

# Texas Medical Providers Performing Abortion Services v. Lakey (2012)

In the 2012 case *Texas Medical Providers Performing Abortion Services v. David Lakey*, a US appeals court ruled as constitutional a Texas law that required abortion providers in the state to show women receiving abortions the ultrasound images of their fetuses. The law also required providers to describe the sounds of the fetuses' nascent hearts. In doing so, the court set precedent that ultrasound readings are necessary medical information for pregnant women seeking abortions, increasing the wait-period for women seeking abortions. The decision fueled debates in the early twenty-first century US about women's rights to abortions.

In February 2011, Sid Miller, a Republican in the Texas State House of Representatives, introduced Texas House Bill 15 to the state's legislature in Austin, Texas. The bill amended the state's Woman's Right to Know Act (2003), which required physicians to inform pregnant women of health complications and risks associated with abortion procedures. Miller's amendments required physicians to perform ultrasound readings before abortion procedures. Miller, a self-declared advocate for the anti-abortion movement, affirmed that the bill intended to conserve life by preventing abortions. After passing through both the Texas House and Senate, Texas governor Rick Perry signed House Bill 15 into law on 19 May 2011.

Texas politicians, by passing House Bill 15, required physicians performing abortions in the state of Texas to provide real-time ultrasound images for any pregnant woman seeking abortions between 24 and 72 hours before she received the procedure. An ultrasound is an image that captures a fetus inside a pregnant woman obtained through a medical sonogram-imaging device, which uses sound waves to visualize structures inside the body. The bill also required physicians to verbally explain the ultrasound results in a manner that women could understand, even if the pregnant women declined or resisted the information. The explanation must include details about the size and developmental stage of the fetus.

House Bill 15 also required physicians to play the sound of the fetus's developing heart to women seeking abortions. After the pregnant woman views the ultrasound and hears the heart, according to the bill, the physician must receive the written consent of the pregnant woman certifying that she has received the required information. If the woman chooses not to have the abortion procedure, the physician must provide her with information necessary to establish paternity. That information must describe benefits of determining paternity as well as steps necessary to obtain child support.

The non-profit Center for Reproductive Rights, headquartered in New York City, New York, advocated for the reproductive rights of women throughout the US. The Center argued that House Bill 15 forced physicians to communicate, and pregnant women to hear, the anti-abortion political ideology of the State. According to the Center, an ultrasound image does not constitute medical information necessary for pregnant women to decide whether or not to terminate a pregnancy. The Center argued that the bill only meant to discourage women in Texas from deciding to get an abortion, and the law thus violated federal law that protects women's right to abortions.

On 13 June 2011, the Center for Reproductive Rights and the organization Metropolitan OBGYN of San Antonio, Texas, filed a lawsuit in the United States District Court for the Western District of Texas, Austin Division in Austin, Texas, on behalf of all Texas medical providers performing abortion services. The suit was brought against the Commissioner of the Texas Department of State Health, David Lakey, the executive director of the Texas Medical Board, Mari Robinson, and the county attorney for Travis County, Texas, David Escamilla. All three represented the State of Texas in the

lawsuit, although only Lakey's last name appeared in the lawsuit's title. The Center for Reproductive Rights and Metropolitan OBGYN challenged the constitutionality of House Bill 15. They sued the State of Texas in a class action lawsuit, meaning Metropolitan OBGYN was suing on behalf of all physicians who perform abortions in the state and all women who were or may become patients of any abortion providing facilities. Therefore, the title of the case represents all of the Texas medical providers who provide abortion services. The Center filed a class action lawsuit to ensure that if any part of House Bill 15 were found to be unconstitutional, those sections of the bill would no longer apply to any of the medical practices and physicians performing abortions in the State of Texas. The Center provided the lawyers who argued on behalf of Texas abortion providers as the case moved through different courts. Henceforth, this article refers primarily to the Center, as it represented all Texas abortion providers.

Judge Sam Sparks presided over the case in the US District Court for the Western District of Texas in Austin. During the preliminary hearing of the case, the Center, on behalf of all medical providers performing abortion services, requested that the State of Texas cease implementation of any sections of House Bill 15 for the duration of the trial a request called a preliminary injunction. The preliminary injunction would prevent abortion providers from facing legal punishment for disobeying any aspect of the bill while the bill's constitutionality was being tested in court. To be granted a preliminary injunction, the Center needed to argue that the House Bill 15 was inconsistent with the US Constitution. Those arguments were presented during the preliminary hearing and would need to convince Sparks that the district court would most likely find the bill unconstitutional. The Center challenged House Bill 15 on eight points while petitioning for a preliminary injunction.

The first point argued by the Center was that House Bill 15 contained clauses that were unconstitutionally vague, meaning that the language and wording of sections of the bill were unclear or contradictory. That vagueness could result in abortion providers unknowingly violating the bill. Of the many challenged clauses, Sparks agreed that three were unconstitutionally vague. According to Sparks, there are situations in which several physicians perform the abortion consultation and procedure. Therefore, the clause that details the requirement that the physician who explained the ultrasound also be the physician who performed the abortion could lead to confusion. Sparks also ruled that the bill failed to make clear who was liable if the pregnant woman refused to view the ultrasound images. Lastly, Sparks ruled that the bill failed to clearly outline and define the information a physician must provide to pregnant women who chose not to get an abortion. As physicians disobeying the bill were subject to punishment by law, Sparks ruled that the bill created uncertainty that could potentially lead physicians to unknowingly violate the law.

The Center's second claim stated that House Bill 15 violated the freedom of speech rights of the physicians and of the pregnant women, rights protected by the First Amendment to the US Constitution. The Center argued that the bill forced physicians and pregnant women to engage in politically motivated conversation. According to the Center, hearing verbal explanations of ultrasound readings is not information necessary for patients to properly consent to an abortion. As abortion providers rarely gave that information, the Center argued that verbal explanations of sonogram readings or heartbeats were medically unnecessary. As the requirements of the bill differed from standard medical practice, the Center argued that the bill violated the physician's right to speak freely and forced them to speak only in the interest of the state. The Center also contended that the bill subjected pregnant women to verbal and visual depictions of the fetus against their wills. Therefore, the bill violated the rights of pregnant women to avoid unwanted conversation.

Additionally in an attempt to gain a preliminary injunction, the Center argued that the Due Process Clause of the Fourteenth Amendment to the US Constitution protected women's rights to seek abortions without the State interfering. The Due Process Clause asserts that a state may not infringe on the life, liberty, or property of any citizen without due process of law. The Center cited two US Supreme Court cases to illustrate past rulings on the basis of due process. The US Supreme Court ruled in *Roe v. Wade* (1973) that the Fourteenth Amendment implies that citizens have a right to privacy in medical decisions and that state legislation could not prevent a pregnant woman from seeking an abortion. Later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the US Supreme Court, relying on the precedent set in *Roe v. Wade*, ruled that laws regulating abortion services could not place an undue burden on the pregnant woman seeking an abortion.

That ruling meant that individual states could not enact laws to hinder a woman's pursuit of an abortion merely to prevent her from practicing her right to an abortion. The Center argued that the requirements of House Bill 15, which was not inline with current medical practice, were obstacles meant to prevent women from seeking abortions and thus went against the precedents set by the Supreme Court in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

In response, the state of Texas opposed the due process claim. The State of Texas also referenced in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). In *Casey*, the US Supreme Court ruled that the state can require physicians to share information with pregnant women seeking abortions if the information is truthful and medically relevant. The state of Texas, using the precedent established by *Casey*, argued that requiring physicians to verbally explain ultrasound readings and heartbeat was not beyond the rights granted to the State.

The State also used precedents established by *Casey* to argue that House Bill 15 did not violate women's rights to privacy as established in *Roe v. Wade*. According to the ruling in *Casey*, states cannot pass laws that unjustifiably inhibit women from practicing their right to seek abortions. States, under *Casey*, do have the right to protect life and may regulate abortion services, so long as their laws do not purposely attempt to obstruct women's rights to abortions. Texas argued that the requirements established by House Bill 15 did not unlawfully prevent pregnant women from seeking abortions. Instead the State argued that the bill offered pregnant women the information that the State said they needed to make decisions about whether or not to terminate a pregnancy.

Sparks agreed that House Bill 15 did not violate the Fourteenth Amendment. However, Sparks ruled that by forcing physicians to communicate information that they did not consider medically necessary, the Texas law violated the First Amendment rights of physicians. Sparks argued that the Supreme Court's ruling in *Casey* did not apply to House Bill 15. According to Sparks, *Casey* limited the state's right to compel the speech of physicians about information that is important for pregnant women to know, which includes health risks associated with an abortion procedure. Sparks argued that *Casey* does not allow Texas to compel physicians to share the state's political ideology. He ruled that specific clauses in House Bill 15 were unconstitutionally vague and that the bill violated the First Amendment rights of physicians.

On 30 August 2011 Sparks granted the preliminary injunction for the Texas medical providers performing abortion services. The injunction prevented the state of Texas from enforcing any part of House Bill 15 ruled unconstitutional until the class action lawsuit concluded. It also prevented the State of Texas from punishing physicians and pregnant women who disobeyed any sections of House Bill 15 that were ruled unconstitutional. Nancy Northrope, the CEO of the Center for Reproductive Rights, called the District Court's preliminary ruling a tremendous victory for women's rights.

Following Sparks's decision, the State of Texas immediately filed an appeal in the US Court of Appeals for the Fifth Circuit in New Orleans, Louisiana. Three judges heard oral arguments: Chief Judge Edith Jones, and circuit judges Patrick Higginbotham and Jerry Edwin Smith. On 10 January 2012 the appellate court issued its decision, authored by Jones. Unlike Sparks, the Court ruled that the arguments presented against House Bill 15 failed to prove that House Bill 15 violated the US Constitution. Jones argued that the State did not overstep any constitutional boundaries in mandating certain requirements for abortion procedures.

Jones relied on the US Supreme Courts ruling in *Casey* to evaluate the claims made against House Bill 15. The US Supreme Court had ruled that the state could require physicians to share medically appropriate and truthful information with pregnant women. Jones argued that the information required by House Bill 15 was necessary for women to make mature decisions about abortion services. Jones, applying the Supreme Court's rulings in *Casey*, also argued that the First Amendment freedom of speech rights of physicians could be regulated by the state to ensure rightful consent is received in medical practices. Jones concluded that House Bill 15, therefore, did not violate the freedom of speech rights of physicians. Jones said that ultrasound images and fetal heartbeat readings constituted necessary medical information. According to Jones, the requirements established by House Bill 15 ensured that pregnant women are informed before making a decision. Jones stated that she believed that ultrasound readings would aid women in deciding whether or not to proceed with an abortion procedure and therefore did not constitute undue burden. According to Jones,

it was therefore within the State's power to mandate that physicians verbally explain sonogram images.

Unlike Sparks, the appellate court found no unconstitutional vagueness in House Bill 15. While Sparks had held that the phrase requiring the physicians who perform the ultrasounds also perform the abortion procedures was unclear, Jones concluded that the bill implies that the physician who intends on performing the procedure must also perform the sonogram. Jones found no confusion in the mandated duties of physicians under House Bill 15. Additionally, Jones ruled that the Bill only required that physicians make the sonogram images available for the pregnant woman to see. According to Jones, the bill did not hold physicians responsible if the woman refused to view the images. The same logic was applied to the physician's role in performing heartbeat tests. Jones dismissed all arguments of unconstitutional vagueness presented against House Bill 15, calling them trivial matters.

Jones and the Appeals Court concluded that all the claims made by the Center on behalf of the Texas medical providers were not substantial. Jones overturned the preliminary injunction and issued an order permitting House Bill 15 to take effect immediately.

Following Jones decision in the Appeals Court, the class action lawsuit resumed in Spark's District Court for final ruling. On 6 February 2012, Sparks and the District Court for the Western District of Texas Austin Division dismissed the case against the State of Texas. By 2017, twenty-five states had implemented laws similar to, or inspired by, Texas House Bill 15.

## Sources

1. Aaronson, Becca. "House and Senate Unite on Sonogram Abortion Bill." Texas Tribune, May 4, 2011. <https://www.texastribune.org/2011/05/04/house-and-senate-unite-on-abortion-sonogram-bill/> (Accessed June 23, 2017).
2. Legal Documents from Center for Reproductive Rights. "Texas Medical Providers Performing Abortion Services v. Lakey." <https://www.reproductiverights.org/case/texas-medical-provider-s-performing-abortion-services-v-lakey> (Accessed June 23, 2017).
3. First Amendment to the US Constitution (1791)" Cornell University Law School. [https://www.law.cornell.edu/constitution/first\\_amendment](https://www.law.cornell.edu/constitution/first_amendment) (Accessed June 23, 2017).
4. "Fourteenth Amendment to the US Constitution (1868)" Cornell University Law School. <https://www.law.cornell.edu/constitution/amendmentxiv> (Accessed February 14, 2016).
5. Hamilton, Reeve. "Texas Abortion Bill Tentatively Passes House." Texas Tribune, March 3, 2011. <https://www.texastribune.org/2011/03/03/texas-abortion-bill-tentatively-passes-house/> (Accessed 21 January 2015).
6. Medical Providers Performing Abortion Services v. Lakey, 806 F. Supp. 2d 942 (W.D. Tex. 2011). [https://scholar.google.com/scholar\\_case?case=5781228286196559713&hl=en&as\\_sdt=806](https://scholar.google.com/scholar_case?case=5781228286196559713&hl=en&as_sdt=806) (Accessed June 23, 2017).
7. Planned Parenthood of Southeastern Pennsylvania v. Casey. 505 U.S. 833 (1992). [https://scholar.google.com/scholar\\_case?case=6298856056242550994&hl=en&as\\_sdt=806](https://scholar.google.com/scholar_case?case=6298856056242550994&hl=en&as_sdt=806) (Accessed June 23, 2017).
8. Roe v. Wade. 410 U.S. 113 (1973). [https://scholar.google.com/scholar\\_case?case=12334123945835207673&hl=en&as\\_sdt=806](https://scholar.google.com/scholar_case?case=12334123945835207673&hl=en&as_sdt=806) (Accessed March 28, 2016).
9. Texas Medical Providers Performing Abortion Services v. Lakey. 667 F.3d 570, 572 (2012). [https://scholar.google.com/scholar\\_case?case=14099006333317456221&hl=en&as\\_sdt=806](https://scholar.google.com/scholar_case?case=14099006333317456221&hl=en&as_sdt=806) (Accessed June 23, 2017).
10. Texas Medical Providers Performing Abortion Services v. Lakey, No. A-11-CA-486-SS (W.D. Tex. Feb. 6, 2012). [https://scholar.google.com/scholar\\_case?case=10634504427456516915&hl=en&as\\_sdt=806](https://scholar.google.com/scholar_case?case=10634504427456516915&hl=en&as_sdt=806) (Accessed June 23, 2017).
11. Woman's Right to Know Act, S.B. No. 835 (2003). <http://www.legis.state.tx.us/tlodocs/78R/billtext/pdf/SB00835I.pdf> (Accessed March 28, 2016).
12. Woman's Right to Know Act (Amendment), H.B. 15 (2011). <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB00015F.pdf> (Accessed March 28, 2016).