

MEMORANDUM

To: Interested Parties
From: SKDKnickerbocker
Date: January 5, 2016
Re: Amicus Filings in *Whole Woman’s Health v. Cole* Show Breadth of Support for Ensuring Women Can Access a Safe & Legal Abortion

A diverse and impressive set of stakeholders have filed **45 amicus briefs** urging the Supreme Court to once again affirm longstanding precedent and uphold a woman’s constitutional right to access safe and legal abortion services. This term, the United States Supreme Court will review provisions of a sweeping Texas law that imposes numerous restrictions on access to abortion. This case challenges two provisions in that law: (1) the requirement that doctors who provide abortion services must obtain admitting privileges at local hospitals no farther than 30 miles away from the clinic; and (2) the requirement that abortion facilities must meet building specifications to essentially become mini-hospitals (also known as ambulatory surgical centers, or ASCs).

The law, commonly referred to as “HB2”, was designed to shut down abortion clinics and has already forced more than half of Texas’ clinics to close their doors. If the challenged provisions are upheld, it will leave 10 or fewer abortion clinics open in Texas, the second-most populous state in the nation, and will gravely harm women in Texas.

A broad array of organizations and individuals – including leading medical experts, social scientists, legal experts, federal/state and local governmental entities and officeholders, Republican voices, military officers, religious leaders, ethicists, reproductive rights and other civil rights advocates, and many others – have filed briefs in support of *Whole Woman’s Health* and other Texas providers – the Petitioners in the case – in what will be the most consequential reproductive rights case in the last two decades.

Ever since the landmark *Roe v. Wade* decision, that was affirmed again in 1992 in *Planned Parenthood v. Casey*, the U.S. Supreme Court has made clear that women have a constitutional right to safe, legal abortion care and that states do not have a right to unduly interfere. The *Casey* decision explained, “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”

By enacting these provisions, Texas is attempting to sneak around the Constitution and four decades of established Supreme Court precedent. The Fifth Circuit’s decision ignores numerous Supreme Court rulings by simply rubberstamping severe restrictions on abortion access and suggesting that federal courts have no meaningful role to play in protecting this constitutional right.

Depth and Breadth of *Whole Woman's Health* Amici

A broad array of likely and unlikely voices has filed amicus briefs in support of the Petitioners explaining why the challenged restrictions are unsound and unconstitutional:

- **Medical experts oppose these restrictions.**
 - Medical experts, including physicians and nurses, are united in opposing these restrictions. Many of the Nation's leading medical societies -- the **American College of Obstetricians and Gynecologists (ACOG)**, the **American Medical Association (AMA)**, the **American Academy of Family Physicians (AAFP)**, the **American Osteopathic Association (AOA)** and the **American Academy of Pediatrics (AAP)** --argue that the requirements are not medically necessary and do not serve the health of women in Texas, but instead will jeopardize women's health. The **National Physicians Alliance**, **American Nurses Association**, **American Academy of Nursing**, **CAP D/B/A Doctors for America** and **Society for Adolescent Health and Medicine** argue in a separate brief that Texas' regulation of health care to advance political objectives unrelated to health is an example of harmful legislative interference with medicine.
 - **The American Public Health Association** and **over 50 public health experts** explain that access to abortion is a crucial component of public health and warn about the public health harms that will ensue from enforcement of the challenged restrictions.
 - The **Society of Hospital Medicine (SHM)** explains the benefits of the increasingly dominant "hospitalist model" of care, in which patients are treated in hospitals by physicians specializing in hospital care, rather than by their outpatient physicians. SHM argues that laws like HB2 that mandate that outpatient physicians obtain admitting privileges are inconsistent with modern hospital care. **Medical staff professionals** – including healthcare practitioners, administrators, managers, consultants and medical school faculty who have served on hospital credentialing committees, medical staff executive committees and hospital boards of trustees – detail the improbability of even the most qualified abortion providers obtaining privileges, making them an unreliable indicator of clinical competence.
- **Scientific studies show that abortion is safe and that these restrictions will harm women.**
 - **Forty-seven prominent social science researchers**, joined by the **Guttmacher Institute**, rely on objective, scientific data to refute Texas' claims that these restrictions will further women's health. The social scientists offer data about the safety and incidence of abortion; refute the argument that abortion is harmful to women's mental health; and identify harms to women from erecting barriers to abortion, such as negative socio-economic consequences to women and children.
- **Millions of Texas women will be adversely impacted by these restrictions.**

Eleven briefs highlight the harmful impact these restrictions will have on women in Texas:

 - The **National Abortion Federation** highlights the urgency on the ground for women in Texas trying to obtain abortions, who face closed clinics and long travel and wait times, and explains that the situation will worsen if the Supreme Court allows the challenged provisions to go into effect.
 - **Planned Parenthood** details the dire consequences for women as clinics in Texas have been forced to close and the reasons why the demand for abortion services in Texas cannot be met by it or by other abortion facilities if these restrictions are upheld.

- The **National Latina Institute for Reproductive Health and nine local and national Latino/a organizations** explain how the challenged restrictions exacerbate barriers to reproductive healthcare faced by Latina women in Texas in violation of the international human rights principle that a fundamental right must be accessible in practice and cannot be manipulated out of existence.
- **In Our Own Voice and 11 other organizations dedicated to the fight for reproductive justice** explain how the Texas restrictions will make it all but impossible for African-American women living in Texas to exercise their constitutionally protected right to abortion given the economic, professional, and personal realities of their lives.
- **Service Women’s Action Network (SWAN) and retired or former military officers** explain the unique burdens that the challenged restrictions will impose on military women based in Texas, due to limitations on their ability to access abortion services and the impact of closures of nearby clinics.
- In two separate briefs, a broad array of more than thirty experts on interpersonal violence (including **Texas Association Against Sexual Assault, National Sexual Violence Resource Center, Legal Voice, National Center on Domestic and Sexual Violence** and others) explain the burdens of reduced abortion access on sexual assault survivors and intimate partner violence survivors in Texas.
- The **National Network of Abortion Funds and 41 member abortion funds** explain why the clinic closures resulting from the Texas restrictions will be especially burdensome for women of limited financial means, who already face significant obstacles in exercising their constitutional right to access abortion services. And a brief from **Jane’s Due Process** highlights the burdens that the challenged restrictions will place on Texas teens and all Texas women facing unintended pregnancy.
- **The Institute for Women’s Policy Research, the National Association of Social Workers and its Texas chapter and Re: Gender (formerly the National Council for Research on Women)** – organizations committed to improving the health and well-being of women and children nationally and in Texas – discuss the particularly poor health and well-being outcomes facing women and their families in Texas and how these in part reflect policy choices of the Texas legislature.
- **National Advocates for Pregnant Women and 13 other** organizations that work to advance the interests and well-being of pregnant women and their families – argues that the challenged provisions will prevent some women from having abortions, result in others having abortions outside of safe medical settings, and make those who do that more vulnerable to arrest and prosecution. The brief explains to the Court that all pregnancies and pregnancy outcomes have profound risks and consequences and those are reasons to respect, not undermine, women’s decision-making competence and healthcare access.
- **Legal experts explain the errors in the Fifth Circuit’s decision in this case and urge reversal.**
 - **Sixteen Constitutional Law Professors – including Geoffrey Stone (University of Chicago Law School), Michael Dorf (Cornell Law School), Laurence Tribe (Harvard Law School) and Gillian Metzger (Columbia Law School)** – trace Supreme Court jurisprudence to explain how courts are required to give meaningful scrutiny to laws that negatively burden constitutional rights, including abortion, and that the Fifth Circuit’s decision contained fundamental legal errors and is wrong under *Casey* and other Supreme Court precedents.

- **Professors Melissa Murray (Berkeley Law School), Glenn Cohen (Harvard Law School), and B. Jessie Hill (Case Western Law School)** argue that these restrictions place a substantial obstacle in the way of a women seeking care and deprive women of their dignity and equal citizenship.
 - **Professor Cilla Smith (Yale Law School)** explores 1992’s “Casey compromise,” where the Supreme Court forged a middle path on the abortion question, and explains how upholding the challenged restrictions would do damage to this important precedent and the constitutional balance it struck.
 - The **Constitutional Accountability Center (CAC)** demonstrates that the text and history of the Fourteenth Amendment protect personal individual rights essential to liberty, dignity and autonomy and require courts to carefully review state legislation impinging on individual liberty. CAC argues that, in refusing to meaningfully scrutinize these restrictions that would close more than 75 percent of abortion clinics in Texas, the Fifth Circuit failed to protect the full scope of liberty guaranteed by the Fourteenth Amendment and to fulfill the constitutionally mandated role of courts in securing personal liberty and equal dignity for all.
 - **Lambda Legal** explains how landmark decisions vindicating the rights of LGBT people compel the conclusion that the constitutional right to an abortion finds protection under the constitutional protections for both liberty and equal protection of the laws. The brief further explains how the challenged restrictions infringe on women’s equal dignity and ability to participate in society relative to men and how similar dynamics affect LGBT people and women seeking to exercise their constitutional right to abortion.
 - The **Association of the Bar of the City of New York** argues that requiring abortion providers to obtain admitting privileges is an unlawful delegation of authority by the legislature to private parties – posing the risk of arbitrary actions by hospitals and violating the due process rights of physicians under the Due Process clause of the Fourteenth Amendment.
- **Experts explain how credible, competent evidence – not pseudoscience – must support the state’s health rationale and fails to do so here.**
 - The **American Civil Liberties Union (ACLU)** explains that trial courts examining requirements that abortion providers obtain admitting privileges have consistently found – based on the credible, competent evidence presented – that the requirement undermines, rather than furthers, the state interest in women’s health. ACLU also explains that when constitutional rights are at stake, courts have the duty to determine whether the restriction actually furthers the government’s interests.
 - **40 leading scientists, science educators, and skeptics** speak out against the use of pseudoscience in court. The brief explains that the so-called experts who testified in favor of HB2 have been discredited by multiple federal courts and exposed for submitting testimony written by an anti-abortion activist with no medical training as their own.
 - The **National Center for Lesbian Rights**, joined by prominent **LGBT and racial justice groups**, explain the long history of courts accepting junk science to deprive marginalized groups of protected liberties – particularly in the contexts of laws targeting people of color, people with disabilities, and LGBT people.

- **Women and physicians share their stories about obtaining or providing abortion.**
Four amicus briefs highlight the voices of women who have chosen to have abortions. A wide array of women are featured in these briefs.
 - A brief by **113 women in the legal profession who had abortions** discusses the importance of access to abortion and argues that the next generation of lawyers should have the ability to control their reproductive lives and thus have the opportunity to fully participate in the “economic and social life of the Nation,” as promised in *Casey*.
 - An abortion stories brief was also filed by **legislators who had abortions** (including former Texas State Senator Wendy Davis), explaining the importance of abortion access and identifying the stigma and backlash that results when women share their abortion stories.
 - A third brief was filed by **women from a diverse array of perspectives and outlooks who had abortions**. The signers include professional women (such as businesswomen, professors, an actress, a doctor and an Episcopal priest) and non-professional women (including a grandmother and a mother who found fulfillment in family life instead of prioritizing careers).
 - A **speak-out brief by 1 in 3** directly illustrates legal principles from Supreme Court doctrine –for example, that states cannot place “substantial obstacles” in the path of women seeking pre-viability abortions, and that the right to choose abortion is linked to “dignity” – through the voices of more than 25 women who share their deeply personal stories to explain how such legal concepts operate in real life.
 - **Physicians for Reproductive Health’s** brief highlights the voices of physicians who provide abortions, explaining their motivation to do so and their commitment to provide quality health care to women, despite the dangers of doing so in this political climate.

- **The Texas restrictions will have negative economic implications.**
 - **The National Women’s Law Center and 47 other groups committed to equality and economic opportunity for women** argue in their brief that abortion restrictions like those challenged here inhibit a woman’s ability to participate equally in the economy and violate women’s constitutionally protected liberty to make the intimate reproductive decisions that are intertwined with broader economic and social equality rights.
 - **60 business leaders, including current and former Fortune 200 and technology industry executives, corporate directors, and owners of small businesses, and academics** submitted a brief highlighting the essential role that women play in driving the business and national economies – a role that has increased dramatically since the Supreme Court first recognized the right to abortion in 1973 - and arguing that women, businesses, and the economy all suffer if women cannot choose whether and when to have children, or face unnecessary state-imposed hurdles in accessing reproductive health care.

- **Government agencies and officials oppose these restrictions.**
 - The **United States** explains that though the balance struck by the Court in *Planned Parenthood v. Casey* gives significant weight to the governmental interest in ensuring women’s health, it ensures that there is “real substance to the woman’s liberty to determine whether to carry her pregnancy to full term.” The Texas requirements are unconstitutional because they have no medical benefit and present substantial

- obstacles to women seeking abortions. The Fifth Circuit’s approach, which essentially treats *Casey*’s undue burden test as a mere rational basis analysis, should be rejected.
- **163 Members of Congress** weigh in to protect the rights of their constituents and explain how permitting pretextual laws like HB2 to take effect would allow states to thwart the mandates of *Roe* and *Casey*—which the Supreme Court stated unequivocally are the law of the United States—and would create a patchwork of rights across the United States.
 - **Attorneys General of 14 states and the District of Columbia** argue that even while courts should generally defer to state legislatures’ health regulations, they must apply higher scrutiny when states curtail women’s fundamental rights for pretextual reasons that serve no state interest. The brief also speaks to the state border issue, highlighting that Texas cannot shirk its constitutional obligation to allow women access to abortion services by arguing that Texas women can travel out of state for those services. Amici are: New York, California, Connecticut, Delaware, Hawai’i, Illinois, Iowa, Maryland, Maine, Massachusetts, Oregon, Vermont, Virginia, Washington, and the District of Columbia.
 - **A coalition of cities and local government leaders (including officials from Travis County, Texas)** argue that municipalities and counties face administrative hurdles when laws like HB2 are enacted. Abortion restrictions like admitting privileges and ASC requirements lead to a reduction in abortion services; this in turn leads to a greater burden on cities and counties to meet the healthcare needs of their own residents, straining their resources and endangering women’s health.
- **Republican officials speak out against Texas’ intrusion into women’s liberty.**
 - **Republican Majority for Choice** and current and former **Republican officials** rally in support of the Supreme Court’s 1992 decision in *Casey*. Their brief criticizes the Texas clinic shutdown law, viewing these regulations as a government overstep into personal liberty and decision-making.
 - **Religious leaders oppose these restrictions.**
 - **Judson Memorial Church, 16 faith groups, and over 1200 religious leaders and pastoral counselors** submitted a brief explaining their recognition of a woman’s moral authority to make her own decisions about her pregnancy, the important work of people of faith in assisting and counseling women who face the choice to continue or terminate a pregnancy, and the harms to women – especially those most marginalized or vulnerable – from these types of restrictions on access to safe abortion care.
 - **Over 40 theologians and ethicists** argue HB2 is unjust, according to the teachings of legal philosopher St. Thomas Aquinas, because it is based on pretext and will disproportionately harm the poor. They further explain that even those who oppose legal abortion should recognize the immorality of undermining Supreme Court doctrine through dishonest means rather than arguing forthrightly that the government should be able to prohibit a woman from ending a pregnancy.
 - **Economists and historians argue for careful court scrutiny of the Texas restrictions.**
 - A group of **leading economists** argue that courts must look at evidence of a regulation’s likely costs and benefits to evaluate whether the regulation will actually further the government’s stated interest in health.

- **Prominent historians** explain the history of U.S. laws purported to protect women that in fact harmed and discriminated against them—barring women from owning property, entering into contracts, serving on juries, and entering certain professions. They argue that courts should carefully scrutinize abortion regulations in light of the long history of using the protection of women as a pretext to deny them the rights and responsibilities of citizens.
- **Texas restrictions will harm the healthcare marketplace.**
 - **Freedom and Individual Rights in Medicine (FIRM) and libertarian physicians and journalists** argue that abortion restrictions like these will decrease competition in the marketplace and will ultimately harm consumers by reducing patient choice, increasing costs, and stifling innovation.
 - **Pennsylvania abortion providers** explain that medically unjustified restrictions such as these Texas requirements undermine the ability of responsible, high-quality abortion providers to provide safe, legal care to women. Such restrictions shut down law-abiding, quality providers, and do not deter rogue providers who do not comply with laws.
 - **Experts in Health Policy** explain that a diverse a set of stakeholders – from health policy scholars and government leaders, to business leaders, physicians, hospitals, insurance companies, and patient advocates -- are in substantial agreement that to deliver optimal health outcomes and be sustainable in the long run, the U.S. health care system must find ways to deliver high quality care to more people more efficiently. The brief explains that the challenged regulations are fundamentally out of step with the national drive toward making high quality care more accessible and less costly.