Testimony of Professor Michele Goodwin[†]
University of Minnesota Law School

Minnesota State Legislature
Committee on Judiciary and Public Safety Finance and Policy

Chaired by Senator Warren Limmer

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SF 702/HF 809 and SF 704/HF 812 Are Unconstitutional and Unnecessary

Chairman Limmer, and members of the Minnesota Legislature Committee on Judiciary and Public Safety Finance and Policy, my name is Michele Goodwin. I am a Chancellor's Professor of Law at the University of California, Irvine School of Law and President of the Institute for Global Child Advocacy, incorporated in Minnesota. I serve on the Board of ACLU Minnesota and the Executive Committee of the National ACLU.

My prior credentials include holding the Everett Fraser Chair in Law at the University of Minnesota Law School and the directorship of one of the nation's top ten-ranked health law programs, as well as serving as the Chair of the American Association of Law School's Section on Health Care Law. My work has been reviewed in or featured by the New England Journal of Medicine, the Journal of the American Medical Association, and Nature, among numerous other periodicals. I provide this written testimony not only in my capacity as a law professor, but also as a constitutional law scholar and trained bioethicist. My scholarship has been published in or is forthcoming in the *Harvard Law Review, Yale Law Journal, California Law Review, Georgetown Law Review* and notable others.

I offer this testimony to clarify the constitutional challenges before the legislature with the two proposed bills and to explain why they violate constitutional law, including the Supreme Court's most recent case addressing abortion: *Whole Woman's Health v. Hellerstedt*.

My testimony today covers three major concerns. The first is to explain why as a matter of law and policy your committee should oppose both SF 702/HF 809 and SF 704/HF 812; both bills violate prior case law, and are built on unconstitutional foundation. Second, neither bill advances women's reproductive health. Finally, because both measures violate prior law, they will likely cost Minnesota tax payers millions of dollars to defend, which is an unwise use of taxpayer resources.

I. SF 704/HF 812 Is Unconstitutional

The proposed bill SF 704/HF 812 should be opposed, because it violates constitutional law.

2016 Supreme Court Ruling Striking Down Bills Like SF 704/HF 812

[†] michelebgoodwin@gmail.com © Michele Goodwin

This legislation would require abortion clinics to meet Ambulatory Surgical Center (ASC) Standards—a mandate that was recently overturned by the United States Supreme Court in *Whole Woman's Health v. Hellerstedt.* [1] In that case, the Supreme Court decided 5-3 to strike down Texas Health and Safety Codes H.B.2., a similar law requiring exactly what Minnesota is proposing. The law was struck down at the District Court level. When the law was appealed, ultimately reaching the Supreme Court, it was struck down again. As a result, statutes requiring Ambulatory Surgical Center Standards for abortion clinics are unconstitutional as a matter of law.

Writing for the majority in that case, Justice Breyer stated that the Texas law already subjected clinics that perform abortions to develop, complete, and maintain: environmental and physical requirements; annual reporting; infection control; record keeping; patients' rights standards; quality assurance mechanisms; disclosure requirements; and anesthesia standards among others.[2] Similarly, Minnesota requires abortion clinics to maintain health and safety standards.

Siding with the District Court, the Court found the new stipulations did not benefit patients nor promote any greater safety. For example, "risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities."[3] The Court found that women were no better off receiving an abortion at an ambulatory care facility than at a previously licensed facility. In addition, the new law offered "no benefit when complications arise in the context of an abortion produced through medication."[4]

Moreover, the Texas ambulatory surgical center law violated constitutional law, because it imposed an undue burden and substantial obstacle to women who desired to terminate their pregnancies. In *Planned Parenthood v. Casey,* the Supreme Court ruled that laws that place an undue burden in the path of women seeking an abortion are unconstitutional. That case "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."[5] Texas failed to take guidance from the Court. The Minnesota legislature would be following the same path if this law is enacted.

According to the Texas Policy Evaluation Project, within months of the law's enactment, the number of abortion clinics in Texas dramatically declined by 56%; from forty-one licensed clinics to eighteen.[6] After the bill's passage, researchers marked a dramatic uptick in the number of

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[1] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2302, 2311 (2016).
[2] *Id.* at 2314 (citing Tex. Admin. Code, tit. 25, §§ 139.4, 139.5, 139.55, 139.58; §§ 139.43, 139.46; § 139.48; § 139.49; § 139.50; § 139.59. *See also*, §§ 139.23, 139.31; Tex. Health & Safety Code Ann. § 245.006(a) (West 2010)).
[3] *Id.* at 2315 (citation omitted).
[4] *Id.* at 2315.
[5] *Id.*
[6] *See* TEXAS POLICY EVALUATION PROJECT, ACCESS TO ABORTION CARE IN THE WAKE OF HB2, http://www.utexas.edu/cola/txpep/_files/pdf/AbortionAccessafterHB2.pdf; *see also* Manny Fernandez & Erik Eckholm, *Court Upholds Texas Limits on Abortions,* N.Y. TIMES (June 9, 2015), https://www.nytimes.com/2015/06/10/us/court-upholds-texas-law-criticized-as-blocking-access-to-abortions.html; N.Y. TIMES, *Fewer Abortion Clinics in Texas*, N.Y. TIMES (June 10, 2015), http://www.nytimes.com/interactive/2014/08/04/us/shrinking-number-of-abortion-clinics-in-texas.html.

women who sought to self-induce abortions. They estimated that between 100,000 to as many as a quarter of a million women in Texas attempted self-induce abortions.[7]

Perhaps even more compelling to the Court, was evidence that legal abortions, performed at clinics prior to the enactment of H.B.2. were safe—as they are in Minnesota. Justice Breyer wrote, "[t]he record also contains evidence indicating that abortions taking place in an abortion facility are safe — indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements."[8] To emphasize this point, the Court noted that a colonoscopy, which takes place outside of a surgical center and hospital setting, has a mortality rate 10 times higher than an abortion," and liposuction (also performed outside of a surgical center and hospital) has a mortality rate that "is 28 times higher than the mortality rate for abortion."[9] Breyer concluded that:

> [t]he upshot…[of this] record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court's conclusion that "[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary."[10]

Finally, I wish to make five clear points related to pregnancy, health, and safety in my testimony:

1. The World Health Organization reports that a legal abortion is as safe as a penicillin shot.[11] A penicillin shot does not require an ambulatory surgical center to facilitate that procedure.
2. Women are 14 times more likely to die from childbirth than a legal abortion in the United States.[12] The state of Minnesota does not require that child births take place in ambulatory surgical centers.
3. In fact, the Minnesota Department of Health's data shows that the complications associated with an abortion are less than 0.01%.[13]
4. In the state of Minnesota, among the ten leading causes of death are: cancer, heart disease, chronic lower respiratory disease, stroke, Alzheimer's disease, diabetes,

[7] *See* TEXAS POLICY EVALUATION PROJECT, KNOWLEDGE, OPINION AND EXPERIENCE RELATED TO ABORTION SELF-INDUCTION IN TEXAS (Nov. 17, 2015), http://liberalarts.utexas.edu/txpep/_files/pdf/TxPEP-Research-Brief-KnowledgeOpinionExperience.pdf; TEXAS POLICY EVALUATION PROJECT, TEXAS WOMEN'S EXPERIENCES ATTEMPTING SELF-INDUCED ABORTION IN TEXAS (Nov. 17, 2015), http://liberalarts.utexas.edu/txpep/_files/pdf/TxPEP-Research-Brief-WomensExperiences.pdf.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 2316.
[11] WORLD HEALTH ORGANIZATION, UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2008 14 (2011), http://apps.who.int/iris/bitstream/10665/44529/1/9789241501118_eng.pdf.
[12] E.G. Raymond & D.A. Grimes, *The comparative safety of legal induced abortion and childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215-19 (Feb 2012), *available at* http://www.ncbi.nlm.nih.gov/pubmed/22270271.
[13] Induced Abortions in Minnesota, January-December 2015, Report to the Legislature. Minnesota Department of Health, Center for Health Statistics.

pneumonia and influenza, suicide, and nephritis.[14] A woman in Minnesota is more likely to die from domestic violence, gun death, drug poisoning, or homicide than from a legal abortion.[15]

5. Ambulatory Surgical Center Standards run afoul of constitutional law and Supreme Court precedent, because they are medically unnecessary, create a undue burdens, and offer no added health benefit to women seeking legal abortions. Legal abortions are among the safest of any medical procedure.

II. SF 702/ HF 809 Is Cruel, Unnecessary, and Contravenes Established Minnesota Law

The state of Minnesota has long prided itself on having a robust, egalitarian constitution that protects the interests and needs of all its citizens. To this end, the state legislature and courts strived to ensure that poor citizens were not excluded from the basic guarantees of equality and dignity, including medical access.[16] This law, if enacted, will prohibit state-sponsored health programs from covering pregnancy termination and violate established Minnesota law that ensures that every woman in the state will receive access to reproductive health services regardless of their wealth or poverty. Under this bill, poor women would be uniquely singled out for harm.

This law is unconstitutional and could be challenged on equal protection grounds. The state of Minnesota proposes to discriminate in its distribution of state benefits, which is coercive interference with the free exercise of a fundamental right. In *Roe v. Wade,*[17] the United States Supreme Court declared that a woman's right to determine her own reproductive health is a fundamental right. The Court explained that the right of personal privacy is "fundamental . . . in the concept of ordered liberty."[18] The Court reasoned that "where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[19] The Supreme Court affirmed *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey.*[20]

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[14] Minnesota Department of Health, *2015 Minnesota County Health Tables, Mortality Table 4: Minnesota's 10 Leading Causes of Death,* 13 (2015) at
http://www.health.state.mn.us/divs/chs/countytables/profiles2016/cmort15pdf.pdf

[15] Centers for Disease Control, Stats of the State of Minnesota, 2 (2013/14) at
https://www.cdc.gov/nchs/pressroom/states/MN_2015.pdf; Minnesota Coalition of Battered Women, *Femicide Report,* January 31, 2017, 6 (reporting that at least 18 women died in Minnesota from domestic violence in 2016, down from the previous year of 22 female deaths) at
http://media.wix.com/ugd/f4bdb8_d558244290764dd0ac411e2210e56593.pdf; The Health of Minnesota, *Statewide Health Assessment: Part Two,* May 2012, 20 (explaining that "every day approximately one Minnesotan dies and another is injured from a firearm. Firearms are the second leading cause of traumatic brain injury in Minnesota) at
http://www.health.state.mn.us/healthymnpartnership/sha/docs/1205healthofminnesotasupp.pdf.

[16] Women of State of Minn. by Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995).

[17] *Roe v. Wade,* 410 U.S. 113 (1973).

[18] *Id.* at 152 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).).

[19] *Id.* at 155.

[20] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Because a woman is 14 times more likely to die in childbirth than a legal abortion, the state's interest could not be more compelling than a woman's life. Moreover, the government cannot be discriminatory in the distribution of resources. Rather, the government must be neutral regarding its funding of reproductive health. The government could decide that it will deny medical benefits for child birth and abortion. However, it cannot preference one over the other as both are fundamental constitutional rights. That is, rights cannot be conditioned on economic status. Women's reproductive healthcare rights must not be conditioned on their wealth or poverty.

There are three clear points that I wish to make here:

1. The government cannot be discriminatory in how it distributes benefits.
2. The unequal distribution of reproductive health resources creates negative impacts on poor women.
3. By unequally distributing its resources, the government interferes with the exercise of a fundamental right.

Finally, because legal abortions are safe, many Americans have forgotten the plight of women before the procedures became legal. According to the Guttmacher Institute, "[t]he toll the nation's abortion laws took on women's lives and health in the years before *Roe* was substantial."[21] Estimates vary, but reports suggest that between 200,000 to over 1 million illegal abortions took place each year, prior to *Roe v. Wade,* with hundreds ending in death, and numerous others requiring emergency hospital interventions. Sometimes women were left infertile as a result of illegal procedures. In fact, by the "early 1960s, [illegal] abortion related deaths accounted for nearly half, or 42.1 percent, of the total maternal mortality in New York."[22] Sadly, these deaths were preventable, because legal abortions are even safer than childbirth.[23]

SF 702/ HF 809 should be opposed because it violates constitutional law, Minnesota law, and undermines the health, safety, and dignity of poor women to determine their own reproductive healthcare.

III. Conclusion

You should oppose SF 702/HF 809 and SF 704/HF 812 because they are backdoor measures to impose substantial burdens in the path of women's constitutionally protected right to privacy. *Roe v. Wade* was affirmed last year in *Whole Woman's Health,* a Supreme Court decision addressing the ambulatory surgical center standards of the type Minnesota now proposes. The Court struck down a law identical to that proposed now by Minnesota. To litigate this matter, which is settled federal law, the state of Minnesota will cost taxpayers significant resources. This would be an unwise use of state resources. These cases are expensive to litigate; costing states $1 million and more in legal fees alone.

[21] Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue?*, 6 GUTTMACHER POLICY REV. 8 (2003), https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue.
[22] LESLIE REAGAN, WHEN ABORTION WAS A CRIME, 214 (1996).
[23] Michele Goodwin & Allison Whelan, *Constitutional Exceptionalism*, U. ILL. L. REV. (forthcoming 2016).

Let me conclude with a quote from the 2016 Supreme Court decision, *Whole Woman's Health.* According to Breyer, "we conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes."[24]

[24] *Id.*