

JESSICA MASON PIEKLO: What does the Supreme Court decision mean?

Jenn Stanley: This is a special episode of CHOICE/LESS from Rewire Radio, a podcast about reproductive injustice and the laws that put people in choice-less situations. I'm Jenn Stanley, senior staff reporter at Rewire, and the host of this podcast.

We're here today to talk about the 5-3 Supreme Court decision in favor of Whole Woman's Health in the case *Whole Woman's Health v. Hellerstedt*. The case challenged two provisions of HB 2, Texas' sweeping anti-choice law.

Two of our storytellers this season, Candice and Valerie, had to leave Texas to access abortion care, in part because of the restrictions put in place when the law was enacted. So I wanted to follow up this week and talk about what this decision means in the context of some of the stories we've heard this season. So I enlisted the help of one of our resident legal experts here at Rewire:

Jessica Mason Pieklo: I am Jessica Mason Pieklo, I am vice president of law and the courts and rewire and my job is to provide daily reporting, analysis, and commentary on reproductive rights and social justice issues that are happening within the courts.

JS: Jessica has tirelessly followed and covered Texas House Bill 2 since its introduction in 2013.

JMP: I was very pleasantly surprised by the decision. Going through oral arguments it was clear to me that Justice Kennedy, who many of us believed to be the swing vote in this case, was not comfortable upholding the Texas restrictions. It was just so clear that Texas in passing HB 2 and likely other conservative states that have done the same really overreached. They really felt like they had carte blanche from the federal courts to legislate away abortion rights so long as they just shrugged and said, it's for women's safety, we want patients to be OK. You know and invoke occasionally the horrors of Dr. Kermit Gosnell, and so the court put an end to that. So that is amazingly important.

One of the other things that I really was excited about in this opinion, and it's a total law nerd point but I think is one that kind of gets overlooked is that Justice Breyer wrote the opinion rather than Justice Kennedy, and that matters because Justice Breyer is known as the Supreme Court's data guy. He is heavy into statistics and correlation and analysis like that and as you read the opinion you really see the impact of that as wonderful as it was that all of these people were sharing their abortion stories with the court that over 100 women lawyers filed an amicus brief explaining in very personal detail how having access to safe and legal abortion care made their careers possible those stories clearly had an impact but this is a decision that is grounded

in data. So for abortion rights advocates I think that is fantastic because it has been, oh I can't even think of the last abortion rights decision that was actually grounded in data. In evidence. And putting legislators on notice to say, you cannot simply say a bill is for one thing when the evidence overwhelming shows that it is doing the opposite of that thing.

JS: That said, at Rewire, our biggest thing is evidence based reporting. Getting the data out there. Really debunking that false equivalency. What do you think Breyer's opinion says about the future of reporting on these issues and the way we talk about these issues from a national and mainstream media standpoint?

JMP: Well I think that the national and mainstream media while it's getting better still has a long way to go in how it reports on these issues and in particular these cases. One you know example we've seen broadly is the press talking about the fact that HB 2 was struck down. HB 2 was not struck down in its entirety, and I felt a little bit like buzzkill on the first round of press related to this coverage because I was constantly reminding folks that there are still a lot of harmful provisions of the bill that are in effect.

JS: This is an incredibly important point here. HB 2 was not struck down. HB 2 is an omnibus abortion law—

JMP: which I describe that typically as a Frankenstein's monster of abortion restrictions that are all stitched together into one monster bill.

JS: This particular Frankenstein's monster of a bill included a 20-week ban, an amendment to the physician reporting requirements that say that a doctor must include probable post-fertilization age of the "unborn child," the laws language, not mine. And restrictions on medication abortion that would require up to four clinic visits for the abortion pill, a tall order for people living hundreds of miles from the nearest clinic.

It also required doctors to have admitting privileges at a nearby hospital and for clinics to meet the architectural standards for an ambulatory surgical center. These are the provisions that Whole Woman's Health v. Hellerstedt were concerned with, and these are the requirements that have forced Texas clinics to close, and would have forced even more to close if the Supreme Court upheld the law.

JMP: When you have omnibus bills like that you are able to pick and choose which portions that you want challenge and that does not preclude you from challenging other provisions later on down the road. So there's that part of it. When I first started reporting on this story and when the lawsuits started I asked advocates that same question, particularly with regard to the 20-week ban. At the time the lawyers said that- the 20-week ban portion of the bill- and at the time the lawyers acknowledged that that was a really devastating component of the bill. But in terms of resources and strategic allowances they wanted to first target what they felt had the greatest impact and work their way backward from there. The thinking being that fewer people need procedure at 20 weeks or beyond, whereas everybody needs access to a reproductive health care clinic regardless of whether it's to have an abortion or not.

JS: As you may recall from their interviews on this podcast, Candice from episode one, and Valerie from episode 3, faced several obstacles while trying to access abortion care

in Texas. One of the issues for both of them was the extremely long wait times at the clinics.

HB 2 forced many clinics to close, meaning clinics near Dallas and Austin where Candice and Valerie live respectively, were overbooked. This was a direct result of the admitting privilege requirements and the ambulatory surgical center requirements. But this led to another problem.

So remember Candice had a hormonal IUD, and she wasn't getting her period. So she didn't realize she was pregnant until about 13 weeks along. She'd have to wait several weeks for an appointment, and with the state's mandatory counseling session and 24-hour waiting period, she'd need two appointments, that's two days off work. She was worried that if something happened where she'd have to reschedule one of those appointments, she'd be past the 20-week mark, and could no longer legally get an abortion in Texas.

Valerie was in a similar situation regarding the 20-week ban. She was 17-weeks pregnant when she got the devastating fetal diagnosis of alobar holoprosencephaly, which doctors told her was 100 percent incompatible with life. The wait for an appointment was several weeks long, which would put her past 20 weeks.

JMP: That's a really great point. I think both Justice Kagan in oral arguments over HB 2 and in Justice Breyer's majority opinion does really well which is to show causation correlation argument, right? You close clinics, well it's not as though you decrease demand, those patients have to go somewhere else. So then those clinics are overburdened and patients can't access that care, and as you said you either get pushed up to that 20 week window where they may not be able to legally get an abortion in the state of Texas anymore, or then be forced to travel outside the state where they can access that care.

And so one of the things that was really important I think in the decision in Whole Woman's Health v. Hellerstedt is that Justice Breyer really talks about the layering effect that these regulations and barriers pose to patients trying to access an abortion. So it is very much as you've said that we've heard from the women's experiences on this podcast that it is not simply a restriction, it is not simply the admitting privileges component of HB 2 that stands in the way. It is the entire panoply of restrictions that we expect patients to navigate in a very short and very stressful window of time.

JS: Let's talk about HB 2 now. So these two provisions are gone...

JMP: Well, so, we still have the 20-week ban in effect, which is a huge a problem. As we've talked about because- while HB 2- while the decision in Whole Woman's Health was fantastic, it didn't mean that immediately 20 new clinics in Texas opened. So the question of the real strain on the resources that are already there that remains. And so I think that there needs to be a serious look at the extent to which the 20 week ban component of it is adding to the layers of burden that Justice Breyer described in the opinion, so there's that.

And you know the other component too, as we talk about the various layers of restriction, are these restrictions on medication abortion. And so you know one of the concerns that justice Kennedy brought up during oral arguments in Whole Woman's Health v. Hellerstedt was the fact

that nationally medicinal abortion rates are going up. That's a good thing. It's earlier in the pregnancy. Medicinal abortions are very safe, very low cost, low overhead to perform. And they're going up everywhere except in Texas, and in Texas those rates are going down and surgical abortions are going up. And again, you know, I think the future of HB 2 is the bill is still largely in tact. The two clinic closure provisions are gone for the moment. I also don't at all trust the Texas legislature not to come up with some new bunch of whatever in the next legislative session in 2017.

JS: How quickly do you think we'll see the positive aspects of this law?

JMP: Well we've seen them already in the sense. The Alabama attorney general said he was withdrawing his appeal of a ruling that blocked Alabama's TRAP measures. The Supreme Court the very following day on Tuesday today turned away cases from Wisconsin and Mississippi effectively putting an end to challenges for similar laws in Wisconsin, Louisiana, Mississippi, so I mean that's all really good news, especially in the deep South where so much of the impact of TRAP- these particular TRAP laws- were really really devastating.

JS: One of the biggest things people have said to me after listening to CHOICE/LESS is that they feel like they hear these stories, they didn't know anything about this, it makes them so mad, and then they feel like we're not giving them a call to arms. So what do they need to do to try to combat this? What's the call to arms for the layperson who wants to do something and had no idea this was going on?

JMP: Well first and foremost I think is to see if you can volunteer at a local clinic or with a local abortion funds because we need all of the help. One thing that I think is a very immediate and attainable goal if we put our mind and our resources to it is the push to end the Hyde Amendment and its correspondingly awful cousin the Helms Amendment. These are restrictions on public financing for abortion. With the Helms Amendment it applies to people serving overseas, with the Hyde Amendment it's for patients on Medicaid. These are just spending decisions. They get made each time the budget comes up for renewal, and for the first time the Democrats have included in their platform a repeal Hyde pledge. And I think that is something that we really need to push because that opens up or at least takes away one of the economic barriers. So listeners should call and tell their congress people to end Hyde, to not re-up it, and same with Helms.

I do think the other part of it, which you've mentioned quite a bit, is storytelling. You know not all of us have had an abortion but all of us have had the ability to speak frankly about abortion politics. So if this is something that a listener feels really outraged about they should tell people. They should talk about it. Just because it has to do with abortion doesn't mean it's impolite conversation. So I do think that's working to push that stigma, and even within our own tendencies to maybe self censor or self edit depending on who we're around, I think we need to push ourselves a little in that direction too.

JS: I think the self censoring thing is huge, and I'm notice it even with myself this season. Traveling to capture these stories, I've been in a few places and circumstances where I didn't know what to say when people asked what I did or what the show is about.

When I was in South Dakota to talk to Kelsey for episode 6, she told me someone threatened her at a bar once because she said she was a nurse at Planned Parenthood.

I've had similar uncomfortable conversations, even with people who care about me who I really care about, who have made it clear that they disapprove of the content of this show.

And sometimes, you know, more often than not, my immediate instinct is to apologize, or change the subject because I'm worried about making someone else uncomfortable. But then I think about the people who've been so generous with their stories, and everyone who has been on the show this season has told me that they chose to share their stories to reduce the stigma and help other people who might be going through some of the same stuff, but because there is so much shame they feel they can't talk about it. And they're missing the opportunity to hear from somebody else, oh that happened to me, I understand completely. And the stories are helping, so are the facts. So is the data.

JMP: I think the fact that those stories were there not only helped drive the court's willingness to produce an opinion that is very- you know- it's almost clinical in its approach, which is not at all how we're accustomed to talking about abortion rights in the law. But I think it's those stories that likely got Justice Kennedy to sign onto that opinion as a fifth vote rather than feel the need to write an opinion on his own. It's speculation but the power of individual storytelling in terms of the culture and the courts is not something I think that we should just write off. To the extent that storytelling makes the courts more willing to engage seriously with the data because there is a personal narrative behind it that helps. And I think to the extent that the data helps drive home the impact that these decisions have on people's lives who the federal courts may or may not always be concerned about I think that both are very necessary and need to coexist together.

JS: Whole Woman's Health v. Hellerstedt was a pro-choice win for sure, but there are many more challenges to access. We can't stress this enough, that while these two provisions were struck down, much of HB 2 is still alive and well.

One in three women will have an abortion by 45. So we need to keep talking about it, keep calling out junk science, stay on top of state politics. People are very concerned about the national election, and rightly so, but most of these restrictions are being passed at the state level. Just so many laws have been passed in so many states. Would you say, Jessica, that this case is a kind of culture shift? Giving our voices back? Giving us momentum again?

JMP: I certainly think that it has the potential to be, and that it would be a shame if we squandered this moment. The Supreme Court- there had been some inklings that they were not super excited to get back into the abortion debate. What I think happened with Texas and HB 2 though is that it just forced the issue they couldn't avoid it anymore.

JS: Thank you so much to Jessica Mason Pieklo, vice president of law and the courts here at Rewire, for sharing her insights on this complicated case.

This episode of CHOICE/LESS was produced by me, Jenn Stanley, for Rewire Radio, with editorial oversight by Marc Faletti. Jodi Jacobson is our editor-in-chief, Brady Swenson is our director of technology. Music for this episode was by Doug Helsel. Special thanks to all the staff at rewire.

For more on Whole Woman's Health v. Hellerstedt, including a comprehensive timeline of HB 2, visit our website at Rewire.news/CHOICELESS.

We have one more episode of CHOICE/LESS this season before take a short hiatus to record season 2. If you like what you've been hearing, please take a minute to rate and review us on iTunes. This helps get us more visibility so that we can bring these stories to a wider audience.

Thanks for listening.