licensed physicians under the First Amendment to the United States Constitution?

Facts of the Case

History of Proposition 417

In 2015, voters in the State of Olympus adopted Proposition 417. See Appendix I. Proposition 417 requires women seeking an abortion in the State of Olympus to first submit to a transvaginal ultrasound (“the ultrasound procedure”). The ultrasound procedure is to be performed by a physician who is licensed in Olympus to practice medicine and to perform ultrasounds. The physician is required to read a script prepared by the State. See Appendix II. According to the rules and regulations developed by the Olympus Department of Public Health, the ultrasound procedure is to be performed while the woman is “awake and alert,” and she is to face the machine’s monitor. See Appendix III.

Proposition 417 calls for the creation of a script to be discussed with women seeking abortions. See Appendix II. With this script, Olympus became the eighteenth state to mandate pre-abortion counseling.

Olympus is one of forty states that require abortions to be performed by a physician. The physician who performs the ultrasound procedure is required to be the same physician who would perform the abortion. If the physician who performed the ultrasound procedure is unavailable, the woman is to either reschedule or repeat the process with a different doctor and undergo the ultrasound procedure again. The only exception to the requirement that the same physician perform the ultrasound and the abortion is if the life of the mother would be at risk by waiting. In such instances the ultrasound does not have to be re-administered unless requested by the woman seeking an abortion. No woman can be made to undergo the ultrasound procedure or review the results more than three times before procuring an abortion. A physician who fails to comply with Proposition 417 risks a monetary fine and/or the temporary suspension of his or her medical license. A physician who fails to comply more than three times can be barred from practicing medicine in Olympus or, depending on the circumstances, forbidden from performing abortions in Olympus.

Abortion is treated as a commercial enterprise in Olympus. The State has five abortion providers, each staffed by state-licensed physicians, medical technicians, nurses, and support staff who are paid for their services. Each provider advertises in print and electronic media, as well as on the radio. Like most states, Olympus allows health care providers and institutions to refuse to perform abortions. Proposition 417 forbids insurance companies operating in Olympus from paying for the procedure except under certain defined exceptions. See Appendix I.

Proposition 417 provides for four exceptions to the ultrasound procedure:

- (A) If the woman is pregnant as a result of rape, incest, or other violation of the Olympus Penal Code that has been reported to law enforcement authorities or that has not been reported because a woman could reasonably believe that doing so would put her at risk of retaliation resulting in serious bodily injury;
- (B) If the woman is a minor and obtaining an abortion in accordance with judicial bypass procedures under Olympus Family Code;

- (C) If the fetus has an irreversible medical condition or abnormality, as identified by reliable diagnostic procedures and documented by a licensed physician in the woman's medical file;
- or
- (D) If carrying the baby to term would endanger the life of the mother, and such a claim is documented by a licensed physician in the woman's medical file.

At the conclusion of the consultation, a woman is required to sign and date a form certifying that she either qualifies for an exception to the requirement that she undergo the procedure or that she underwent the consultation, understands the possible risks to herself and others associated with abortion, and still wishes to terminate her pregnancy. Upon certification, the physician is authorized to schedule and perform the ultrasound procedure. The ultrasound procedure, which takes 30-60 minutes, can be scheduled and performed the same day as the consultation. However, the requirement that a woman have a full bladder before the test could cause a short delay.

Proposition 417 went into effect on January 22, 2016. Counting Olympus, twenty-five states have trans-vaginal ultrasound laws. Eleven of these states require that the trans-vaginal ultrasound be performed before any abortion. Four of these eleven states require that providers display and describe the ultrasound image to women. Seven of these eleven states, while requiring the procedure, stop short of requiring that providers display and describe the ultrasound image to women, but require provider to offer to display the image to women. For a listing of the twenty-five states that have enacted trans-vaginal ultrasound laws as of this date, see Appendix IV.

The Case of Andrea Sommerville and Dr. DeNolf

On February 14, 2017, Andrea Sommerville discovered that she was eight weeks pregnant. She did not qualify for Medicaid. On Friday, February 15, 2017, Ms. Sommerville consulted with a licensed abortion provider, Dr. William DeNolf. Dr. DeNolf read Ms. Sommerville the script required by Proposition 417. She informed him that she did not qualify for any of the exceptions nor for the waiver of the 24-hour waiting period (see Appendix I). Ms. Sommerville, whose mother and grandmother had both been diagnosed with breast cancer, asked Dr. DeNolf if an abortion would really raise her risk of breast cancer. He informed her that under the law, at risk of being fined and losing his license, he could not instruct her on the matter other than to refer her to the State Department of Public Health. Ms. Sommerville asked if Dr. DeNolf could recommend a good oncologist with whom she could consult about the breast cancer risks associated with abortion. Again, he informed her that he could not under the law. Ms. Sommerville asked him what section of the law forbids such a referral. Dr. DeNolf admitted that he was uncertain, but that his facility's legal advisor had advised him "not to answer any questions about anything related to Proposition 417." Ms. Sommerville left and later contacted the State Department of Public Health and asked for more information on the studies referenced in "What a Woman Should Know About Risks Associated with Abortion." The official with whom she spoke referred her to several of the groups associated

with the campaign for Proposition 417. This included Olympians for Fair and Sensible Abortion Laws. None of the groups that she contacted would discuss the merits of the studies referenced by Dr. DeNolf or in “What a Woman Should Know About Risks Associated with Abortion.” Ms. Sommerville contacted an oncologist who practiced medicine outside of Olympus, who informed her that in his opinion “the studies were inconclusive at best” and “likely flawed and biased.” Ms. Sommerville read several similar accounts of the studies on-line.

On Monday, February 18, 2017, Ms. Sommerville contacted Dr. DeNolf to schedule her transvaginal ultrasound. She arranged an appointment on the morning of Wednesday, February 20, 2017. At this appointment, Dr. DeNolf, pursuant to Olympus law, performed the ultrasound procedure. Ms. Sommerville, who paid out of pocket, viewed the ultrasound and heard the heartbeat. She was presented with a record of the test indicating the baby’s size and shape and was presented with the pamphlet “What a Woman Should Know About Risks Associated with Abortion.” The record below does not indicate how her pregnancy was ultimately resolved.

On March 17, 2017, Ms. Sommerville retained legal counsel and filed a lawsuit in federal court under 42 U.S.C. § 1983 against the State of Olympus asserting that Proposition 417 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it requires an unnecessary medical procedure as a pre-condition to procuring an abortion. Ms. Sommerville asserts that the procedure required by Proposition 417 represented “an undue burden” and as such is unconstitutional. At her trial challenging Proposition 417, Ms. Sommerville stated:

“No woman should have to undergo what Proposition 417 requires. The burden was too great—especially when one is at peace with one’s decision. This is not about abortion rights. This is about forcing an unwanted and invasive medical procedure on women, not to mention making them pay for it out of pocket.”

The Petitioner’s Claim

Ms. Sommerville was joined in the suit by Dr. DeNolf, who alleges that Proposition 417 violates the First Amendment to the United States Constitution because it compels him to express political, moral, medical, and scientific sentiments that are not his own. At trial, the federal district court judge ruled that Proposition 417 is unconstitutional because it compels physicians to make statements contrary to their personal beliefs and opinions and is an undue burden on a woman’s right to procure abortion healthcare. The State of Olympus appealed to this court.

Cases Cited: Undue Burden Cases

- 1) *Griswold v. Connecticut*, 381 U.S. 479 (1965)
<http://supreme.justia.com/cases/federal/us/381/479/case.html>
- 2) *Roe v. Wade*, 410 U.S. 133 (1973) <http://supreme.justia.com/cases/federal/us/410/113/case.html>
- 3) *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989)
<http://supreme.justia.com/cases/federal/us/492/490/>
- 4) *Hodgson v. Minnesota*, 497 U.S. 417 (1990) <http://supreme.justia.com/cases/federal/us/497/417/>
- 5) *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)
<http://supreme.justia.com/cases/federal/us/505/833/>
- 6) *Stenberg v. Carhart*, 530 U.S. 914 (2000)
<http://supreme.justia.com/cases/federal/us/530/914/case.html>
- 7) *Gonzalez v. Carhart*, 550 U.S. 124 (2007)
<http://www.supremecourt.gov/opinions/06pdf/05-380.pdf>
- 8) *Planned Parenthood of Minn., N.D., S.D. v. Rounds* 686 F.3d 889 (8th Cir. 2012) (en banc)
<http://media.ca8.uscourts.gov/opndir/12/07/093231P.pdf>

Cases Cited: Free Speech Cases

- 1) *Wooley v. Maynard*, 430 U.S. 705 (1977)
<http://supreme.justia.com/cases/federal/us/430/705/>
- 2) *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530 (1980)
<http://supreme.justia.com/cases/federal/us/447/530/>
- 3) *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980)
<http://supreme.justia.com/cases/federal/us/447/557/>
- 4) *Accountant's Soc. of Va. v. Bowman*, 860 F.2d 602 (4th Cir. 1988)
<http://law.justia.com/cases/federal/appellate-courts/F2/860/602/465793/>
- 5) *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995)
<http://supreme.justia.com/cases/federal/us/515/618/>
- 6) *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002)
<http://caselaw.findlaw.com/us-9th-circuit/1343211.html>
- 7) *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014)
http://cdn.ca9.uscourts.gov/datastore/general/2014/01/29/12-17681_order_amended_opinion.pdf
- 8) *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012)
<https://www.ca5.uscourts.gov/opinions/pub/11/11-50814-CV0.wpd.pdf>

Appendix I

Proposition 417

The Voters of Olympus do hereby amend the Olympus State Public Health and Public Safety Code.

Section 1: DEFINITIONS: In this proposition the following terms are employed:

- (1) "Abortion" means the use of any means to terminate the pregnancy of a female known by the attending physician to be pregnant with the intention that the termination of the pregnancy by those means will, with reasonable likelihood, cause the death of the fetus.
- (2) "Abortion provider" means a facility where an abortion is performed, including the office of a physician and a facility licensed under Chapter 245 of Olympus State Code.
- (3) "Medical emergency" means a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed.
- (4) "Ultrasound" means the use of ultrasonic waves for diagnostic or therapeutic purposes, specifically to monitor an unborn child.

Section 2: All women seeking to procure an abortion in Olympus must submit to a trans- vaginal ultrasound. Failure to do so shall result in penalties that shall include a fine of \$500 to \$5000 and/or a prison term of no fewer than 30 and no greater than 60 days. Judges can suspend these sentences for first-time offenders.

Section 3: The requirement to submit to a trans-vaginal ultrasound shall not apply to women:

- A) If the woman was pregnant as a result of a rape, incest, or other violation of the Olympus Penal Code that has been reported to law enforcement authorities or that has not been reported because a woman could reasonably believe that doing so would put her at risk of retaliation resulting in serious bodily injury;
- (B) If the woman is a minor and obtaining an abortion in accordance with judicial bypass procedures under Olympus Family Code;
- (C) If the fetus has an irreversible medical condition or abnormality, as identified by reliable diagnostic procedures and documented in the

woman's medical file; or

- (D) If carrying the baby to term would endanger the life of the mother, and such a claim is documented by a licensed physician in the woman's medical file.

Section 4: Women seeking an exemption must do so in writing specifying the reason for the exception. Lying or making false statements about qualifying for an exception is a misdemeanor punishable by a fine not to exceed \$500 for each occurrence.

Section 5: At the conclusion of the trans-vaginal ultrasound, women seeking to procure an abortion in Olympus shall be presented with a record of the test indicating the baby's size and shape and a pamphlet to be created by the Olympus Department of Public Health. This pamphlet shall describe a baby's development, week by week, and explains abortion procedures. The father of the baby may request a copy of this record, as well as to be present for the procedure; however, the mother has the authority to instruct her physician to deny such a request. The mother's decision as it pertains to requests made by the father is not appealable to any state or municipal court of law within the jurisdiction of the State of Olympus.

Section 6: All abortions in Olympus shall be performed by a physician who is licensed in the State of Olympus to practice medicine and to perform ultrasounds.

Section 7: The Olympus State Department of Public Health shall create rules and procedures for the procedure required by Section 2 of this law by January 23, 2013. That department shall develop a script to be read to women seeking an abortion and create a free pamphlet for women seeking an abortion that shall describe fetal development, and an explanation of the procedure to be performed. This pamphlet shall detail the mental and physical health risks to women who procure abortions. These shall include, but are not be limited to, risks of suicide, depression, breast cancer, fever, hemorrhage, and infertility. This pamphlet shall be offered to the father of the child, if present at the medical facility, and it shall be posted on-line.

Section 8: Women seeking an abortion in the State of Olympus who do not qualify for one of the exceptions established in Section 3 of this law shall sign and date a form to be developed by the Olympus State Department of Public Health certifying that she has consulted with a physician licensed by the State of Olympus to perform abortions in Olympus, that she understands the possible risks associated with abortion, and that she still wishes to terminate her pregnancy.

Section 9: Women who have certified that they wish to procure an abortion in Olympus from a physician licensed by the State of Olympus to perform abortions in Olympus must wait for a period of at least 24 hours before procuring an abortion. This provision can be waived if a woman certifies in writing that she currently lives 100 miles or more from the nearest licensed abortion facility in the State of Olympus. Women seeking a waiver from the 24-hour waiting period must provide proof of residence in the form of a government-issued photo identification card, which includes an address, two utility bills limited to cable, gas, or electric, and a letter from a landlord or bank certifying the location of the woman's residence. Women seeking a waiver from the 24-hour waiting period must produce the aforementioned documents of

proof of residency at the time of their trans-vaginal ultrasound to legally waive the waiting period.

Section 10: The physician who performs a patient's abortion must be the same physician who performed the trans-vaginal ultrasound. If the physician who performed the trans-vaginal ultrasound is unavailable, the patient must repeat the trans-vaginal ultrasound and its review with a different physician who is licensed to practice medicine and perform ultrasounds in the State of Olympus. No patient shall be made to undergo a trans-vaginal ultrasound procedure or repeat the consultation and/or review the results more than three times. In such instances the script shall not have to be re-administered unless requested by the woman seeking an abortion. The only exception to repeating this process is if the life of the mother would be at risk by waiting.

Section 11: Physicians licensed to practice medicine in Olympus shall not give advice (other than medical) about whether to obtain an abortion. They shall read and review a script, to be developed by the Olympus State Department of Public Health, with patients who seek an abortion. Physicians who fail to comply with this law shall be fined up to \$10,000 for each occurrence and are subject to a suspension of their medical license. Physicians who fail to comply with this law in excess of three times shall be subject to loss of license and/or be subject to being forbidden to perform abortions in Olympus.

Section 12: No insurance company operating in Olympus shall pay for trans-vaginal ultrasounds unless the patient qualifies for a non-elective abortion as established in Section 3 of this law.

Section 13: This law shall take effect January 23, 2016.

Appendix II

"The Script"

Women are to be told: "Studies have found that a sizeable number of women who procure abortions become depressed and/or a threat to themselves or others. A sizeable number of women who abort fetuses commit suicide or engage in other acts of violence aimed at themselves or others. You should know that when it comes to abortion there is always an immediate threat to your own health, including but not limited to death, developing infections, or hemorrhaging, and you may suffer long-term physical side-effects, including but not limited to the potential for infertility and the increased chance of getting breast cancer. You may suffer from a lifetime of guilt and develop mental health issues, including but not limited to depression. There is a chance the fetus feels pain as a result of an abortion. Do you understand what I have just told you? Do you wish to continue with the process of performing a trans-vaginal ultrasound, which will allow you to view the fetus and hear its heartbeat, and potentially procure an abortion that will extinguish the life of the fetus and may put you and your loved ones at risk? The State has made information available to you

about the risks posed by abortion. Would you like to receive such information? It is available online at the Olympus State Department of Public Health's website.”

Appendix III

Procedures Developed by the Olympus State Department of Public Health Governing the Performance of Trans-Vaginal Ultrasounds

- Rule 1:** Physicians administering trans-vaginal ultrasounds are to ensure that patients are awake and alert and that they position themselves so as to face the machine's monitor. Physicians shall ensure that patients do not obstruct their ears so as to be unable to hear their physician and that they can hear the heartbeat. Physicians shall make every reasonable effort to describe what they see or hear with respect to the fetus to any patient who is physically unable to view or hear the ultrasound.
- Rule 2:** Physicians administering trans-vaginal ultrasounds shall instruct patients about the dangers of abortion as well as the virtues of parenthood, the possibility that they will come to regret their decision, and dangers that are associated with abortion. Patients are to be read a script prepared by the State of Olympus Department of Public Health.
- Rule 3:** Physicians licensed to practice medicine in Olympus shall not discuss the merits of any material provided by the State of Olympus to patients as they relate to abortion. Nor shall they critique or pass judgment—personal, medical, or otherwise—on the propriety of abortion, the wisdom or legality of this law, or the virtue of any study that examines the risks and benefits associated with abortion with their patients. This includes if a patient alludes to or asks about alternate studies. Physicians shall direct all such inquiries to the State Department of Public Health.
- Rule 4:** Physicians administering trans-vaginal ultrasounds shall comply with all laws of the State of Olympus respecting what advice they shall offer or shall not offer to patients seeking to procure an abortion in Olympus.
- Rule 5:** These rules shall take effect January 23, 2016.

