



CENTER
FOR
REPRODUCTIVE
RIGHTS

Whole Woman's Health v. Hellerstedt: **The Winning Strategy Behind the Supreme Court's Decision and the Way Forward**

On June 27, 2016, the Center for Reproductive Rights won the most important Supreme Court victory for the right to safe abortion care in decades. In its sweeping 5-3 majority opinion in *Whole Woman's Health v. Hellerstedt*, the Court unequivocally reaffirmed a woman's fundamental right to access legal abortion and strengthened constitutional protection for the next generation of women. The ruling is a powerful means for protecting women's autonomy, health, and dignity, especially as we confront the aggressive threats to reproductive rights in the United States posed by the Trump administration.

We invested five years in carefully building a national strategy to turn the tide against an onslaught of dangerous anti-choice laws across the country that have put the health and lives of millions of women at risk. This is the story of how we created and executed a distinctive plan to achieve this historic victory.

A Decades-Long Assault on a Woman's Right to Abortion

The Center's strategic game plan in bringing *Whole Woman's Health* to the Supreme Court was based on achieving three central goals: strengthening constitutional standards on abortion regulations, building new allies among elite influencers, and promoting a fresh narrative about what's at stake for women. These goals built upon abortion rights battles that have been taking place for decades.

On January 22, 1973, the Supreme Court recognized that the Constitution protects a woman's right to access abortion, regardless of where she lives, in the landmark case *Roe v. Wade*. But opponents of abortion started working immediately to undermine *Roe*, enacting regulations and procedural hurdles to cut off access and slowly chip away at women's reproductive rights.

The Supreme Court issued another landmark ruling 20 years after *Roe*, in the 1992 case *Planned Parenthood v. Casey*. That decision affirmed constitutional protections for abortion access, but it also affirmed that states may regulate the practice of abortion in the interest of women's health – so long as they do not create an “undue burden” on a woman's right to access care. What constituted an undue burden was not entirely clear, and this created an opening for anti-choice lawmakers to justify a flood of medically unnecessary restrictions under the guise of public health reforms.

These laws single out abortion providers—and the women that they serve—for regulatory hurdles that yield no legitimate public good: Mandatory waiting periods. Invasive forced ultrasounds. Bans on commonly used methods. Arbitrary limits on medication abortion.

Lawmakers also pushed a type of legislation known as a TRAP law – “targeted regulation of abortion providers” – meant to shut down women's health clinics by burying them under strict licensing requirements and needless facilities regulations that can impose substantial additional operating costs.

Over 330 restrictions in 32 states have been passed over the last five years. Taken together, these barriers can function as de facto bans on abortion, pushing access entirely out of reach.

The Center for Reproductive Rights has blocked almost all of the restrictions it has challenged since 2011. But the process of overturning these laws in court is slow and expensive. Each has to be challenged one at a time, and lawmakers are intent on undermining the protections guaranteed in *Roe* by simply passing new laws faster than courts can strike them down.

The Center's Big-Picture Litigation Strategy

Our legal team knew that the best hope for restoring access across America was a definitive ruling from the U.S. Supreme Court, which could be used in courtrooms nationwide to demonstrate that these restrictions on abortion are unconstitutional.

The Center and its allies began preparing an innovative legal, advocacy, and communications strategy that would come to fruition more than a half-decade later with the 2016 *Whole Woman's Health v. Hellerstedt* ruling. The key to that strategy was clarification that *Casey's* "undue burden" standard requires the meaningful scrutiny of abortion restrictions. Such a ruling would put an end to an extreme reading of the standard pushed by anti-choice activists.

Our attorneys identified a handful of cases that turned on the essential question of how the disputed "undue burden" standard must be applied. The entire litigation team refined the legal and factual arguments that would be needed to defeat the latest round of TRAP laws, developing those arguments in numerous cases throughout the country. They also started to engage with academics and legal elites to develop a compelling legal framework that would ensure success no matter which case made it to the high court. And then Texas enacted one of the most sweeping anti-choice laws we had seen yet.

Texas Puts Women's Health and Lives in Jeopardy

In 2013, the Texas legislature passed HB2, a bill designed to shut down the state's abortion clinics. It included provisions that imposed arbitrary licensing requirements that prevented qualified doctors from performing abortions, and mandated unnecessary facilities renovations that could cost millions.

More than half of the state's 42 abortion clinics closed, with the overburdened remaining clinics concentrated in urban areas. Women in vast stretches of the state were stranded, forced to drive hundreds of miles for safe abortion care. Those who could afford to make the journey to an open clinic faced wait times of up to three weeks, pushing access to care entirely out of reach for many and forcing some to take matters into their own hands.

Full implementation of HB2 was poised to leave no more than 10 clinics to provide care for the 5.4 million women of reproductive age in Texas. The state's abortion providers knew that the only way to prevent a public health catastrophe in Texas was to fight back.

This was the moment for which the Center for Reproductive Rights had been carefully laying the groundwork for years.

The Center Goes to Court

In April 2014, the Center sued Texas on behalf of various clinics, physicians, and patients in the case that would come to be known as *Whole Woman's Health v. Hellerstedt*.

During an expedited trial, our legal team presented overwhelming evidence and expert medical testimony showing how these restrictions not only fail to improve women's health, but actually put women at greater risk of harm.

In August 2014, U.S. District Court Judge Lee Yeakel struck down the challenged provisions of HB2, saying they had a “tangential relationship to patient safety.”

Texas appealed that decision to the U.S. Court of Appeals for the Fifth Circuit, and a three-judge panel overturned the lower court decision in June 2015. The court of appeals decision endorsed the position that courts should passively accept the stated intentions of lawmakers, without engaging in a fact-based review of a law's real-world impact. This meant that courts would be required to ignore the experts and take the politicians at their word.

At our urgent request, the U.S. Supreme Court temporarily stopped enforcement of HB2 while we prepared our appeal. In November 2015, the Court accepted *Whole Woman's Health* for review.

Putting Together a Full-Fledged Supreme Court Campaign

From the start, we knew what we needed to devote the full weight of our organization and allies to executing a successful Supreme Court campaign. These key elements included the following:

A Comprehensive Amicus Brief Strategy

In 2012, the Center put together a team dedicated to studying ways to influence abortion jurisprudence while building partnerships with nontraditional allies and elite institutional players—including Congress, the private bar, the business community, legal media, think tanks, expert medical organizations, and the U.S. Department of Justice.

Those partnerships were pivotal in building one of the most successful amicus brief campaigns ever presented to the high court, one designed to influence key justices, counter damaging narratives, engage a broad range of stakeholders and give women a voice at the Court.

In recent years, the Supreme Court has become more reliant on amicus briefs—which are submitted by independent groups and individuals with an interest in the outcome of the case—during their review.

High-profile amici in *Whole Woman's Health* included business leaders and economists, libertarians and ethicists, social science researchers, and abortion providers. They included the American Medical Association, the American Congress of Obstetricians and Gynecologists, and other top medical organizations—all stepping forward to condemn HB2 as dangerous to women's health and lives. The United States Solicitor General also submitted a brief supporting our arguments in *Whole Woman's Health*, saying HB2 was poised to leave women with “a constitutional right that ‘exists in theory but not in fact.’”

Other amici included a groundbreaking collection of briefs from hundreds of women sharing their own personal stories about why abortion access must be protected. They came from all walks of life, from businesswomen and elected officials to homemakers and an Episcopal priest. One notable brief included more than 100 stories from women in the legal profession. Many amicus briefs explained the harms of HB2 to different groups of women.

The impact of the 46 amicus briefs submitted in support of the Center is undeniable. Nine of those briefs were cited in the majority opinion and concurrence – the most of any case that term – and text analysis reveals language in other briefs likely influenced the outcome. In other words: the justices listened to the experts.

Support from Legal Experts

The Center paved the way for this transformative campaign with aggressive outreach to the legal academy and the private bar.

Those efforts engaged prominent law faculty allies like Columbia Law School professor Gillian Metzger, former Justice Kennedy clerk Michael Dorf, Duke University professor Neil Siegel, and other prominent academics, who signed a critical early-stage amicus brief that helped persuade the Court to review the case. We forged strategic connections with unlikely allies such as NYU Law School professor Richard Epstein, an influential libertarian thinker who subsequently argued in a widely read *Newsweek* op-ed that *Whole Woman's Health* should be decided in our favor.

We also engaged high-profile law firms and won support from the private bar. As a result of that outreach, 28 major national law firms took part in the amicus brief campaign on a pro bono basis.

Innovative Communications Strategy

While the Center's top legal and policy minds worked to shift the jurisprudence on abortion access, our communications team was developing a comprehensive outreach program to shape public discourse around the case.

Round after round of focus groups, polling, and message-testing showed that the public is overwhelmingly opposed to laws that are based on deception, harm women, and subvert the protections of the Constitution. We encapsulated that opposition into a single, memorable phrase that would become the defining battle cry of the campaign: Stop the Sham. The hashtag #StopTheSham trended nationally on Twitter at three key moments during the case.

With the help of SKD Knickerbocker, a top-tier Washington communications firm, we connected daily with key journalists and editorial boards in traditional, digital, and legal media through press releases, background conversations, national press calls, and interviews with president and CEO Nancy Northup and our top litigators.

Our press team amplified the themes and voices in the amicus briefs through a carefully coordinated rollout strategy that called press attention to key briefs, resulting in more than 100 instances of strong, continuous coverage of those briefs during the two months leading up to oral arguments. The Center also played a role in the publication of more than 50 related op-eds, including in major outlets like *The New York Times*, *USA Today*, and *The Washington Post*.

Meanwhile, our online strategists developed innovative campaigns like Draw the Line, designed to change the way we talk about abortion in America. Draw the Line brought together celebrities, activists, artists, business people, and other supporters to speak out by sharing their personal stories via video and social media. Actress and amicus brief signer Amy Brenneman contributed her own personal story, which was viewed over 60,000 times the week of oral arguments and picked up by many major news outlets.

The Ability to Move the Coalition

Unified and disciplined messaging across a movement is critical to success, and the Center worked closely with coalition partners—including our client Whole Woman’s Health, Planned Parenthood, NARAL, National Latina Institute for Reproductive Health, ACLU, National Women’s Law Center, Physicians for Reproductive Health, In Our Own Voice, All Above All, and National Institute for Reproductive Health—to develop, test, and share messages.

For more than six months, we spearheaded a “war room” of reproductive rights organizations to coordinate press strategy, amplify one another’s initiatives, and plan what would become one of the largest rallies in Supreme Court history. Seventy organizations ultimately participated in the rally on the high court’s steps the morning of oral arguments in March 2016, drawing a crowd of more than 3,000 vocal reproductive rights supporters.

Persuasive Oral Arguments

While arguments are typically handled by a small group of (mostly male) Supreme Court specialists, we knew our best chance for victory was to trust Stephanie Toti, a 10-year veteran of the organization who had been with the case from the beginning and knew the issues inside and out.

Toti spent more than four months in what amounted to oral argument boot camp: She traveled to Harvard, Georgetown, and elsewhere to conduct a half-dozen “moot courts,” where she was grilled on the case in simulated arguments by the nation’s top legal minds. She listened to hours of recordings of old oral arguments. She consulted with legal scholars, leading Supreme Court practitioners, constitutional experts, and colleagues at partner organizations.

Four of the justices appeared firmly in support of overturning HB2, but the death of Antonin Scalia had left the Court with a bench of eight. An evenly divided ruling would be disastrous for the women of Texas—effectively upholding the Fifth Circuit’s decision and forcing clinics across the state to close.

The Decision

The outcome of the Supreme Court case accomplished everything the Center set out to achieve five years earlier. The majority opinion clearly establishes that the undue burden standard functions as a robust check on legislative overreach – one that requires courts to subject laws to heightened scrutiny, using evidence-based inquiry that carefully balances the actual benefits of a law against the barriers it creates. The ruling sends a clear message to lawmakers: laws must be based on facts.

The first dominoes fell immediately, when the Supreme Court declined to review an existing legal challenge to a virtually identical sham law in Wisconsin, ensuring that law would remain blocked. State officials in Alabama then announced they were giving up on a similar law that was doomed to fail under the high court’s guidance. Since then, the Oklahoma Supreme Court has permanently struck down an Oklahoma law that was nearly identical to one of the requirements in HB2. We expect similar outcomes in ongoing litigation in Kansas, Louisiana, Mississippi, and Tennessee.

Protecting the Right to Abortion Against New Threats

Although the decision is a landmark victory for women, for science, and for the rule of law, it is not an endpoint. The Trump administration’s proposed policies pose a grave danger to women’s health and safety—especially for women of color and limited financial means. We now expect an unprecedented avalanche of anti-choice legislation at both the state and federal level. Within four days of the Supreme Court decision, Texas issued a new set of medically unnecessary restrictions on the disposal of fetal tissue, and several states are exploring restrictions based on the dubious premise of “protecting” embryonic or fetal tissue.

Furthermore, the Supreme Court decision did not automatically invalidate the hundreds of dangerous restrictions hindering abortion access around the country. Each law is different and must be challenged in court, and the clock is ticking.

But we now have the tools to go on the offensive against these anti-choice laws. The Center is poised to leverage the momentum created by *Whole Woman's Health* to dismantle existing barriers to abortion and block emerging restrictions in the states. We will also fight federal bans on abortion, attempts to defund Planned Parenthood, and any arbitrary and capricious regulations from federal agencies. We worked with our champions in Congress to reintroduce the Women's Health Protection Act. And we will create a national network of attorneys committed to working on reproductive health and rights and who will serve as influential spokespeople with the private bar.

We will not back down. The Center's mission, at its very core, is designed for times like these. For 25 years, our commitment to advancing women's fundamental rights has not wavered—even in the face of hostile governments—and we will not give up the fight now.

We are ready to bring the full force of *Whole Woman's Health* and the Constitution to bear in defending our rights in state and federal courts across the country and advancing every woman's health, equality, and dignity. That's why it has never been more important to have the resources we need, as we continue to fulfill the promise made possible by the *Whole Woman's Health* victory.