The following article was written by

Nancy Northup,

President and CEO of the Center for Reproductive Rights

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A Voting Rights Act for Reproductive Rights?

Assessing the jarring similarities between threats to abortion rights and the right to vote.

*Nancy Northup**
President & CEO
Center for Reproductive Rights

From its inception, the Brennan Center was hard-wired to think big and act creatively in the pursuit of justice under law. Josh Rosenkranz and Burt Neuborne envisioned a new type of public interest organization. With one foot in the academy and one foot in the world of action, its initial focus was on an ambitious and necessary agenda: to advance laws and policies that would make America's electoral systems more fair and participatory. Having grown up during the Cold War with the constant contrast of democratic and totalitarian societies, I was glad to be on the democratic side of the divide, but still well aware that the rules of engagement shaped how closely we lived up to — or not — the ideal of a government "of the people, by the people, and for the people." So I was thrilled to get Josh's call to come on board as the Brennan Center was getting up and running.

We went to work on improving those rules of engagement so that Election Day would more closely represent "one person, one vote."

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An early Brennan Center flagship initiative was a multi-pronged effort to reform our nation's campaign finance systems at the federal, state, and local levels. It seems quaint now, in the wake of *Citizens United*,[2] but we set out to reduce the influence of money in politics through robust campaign finance reform, including contribution limits, voluntary spending limits, public funding, and addressing the pernicious influence of soft money and independent expenditures that even 20 years ago was having a corrosive effect. It seemed, even then, that money was far more important than constituents, and unless there was serious structural reform, the power of the individual voter would be lost to well-funded interests.

We strove to open up access to the ballot, both within the two major parties and in order to give more third party and independent candidates a fair shot. For example, we successfully sued the Democratic and Republican parties on behalf of candidates as diverse as John McCain and Bill de Blasio in order to knock out burdensome rules that made it impossible for individuals not favored by the establishment to even get on the ballot and make their case to voters.[3]

Our agenda also included voting rights, both reapportionment issues as the 2000 Census loomed, and a glaring flaw in America's claim to universal suffrage: the permanent disenfranchisement of ex-felons. I was lead counsel in *Johnson v. Bush*,[4] a federal case we filed in the fall of 2000 to challenge Florida's denial of the right to vote to 600,000 of its citizens who had fully served their sentences.[5] We sued under the U.S. Constitution and the Voting Rights Act because the purpose and effect of the law was to deny African-Americans the right to vote.[6] Indeed, the law's disenfranchisement of 1 in 6 black men in Florida[7] was a vestige of our country's disgraceful history of racial oppression.

The laws around campaign finance reform, ballot access, and voting rights seem worlds away from my current work on ensuring that access to the full range of reproductive health care — from essential obstetrics care, to contraception, to reproductive and sexual health information, to safe and legal abortion services — is protected as a fundamental human right by governments around the world. In 2003, when I packed up my Brennan Center files to head for the Center for Reproductive Rights,

I did not see much of a connection between my work on voting and my work on reproductive rights. The Brennan Center did not work on gender and the Center for Reproductive Rights did not work on elections. It appeared that I was off to a new area of law and justice.

Apparently not. By 2011, reproductive rights and voting rights were being significantly undermined by a similar and insidious foe: pretextual state laws that purported to be advancing legitimate state interests, but were designed to strip away constitutionally guaranteed rights.

Pretextual Laws in Voting and Reproductive Rights

In the case of voting rights, the deceitful laws took the form of voter ID laws. While some states had longstanding laws that required a document with the voter's name, there was a rapid acceleration after the 2010 election for photo ID requirements.[8] States without any ID requirements continued to adopt them, while states that already requested some sort of ID made the laws more stringent, adding a requirement that the ID have a photo — a burden to all voters, but disproportionately impacting the poor and racial minorities.[9] Legislators claimed these laws were necessary to prevent fraud and safeguard confidence in the election system.[10] But photo ID laws were passed in state after state with no evidence of fraud.[11] All that had triggered these laws, it seems, was a change of political power in state capitols and a concerted effort to keep racial minorities from the polls — a 21st century version of the poll tax.[12]

On the issue of access to reproductive healthcare, new sham laws ushered in after 2010 hid behind the pretext of "health and safety." Without justification, states began to make an end run around public opinion and Supreme Court rulings by pushing laws they claimed would promote women's health and well-being — but did not. Abortion is one of the safest medical procedures.[13] Less than one-quarter of 1 percent of abortions result in a major complication.[14] Nevertheless, states enacted laws singling out abortion providers for onerous regulations such as requiring providers to have admitting privileges at a local hospital, and mandating facilities meet the standards of ambulatory surgical centers — in essence mini-hospitals.

It is politicians, not doctors, advancing these laws, often based on model legislation developed by anti-abortion groups. When Mississippi enacted such a law in 2012, a state senator put it plainly: "There's only one abortion clinic in Mississippi. I hope this measure shuts that down."[15] Others made similar comments demonstrating their true motivations. Lieutenant Governor Tate Reeves stated that the measure "should effectively close the only abortion clinic in Mississippi" and "end abortion in Mississippi."[16] Governor Phil Bryant, vowing to sign the bill, said he would "continue to work to make Mississippi abortion-free."[17] When he signed the bill, he said, "if it closes that clinic then so be it."[18]

In Texas, Governor Rick Perry, who called a special session of the state's legislature in 2013 specifically to pass that state's most recent set of abortion restrictions, not only stated his intention to "make abortion, at any stage, a thing of the past,"[19] but also wrote the preface to the 2014 legislative playbook by the anti-abortion group Americans United for Life that wrote the language on which parts of the Texas law are based.[20]

Challenges to Sham Laws

Lawsuits challenging sham laws attacking both voting and reproductive rights have been mounted in recent years. While results have been mixed, in many instances courts have seen through the pretextual reasons that politicians have used to enact the laws, and exposed their true aim of rights suppression.

Prior to the 2014 election, voters and advocates challenged newly-enacted voter ID laws and other voting restrictions in Texas, North Carolina, and Wisconsin as violations of the Constitution and the Voting Rights Act. Some courts evaluating these laws have accepted the states' reasons for them. For instance, the U.S. Court of Appeals for the Seventh Circuit upheld Wisconsin's law, accepting the state's justification that the law promoted public confidence in elections generally, despite the absence of documented evidence of voter fraud.[21] Other courts rejected those stated reasons as pretextual, instead seeing the voting restrictions for what they were: designed to suppress minority voting.

For instance, considering Texas's law, the federal district court observed that while the state has a legitimate interest in detecting and preventing voter fraud, there was little, if any, evidence that this was a problem in Texas.[22] The court noted that the law "was clearly overkill in that its extreme limitation on the type of [qualifying] photo IDs…does not justify the burden that it engenders."[23] The stated policies for the law were only tenuously related to its provisions.[24] The court concluded, among other rulings, that the law had an unconstitutional discriminatory purpose, as well as a discriminatory effect against Hispanics and African Americans in violation of Section 2 of the Voting Rights Act.[25] The U.S. Court of Appeals for the Fifth Circuit affirmed the lower court's ruling on discriminatory effect, but remanded for further consideration of discriminatory purpose under the Act,[26] continuing the litigation over whether Texas's voter ID law is pretextual.

In North Carolina, the U.S. Court of Appeals for the Fourth Circuit rejected the state's administrative convenience reasons for cutting early voting, stating that the Voting Rights Act "does not prescribe a balancing test under which the State can pit its desire for administrative ease against its minority citizens' right to vote."[27]

In the area of reproductive rights, recent challenges to clinic shutdown laws have by and large succeeded. Laws in Alabama,[28] Louisiana,[29] Mississippi,[30] Tennessee,[31] and Wisconsin[32] have been preliminarily or permanently blocked by federal courts.[33] Courts evaluating these laws have done more than merely accept states' purported rationale for passing them.

For example, Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit noted, in affirming the lower court's decision preliminarily blocking Wisconsin's admitting privileges requirement, "the apparent absence of any medical benefit from requiring doctors who perform abortions to have [admitting] privileges at a nearby or even any hospital [and] the differential treatment of abortion vis-à-vis medical procedures" with comparable risks.[34] The district court subsequently permanently enjoined the law, "more convinced that the admitting privileges requirement…remains a solution in search of a problem, unless that problem is access to abortion itself."[35]

A federal district court in Alabama likewise described that state's justifications for its clinic shutdown law as "weak, at best,"[36] and "by no means sufficiently robust to justify the obstacles that the requirement would impose on women seeking abortion."[37] Rather than merely accepting the state's proffered justifications, courts in these two cases have looked behind the states' sham women's health rationale at the reality of the burdens these laws impose on women's lives.

One major exception to these successes is in a case from Texas now pending certiorari review before the U.S. Supreme Court. Two court challenges were mounted against Texas's sweeping abortion restrictions, enacted in 2013, and in both cases the plaintiffs prevailed in the trial court. They demonstrated that not only would the restrictions fail to enhance the safety of abortion or women's health, but also that they would drastically cut the number and geographic distribution of facilities in Texas and increase health risks for women seeking services. Indeed, the law would eliminate all licensed providers from large regions of the state, meaning that women who live in those areas would have to travel hundreds of miles to obtain a legal abortion in the state. This shortage would postpone the service for many women — and for some, block access altogether.

In the latest lawsuit, the federal district court concluded that "the severity of the burden imposed by [the] requirements is not balanced by the weight of the interests underlying them."[38] The court catalogued the law's burdens on Texas women's access to abortion, observing that the law would leave so few clinics in the state that it would "undeniably reduce meaningful access to abortion care for women throughout Texas."[39] Further, the court observed, these burdens, coupled with other abortion regulations already in place in the state, would fall most heavily on "poor, rural, or disadvantaged women."[40] The state's argument — that despite this drastic shortage of clinics, the remaining clinics could meet the demand for women in the entire state — in the court's words, "stretches credulity."[41] Moreover, even if the remaining clinics could meet such demand, the court concluded that "the practical impact on Texas women due to the clinics' closure statewide would operate for a significant number of women in Texas just as drastically as

a complete ban on abortion."[42] Against these burdens, the court deemed the state's interest in women's health wholly inadequate — describing the ambulatory surgical center (ASC) requirement as bearing such "a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary,"[43] and the safety rationale for the admitting privileges requirement as "weak and speculative."[44] The court also concluded that, given the operation of the ASC requirement and "the dearth of credible evidence" supporting the state's position, the ASC requirement was enacted with an improper purpose, finding that it "was *intended to* close existing licensed abortion clinics."[45]

On appeal, the Fifth Circuit chose to ignore the persuasive evidence in front of the trial court, ruling that the state did not have to provide *any* evidence in support of its claim that the law was about protecting women's health — and instead concluded that speculation was sufficient to justify restricting women's constitutional rights.[46] The court ruled for Texas despite the joint amicus brief filed by the American Medical Association and the American College of Obstetricians and Gynecologists disputing the medical basis of these laws.[47]

This legal reasoning and the impact of the Texas rulings are devastating. After the Texas law went into effect in 2013, nearly half of Texas's abortion facilities were forced to close. If the Fifth Circuit's 2015 ruling goes into effect, more than half of the remaining abortion facilities in Texas will be shuttered.[48] This will amount to a more than 75 percent reduction in Texas facilities in just a two-year period, creating a severe shortage of safe and legal services in a state in which more than 5 million women of reproductive age live.[49] Fortunately, the Supreme Court has stepped in to block the Fifth Circuit's decision from going into effect while it decides whether to take the case in the 2015-16 Term.[50]

It is imperative that the Supreme Court stops these underhanded legislative attempts to sneak around the Court's prior decisions. The Court needs to make clear that its 1992 ruling in *Planned Parenthood v. Casey*[51] was not a free pass to enact any burden on accessing abortion services. The Court should take the Texas case, expose the flimsy pretext, and clarify that *Casey*'s undue burden standard is a meaningful restriction on attempts to outlaw abortion. In *Casey*, the

Court recognized that the ability to terminate a pregnancy is "central to personal dignity and autonomy … [and] the liberty protected by the Fourteenth Amendment,"[52] and held 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 the right."[53] The Court should reject the Fifth Circuit's approach of applying the undue burden standard in a manner that renders hollow *Casey*'s protection for women's constitutional rights. The Fifth Circuit failed to evaluate whether the abortion restrictions actually further an interest in women's health, to consider the fact that the laws single out abortion without medical justifications, and to look at how the restrictions actually impact women. This bears no resemblance to the close scrutiny the Supreme Court held courts must apply to abortion restrictions.

It's Time for a Voting Rights Act for Reproductive Rights

Not only is it time for the Supreme Court to reiterate the constitutional protections for access to abortion services, but it is also time for the equivalent of the Voting Rights Act for reproductive rights. In response to states' relentless efforts to curtail constitutionally-protected voting rights, Congress shored up those protections by passing the Voting Rights Act of 1965, which limits states' ability to enact election laws that undermine meaningful access to the ballot. Specifically, Section 2 of the Voting Rights Act prohibits any state or local government from imposing any voting law that results in discrimination against racial or language minorities, and prohibits any standard, practice, or procedure that results in a denial or abridgment of the right to vote based on race or color.[54] The legislation responded to the inadequacy of case-by-case litigation as a means of ensuring the right to vote since "enforcement of the law could not keep up with violations of the law."[55] In doing so, the Voting Rights Act gave teeth to judicial review of voting restrictions premised on pretext.[56]

Currently, the case-by-base constitutional adjudication of abortion restrictions, while largely successful, is like a game of whack-a-mole with the avalanche of pretextual laws designed to make end runs around the

Supreme Court's rulings. This state of affairs is not just business-as-usual in the four-decade campaign to deprive women of the promise of *Roe v. Wade*. Never before has there been legislation like the one contested in Texas right now that would shut down more than 75 percent of the clinics in the second most populous state in the country. While we continue to vigorously litigate in the courts, we also need a strong legislative fix to the current crisis in rights deprivation. That fix is the Women's Health Protection Act, which was first introduced in 2013.[57] The proposed legislation would enforce and protect a woman's access to safe, legal abortion care no matter what state she lives in. It would prohibit states from singling out reproductive health care providers with oppressive requirements. It would allow true health and safety laws that apply to all similarly-situated medical care to be maintained, while prohibiting dangerous regulations passed under pretext that cut off access to abortion care and endanger women's health and lives. Simply put, it would ban pretextual laws that seek to regulate abortion care vastly differently from other low-risk practices and procedures. And it would give the Department of Justice much-needed oversight to address violations of the Act.

One in three women in the United States makes the decision at some point in her life that terminating a pregnancy is the right decision for her.[58] Her decision is based on her individual circumstances, her health, and her life. And when a woman makes that decision, she needs access to good, safe, reliable care from a health care provider she trusts, in or near the community she calls home. Today, however, a woman's ability to access safe and legal abortion care increasingly depends on the state in which she happens to live. In response to stealth efforts to suppress the votes of low-income people and people of color, Congress made clear with the Voting Rights Act that the right to vote cannot depend on the state in which a person lives. Congress and the Supreme Court must make clear that the same is true of a woman's fundamental right to access abortion. We know that the Women's Health Protection Act has a long road from conception to enactment. But we are ready to take that long road to ensure that every woman in the nation has an equal ability to exercise her constitutional rights.

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24 *See id.* at 694–707.

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