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# Virginia's "War on Women": How Forcing Women to Have an Ultrasound Before Abortion is Unconstitutional

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# COMMENTS

## VIRGINIA’S “WAR ON WOMEN:” HOW FORCING WOMEN TO HAVE AN ULTRASOUND BEFORE ABORTION IS UNCONSTITUTIONAL

*Alison B. Linas*

### I. INTRODUCTION

Women’s rights have come a long way in the last hundred years. In 1920, women won the right to vote with the ratification of the Nineteenth Amendment.<sup>1</sup> In 1963, Congress passed the Equal Pay Act, mandating that employers pay women the same salary as men for the same job.<sup>2</sup> In 1965, the Supreme Court of the United States legalized birth control for married couples.<sup>3</sup> Finally, in 1972, the Supreme Court recognized a woman’s right to have an abortion.<sup>4</sup> None of these milestones has come without controversy, and now the controversy continues.

In the last several years, state legislatures around the country have started trying to chip away at abortion rights.<sup>5</sup> States have passed various forms of legislation mandating such things as a twenty-four hour waiting period between consultation and abortion, discussions on fetal pain and potential negative psychological effects on the mother, and ultrasounds before an abortion can be performed.<sup>6</sup> Though not always readily apparent, these laws are all meant to erode the rights given and upheld by the Supreme Court. Most of these laws may also be unconstitutional.<sup>7</sup>

Virginia is one of the states that recently jumped on the anti-abortion bandwagon. In the 2012 legislative session, conservative Republicans

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<sup>1</sup> U.S. CONST. amend. XIX.

<sup>2</sup> Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963).

<sup>3</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>4</sup> *Roe v. Wade*, 410 U.S. 113, 164 (1973).

<sup>5</sup> See generally Guttmacher Inst., State Policies in Brief: Requirements for Ultrasound, available at [http://www.guttmacher.org/statecenter/spibs/spib\\_RFU.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf); Guttmacher Inst., State Policies in Brief: An Overview of Abortion Laws, available at [http://www.guttmacher.org/statecenter/spibs/spib\\_OAL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf).

<sup>6</sup> *Overview of Abortion Laws*, *supra* note 5.

<sup>7</sup> See *State Governments*, NARAL PRO-CHOICE AMERICA (last visited Mar. 14, 2012), <http://prochoiceamerica.org/government-and-you/state-governments> (click on a state to get a detailed view of the abortion laws and regulations in that state and an analysis of the constitutionality of those laws).

gained control of the House, Senate, and Governor's mansion.<sup>8</sup> With the Republican takeover of the Legislature came support for a slew of socially conservative legislation—including new restrictions on abortion.<sup>9</sup> Two key pieces of legislation were introduced: a bill stating that personhood begins at conception<sup>10</sup> and a bill mandating that a woman be required to have an ultrasound before she can have an abortion.<sup>11</sup> The ultrasound bill passed.<sup>12</sup>

This comment will discuss how the ultrasound bill, like similar ones in other states, is unconstitutional for two reasons. First, requiring a woman to undergo a medically unnecessary procedure *at her own expense* is an undue burden under *Planned Parenthood v. Casey*.<sup>13</sup> Second, the Supreme Court has held that competent people have the right to refuse medical care.<sup>14</sup> By requiring a woman to have an ultrasound, the State is depriving her of her constitutional right to refuse care.

Part II of this comment will focus on the Supreme Court's role in shaping abortion policy. Part II(A) concerns the history of abortion rights, starting with *Roe v. Wade* and ending with *Planned Parenthood v. Casey*. I will discuss the expansion of the right to privacy to include the right to have an abortion, and explain the “undue burden” standard adopted in *Casey*. Part II(B) will discuss the Supreme Court's recognition of a rational adult's right to refuse medical care.

Part III will describe Virginia's new ultrasound requirement and how the above-mentioned Supreme Court decisions affect the new bill's legality. Part III(A) will lay out the relevant portions of the bill and discuss its legislative history. Part III(B) will analyze the bill through *Casey*'s undue burden lens. This section will conclude that the bill creates an undue burden on the women it purports to help for a variety of reasons. First, ultrasounds before first trimester abortions are medically unnecessary.<sup>15</sup> Second, requir-

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<sup>8</sup> Anita Kumar & Laura Vozzella, *GOP Takes Control of Virginia General Assembly*, WASH. POST, Jan. 11, 2012, [http://www.washingtonpost.com/local/dc-politics/gop-takes-control-of-virginia-general-assembly/2012/01/11/gIQATCdGsP\\_story.html](http://www.washingtonpost.com/local/dc-politics/gop-takes-control-of-virginia-general-assembly/2012/01/11/gIQATCdGsP_story.html).

<sup>9</sup> Lucy Madison, *Virginia Gov. Bob McDonnell Signs Virginia Ultrasound Bill*, CBS NEWS, Mar. 7, 2012, [http://www.cbsnews.com/8301-503544\\_162-57392796-503544/virginia-gov-bob-mcdonnell-signs-virginia-ultrasound-bill](http://www.cbsnews.com/8301-503544_162-57392796-503544/virginia-gov-bob-mcdonnell-signs-virginia-ultrasound-bill); see also Laura Vozzella, *Virginia Republicans Push Slew of Conservative Bills*, WASH. POST, Jan. 22, 2012, [http://www.washingtonpost.com/local/dc-politics/virginia-republicans-push-slew-of-conservative-bills/2012/01/20/gIQARNsXJQ\\_story.html](http://www.washingtonpost.com/local/dc-politics/virginia-republicans-push-slew-of-conservative-bills/2012/01/20/gIQARNsXJQ_story.html).

<sup>10</sup> H.B. 1, 2012 Gen. Assemb., Reg. Sess. (Va. 2012) (not enacted), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=121&typ=bil&val=hb1>.

<sup>11</sup> H.B. 462, 2012 Gen. Assemb., Reg. Sess. (Va. 2012) (enacted), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?121+mbr+HB462>.

<sup>12</sup> *Id.*

<sup>13</sup> See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 901 (1992).

<sup>14</sup> See *Cruzan v. Dir. of Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).

<sup>15</sup> See Sarah E. Weber, *An Attempt to Legislate Morality: Forced Ultrasounds as the Newest Tactic in Anti-Abortion Legislation*, 45 TULSA L. REV. 359, 368 (2009); *Overview of Abortion Laws*, *supra* note

ing a woman to have a medically unnecessary procedure interferes with the doctor-patient relationship. Third, the cost of the ultrasound is prohibitively expensive to many women.<sup>16</sup> Finally, being forced to have a medically unnecessary procedure and to see (and hear) the images on the screen may cause psychological issues for the mother. Part III(C) will argue that requiring a woman to have a mandatory medical procedure effectively prevents her from refusing medical care, a right given to her by the Supreme Court.<sup>17</sup> Part IV will state the conclusion that Virginia's new ultrasound requirement should be found unconstitutional because it violates both a woman's right to have an abortion without an "undue burden" and her right to refuse medical care.<sup>18</sup>

## II. HISTORY OF RELEVANT SUPREME COURT DECISIONS

### A. From *Roe* to *Casey*, Privacy and the "Undue Burden" Standard

#### 1. *Roe v. Wade*

In 1973, the Supreme Court acknowledged the constitutional right of women to have an abortion in certain circumstances.<sup>19</sup> Eight years prior, the Court had officially recognized the existence of a right of personal privacy, or a guarantee of certain areas or zones of privacy under the Constitution.<sup>20</sup> This right to privacy was not found in the literal language of the Bill of Rights, but in the "penumbras" of several of the amendments.<sup>21</sup> The right might also be found in the Due Process Clause of the Fourteenth Amendment.<sup>22</sup> After expounding on the common-law history of specific instances of constitutionally recognized privacy, the *Roe* Court expanded the bounds of the definition of privacy to include a woman's decision whether or not to

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5, at 1; Robin Carlyle, *Ultrasound Before Abortion Not Medically Necessary*, CLINICAL ADVISOR (Mar. 1, 2012), <http://www.clinicaladvisor.com/ultrasound-before-abortion-not-medically-necessary/article/229974>.

<sup>16</sup> See Aetna, Inc., *Clinical Policy Bulletin: Ultrasound for Pregnancy*, AETNA.COM (last accessed Mar. 18, 2012), [http://www.aetna.com/cpb/medical/data/100\\_199/0199.html](http://www.aetna.com/cpb/medical/data/100_199/0199.html); see also Maya Dusenbery, *Why Virginia's New Mandatory Ultrasound Law Still Sucks*, MOTHER JONES, Mar. 3, 2012, <http://motherjones.com/mojo/2012/03/why-virginias-new-mandatory-ultrasound-law-still-sucks>.

<sup>17</sup> See generally *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>18</sup> See generally *Casey*, 505 U.S. 833; *Cruzan v. Dir. of Mo. Dep't of Health*, 497 U.S. 261 (1990).

<sup>19</sup> See generally *Roe*, 410 U.S. 113.

<sup>20</sup> See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>21</sup> *Id.* at 484–85. The right to privacy is found in the penumbras of the right of association of the First Amendment, the prohibition against quartering soldiers in private homes in the Third Amendment, the right to security from search and seizure in the Fourth Amendment, the self-incrimination clause of the Fifth Amendment, and the enumeration clause of the Ninth Amendment. *Id.*

<sup>22</sup> *Id.* at 502–07 (White, J., concurring); *id.* at 486–99 (Goldberg, J., concurring).

terminate her pregnancy.<sup>23</sup>

In acknowledging a woman's right to have an abortion, the Court stated that at some point the State's interest in the protection of health, medical standards, and prenatal life become dominant.<sup>24</sup> Accordingly, the Court adopted a "first trimester" framework<sup>25</sup> and determined that during the first trimester, the State could not restrict abortions because its interest in protecting the potentiality of human life<sup>26</sup> was not yet compelling.<sup>27</sup> The State's interest grows in the second trimester, but only as to the extent that it relates to the preservation and protection of maternal health.<sup>28</sup> After viability (in other words, after the first trimester), the Court held the State is allowed to proscribe abortion except as necessary to preserve the life or health of the mother.<sup>29</sup>

## 2. Planned Parenthood of Southeastern Pennsylvania v. Casey

The national (and legal) abortion debate did not die with *Roe*. In the next nineteen years, the Court heard several more cases dealing with nuances of state abortion laws. The decisions varied in their holdings but didn't drastically alter interpretations of *Roe*.<sup>30</sup> This all changed in 1992 with the plurality holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>31</sup> By this time, two of the more liberal Supreme Court justices from the *Roe* Court had retired, leaving the *Roe* holding potentially vulnerable to being overruled.<sup>32</sup> Based on *stare decisis*, the Court did not overturn *Roe*, but its application was severely limited.<sup>33</sup>

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<sup>23</sup> *Roe*, 410 U.S. at 153.

<sup>24</sup> *Id.* at 154.

<sup>25</sup> *Id.* at 163.

<sup>26</sup> *Id.* at 162.

<sup>27</sup> *Id.* at 163 ("the compelling point is viability").

<sup>28</sup> *Id.* Examples of permissible State regulation in this area include requirements about the qualifications of the person who is to perform the abortion, the licensure of that person, and the type of facility in which the procedure is to be performed. *Id.*

<sup>29</sup> *Id.* at 163-64.

<sup>30</sup> See, e.g., *Thornburgh v. American Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (holding that a Pennsylvania act requiring women be advised on alternative medical assistance and child support, requiring physicians to inform women of the negative physical and psychological effects of abortion, requiring a second physician in the room during the abortion, and failing to provide a medical emergency exception was unconstitutional); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (holding that provisions of a state ordinance dealing with such requirements as parental consent, informed consent, and a 24-hour waiting period were unconstitutional); *Colautti v. Franklin*, 439 U.S. 379 (1979) (holding that a state law banning abortion where the fetus "is viable" or "may be viable" is too vague).

<sup>31</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>32</sup> Weber, *supra* note 15, at 361.

<sup>33</sup> *Casey*, 505 U.S. at 853.

The Court upheld the right of a woman to have an abortion but discarded the first trimester framework, opting instead for a more vague “viability” standard;<sup>34</sup> the State’s interest begins as soon as the fetus is “viable.”<sup>35</sup> In promoting its interest, the State is entitled to take steps to ensure that a woman’s choice is “thoughtful and informed” and thus may enact rules designed to show her alternatives to abortion.<sup>36</sup> It should be noted that in its examples of “informed consent,” the Court only mentioned alternatives to abortion; there is no discussion of fetal age, health, heartbeat, or pain.<sup>37</sup>

Arguably the biggest change to come out of the *Casey* decision was the Court’s shift from the strict scrutiny analysis of abortion laws applied by *Roe* to a brand-new, almost undefined “undue burden” standard.<sup>38</sup> As it currently stands, any State action restricting a woman’s access to abortion must pass the undue burden test. An undue burden is created 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.”<sup>39</sup> The Court declined to explain how to apply this new standard; it merely provided “guiding principles” in the form of examples of situations that do not constitute undue burdens.<sup>40</sup> It applied this standard to the disputed Pennsylvania law and held that requiring a woman to notify the man who supplied the sperm of her intention to have an abortion was an undue burden,<sup>41</sup> but that requiring an unemancipated minor to have parental permission,<sup>42</sup> requiring a woman to wait twenty-four hours,<sup>43</sup> and requiring the physician to inform the woman about the risks of abortion and information about the fetus<sup>44</sup> were not. The Court further acknowledged that increased cost could become a substantial obstacle to a woman seeking abortion.<sup>45</sup>

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<sup>34</sup> *Id.* at 870; see also Weber, *supra* note 15, at 362–63; Caroline Burnett, *Dismantling Roe Brick by Brick—The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003*, 42 U.S.F. L. Rev. 227, 238 (2007).

<sup>35</sup> *Casey*, 505 U.S. at 846.

<sup>36</sup> *Id.* at 872

<sup>37</sup> “[T]he State may enact rules and regulations designed to encourage her to know that... there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.” *Id.*

<sup>38</sup> See *id.* at 876–77; see also Burnett, *supra* note 34, at 238–39.

<sup>39</sup> *Id.* at 877.

<sup>40</sup> *Id.* at 877–78.

<sup>41</sup> *Id.* at 893–94.

<sup>42</sup> *Id.* at 899.

<sup>43</sup> *Id.* at 881.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 901.

## B. The Right to Refuse Medical Care

The Supreme Court has consistently found that a competent adult has the right to refuse medical care.<sup>46</sup> In common law this right was based on the concepts of battery,<sup>47</sup> informed consent,<sup>48</sup> and bodily integrity;<sup>49</sup> “even the touching of one person by another without consent...constitutes a battery.”<sup>50</sup> Justice Cardozo expounded these concepts (later quoted by the *Cruzan* Court) as a justice on the Court of Appeals of New York: “Every human being of adult years and sound mind has a right to determine what shall be done with his own body.”<sup>51</sup> Furthermore, the *Cruzan* Court determined that patients generally possess the right to refuse medical treatment.<sup>52</sup>

In concluding that a rational patient has the right to refuse medical care, the Court borrowed a test from a prior case dealing with mental illness and medical treatment.<sup>53</sup> The Court already determined that under the Due Process Clause a person has a “liberty interest” in what happens to his or her body, but that determination does not end the inquiry.<sup>54</sup> Whether a patient’s constitutional rights have been violated must be determined by “balancing his [or her] liberty interests against the relevant state interests.”<sup>55</sup> The Court also noted that the State’s interest weakens and the individual’s right to privacy grows as the degree of bodily invasion increases.<sup>56</sup> The Court concluded that competent people have a very high liberty interest.<sup>57</sup>

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<sup>46</sup> See *Cruzan v. Dir. of Mo. Dep’t of Health*, 497 U.S. 261, 281 (1990) (holding that “it cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment”); *Washington v. Harper*, 494 U.S. 210, 229 (1990) (finding that “the forcible injection of medication into a non-consenting person’s body represents a substantial interference with that person’s liberty”); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (holding that a “child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment”).

<sup>47</sup> *Cruzan*, 497 U.S. at 305.

<sup>48</sup> “Most Courts [since 1976] have based a right to refuse treatment either solely on the common-law right to informed consent or on both the common-law right and a constitutional privacy right.” *Cruzan*, 497 U.S. at 271.

<sup>49</sup> Weber, *supra* note 15, at 372.

<sup>50</sup> *Cruzan*, 497 U.S. at 269.

<sup>51</sup> *Id.* (quoting *Schloendorff v. Society of New York Hospitals*, 105 N.E. 92, 93 (1914)).

<sup>52</sup> *Id.* at 270.

<sup>53</sup> See *Youngberg v. Romeo*, 457 U.S. 207 (1982).

<sup>54</sup> *Cruzan*, 497 U.S. at 279.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 270.

<sup>57</sup> *Id.* at 278. “The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.” *Id.*

## III. VIRGINIA H.B. 462

## A. Relevant Portions and History of the Law

Virginia's H.B. 462, which becomes effective on July 1, 2012, requires, in pertinent part:

B. At least 24 hours before the performance of an abortion, a qualified medical professional trained in sonography and working under the supervision of a physician licensed in the Commonwealth shall perform fetal transabdominal ultrasound imaging on the patient undergoing the abortion for the purpose of determining gestational age...The ultrasound image shall contain the dimensions of the fetus and accurately portray the presence of external members and internal organs of the fetus, if present or viewable.<sup>58</sup>

H.B. 462 was introduced by Rep. Kathy J. Byron of House District 22 and was co-sponsored by twenty-six other Republican representatives.<sup>59</sup> The bill underwent several iterations before being passed, including one that caused a significant amount of national controversy.<sup>60</sup> The original version of the bill required women at an early stage of pregnancy to have a "transvaginal" ultrasound instead of a transabdominal one.<sup>61</sup> The transvaginal ultrasound would be performed by inserting a wand-like probe into the woman's vagina to obtain an image of the fetus.<sup>62</sup> After protests at the Virginia State Capitol,<sup>63</sup> several petitions,<sup>64</sup> and nationally televised ridicule by well-known comedians,<sup>65</sup> the bill was amended to make the transvaginal

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<sup>58</sup> H.B. 462, 2012 Gen. Assemb., Reg. Sess. (Va. 2012) (enacted), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?121+mbr+HB462>.

<sup>59</sup> *Id.*

<sup>60</sup> See Ian Duncan, *Virginia Lawmakers Revise Controversial Abortion Bill*, L.A. TIMES, Feb. 25, 2012, <http://articles.latimes.com/2012/feb/25/nation/la-na-virginia-abortions-20120225>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See Associated Press, *Virginia Governor Signs Pre-Abortion Bill*, USA TODAY, Mar. 7, 2012, <http://www.usatoday.com/news/nation/story/2012-03-07/virginia-abortion-ultrasound-bill/53401720>.

<sup>64</sup> Bob Lewis, *Va. House Scraps Invasive Pre-Abortion Requirement*, SEATTLE POST INTELLIGENCER, Feb. 22, 2012, <http://www.seattlepi.com/news/article/Va-House-scraps-invasive-pre-abortion-requirement-3352115.php>.

<sup>65</sup> *The Daily Show With Jon Stewart* (Comedy Central television broadcast Feb. 21, 2012), available at <http://www.thedailyshow.com/watch/tue-february-21-2012/punanny-State---virginia-s-transvaginal-ultrasound-bill> (last visited Mar. 18, 2012); *Saturday Night Live: Maya Rudolph* (NBC television broadcast Feb. 18, 2012), available at <http://www.hulu.com/watch/331304/saturday-night-live-maya-rudolph> (last visited Mar. 18, 2012) (the criticism appeared during the "Weekend Update" segment at approximately the 34 minute mark); see Laura Vozella, *Daily Show Mocks Virginia's Ultrasound Bill*, WASHINGTON POST, (Feb. 22, 2012 11:03AM), [http://www.washingtonpost.com/blogs/virginia-politics/post/va-ultrasound-bill-gets-daily-show-mocking/2012/02/22/gIQAoV2LTR\\_blog.html](http://www.washingtonpost.com/blogs/virginia-politics/post/va-ultrasound-bill-gets-daily-show-mocking/2012/02/22/gIQAoV2LTR_blog.html).

procedure optional.<sup>66</sup>

### B. H.B. 462 Is An Undue Burden to a Woman's Right to An Abortion

H.B. 462 is an undue burden on women under *Casey* for three reasons, each hinging on the fact that the ultrasound is medically unnecessary.<sup>67</sup> First, forcing a woman to have a medically unnecessary procedure before she can have an abortion interferes with the doctor-patient relationship.<sup>68</sup> Second, because the procedure is medically unnecessary, it will not be covered by insurance<sup>69</sup> and will present undue financial hardship on many women who seek to have an abortion. Finally, forcing a woman to have a medically unnecessary sonogram before she can have an abortion could present serious psychological issues for the woman.

Before most medical students become doctors, they take an oath promising to uphold the dignity of their profession, protect their patients to the best of their ability, and respect the scientific research of others in the medical profession.<sup>70</sup> The oath, attributed to the ancient Greek doctor Hippocrates, creates a relationship between doctor and patient that has lasted for more than two thousand years.<sup>71</sup> While the tenets of the oath have adapted to the modernization of medicine,<sup>72</sup> the doctor's duty to his or her patient remains the same.

According to Dr. Dana Stone, OB-GYN, doctors typically use ultrasounds to determine the gestational age of the fetus and to recognize any potential pregnancy problems.<sup>73</sup> Dr. Stone also states that a capable physi-

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<sup>66</sup> H.B. 462, 2012 Gen. Assemb., Reg. Sess. (Va. 2012) (enacted), available at

<http://lis.virginia.gov/cgi-bin/legp604.exe?121+mbr+HB462>; see also Lewis, *supra* note 64.

<sup>67</sup> Weber, *supra* note 15, at 368; *Overview of Abortion Laws*, *supra* note 5, at 1; Carlisle, *supra* note 15.

<sup>68</sup> JACK M. VALPEY, TESTIMONY OF JACK M. VALPEY, MD, MPH PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH 1–2 (Mar. 28, 2007), available at [http://www.prch.org/files/37\\_valpey.pdf](http://www.prch.org/files/37_valpey.pdf); Rick Ungar, *Virginia's Pre-Abortion Ultrasound Law Medically Unsound—Violates Guidelines of American College of Obstetricians and Gynecologists*, FORBES, Mar. 8, 2012, <http://www.forbes.com/sites/rickungar/2012/03/08/virginias-pre-abortion-ultrasound-law-medically-unsound-violates-guidelines-of-american-college-of-obstetricians-and-gynecologists>.

<sup>69</sup> See Aetna, Inc., *Clinical Policy Bulletin: Ultrasound for Pregnancy*, AETNA.COM (last accessed Mar. 18, 2012), [http://www.aetna.com/cpb/medical/data/100\\_199/0199.html](http://www.aetna.com/cpb/medical/data/100_199/0199.html); see also Maya Dusenbery, *Why Virginia's New Mandatory Ultrasound Law Still Sucks*, MOTHER JONES, Mar. 3, 2012, <http://motherjones.com/mojo/2012/03/why-virginias-new-mandatory-ultrasound-law-still-sucks>.

<sup>70</sup> See generally Peter Tyson, *The Hippocratic Oath Today*, PBS, Mar. 27, 2001, <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html>.

<sup>71</sup> National Institutes of Health, *Greek Medicine—The Hippocratic Oath*, NATIONAL INSTITUTES OF HEALTH (last accessed Mar. 18, 2012), [http://www.nlm.nih.gov/hmd/greek/greek\\_oath.html](http://www.nlm.nih.gov/hmd/greek/greek_oath.html).

<sup>72</sup> See Tyson, *supra* note 68.

<sup>73</sup> Weber, *supra* note 15, at 368 (quoting Telephone Interview with Dr. Dana Stone, OB-GYN (Oct. 3, 2008)).

cian, in most cases, would be able to diagnose a situation requiring an abortion simply by performing an external pelvic exam.<sup>74</sup> In some instances, however, the doctor may determine that an ultrasound is necessary before an abortion can be performed.<sup>75</sup> In those instances, the doctor would explain the situation to the patient, ask for consent, and then perform the ultrasound.<sup>76</sup> H.B. 462 prevents doctors from using their medical expertise and judgment in treating their patients; it prescribes a course of conduct that is not supported by national medical standards and violates the doctors' relationships with their patients.<sup>77</sup>

The *Casey* Court specifically stated, "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."<sup>78</sup> Requiring a physician to perform an ultrasound when he or she knows that it is superfluous is an unnecessary health regulation. On its face, the requirement does not directly prevent abortion,<sup>79</sup> but, as discussed below, its effect discourages women and their doctors from carrying out the procedure. This obstacle is an undue burden and is thus unconstitutional.

Beyond interfering with the doctor-patient relationship, the ultrasound law will artificially drive up the out-of-pocket cost for abortions such that they could become prohibitively expensive for many of the women who seek them.<sup>80</sup> According to the Guttmacher Institute, about half of the pregnancies in the United States each year are unintended.<sup>81</sup> One of the highest rates of unintended pregnancies occurs among low-income women.<sup>82</sup> The Guttmacher Institute also found that this socio-economic group also has a high abortion rate.<sup>83</sup> The abortion rate for minority women is also elevated.<sup>84</sup>

According to Planned Parenthood, a first-trimester abortion per-

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<sup>74</sup> *Id.* at 368–69 (quoting Telephone Interview with Dr. Dana Stone, OB-GYN (Oct. 3, 2008)).

<sup>75</sup> *Id.* at 369 (quoting Telephone Interview with Dr. Dana Stone, OB-GYN (Oct. 3, 2008)).

<sup>76</sup> *Id.* (quoting Telephone Interview with Dr. Dana Stone, OB-GYN (Oct. 3, 2008)).

<sup>77</sup> See Ungar, *supra* note 68.

<sup>78</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992).

<sup>79</sup> See H.B. 462, 2012 Gen. Assemb., Reg. Sess. (Va. 2012) (enacted); available at <http://lis.virginia.gov/cgi-bin/legp604.exe?121+mbr+HB462>.

<sup>80</sup> See *In-Clinic Abortion Procedures*, PLANNED PARENTHOOD (last visited Mar. 18, 2012), <http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.asp>; see also *Oppose H.B. 462/SB 484 Mandatory Ultrasound*, VIRGINIA PRO-CHOICE COALITION (last visited Mar. 18, 2012), [http://www.ppav.org/images/Ultrasound\\_-\\_OPPOSE\\_HB462-SB\\_484\\_2012\\_.pdf](http://www.ppav.org/images/Ultrasound_-_OPPOSE_HB462-SB_484_2012_.pdf).

<sup>81</sup> GUTTMACHER INSTITUTE, IN BRIEF: FACT SHEET: FACTS ON UNINTENDED PREGNANCY IN THE UNITED STATES 1 (2012), <http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html>.

<sup>82</sup> *Id.* at 2.

<sup>83</sup> *Id.* at 1.

<sup>84</sup> *Id.* at 1, 12.

formed at a health center usually costs between \$300 and \$950.<sup>85</sup> The cost often increases for a second-trimester abortion or an abortion performed in a hospital.<sup>86</sup> Ultrasounds can add between \$200 and \$1,200 to the cost of the procedure; because they are not medically necessary, the ultrasound procedure may not be covered by insurance.<sup>87</sup>

The *Casey* Court specifically stated, “increased cost could become a substantial obstacle” to a woman having an abortion.<sup>88</sup> Additionally, to determine whether a state regulation places an undue burden on a woman’s ability to have an abortion, courts must “examine the facts on a case-by-case basis.”<sup>89</sup> In the case of women living at or below the poverty line, an additional \$200 to \$1,200 on top of the base cost of \$300 to \$950 is likely to be prohibitively expensive if not covered by a private charity and could prevent them from obtaining an abortion. In these types of cases, the cost would absolutely be an undue burden for a woman trying to have an abortion.

Finally, in passing H.B. 462, the Virginia Legislature failed to recognize the potentially harmful psychological effects of this forced medical procedure on its recipients. Laws such as this one do not just provide “informed consent” before abortion; they are also used to “morally Mirandize” the woman in an effort to “arouse feelings of sin, guilt, and shame.”<sup>90</sup> The ultrasound essentially “forc[es] women to feel guilty” about choosing a specific healthcare option.<sup>91</sup>

The decision to seek an abortion is very difficult for many women to make and thus is a decision not often taken lightly.<sup>92</sup> Forcing a woman who may be struggling with the decision to abort a pregnancy to have an ultrasound, a procedure that provides an image of the embryo, takes advantage of her heightened emotional state. Furthermore, using an ultrasound as a psychological weapon to discourage a woman from having an abortion could lead to additional psychological trauma.<sup>93</sup> The State has a clear inter-

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<sup>85</sup> *In-Clinic Abortion Procedures*, *supra* note 79.

<sup>86</sup> *Id.*

<sup>87</sup> *Oppose H.B. 462/SB 484 Mandatory Ultrasound*, *supra* note 80.

<sup>88</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 901 (1992).

<sup>89</sup> *See Weber*, *supra* note 15, at 366 (paraphrasing *Casey*, 505 U.S. at 886).

<sup>90</sup> Jeffrey A. Van Detta, *Constitutionalizing Roe, Casey and Carhart: A Legislative Due-Process Anti-Discrimination Principle that Gives Constitutional Content to the “Undue Burden” Standard of Review Applied to Abortion Control Legislation*, 10 S. CAL. REV. L. & WOMEN’S STUD. 211, 259 (2001).

<sup>91</sup> Valpey, *supra* note 68, at 2.

<sup>92</sup> *See Barry Rutherford, Having an Abortion is a Hard and Difficult Decision*, HUBPAGES (last visited Mar. 18, 2012), <http://barryrutherford.hubpages.com/hub/Hard-decision-having-an-abortion>; *Real Voices*, ABORTION CONVERSATION PROJECT, INC. (last visited Mar. 18, 2012), [http://www.abortionconversation.com/real\\_voices.php](http://www.abortionconversation.com/real_voices.php).

<sup>93</sup> *Weber*, *supra* note 15, at 370.

est in maintaining its citizens' health.<sup>94</sup> Putting a woman's mental health in jeopardy with an unnecessary medical procedure is not in the State's interest and fails the "undue burden" test.

### C. H.B. 462 Violates a Woman's Right to Refuse Medical Care

As discussed above, the Supreme Court definitively established a competent adult's right to refuse medical care.<sup>95</sup> H.B. 462 is directly at odds with this right. Medical care includes procedures, treatments, and tests,<sup>96</sup> and an ultrasound is a medical procedure. The *Cruzan* Court based its decision, in part, on the common-law tort of battery, which the Court applied to unauthorized touching by a physician.<sup>97</sup> In fact, "freedom from unwanted medical attention is unquestionably among those principles 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"<sup>98</sup> Ostensibly, most women seeking abortions are competent adults who are allowed to seek and refuse medical care as desired. Forcing them to have an unnecessary medical procedure violates their constitutionally guaranteed right to reject medical treatment.

Informed consent also fits in this argument. In *Casey*, the majority reasoned that, "as with any medical procedure, the State may require a woman to give her written informed consent to an abortion."<sup>99</sup> H.B. 462 acknowledges this kind of informed consent<sup>100</sup> but fails to recognize that the woman has the right to give informed consent regarding *any* medical procedure to which she is subjected. Under this law, the woman *must* consent to having the ultrasound; there is no choice. This violates her right to refusal of medical treatment.

## IV. CONCLUSION

Virginia H.B. 462, like its counterparts in other states, is unconstitutional. It violates the "undue burden" standard set out in *Casey* and it prevents a woman from exercising her right to refuse medical treatment. Per

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<sup>94</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 966 (1992) ("the State's legitimate interest in maternal health").

<sup>95</sup> *Cruzan v. Dir. of Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 305.

<sup>98</sup> *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97 (1934)).

<sup>99</sup> *Casey*, 505 U.S. at 881.

<sup>100</sup> H.B. 462, 2012 Gen. Assemb., Reg. Sess. (Va. 2012) (enacted), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?121+mbr+HB462>.

*Casey*, an undue burden is found 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.”<sup>101</sup>

Forcing a woman to have a medically unnecessary procedure before she can have an abortion is an undue burden in three ways. First, it violates the doctor-patient relationship by requiring physicians to perform procedures they wouldn’t ordinarily perform and to knowingly perform a procedure that could cause further emotional distress.<sup>102</sup> Second, requiring a medically unnecessary ultrasound will drive up the cost of having an abortion to the point that it could be prohibitively expensive to the people who need it most.<sup>103</sup> Unintended pregnancy and abortion disproportionately affects low-income women.<sup>104</sup> By increasing the cost of an already-expensive procedure<sup>105</sup> by adding a medically unnecessary one not covered by insurance,<sup>106</sup> the State could put abortion completely out of reach for a large population of women. Finally, by forcing a woman to essentially take a picture of the potential life growing inside her, the State forces further trauma on a woman who is already in a heightened emotional state.<sup>107</sup>

In addition to being an undue burden, H.B. 462 prevents women from exercising their constitutionally protected right to refuse medical care.<sup>108</sup> Competent people have the right to refuse medical treatment under the common law tradition of battery and the Due Process Clause.<sup>109</sup> The State cannot force a competent person to be subjected to a medical procedure that he or she does not want.<sup>110</sup> Unless the ultrasound is transvaginal, H.B. 462 does not give women the opportunity to opt out of the procedure.<sup>111</sup> If challenged in court, H.B. 462 cannot and should not be able to stand.

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<sup>101</sup> *Casey*, 505 U.S. at 877.

<sup>102</sup> See Valpey, *supra* note 68; Ungar, *supra* note 68.

<sup>103</sup> UNINTENDED PREGNANCY, *supra* note 81; *In-Clinic Abortion Procedures*, *supra* note 80; *Oppose H.B. 462/SB 484 Mandatory Ultrasound*, *supra* note 80.

<sup>104</sup> UNINTENDED PREGNANCY, *supra* note 81.

<sup>105</sup> *In-Clinic Abortion Procedures*, *supra* note 80.

<sup>106</sup> *Oppose H.B. 462/SB 484 Mandatory Ultrasound*, *supra* note 80.

<sup>107</sup> Van Detta, *supra* note 90, at 259; Weber, *supra* note 15, at 370.

<sup>108</sup> *Cruzan v. Dir. of M. Dep’t of Health*, 497 U.S. 261 (1990).

<sup>109</sup> *Id.* at 269, 278.

<sup>110</sup> *Id.*

<sup>111</sup> H.B. 462, 2012 Gen. Assemb., Reg. Sess. (Va. 2012) (enacted); available at <http://lis.virginia.gov/cgi-bin/legp604.exe?121+mbr+HB462>.