

Oral Arguments in *Whole Woman's Health v. Hellerstedt*: The Justices Break their Long Silence on Abortion Rights

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Abortion can be hard to discuss in public. Stigma, misinformation, and isolation deter some people from talking about abortion, even with friends. This kind of inhibition was definitely not present when the Supreme Court heard oral arguments on March 2nd in *Whole Woman's Health v. Hellerstedt*, the first abortion access case to come before it in almost ten years. Several of the Justices – in particular the three women on the Court, along with Justice Breyer – didn't want to stop talking about abortion, causing Chief Justice Roberts to extend the standard 60 minutes of argument time to almost 85 minutes. Counsel for both sides took full advantage of the extra minutes to hammer home their central points, while fielding questions that hinted at how members of the court are inclined to decide the case.

Stephanie Toti, arguing on behalf of the Texas abortion clinics facing closure because of Texas' restrictive legislation known as HB2, stressed that the provisions under challenge do nothing to improve women's health or abortion safety, instead subjecting clinics and doctors to medically unsupported regulations that would force most of them to stop providing abortions. Ms. Toti relied on *Planned Parenthood v. Casey* (1992), the Supreme Court's controlling formulation of what makes abortion restrictions unconstitutional, to argue that when a state claims to pass an abortion regulation in order to make abortion safer, courts need to examine whether that claim is backed up by credible medical evidence instead of deferring to legislatures. The absence of medical benefits, she argued, is part of what makes regulations an "undue burden," as the Court itself decided in *Casey*. (U.S. Solicitor General Donald Verrilli, electing to argue on behalf of the plaintiff clinics, agreed).

Ms. Toti's argument seemed to resonate with Justices Breyer, Ginsburg, Kagan, and Sotomayor, all of whom made multiple observations that the Texas restrictions lack any legitimate medical justification. They drew on examples ranging from colonoscopy (far riskier than abortion, but not subject to the regulations), to aspirin (not required to be swallowed in a mini-hospital, even though it poses some health risks), to the glaring absence of women who appear to have suffered harms from abortion that the Texas regulations would have alleviated.

Scott Keller, representing Texas, took the opposite stance, arguing that courts may not consider whether abortion regulations actually improve health and safety as part of determining whether they place an unconstitutional undue burden on women seeking abortion. Perhaps predictably, Justices Roberts and Alito seemed to agree, albeit without the intense reactions their four colleagues displayed when pushing back on Mr. Keller's claims.

And Justice Kennedy? As befits the swing vote, Justice Kennedy seemed to hang somewhere in the middle. He raised the prospect of delaying the case to allow for more evidence of how the situation in Texas might play out, an outcome that neither side really wants. But when it came to the real constitutional issue – whether courts must examine and reject unsupported health and safety justifications for a law that harms women when applying the undue burden test – his questions suggested that he recognized his own answer, delivered in *Casey*, which was "Yes."

We won't know more until the Court issues a decision, likely in late June. Regardless of what the Court decides, oral arguments were jam-packed with public talk about abortion, both on the bench and at the rally outside. After almost a decade of silence, this animated discussion was both healthy and overdue.