



**Minnesota House of Representatives
Health and Human Services Reform Committee**

Thursday, March 02, 2017
200 State Office Building
St. Paul, Minnesota

**Testimony of Lisa Stratton, Co-founder and Senior Counsel, Gender Justice,
Opposing HF 809**

My name is Lisa Stratton. I'm an attorney and a co-founder of the nonprofit law and policy organization, Gender Justice. Gender Justice works to eliminate gender barriers Minnesotans face due to their gender, sexual orientation, or gender identity. Prior to founding Gender Justice, I was a member of the law faculty at the University of Minnesota Law School. I have been a practicing lawyer focused on gender equality for twenty years. In 2013, Gender Justice represented the nonprofit Pro-Choice Resources, co-counseling with the Center for Reproductive Rights in New York, in litigation involving a legal challenge to Minnesota's Medicaid funding of therapeutic abortion.

I am testifying to share one simple message: HF 809 is unconstitutional.

In 1995, the Minnesota Supreme Court ruled in *Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995), that the right to privacy under the Minnesota constitution protects not simply the right to an abortion. It protects the woman's *decision* to abort, and any legislation infringing on that decision-making process violates that fundamental right. I offer the following brief description of the Court's decision and why it means that HF 809 violates the Minnesota Constitution.

I'll note first that all involved in the *Gomez* case, the plaintiffs (Jane Doe, representing the Women of the State of MN), the state (represented by the Attorney General), and the Court, all agreed on two things:

- The right to decide whether to have an abortion is a fundamental right and is protected by the right to privacy in the Minnesota Constitution. *Gomez*, 542 N.W.2d at 27.
- Without Medicaid funding of therapeutic abortion as part of their reproductive health care, some low-income women would receive later abortions, and "that delay in the performance of abortion may cause some increase in the health risk to the pregnant woman and can impose pain, discomfort, or increased risks for women with medical complications." *Id.* at 26.

The plaintiffs in *Gomez* challenged a law passed by this legislature that excluded abortion from coverage under the state's health care plans for low-income people. The question before the Court was whether funding childbirth-related health services without funding abortion-related health services interferes with a woman's constitutionally-protected decision-making process.

The Court noted that "as the highest court of this state, it is independently responsible for safeguarding the rights of our citizens," and held that the case presented a circumstance in which the Minnesota Constitution provides greater protections than the federal constitution. *Id.* at 30. The right to privacy under the Minnesota constitution protects "not simply the right to an abortion, but rather it protects the woman's *decision* to abort; **any legislation infringing on the decision-making process, then, violates this fundamental right.**" *Id.* at 31 (emphasis added). Ultimately, the court concluded that the challenged statutes violated the state constitutional right to privacy by impermissibly infringing upon an individual's decision whether to have an abortion. *Id.*

The Minnesota Court gave several reasons for its departure from federal constitutional law. One was Minnesota's "long tradition of affording persons on the periphery of society a greater measure of government protection and support than may be available elsewhere," a tradition it found evident in the actions of this legislature on behalf of those who are largely without influence in society, including the poor. *Gomez*, 542 N.W.2d at 30.

The Court held that "the discriminatory distribution of the government benefits can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions." *Id.* at 29.

Gomez is a constitutional-level decision by the highest state court interpreting the scope of a fundamental right under its state constitution. There is no greater protection a legal right could have under state law. The only ways the *Gomez* ruling could be "undone" are a decision of the Minnesota Supreme Court to overrule its own precedent, or by amending our state's constitution.

It is exceedingly rare for the highest appellate court of a state or the U.S. Supreme Court to completely reverse itself. As a State Representative in Utah reportedly said recently, in reference to state bills seeking to overturn *Roe v. Wade*, "any time a state will do a full frontal challenge" to a constitutional decision of the highest court, "you need a reasonable belief you'll meet that challenge." You do not have that here.

If this bill became law, the result would be an immediate court challenge that would ultimately result in the Minnesota Supreme Court (which just reaffirmed the *Gomez* decision in 2013) finding the law unconstitutional under *Gomez*.

The cost to the taxpayers of Minnesota could be enormous, as demonstrated by examples other states' experiences in the last few years.

- Kansas spent nearly \$400,000 in legal bills in six months defending new laws to restrict abortion, according to the Kansas attorney general's office.

- The South Dakota state Legislative Research Council estimated that the cost of defending an abortion restriction requiring a three-day waiting period for an abortion could be between \$1.7 and \$4 million. South Dakota chose instead not to appeal an adverse ruling, and paid the challengers' over \$600,000 for their attorney's fees.
- North Carolina had to tap its emergency fund in 2016 to pay \$1 million in attorneys' fees after a law requiring a woman to view an ultrasound was ruled unconstitutional.
- After a district court ruling that a Wisconsin law was an undue burden on women seeking abortion, the state agreed to pay \$1.6 million in attorney fees and legal costs to the law's challengers.

There are many reasons why passing HF 809 is bad a policy choice that would harm the most vulnerable pregnant people in our state. An abortion would cost a woman on Medicaid nearly a third of her monthly family income. Denying her this necessary health care coverage has been shown to have little impact on abortion rates in states that do so. Two things happen instead: low-income women divert money from living expenses such as rent, food, or utilities, and they access abortions later into their pregnancies after they scrape together the funds to pay for it.

But even if you disagree with the Minnesota Supreme Court and both sides in the *Gomez* case that this delay may cause some increase in the health risk to the pregnant woman and can impose pain, discomfort, or increased risks for women with medical complications, the bottom line is that Minnesota courts would stop this bill from taking effect. Passing this law would accomplish nothing for the Minnesota taxpayer but a large attorney fee bill.

Thank you for the opportunity to share this testimony.

To request citations to sources, please contact: lisa.stratton@genderjustice.us.