LITIGATING ABORTION ACCESS CASES IN THE POST-*WINDSOR* WORLD*

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Exploring how to apply lessons learned from the successful challenge to the federal Defense of Marriage Act (DOMA), not only to ongoing marriage equality work but also reproductive rights work, is a productive and important endeavor, given the similarities between the two. An overarching similarity is that the two movements are grounded in many of the same core values: valuing human dignity, personal decision-making, and fairness. As the plurality opinion by Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey* states,

> Our cases recognize "the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[1]

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Concerns about human dignity and respect for personal choices similarly informed the Court's majority decision, authored by Justice Kennedy, in *United States v. Windsor*:

> The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. . . .
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> [DOMA's treatment of state-sanctioned same-sex marriages] places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. . . .
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> The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.[2]

There are other similarities between the battles for marriage equality and reproductive rights, and also some very significant differences. My observations focus on reproductive rights litigation—and especially litigation to protect the ability of women to continue to access abortion and exercise their reproductive rights in that context. I will highlight some key differences, as well as key similarities, confronted in that litigation as compared to marriage equality litigation.

One key difference between the two contexts is that in the reproductive rights area, we are fighting to preserve existing precedent. In 1973, in *Roe v. Wade*, the U.S. Supreme Court recognized that the Federal Constitution, through the Due Process Clause, protects a woman's right to determine whether to continue a pregnancy.[3] Since that time, opponents of women's right to reproductive decision-making have engaged in non-stop efforts to

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1 Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 851 (1992) (internal citations omitted).

2 United States v. Windsor, 133 S. Ct. 2675, 2692, 2694, 2696 (2013).

3 Roe v. Wade, 410 U.S. 113, 164–65 (1973); *see also* Doe v. Bolton, 410 U.S. 179, 201 (1973) (finding restrictions on provision of abortion in Georgia law unconstitutional).

eviscerate and eliminate that right, seeking to make exercise of that constitutional right increasingly difficult and seeking reversal of the decision in *Roe*. In contrast, the marriage equality litigation is seeking to gain court recognition that the Federal Constitution protects the right of same-sex couples to marry and to have those marriages treated equally to marriages of opposite-sex couples. Thus, the marriage equality litigation is at a stage that reproductive rights litigation was at earlier.

Those different stages of the rights battles have many implications for litigation, as well as for our movements. First and foremost, in most states in this country, since the Court issued its decision in *Roe*, there has been an ongoing legislative effort to limit women's ability to exercise their reproductive rights. Every single year in state legislatures across the country, legislators propose and enact restrictions on reproductive rights, and especially on the provision of abortion.[4] After the Supreme Court ruled that abortion could not be outlawed, that there were constitutional limits on states' ability to restrict the provision of and access to abortion, and that Texas' law criminalizing the provision of abortion at any stage of pregnancy was unconstitutional, states passed laws imposing specific limitations on abortion—such as mandatory delay laws, biased counseling laws, and mandates that a minor obtain a parent's consent in order to obtain an abortion.[5] The fact that some of these restrictions were found unconstitutional by the Supreme Court did not stop other states from passing the same and other types of restrictions, in a continual effort to undercut the decision in *Roe*. This legislative onslaught on abortion access has intensified in the last few years. Between the beginning of 2011 and the end of 2013, state legislators passed more than 200 restrictions on reproductive healthcare in this country.[6]

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4 *See, e.g.*, *The State of the States*, CTR. FOR REPROD. RIGHTS, http://reproductiverights.org/en/the-state-of-the-states-2013 [http://perma.cc/4CN6-SR4F] (last visited June 28, 2014); *2012: A Look Back*, CTR. FOR REPROD. RIGHTS, http://reproductiverights.org/sites/crr.civicactions.net/files/documents/USLP_endofyear_Report_1.9.12.pdf [http://perma.cc/D6NF-7ZB4] (last visited June 28, 2014); *2011: A Look Back*, CTR. FOR REPROD. RIGHTS, http://reproductiverights.org/sites/crr.civicactions.net/files/documents/endofyear_2011_FINAL.pdf [http://perma.cc/SX59-T2QZ] (last visited June 28, 2014); Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers – And the Women They Serve – in the Crosshairs*, GUTTMACHER POL'Y REV., Winter 2014, at 1, *available at* http://www.guttmacher.org/pubs/gpr/17/1/gpr170109.html [http://perma.cc/92BS-826W].

5 *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 422 (1983) (reviewing constitutionality of provisions of an Akron ordinance requiring, *inter alia*, that a woman be provided with state-mandated information and then wait at least twenty-four hours before obtaining an abortion); Bellotti v. Baird, 443 U.S. 622, 625–26 (1979) (reviewing constitutionality of provisions of a Massachusetts law requiring consent of parents or a judge before a woman under the age of eighteen may obtain an abortion).

6 *See* Elizabeth Nash et al., *State Trends for 2013 on Abortion, Family Planning, Sex Education, STIs and Pregnancy*, GUTTMACHER INST. (2013), *available at* http://www.guttmacher.org/statecenter/updates/2013/

In addition, during this time courts have weakened the right recognized in *Roe*. Our opponents' efforts paid off to some extent when the Supreme Court issued its decision in *Casey* in 1992.[7] The plurality opinion in *Casey* very importantly reaffirmed key rulings in *Roe*, including that the Constitution protects, under the Fourteenth Amendment's Due Process Clause, a woman's right to terminate her pregnancy prior to viability and even after viability if the pregnancy endangers her life or health.[8] However, the opinion also took issue with some of the Court's own post-*Roe* decisions, expressing concern that the state's interest in potential life had been undervalued and imposing an undue burden test for reviewing restrictions on the right which implicated that interest.[9] That test provides that if a restriction "has the purpose or effect of placing a substantial obstacle in the path of a woman" choosing to exercise her right to terminate a pregnancy, it constitutes an unlawful "undue burden."[10] Applying that test to challenged restrictions in the Pennsylvania law, the plurality found most of them constitutional.[11] As lower courts have applied and misapplied the undue burden standard, many of the results have been very harmful to women throughout this country, with many restrictions being upheld as constitutional. The combination of legislative activity and court rulings has resulted in a patchwork of restrictions—with a woman's ability to exercise her reproductive rights now again depending on where in this country she lives.

In recent years there have been two other trends that have significantly affected our litigation strategies: our opponents have become more and more extreme in what they are doing, while at the same time increasingly claiming they are trying to benefit women. Opponents of reproductive rights have enacted increasingly extreme bills in the past few years. For example, they have gone so far as to pass a number of bans on pre-viability abortions—even as early as approximately six weeks of pregnancy, twelve weeks, twenty

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statetrends42013.html [http://perma.cc/H3EH-SF7P]; *see also The State of the States*, CTR. FOR REPROD. RIGHTS (Jan. 14, 2014), http://reproductiverights.org/en/feature/the-state-of-the-states [http://perma.cc/SG5D-8E36].

7 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

8 *Id.* at 869.

9 *Id.* at 882–85 (applying the undue burden standard to partially overrule Thornburgh v. Am. College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), and City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983)).

10 505 U.S. at 877.

11 *Compare id.* at 883 (finding that "informed consent" provisions did not impose an undue burden) *and id.* at 886–87 (same for provisions requiring twenty-four-hour delay) *with id.* at 893–98 (finding spousal notification requirements did impose an undue burden).

weeks—although under both *Roe*[12] and *Casey*[13] it is absolutely clear that pre-viability bans are unconstitutional. In 2010, Nebraska enacted a ban on abortions after twenty weeks post-fertilization;[14] since then, not only have a few other states passed similarly unconstitutional twenty-week bans, but in 2013 Arkansas and North Dakota passed even more extreme, also unconstitutional laws—banning abortions after twelve weeks in Arkansas and after a heartbeat is detectable (typically around six weeks into pregnancy) in North Dakota.[15] As the Ninth Circuit Court of Appeals stated when reversing a district court ruling upholding Arizona's twenty-week ban, "[t]he twenty-week law is . . . unconstitutional under an unbroken stream of Supreme Court authority, beginning with *Roe* and ending with *Gonzales* [*v. Carhart*, 550 U.S. 124 (2007)]. Arizona simply cannot proscribe a woman from choosing to obtain an abortion before the fetus is viable."[16]

As another example, we are seeing increasingly onerous requirements placed on abortion providers that are really clearly designed to close them down, to make them unable to provide abortions so women cannot obtain abortions. An example is the enactment in Mississippi of a law requiring that all physicians providing abortions have admitting privileges at a local hospital.[17] What has happened is that all of the physicians at the only remaining health center in Mississippi that provides abortions have been unable to obtain admitting privileges. There is not a medical need for this requirement,[18] and the Center for Reproduc-

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12 Roe v. Wade, 410 U.S. 113, 164 (1973).

13 *Casey*, 505 U.S. at 878–79.

14 NEB. REV. STAT. §§ 28-3,102 to 28-3,111 (2013).

15 *See* Edwards v. Beck, No. 4:13CV00224 SWW, 2014 WL 1245267 (E.D. Ark. Mar. 14, 2014) (finding unconstitutional Arkansas provision banning abortion once fetal heartbeat is detected and the fetus has attained twelve weeks gestation); MKB Management Corp. v. Burdick, No. 1:13–CV–071, 2014 WL 1653201 (D.N.D. Apr. 16, 2014) (finding unconstitutional North Dakota law banning abortion if a heartbeat has been detected). *See generally State Policies in Brief: State Policies on Later Abortion*, GUTTMACHER INST. (June 1, 2014), *available at* http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf [http://perma.cc/FP43-A9RP].

16 Isaacson v. Horne, 716 F.3d 1213, 1231 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014).

17 MISS. CODE ANN. § 41-75-1(f) (2014).

18 *See, e.g.*, Brief of Amici Curiae Am. Coll. Obstetricians & Gynecologists (ACOG) et al., in Support of Plaintiffs-Appellees at 2, Planned Parenthood of Greater Tex. Surgical Health Svcs. v. Abbott, 748 F.3d 583 (5th Cir. 2013) (No. 13-51008) ("there is no medically sound reason for Texas to impose a more stringent requirement on facilities in which abortions are performed than it does on facilities that perform other procedures that carry similar, or even greater, risks. Therefore, there is no medically sound basis for H.B. 2's [admitting] privileges requirement. . . . H.B. 2 is also inconsistent with prevailing medical practices, which are focused on ensuring prompt medical care and do not require that each individual abortion provider have

tive Rights immediately challenged it in federal court on behalf of the health center and its physicians. It is clear that the real goal of this law has been to end the provision of abortion within Mississippi: for example, in vowing to sign the law, Mississippi Governor Phil Bryant stated, "I will continue to work to make Mississippi abortion-free."[19] A federal district court issued a preliminary injunction keeping that requirement from taking effect, so that women in Mississippi could continue to exercise their right of reproductive choice within their home state.[20] On appeal, a panel of the Court of Appeals for the Fifth Circuit affirmed that injunction, as applied to enforcement against the plaintiffs.[21]

At the same time they have become more extreme, our opponents have changed their rhetoric in recent years in an effort to seem *less* extreme. For many years, much of their rhetoric and imagery focused on the fetus. In recent years, many opponents of reproductive rights have changed how they talk about restrictions on women's access to reproductive healthcare. Instead of talking about the state's interest in protecting potential life as the justification for their efforts to restrict or ban abortion, more and more often they are justifying the restrictions as being designed to benefit women, saying the restrictions that they are proposing are designed to protect women's health and safety.[22] However, those claims are not supported by medical evidence.[23] As reproductive rights litigators, it is essential that

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admitting privileges.").

19 Rogelio V. Solis, *Mississippi on Way to Becoming 'Abortion-Free' State?*, NBC NEWS (Apr. 5, 2012, 12:26 PM), http://usnews.nbcnews.com/_news/2012/04/05/11039503-mississippi-on-way-to-becoming-abortion-free-state [http://perma.cc/L2HA-N9V3]. For his part, Lieutenant Governor Tate Reeves declared that the law "should effectively close the only abortion clinic in Mississippi." Joe Sutton & Tom Watkins, *Mississippi Legislature Tightens Restrictions on Abortion Providers*, CNN (Apr. 5, 2012, 5:25 AM), http://www.cnn.com/2012/04/04/politics/mississippi-abortion/ [http://perma.cc/N755-XU54]; *see also Lieutenant Governor Tate Reeves*, OFFICE OF THE LIEUTENANT GOVERNOR OF MISS., www.ltgovreeves.ms.gov/Pages/About.aspx [http://perma.cc/4APR-YDCE] (last visited July 9, 2014).

20 Jackson Women's Health Org. v. Currier, 940 F. Supp. 2d 416 (S.D. Miss. 2013).

21 On July 29, 2014, the Fifth Circuit held that the plaintiffs had demonstrated a substantial likelihood of success on their claim that the law imposed an undue burden on women's constitutional rights, affirming the decision of the lower court. Jackson Women's Health Organization v. Currier, 760 F.3d 448 (5th Cir. 2014).

22 For example, the Arizona legislature asserted that one of its purposes in enacting a ban on abortions at or after twenty weeks of gestation was to protect women's health. *See* Isaacson v. Horne, 716 F.3d 1213, 1218 (9th Cir. 2013) (citing Ariz. H.B. 2036, sec. 9(B)(1)).

23 *See, e.g.*, Planned Parenthood of Wisconsin v. Van Hollen, 738 F.3d 786, 797–98 (7th Cir. 2013) (noting lack of evidence in support of state's position); *see also* Brief of Amici Curiae ACOG et al., in Support of Plaintiffs-Appellees & in Support of Affirmance, Planned Parenthood of Greater Tex. Surgical Health Svcs. v. Abbott, 748 F.3d 583 (5th Cir. 2013) (No. 13-51008) (discussing lack of medical need for Texas's admitting

we show the courts—and the public—that our opponents' claims are hollow, false, and a pretext meant to hide their real goals.

Faced with this type of landscape, necessarily most of our reproductive rights litigation in the United States is defensive, fighting back against new restrictions on abortion access. If we were not fighting against many of these new restrictions, there is a real risk that, at least in many parts of the country, women would be unable to obtain abortions at all.

So one of our biggest challenges is: which cases do we bring? We cannot challenge all of the restrictions that are passed each year, nor should we. It would not be smart or strategic to do so. We are not going to simply "take the bait," try to go after every restriction, and let the other side set our agenda. So we carefully consider which restrictions we challenge in court. The first consideration is: "what impact will this law have on women, especially women who are low-income, have fewer resources, or for other reasons have the greatest difficulties accessing abortion services?" With that in mind, we challenge laws that would force health centers providing abortions to close and drastically reduce access to abortion services, such as the admitting privileges requirement in Mississippi[24] and the building specifications and other requirements imposed by Texas' "ambulatory surgical center" law.[25]

Another key consideration is whether the case would provide an opportunity to strengthen existing legal protections and/or develop new protections. For example, the Center for Reproductive Rights has challenged some restrictions on medication abortions

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privileges requirement); Brief of Amici Curiae ACOG et al., in Support of Plaintiffs-Appellants & in Support of Reversal at 3, Planned Parenthood of Arizona v. Humble, 753 F.3d 905 (9th Cir. 2014) (No. 14-15624) (discussing lack of medical need for Arizona's medication abortion restrictions and stating "[t]he district court correctly recognized that medical abortion is extremely safe; that the medical abortion regimens employed by [Plaintiffs] constitute sound medical practice in line with medical norms and the best interests of patients; and that there is no evidence [that Arizona's medication abortion restrictions] promote women's health"); Brief for Amici Curiae ACOG et al. at 3, Stuart v. Camnitz, (4th Cir. filed Feb. 20, 2014) (No. 14-1150) (discussing lack of medical justification for North Carolina's ultrasound requirements and stating "[t]he district court correctly held that the 'Display of Real-Time View' Requirement . . . serves no medical purpose and should be invalidated").

24 *See* Complaint, Jackson Women's Health Org. v. Currier, 878 F. Supp. 2d 714 (S.D. Miss. 2012) (No. 3:12-cv-00436–DPJ–FKB), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/crr_Complaint_JWHO_v_Currier_62712.PDF [http://perma.cc/P8YX-JZDM].

25 *See* Complaint, Whole Woman's Health v. Lakey, No. 1:14-cv-00284-LY (W.D. Tex. Jul. 7, 2014), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/TMP%20Amended%20Class%20Action%20Complaint.pdf [http://perma.cc/8DXP-ZSUG].

in state courts, raising state constitutional claims, working to develop protections for reproductive rights under those constitutions.[26] And we have challenged coercive ultrasound laws in both state and federal courts as violations of free speech rights.[27]

Another key consideration in our litigation—and this relates to the landscape we have and how we want to try to shift that landscape—is that we look for situations that will help us reframe the discussion. What are the cases that give us that opportunity? So we consider whether a possible case will give us the opportunity to show the public the real agenda behind the restrictions. For example, cases that enable us to expose to the public our opponents' hostility to women can give us a win even if the court does not rule in our favor, by making more of the public aware of what is going on and engaging them on our side of the battle over access to abortion. Whether we are talking about reproductive rights or marriage equality or other civil rights, we will not win recognition of rights and protect those rights which have been recognized if we rely only on the courts. The courts are extremely important in these struggles, but we will not win and maintain our wins without cultural and social shifts in thinking by the public. Court cases and decisions can play important roles in furthering those shifts, by educating, engaging, and galvanizing the public, and thinking about how we can use our litigation in those ways is an important part of our strategizing. And it works in the other direction also: judges live in the real world. So the culture affects the judges, and the court decisions can affect the culture. As movement lawyers, we must work simultaneously in multiple realms, not just in the courts.

And of course, an important part of the framing of a case relates to who the face of the case is: who will be the plaintiff or plaintiffs in the case? We have certainly seen in the marriage equality litigation how important who the plaintiffs are has been in terms of media coverage and the public's reaction to the case. Unfortunately, in challenges to abortion restrictions, in particular, it typically is very hard to find individual women affected by the restrictions who are willing to be plaintiffs, for many reasons. One is that sometimes the restrictions are passed with immediate effective dates, or a very short time between enactment and effective date, so it is necessary to get into court very quickly in order to block

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26 *See* Complaint, MKB Management Corp. v. Burdick, Civ. No. 09-2011-CV-02205, available at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/ND_Complaint.pdf [http://perma.cc/9V63-8PY8]; Complaint, Okla. Coal. for Reprod. Justice v. Cline, No. CV-2011-1722, slip op. (Dist. Ct. Okla. Cnty. May 11, 2012), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Complaint_Oklahomans_for_Reproductive_Justice.PDF [http://perma.cc/W53U-A7XM].

27 *See, e.g.*, Nova Health Systems v. Pruitt, 292 P.3d 28 (Okla. 2012) (mem.) (regarding state court challenge to Oklahoma's ultrasound law); Stuart v. Loomis, 992 F. Supp. 2d 585 (M.D.N.C. 2014) (regarding federal court challenge to North Carolina's ultrasound law).

the law. There simply is not time to search for an individual woman who would be willing to be a plaintiff and be ready with a challenge on her behalf. In contrast, for at least some of the marriage equality cases, it was possible to carefully strategize about what couples might be the best faces for the cases and to select plaintiffs accordingly.

Another difficulty in the reproductive rights context is that women who are seeking an abortion typically do not view that experience as a defining aspect of their being or identity or a recurring situation for them, unlike many individuals affected by restrictions on their ability to marry the partner of their choice, so women seeking abortions may feel less willing to be a plaintiff in a court challenge. Abortion stigma is also an important factor—our opponents have stigmatized getting an abortion such that many women are unwilling or at least very reluctant to be public about their abortion decision even to friends and families, making it unlikely they would be willing to be in a court case even if the court would allow them to proceed under a pseudonym.

However, we are able to bring our challenges to abortion restrictions on behalf of a variety of types of abortion providers. The Supreme Court recognized decades ago that it was appropriate to allow abortion providers to assert claims on behalf of their patients, as well as their own claims.[28] Our clients in challenges to abortion restrictions are typically physicians and health centers that provide abortions, asserting claims on behalf of themselves, their patients, and/or their staff. The physicians include ones who provide abortion services only at health centers where abortions are provided; ones who provide abortions, along with a full range of obstetrical and gynecological services, in medical offices; and ones who provide abortions in hospitals, including university hospitals. Moreover, in cases challenging restrictions on access to contraceptives—a less stigmatized area than abortion access—we have had more success in having individual women as plaintiffs. For example, the Center for Reproductive Rights—along with co-counsel from the Partnership for Civil Justice Fund and Southern Legal Counsel—challenged the federal Food and Drug Administration's (FDA's) restrictions on access to emergency contraception and, after that suit was successful, the Center for Reproductive Rights challenged similar restrictions enacted in Oklahoma to deprive Oklahoma women of the benefits of the FDA's lifting of restrictions. In both of those cases we were able to include individual women among the plaintiffs.[29]

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28 Singleton v. Wulff, 428 U.S. 106 (1976) (recognizing that an abortion provider can assert claims on behalf of women seeking abortions).

29 *See, e.g.*, Tummino v. Hamburg, 936 F. Supp. 2d 162 (E.D.N.Y. 2013) (vacating the FDA's denial of a citizen's petition regarding access to emergency contraception); *New Lawsuit: Oklahoma Law Restricting*

I want to illustrate these case selection points with two examples. First, there is an ongoing challenge to North Carolina's coercive ultrasound law, brought jointly by the Center for Reproductive Rights, the American Civil Liberties Union, Planned Parenthood Federation of America, and O'Melveny & Myers LLP. That law, enacted in 2011, requires that an ultrasound be performed by a physician (or other specified medical professional) at least four hours before any woman can lawfully obtain an abortion and, while performing the ultrasound, the physician must "display the images so the pregnant woman may view them" and must provide a detailed, simultaneous "explanation of what the display is depicting."[30] The statute specifies what that verbal description must include. The physician must comply with these requirements with no exceptions, no matter what the woman's circumstances, and even if the woman objects and tells her physician "I don't want to look at it" or "I don't want to hear about it."[31] The statute actually says that the woman is allowed to "avert her eyes" and "refuse to hear," but that the physician must nonetheless put the image in her line of vision and describe it.[32] It is hard to understand what is supposed to happen during the ultrasound if the woman "refuses" to hear the physician's mandated speech. But the state's lead attorney explained when defending this requirement at the hearing for a preliminary injunction that the physician can give each woman noise-cancelling headphones to put on while her abdominal or vaginal ultrasound is being performed and let her turn a switch so that, while the physician provides a description of the ultrasound image, the woman will

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Emergency Contraception Violates State Constitution, Discriminates Against Women, CTR. FOR REPROD. RIGHTS (Aug. 8, 2013), http://reproductiverights.org/en/press-room/new-lawsuit-oklahoma-law-restricting-emergency-contraception-violates-state-constitution [http://perma.cc/A4G9-95LN].

The Center for Reproductive Rights also litigates in other countries, and in that litigation we often are suing on behalf of an individual woman. Some of those cases are brought on behalf of women who have come forward due to particularly extreme situations—such as being forced to carry to term a fetus with a fatal fetal anomaly or being denied vitally needed health care due to pregnancy—and provide compelling personal stories about the harsh impact of abortion restrictions. *See, e.g.*, *K.L. v. Peru (United Nations Human Rights Committee)*, CTR. FOR REPROD. RIGHTS (Dec. 10, 2008), http://reproductiverights.org/en/case/kl-v-peru-united-nations-human-rights-committee [http://perma.cc/V35G-7GQM] (summarizing case of Peruvian woman who was pregnant with an anencephalic fetus and denied an abortion); *L.C. v. Peru (UN Committee on the Elimination of Discrimination Against Women)*, CTR. FOR REPROD. RIGHTS (July 8, 2009), http://reproductiverights.org/en/case/lc-v-peru-un-committee-on-the-elimination-of-discrimination-against-women [http://perma.cc/C9JM-7WSA] (summarizing case of 13-year-old Peruvian who became pregnant after being raped, injured her spine when she attempted suicide, was denied needed spinal realignment because she was pregnant, eventually miscarried, and remained paralyzed after belatedly receiving spinal surgery).

30 N.C. GEN. STAT. § 90-21.85(a) (2014), *invalidated by Stuart*, 992 F. Supp. 2d 585.

31 N.C. GEN. STAT. §§ 90-21.85(a), (b) (2014), *invalidated by Stuart*, 992 F. Supp. 2d 585.

32 *Id.*

not be able to hear anything the physician says.[33]

In the real world, these requirements put physicians in the position of violating ethical principles or violating the law. Requiring physicians to deliver the specified speech and take the associated actions even over the patient's objections, when the physician thinks doing so will harm the patient, and when doing so is contrary to the physician's medical judgment forces the physician to violate medical ethical principles.[34]

Our primary claim in challenging North Carolina's ultrasound law is that it violates the free speech rights of physicians under the First Amendment. In addition to protecting the right to speak, the First Amendment protects the right *not* to speak—not to be forced by the state to speak and to provide the state's message.[35] North Carolina's law compels physicians to deliver the state's content-based message to their patients, a message they do not want to deliver in the absence of a request or consent from the patient. The federal district court permanently enjoined the requirements, finding that they violate the First Amendment rights of physicians; the state defendants have appealed that decision to the Court of Appeals for the Fourth Circuit. The district court ruled that these requirements must satisfy the highest standard for review applied in First Amendment challenges. As the court stated, "Requiring a physician or other health care provider to deliver the state's content-based, non-medical message in his or her own voice as if the message was his or her own constitutes compelled ideological speech and warrants the highest degree of First Amendment protection."[36] The court also distinguished and disagreed with decisions by courts in two other cases in which abortion restrictions were challenged on First Amendment grounds, but the courts "appli[ed] a due process standard to a First Amendment issue [thus] improperly conflat[ing] two separate constitutional doctrines in a way that gives short shrift to the First Amendment."[37]

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33 *See* Stuart v. Huff, 834 F. Supp. 2d 424, 433 n.9 (M.D.N.C. 2011) (referring to Defendants' suggestion at oral argument that women can "use some sort of technological device if they do not wish to see or hear the compelled message").

34 For example, the requirements conflict with the "basic precept of medical ethics that physicians are charged with the duties to not inflict harm on patients and to exercise their medical judgment and discretion." Stuart v. Loomis, 992 F. Supp. 2d at 604 (also referring to "undisputed evidence" presented by plaintiffs regarding "serious ethical issues" raised by law's requirements); *see also id.* at 590–91 (summarizing evidence).

35 *See id.* at 592–93.

36 *Id.* at 599.

37 *Id.* at 608 (explaining that the rulings on the First Amendment claims in Texas Medical Providers Performing Abortion Services v. Lakey, 667 F.3d 570 (5th Cir. 2012), and Planned Parenthood Minn., N.D.,

Thus, the North Carolina case provided an opportunity to argue—so far, successfully—that the assault on access to reproductive services endangers several of our most valued constitutional principles. In addition, the absurdity of the requirements and some of the arguments in support of them have helped us frame the discussion. This is a very clear example of legislators interjecting themselves between a patient and her doctor and interfering with medical judgment, the personal decision-making of a woman, and her autonomy. Forcing women in the midst of an ultrasound to be subjected to unwanted images and descriptions over their objections is a blatant assault to women's dignity. Moreover, the requirements and the litigation demonstrate the hostility of our opponents towards women. This was illustrated, for example, by the state's attorney's statement at oral argument, quoted by the district court judge in her opinion, that a woman who does not want to hear the description should "be a man about it" and "hear what is not pleasant to hear."[38]

Our case selection considerations are also illustrated by the Center for Reproductive Rights'[39] challenge to Oklahoma's restrictions on medication abortion. Medication abortion is a safe and effective alternative to surgical abortion that can be used by women who are in the first nine to ten weeks of pregnancy. The attacks on medication abortion have been designed to roll back the clock on more than a decade of medical research and doctors' practical experiences and deprive women who seek abortion of medical advances. In 2011, Oklahoma enacted a law that prohibited physicians from providing abortion-inducing medications except "according to the protocol" set forth in the FDA-approved labeling for that particular drug being prescribed, and "as authorized by the drug label" for that drug;[40] the law was worded such that it not only barred use of the safest and most effective protocol for performing a medication abortion, but banned all medication abortions and the most effective treatment for ectopic pregnancies.[41] We decided to bring our challenge in state court to further develop state constitutional law, seeking recognition that these types of restrictions violate provisions of the state constitution, asserting several claims, including that the law violated the rights to privacy and bodily integrity and the equal protection of the laws and that it constituted an impermissible "special law" under provisions of the

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S.D. v. Rounds, 686 F.3d 889 (8th Cir. 2012), were "wrongly decided").

38 *Stuart*, 992 F. Supp. 2d at 602 n.34.

39 Assisted by Oklahoma attorneys Anne Zachritz and Martha Hardwick and, at later stages of the case, attorneys from Orrick, Herrington & Sutcliffe LLP.

40 OKLA. STAT. tit. 63, § 1-729a (2014).

41 Cline v. Okla. Coal. for Reprod. Justice, 313 P.3d 253 (Okla. 2013) (construing meaning of Oklahoma H.B. No. 1970 in response to certified questions from U.S. Supreme Court).

state constitution.[42]

The state trial court ruled the law was unconstitutional under the state constitution, but grounded its reasoning in part on federal constitutional law.[43] On appeal, the Oklahoma Supreme Court also ruled in our favor, but on the basis that the law was unconstitutional "pursuant to [*Planned Parenthood v. Casey*]."[44] We had not pled any claims under the federal constitution, but this ruling enabled our opponents to seek review from the U.S. Supreme Court, which they did. And the Court initially granted certiorari, but asked the Oklahoma Supreme Court to provide an interpretation of the scope of the law, in response to two certified questions. The Oklahoma Supreme Court issued a decision finding that the law is a ban on the provision of medication abortion and noting that its restrictions are "completely at odds with the standard that governs the practice of medicine."[45] The U.S. Supreme Court then dismissed its grant of certiorari as improvidently granted,[46] resulting in a final permanent injunction blocking the law from ever going into effect.

Although, as discussed above, there are some crucial differences between the marriage equality litigation and reproductive rights litigation, they share some important commonalities. Among those is also the fact that the cases provide very exciting opportunities to protect and affirm vitally important rights. The momentum for marriage equality is especially strong post-*Windsor*, but the need to protect abortion access is also gaining more attention now, partly due to the extremism of our opponents. More people in the country appear to be understanding the extent to which hostility to women is behind many of the restrictions and the unfairness of depriving women of access to abortion services in their state or community. Along with tremendous challenges, there are tremendous opportunities to protect essential rights, move the jurisprudence, and move the discourse on reproductive rights throughout the country.

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42 Complaint, Okla. Coal. for Reprod. Justice v. Cline, No. CV-2011-1722, slip op. (Dist. Ct. Okla. Cnty. May 11, 2012), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Complaint_Oklahomans_for_Reproductive_Justice.PDF [http://perma.cc/W53U-A7XM].

43 Findings of Fact & Conclusions of Law, Okla. Coal. for Reprod. Justice v. Cline, No. CV-2011-1722, slip op. (Dist. Ct. Okla. Cnty. May 11, 2012), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/crr_OK_MedAbortion_FF_CL.pdf [http://perma.cc/CPK5-NCVD].

44 Okla. Coal. for Reprod. Health v. Cline, 292 P.3d 27 (Okla. 2012).

45 Cline v. Okla. Coal. for Reprod. Health, 313 P.3d 253 (Okla. 2013).

46 Cline v. Okla. Coal. for Reprod. Health, 134 S. Ct. 550 (2013) (mem.).