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Texas House Bill 2: Discrimination Toward Abortion Providers Creates Undue Burdens for Texas Women

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In 1992, the United States Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, upheld the ruling in *Roe v. Wade*, namely that women have a right "to choose to have an abortion before viability and to obtain it without undue interference from the State."[1] However, since this ruling, some states have imposed regulations that greatly limit this right by restricting access. Texas is a recent example of this. Two proposed restrictions in House Bill 2 (HB 2), which will be discussed in detail below, will force all but eight clinics that are located in metropolitan areas to shut down. The U.S. Supreme Court put the proposed restrictions on hold in October 2014, allowing several clinics to remain open while the restrictions are being appealed in the U.S. Court of Appeals for the Fifth Circuit. If the restrictions are passed, however, those clinics will be forced to shut down and, as a result, many women in Texas will be required to travel more than 100 miles in order to access a safe and legal abortion.

Much of the focus of these restrictions has been on women and rightly so. However, I want to turn the attention to physicians. The requirements exacerbate unfair treatment of abortion providers compared with other physicians. Abortion providers face threats from the public—some of which turn into violent attacks—and they are often ostracized by their fellow medical practitioners. There are so few abortion providers to begin with and the proposed requirements limit these physicians' opportunities to practice the branch of medicine of their choosing. Although the HB 2 requirements may not result in an unconstitutional undue burden on physicians, the challenges created by the bill limit physicians' abilities to provide abortions. As a result of these limits, HB 2 creates an unconstitutional undue burden for women seeking abortions by creating barriers directed at abortion providers and clinic staff who are willing and able to provide abortions.

The first of the two controversial HB 2 requirements is the admitting privileges requirement: "A physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced."[2] The second requirement is the ambulatory surgical center requirement: "The minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [Texas Health & Safety Code] […] for ambulatory surgical centres."[3] In order to meet these state-mandated obligations, some abortion clinics would have to spend more than $1 million in upgrades if they wish to remain open. The District Court decided that the ambulatory surgical center requirement places an unconstitutional undue burden on women, and that the two requirements together place an undue burden on women in Texas and especially in the Rio Grande Valley where the nearest clinic is a couple hundred miles away.[4] Later, the U.S. Court of Appeals for the Fifth Circuit reversed the District Court's decision and argued, "the admitting privileges requirement is constitutional on its face."[5] While the regulations are being appealed, the Supreme Court granted a stay of injunction, allowing about twelve abortion clinics to reopen until a final decision regarding the regulations is made.

The District Court ruled that the purpose of the two regulations was to create a substantial obstacle for women seeking abortions in Texas. While the defendants argued

that the regulations were designed to make abortions safer and reduce risk, the Court decided that this was not the case. An abortion, especially a first-term abortion, is a very safe procedure and is safer than many other routine surgical procedures. As stated in *Planned Parenthood v. Casey*, "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."[6] The undue burden in this case is imposed, not through restricting women's access directly, but by restricting physicians' freedom to perform abortions. The admitting privileges requirement has reduced the number of physicians who can perform abortions and the ambulatory surgical center requirement has reduced the number of clinics where abortions can be performed.

The American Medical Association (AMA) states, "[t]he Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion in accordance with good medical practice and under circumstances that do not violate the law."[7] This means that physicians are not required to perform abortions, except in emergency situations, but can as long as the procedure is done safely and does not violate the law. The new Texas regulations, however, are so restrictive that few abortion providers, limited to only four urban areas, can legally perform abortions. Physicians do not have an absolute right to perform abortions as opposed to women who have an absolute right to have access to an abortion. Physicians do face many challenges that other professionals face in terms of obtaining qualifications and finding work. Abortion providers, however, face challenges that most other physicians do not. The restrictions imposed by these regulations exacerbate unfair treatment toward abortion providers and place further obstacles in their path in terms of providing the service they want and are qualified to provide.

Both abortion clinics and abortion providers are being treated differently from other medical clinics and physicians. For instance, "grandfathering of existing facilities and the granting of waivers from specific requirements is prohibited for abortion providers, although other types of ambulatory surgical facilities are frequently granted waivers or are grandfathered."[8] Many abortion clinics cannot afford the necessary upgrades. Furthermore, it is extremely expensive to open a brand new clinic that complies with the ambulatory surgical center requirements. Being grandfathered in would be the only option available to abortion clinics that cannot afford the upgrade. However, unfair treatment of abortion clinics and providers is preventing those clinics from being grandfathered into the new system. As a result, many abortion clinics may be forced to close.

Admitting privileges are proving difficult or impossible for physicians both to obtain and, for those who have already been granted privileges, to keep. Dr. Sherwood Lynn, an obstetrician-gynecologist who has performed abortions for decades, describes the process of obtaining admitting privileges and the difficulties abortion providers face. After sending in an application a physician must wait for the hospital to send them the required materials, "but if the address of the practice on the application is of an abortion provider or clinic, [the hospital] won't send [them] the package of materials required. [They] simply can't apply."[9] Dr. Lynn and several other physicians have surmised that hospitals are only withholding

privileges from qualified physicians who perform abortions and that other physicians do not face this discriminatory treatment.

Hospitals have also revoked privileges granted to physicians after learning that the physicians perform abortions. For instance, in Texas two doctors, "received notices […] informing them that their admitting privileges to the University General Hospital of Dallas have been revoked, with the hospital's CEO claiming the hospital was unaware they were providing abortion care and that the hospital believed such care would damage its reputation."[10] What is curious about this revocation is that, "federal and state laws […] forbid hospitals from discriminating against doctors who perform abortions," and yet hospitals are clearly doing just that.[11] Dr. Pamela Richter, another abortion provider in Texas, had her temporary admitting privileges revoked with no explanation and because of this, the clinic where she performed abortions, Reproductive Services, can no longer provide abortions at all.[12] As the hospital gave no reason for the revocation, it not clear Dr. Richter's privileges were revoked because she performs abortions. Dr. Richter, however, has performed over 17,000 abortions and her privileges were revoked soon after HB 2 was introduced.[13] According to the Texas Hospital Association (THA), giving admitting privileges to doctors who do not work for the hospital is expensive and time-consuming but this does not account for the fact that hospitals are revoking previously granted privileges from physicians whom they learn are providing abortion services.[14]

As mentioned previously, the District Court found that the admitting privileges requirement and the ambulatory surgical center requirement do not further ensure the health and safety of women undergoing an abortion. Several physicians have testified to this fact. Dr. Lynn stated in an interview:

> *The admitting privileges requirements are […] absolutely unnecessary. If you have a number of patients waiting for procedures, and something happens and a patient needs to be transferred to a hospital, you're not going to leave everyone else and go to the hospital. That makes no sense. You're going to refer that person to a gynecologist at the hospital. There is no safety issue involved here. If a patient shows up with an emergency, every hospital is required to admit that patient. They have to by law.*[15]

It is rare that complications will arise from an abortion performed in a clinic. Dr. Richter, for example, has performed more than 17,000 abortions and not once had to send a patient to a hospital because of complications resulting from the procedure. According to Dr. Lynn even if abortion providers were granted privileges to hospitals, it is unlikely that they will exercise them. In essence, having admitting privileges at a hospital does nothing to further ensure the safety of an already safe procedure. The only result of the admitting privileges requirement is to limit certain physicians' ability to perform legal abortions.

Not only do the HB 2 requirements fail to further ensure the health and safety of women, the HB 2 requirements may actually create more health risks to women who cannot access the eight remaining clinics. The first risk is that the remaining clinics would

have an influx of patients that they may not be able to handle, forcing women to wait longer for an appointment. As stated by the District Court, "[e]ven assuming every woman in Texas who wants an abortion […] could travel to one of the four metropolitan areas where abortions will still be available, the cumulative results of HB 2 are that, at most, eight providers would have to handle the abortion demand of the entire state."[16] Furthermore, "[t]hat the State suggests that these seven or eight providers could meet the demand of the entire state stretches credulity."[17] Abortion is a time sensitive procedure. It is safest when performed early in a pregnancy. The increase in patients to these remaining clinics, assuming all women in Texas can access them, will increase wait times and may force women to have abortions later in pregnancy. In the worst-case scenario, a woman would not see an abortion provider at all before viability. Such instances may be rare, but they are possible. In such cases, women's access to legal abortions becomes impossible and thereby violate the ruling in *Roe*.

Clinics may be able to avoid the aforementioned problems if they hire more physicians. However, there are two barriers to hiring more physicians. First, as mentioned previously, admitting privileges to Texas hospitals are difficult, if not impossible, for abortion providers to obtain. Second, given the negative treatment of abortion providers by anti-abortion groups, many physicians are not willing to perform abortions. The harassment abortion providers face is unique to those physicians and many physicians will not perform abortions for that reason. In an article published in the *Austin Chronicle*, anti-abortion activist Abby Johnson, "discusses how her group investigated appraisal district records to find the new location of where an Austin abortion physician plans to work."[18] Johnson states, "These abortionists are feeling the pressure from the pro-life movement in Texas. I think they feel like they're on the run. And that's how we want to keep it."[19] If the HB 2 requirements are passed and there remain at most eight abortion providers in Texas, these activists will concentrate on those clinics and, "the dangerous impact of their intimidation tactics will be exacerbated."[20] Even if the number of physicians needed to meet the demand in Texas can obtain admitting privileges and work at one of the remaining clinics, they may choose not to do such work because they are putting themselves at risk.

The harm abortion providers face from such anti-abortion groups is not unique to Texas. There are stories from all over the country and from other countries where abortion is legal of physicians receiving death threats. Dr. George Tiller, an abortion provider in Kansas, was killed outside his church and had received numerous death threats prior to this. The HB 2 requirements are making it so that abortion providers either cannot provide their services any longer or will face increased threats and increased danger to themselves.

Physicians are allowed to conscientiously object to providing medical interventions in certain circumstances for moral and religious reasons. However, there are limits on this right. According to the American Congress of Obstetricians and Gynecologists (ACOG), "[w]hen conscientious refusals conflict with moral obligations that are central to the ethical practice of medicine, ethical care requires that the physician provide care despite reservations or that there be resources in place to allow the patient to gain access to care in

the presence of conscientious refusal."[21] I would argue fear for one's safety in the face of immediate threats is perhaps a stronger ground on which to refuse to provide care than a personal belief that abortion is immoral or against one's religion. ACOG also states, "[p]roviders with moral or religious objections should either practice in proximity to individuals who do not share their views or ensure that referral processes are in place so that patients have access to the service that the physician does not wish to provide."[22] This responsibility has been largely disputed by the medical community but in cases of rape, incest, and health risks to women, referrals must be made without exception. However, under the requirements of HB 2, working in proximity to an abortion provider may not be possible because they are so geographically limited. Referrals are supposed to be made within reason (although what is considered within reason has not been officially defined). Some areas of Texas, such as the Rio Grande Valley, are up to 200 miles away from the nearest clinic that would remain open if HB 2 is passed. Referrals may simply not be feasible given the geographical distances and the decreasing number of available physicians.

As mentioned above, there are two risks to the health and safety of women as a result of HB 2. The second of these is that if a woman cannot access one of the remaining clinics, she may seek out a more convenient but illegal and unsafe abortion, which is far more likely to result in a dangerous complication. Dr. Lynn states, "[b]ecause of the restrictions lawmakers impose, women will seek abortions illegally, and we're going to see a rise in septic abortions."[23] Some areas of Texas might effectively revert back to a pre-Roe era where abortions were performed in unsanitary conditions by unqualified people resulting in dangerous medical complications far more often than legal abortion procedures do now. Physicians like Dr. Lynn who want to prevent this from happening generally cannot do so without facing legal sanction. Physicians have a duty to provide safe medical care and if they cannot obtain admitting privileges, they cannot exercise this duty.

ACOG released a statement expressing their objections to the new requirements. They state that HB 2 is, "plainly intended to restrict the reproductive rights of women in Texas through a series of requirements that improperly regulate medical practice and interfere with the patient-physician relationship."[24] Executive Vice-President of ACOG, Hal C. Lawrence III stated:

> *The Texas bills set a dangerous precedent of a legislature telling doctors how to practice medicine and how to care for individual patients. ACOG opposes legislative interference, and strongly believes that decisions about medical care must be based on scientific evidence and made by licensed medical professionals, not the state or federal government.*[25]

Abortion is one of only a few areas of medicine where the legislature imposes so many regulations restricting particular physicians' ability to practice medicine. Not only are abortions providers being regulated by the state, they are also facing clear discrimination from others within the medical community. The state is closing down clinics that do not

meet the ambulatory surgical center requirements and hospitals are denying physicians admitting privileges because they perform abortions.

In summary, abortion providers are being discriminated against both by the legislature and other members of the medical community. Other physicians who do not perform abortions are not denied admitting privileges on discriminatory grounds. Clinics that cannot afford upgrades to become an ambulatory surgical center are being grandfathered in, while abortion clinics are being forced to close down. Ob-Gyns who conscientiously object to performing abortions and who are not located in close proximity to at least one abortion provider cannot effectively fulfill their duty to refer patients. Lastly, given the barriers these regulations will create, there will likely be a rise in complications resulting from abortions provided under grossly unsafe conditions.

Physicians, whose duty it is to provide safe and effective medical care, are being denied the right to exercise this duty. While this denial may not be unconstitutional, it is certainly unjust and discriminatory and creates obstacles that other physicians do not face. Most importantly, these obstacles are creating an undue burden for women. The HB 2 requirements do not increase the health and safety of abortions; all they do is create substantial obstacles for women. In light of these observations, the requirements seem to me to be in clear violation of *Casey*, in which it was decided that, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on that right."[26] These regulations do just what *Casey* was meant to prohibit and this is accomplished through limiting physicians' ability to practice safe abortions across the state of Texas. Therefore, the HB 2 requirements may not impose an undue burden on doctors but they do impose an undue burden on women.

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[1] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, pg. 2.

[2] *Whole Women's Health v. Lakey,* pg. 2.

[3] Ibid.

[4] Ibid., 4.

[5] Ibid., 2.

[6] *Planned Parenthood v. Casey*, pg. 16

[7] AMA Code of Medical Ethics, "Opinion 2.01 – Abortion," American Medical Association.

[8] *Whole Women's Health v. Lakey,* pg. 10.

[9] Dr. Sherwood Lynn, "A Texas Ob-Gyn Details the Horrific Consequences of Abortion Restrictions", Cosmopolitan.

[10] Feminist Newswire, "Texas Hospitals Revoke Admitting Privileges to Abortion Providers," Feminist Majority Foundation Blog.

[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] Glenn Hegar, "Texas Hospital Association's Statement of Opposition to Section 2 of the Committee Substitute for Senate Bill 5," *Texas Hospital Association*.

[15] Dr. Lynn, "A Texas Ob-Gyn."

[16] *Whole Women's Health v. Lakey,* pg. 10.
[17] Ibid.
[18] Mary Tuma, "Undercover Audio Reveals Anti-Abortion Tactics: Anti-abortion activists monitor and track providers, patients," *Austin Chronicle*.
[19] Ibid.
[20] Ibid.
[21] Committee on Ethics, "The Limits of Conscientious Refusal in Reproductive Medicine," *The American Congress of Obstetricians and Gynecologists*.
[22] Ibid.
[23] Dr. Lynn, "A Texas Ob-Gyn."
[24] "Ob-Gyns Denounce Texas Abortion Legislation: Senate Bill 1 and House Bill 2 Set Dangerous Precedent," *The American Congress of Obstetricians and Gynecologists*.
[25] Ibid.
[26] *Planned Parenthood v*. *Casey*, pg. 16.