



NARAL
Pro-Choice America

The Women's Health Protection Act: Reclaiming a Woman's Right to Choose

More than 40 years after the Supreme Court recognized a woman's right to choose as a fundamental constitutional right, access to safe, legal abortion has been the object of unrelenting attacks by politicians intent on taking that freedom away. Since 1995, state legislators have imposed more than 800 anti-choice state measures on women. In the face of these unrelenting legislative assaults on women's reproductive rights, a federal response is urgently needed.

Answering the call, Sens. Richard Blumenthal (D-CT) and Tammy Baldwin (D-WI) and Reps. Judy Chu (D-CA), Marcia Fudge (D-OH), and Lois Frankel (D-FL) authored the Women's Health Protection Act (S.217/H.R.448 in the 114th Congress), a bill to preserve and protect a woman's right to choose by curbing restrictions on abortion. If enacted, the bill would establish federal protections against anti-choice measures that purport to protect women's health but are really about taking away their right to choose. In so doing, the legislation stands for the belief that women can and should be trusted to make these personal, private medical decisions without interference from politicians. The Women's Health Protection Act is a modest first step against the cascade of medically unnecessary and politically motivated restrictions on access to abortion, and ensuring that *all* women have access to reproductive-health care, regardless of their zip code.

Choice Under Attack

In 1973, the Supreme Court held in *Roe v. Wade* that the Constitution's right to privacy encompasses the right to choose whether to end a pregnancy.¹ Well into its fourth decade, *Roe's* protections remain an essential guarantor of freedom for American women, but in the years since this landmark decision, *Roe's* protections have been eroded significantly; now, reproductive freedom is in great peril.

After the *Roe* decision, opponents of reproductive freedom, both inside and outside government, organized and undertook a concerted effort to chip away strategically at the right to choose through a series of legislative attacks. At the same time, they succeeded in nominating and confirming anti-choice jurists to the federal bench, all but guaranteeing that, over time, anti-choice state and federal laws would be upheld.

As a result of this strategy, the composition of the nation's highest court shifted dramatically by the time anti-choice legal advocates mounted their next major attack on *Roe* itself. In 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the newly more conservative court

barely reaffirmed the decision in *Roe*, and at the same time sharply curtailed its protections. The *Casey* court abandoned the strict-scrutiny standard of review and adopted a less protective standard that allows states to impose restrictions as long as they do not “unduly burden” a woman’s right to choose.² Under this new standard, the court cleared the way for state restrictions that it had previously found to violate the right to privacy and effectively invited states to impose new barriers on women’s access to abortion.³ Indeed, under *Casey*’s looser standard, courts have allowed state politicians to impose a multitude of state restrictions on a woman’s reproductive freedom.⁴ Abortion bans, mandatory waiting periods, biased-counseling requirements, and medically unnecessary regulations on doctors have unfortunately achieved their intended result: it is more difficult for women to obtain safe, legal abortion care today than it was in 1973, just after the *Roe* decision was handed down.

Now, anti-choice advocates are taking the next step: having already severely restricted women’s access to legal abortion nationwide, now they are looking to put the procedure totally out of reach for many American women. Since 1995, state legislatures have enacted 875 anti-choice laws, and the pace accelerated steeply in the past three years. In 2011, after a wave of conservative lawmakers swept into office, state legislatures enacted nearly twice as many anti-choice measures as the previous year, a trend that shows no sign of slowing.

Many of the current restrictions were enacted under the guise of protecting women’s health. In reality, however, anti-choice strategists’ real goal is to shrink the number of abortion providers and to place so many barriers between women and legal abortion that the procedure is, for all practical purposes, out of reach. The following is a sample of the most prominent recent anti-choice state restrictions sweeping the nation:

- **Abortion Bans:** Since 2010, abortion bans have spread across the states, from those that outlaw abortion before a woman may even know she is pregnant to those that target later abortion. Indeed, 15 states have passed laws banning abortion after 20 weeks without an adequate health exception.⁵ Sponsors admit that abortion bans are part of an alarming, coordinated effort to lure the Supreme Court into dismantling the protections established by *Roe*.
- **Targeted Regulations of Abortion Providers (TRAP):** Forty-four states and the District of Columbia have laws subjecting abortion providers to burdensome restrictions not imposed on other medical professionals.⁶ These measures are an obvious attempt to drive doctors out of practice and make abortion care more expensive and difficult to obtain. Common TRAP regulations include those that limit the provision of care only to doctors, require doctors to convert their practices needlessly into mini-hospitals at great expense, limit abortion care to hospitals, rather than physicians’ offices, and/or require doctors to have admitting privileges at a local hospital with nothing requiring facilities to grant such privileges. Although the Supreme Court recently struck down some of Texas’ more egregious TRAP restrictions, hundreds of others remain in force nationwide.

- **Mandatory Ultrasound:** Thirteen states mandate the performance of an ultrasound prior to abortion, regardless of whether the doctor recommends this procedure, and even against a woman's will.⁷
- **Biased Counseling and Mandatory Delays:** Thirty-three states have laws that subject women seeking abortion services to biased-counseling requirements and/or mandatory delays.⁸ These laws subject women to a state-mandated lecture and/or materials, typically followed by a delay of at least 24 hours, and in some cases as long as 72 hours. In states with very few providers, a forced delay may result in a woman having to wait as long as another full week for her medical care – which makes it more expensive, increases the risks of the procedure, and in some cases, puts it out of reach altogether.
- **Restrictions on Medication Abortion:** Nineteen states have signed measures into law that restrict the use of medication abortion (also known as RU 486), which provides women with a safe and effective nonsurgical option for early pregnancy termination.⁹ Anti-choice politicians fought FDA approval of this abortion option for decades, at every step. Having lost that fight, now they are doing all they can to restrict access to the medication, including restricting how it is delivered, restricting off-label use of the medication,¹⁰ and banning its prescription through telemedicine networks.¹¹

The Consequences for Women are Real

These restrictions represent more than just an abstract threat to our constitutional rights. Indeed, the hundreds and hundreds of anti-choice laws imposed on women have had very real and dire consequences:

- Several states only have one abortion provider.¹² In some of those, the doctor flies in from another state and provides services only one day a week.¹³ As a result, women seeking abortion care in those states are severely limited in their options.
- In Texas, after the legislature imposed sweeping anti-choice restrictions on women in 2013, all abortion providers in the lower Rio Grande Valley stopped providing the procedure.¹⁴ And research shows that seven percent of all women in Texas who ultimately reached a provider tried first to self-abort.¹⁵
- Anti-choice legislators have systematically enacted laws across the country banning abortion after 20 weeks.¹⁶ In some cases, such as the American Southeast, they have succeeded in creating entire regions across multiple states where there is no provider who can legally offer later abortion care. Although women need access to later abortion for a variety of reasons, many women who end pregnancies after 20 weeks are doing so because they are facing severe health threats or have recently received a diagnosis of a devastating fetal anomaly.

- NARAL Pro-Choice America's *Who Decides?* publication rates 27 states—more than half the country—as failing to protect women's reproductive rights, based on their state laws.¹⁷ According to the Guttmacher Institute, more than half of all women in the country of reproductive age live in the states most hostile to abortion rights.¹⁸

Pre-Roe Hazards Could Reemerge

Effects like those described above could, if the trend is not reversed, signal the reemergence of a grim reality America once knew. When *Roe v. Wade* was decided in January 1973, abortion except to save a woman's life was banned in nearly two-thirds of states.¹⁹ Laws in most of the remaining states allowed only a few additional exceptions.²⁰ An estimated 1.2 million women each year resorted to illegal abortion,²¹ causing as many as 5,000 annual deaths,²² despite the known hazards of frightening trips to dangerous locations in strange parts of town, of whiskey as an anesthetic, doctors who were often marginal or unlicensed practitioners, unsanitary conditions, incompetent treatment, infection, hemorrhage, disfiguration, and death.²³

Doctors who worked in emergency rooms before 1973 saw first-hand the consequences of illegal abortion. Dr. Louise Thomas, a New York City hospital resident during the late 1960s, summed up the dangers of illegal abortion, remembering the "Monday morning abortion lineup" of the pre-*Roe* period:

What would happen is that the women would get their paychecks on Friday, Friday night they would go to their abortionist and spend their money on the abortion. Saturday they would start being sick and they would drift in on Sunday or Sunday evening, either hemorrhaging or septic, and they would be lined up outside the operating room to be cleaned out Monday morning. There was a lineup of women on stretchers outside the operating room, so you knew if you were an intern or resident, when you came in Monday morning, that was the first thing you were going to do.²⁴

Today, because it is legal, abortion is one of the safest medical procedures available. Between 1973 and 1997, the mortality rate associated with legal abortion procedures declined from 4.1 to 0.6 per 100,000 abortions.²⁵ The American Medical Association's Council on Scientific Affairs credits the shift from illegal to legal abortion services as an important factor in the decline of the abortion-related death rate after *Roe v. Wade*.²⁶

In the years since *Roe v. Wade*, hundreds of thousands of American women's lives have been saved. But as new restrictions put safe, legal abortion care out of reach again, the dangers women faced in the years before *Roe* already have begun to reappear.

All Women Should Have Access to Reproductive-Health Care

In the face of these legislative assaults on women's reproductive rights, the Women's Health Protection Act erects a protective barrier. This legislation would establish federal protections against anti-choice measures that purport to protect women's health but, in reality, are designed to render their right to choose illusory. Included among the anti-choice measures prohibited by the legislation are TRAP laws, pre-viability abortion bans, forced-ultrasound and mandatory-delay measures, biased-counseling laws, and measures restricting medication abortion (RU 486). Although the bill is limited in scope and does not invalidate *all* restrictions on abortion care, women across the nation would welcome this effort as a first step in repelling the cascade of medically unnecessary and politically motivated restrictions on access to abortion care.

If anti-choice forces prevail in their efforts, Dr. Thomas' experience in the New York hospital wards during the 1960s is likely to be repeated. Studies show that the more restrictions are placed on abortion care, the less accessible the medical procedure becomes. And history demonstrates that restricted access does not eliminate abortion; rather, in an anti-choice climate, women are forced to seek control over their reproductive lives in any way possible, often risking serious injury or death. Lifting abortion restrictions reduces the number of clandestine, unsafe abortions. Removing unnecessary and inappropriate barriers to abortion care would improve women's health, and spurious claims that abortion services are dangerous should never be used to justify more restrictions on a woman's right to choose.²⁷ The Women's Health Protection Act stands as a much-needed and long-overdue response to the cascade of state restrictions on abortion care that *endanger*, not protect, women's health.

All women, regardless of where they live, must be able to realize their constitutionally protected right to choose. Passing the Women's Health Protection Act represents a modest but welcome step in the right direction.

January 1, 2017

Notes:

¹ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

² *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), at 876.

³ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), at 881-87.

⁴ Between 1995 and 2006, states enacted 512 anti-choice legislative measures—including 45 in 2006 alone. See generally NARAL PRO-CHOICE AMERICA & NARAL PRO-CHOICE AMERICA FOUNDATION, *Who Decides? The Status of Women's Reproductive Rights in the United States* (19th ed. 2010), at http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/.

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- ⁵ NARAL Pro-Choice America & NARAL Pro-Choice America Foundation, *Who Decides? A State-by-State Report on the Status of Women's Reproductive Rights*, at 12 (25th ed. 2016), at www.prochoiceamerica.org/whodecides.
- ⁶ NARAL Pro-Choice America & NARAL Pro-Choice America Foundation, *Who Decides? A State-by-State Report on the Status of Women's Reproductive Rights*, at 10 (25th ed. 2015), at www.prochoiceamerica.org/whodecides.
- ⁷ Guttmacher Institute, *Requirements for Ultrasound*, at <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound> (last visited Sept. 7, 2016).
- ⁸ NARAL Pro-Choice America & NARAL Pro-Choice America Foundation, *Who Decides? A State-by-State Report on the Status of Women's Reproductive Rights*, at 14 (25th ed. 2016), at www.prochoiceamerica.org/whodecides.
- ⁹ In addition to internal analysis, data from this section is complemented with data from: Guttmacher institute, *State Policies in Brief: Medication Abortion* (May 1, 2014) at http://www.guttmacher.org/statecenter/spibs/spib_MA.pdf (last visited Nov. 24, 2015).
- ¹⁰ OHIO R.C. § 2919.123.
- ¹¹ W.S.A. § 253.105. In response to the vague and unnecessary restrictions imposed by the new law, Planned Parenthood of Wisconsin and Affiliated Medical Services stopped providing medical-abortion care. Pro-choice allies pursued a legal challenge—which is still ongoing—but the law has been temporarily enjoined and providers resumed providing non-surgical abortion care. Press Release, NARAL Pro-Choice Wisconsin, *Another Wisconsin Health Provider Ceases Medication Abortion in Face of Vague New Regulations* (May 22, 2012) at <http://www.wispolitics.com/1006/052212NARAL.pdf> (last visited Nov. 24, 2015).
- ¹² There is only one abortion provider in North Dakota, South Dakota, Arkansas, and Mississippi. National Abortion Federation, *How Can I Find a Provider Near Me?* at <https://www.prochoice.org/Pregnant/find/> (last visited Nov. 24, 2015).
- ¹³ NARAL Pro-Choice America, *Targeted Regulation of Abortion Providers (TRAP) Laws: Decreasing Access, Driving Providers Away* (Jan. 2014) at <http://www.prochoiceamerica.org/media/fact-sheets/abortion-access-trap.pdf> (last visited July 10, 2014).
- ¹⁴ Guttmacher Institute, *The State of Sexual and Reproductive Health and Rights In the State of Texas: A Cautionary Tale* (Spring 2014) at <https://www.guttmacher.org/about/gpr/2014/03/state-sexual-and-reproductive-health-and-rights-state-texas-cautionary-tale> (last visited Sept. 7, 2016).
- ¹⁵ Daniel Grossman et al., *The public health threat of anti-abortion legislation*, 89 *CONTRACEPTION*. 73, 73-74 (2014).
- ¹⁶ NARAL Pro-Choice America & NARAL Pro-Choice America Foundation, *Who Decides? A State-by-State Report on the Status of Women's Reproductive Rights*, at 12 (25th ed. 2016), at www.prochoiceamerica.org/whodecides.
- ¹⁷ NARAL Pro-Choice America & NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women's Reproductive Rights in the United States* (25th ed. 2016), at www.WhoDecides.org.
- ¹⁸ Guttmacher Institute, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Sere—in the Crosshairs* (Winter 2014) at <http://www.guttmacher.org/pubs/gpr/17/1/gpr170109.html> (last visited Nov. 24, 2015).
- ¹⁹ *Roe*, 410 U.S. at 118-119 n.2.
- ²⁰ See, e.g., DEL. CODE ANN., tit. 24, §§ 1790-1793.

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- ²¹ Willard Cates, Jr. et al, *Comment: The Public Health Impact of Legal Abortion: 30 Years Later*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 25 (2003); Willard Cates Jr., *Legal Abortion: The Public Health Record*, 215 SCIENCE 1586 (1982); Richard Schwarz, SEPTIC ABORTION 7 (1968).
- ²² The estimated number of deaths from illegal abortion services (e.g. 5,000) has been derived from the findings of several studies. The following is a summary of these studies: "Difficulty as it is to accumulate statistics in this area, a surprising similarity has been noted in various studies independently made within the last thirty years. If general trend observed is accepted, without becoming sidetracked in disputes over exact numbers of methodology, we must consider the probability that more than one million criminal abortions will have been performed in the United States in 1962, and more than five thousand women may have died as a direct result." Zad Leavey & Jerome M. Krummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 124 (1962) (citing to Gebhard, et al, PREGNANCY, BIRTH AND ABORTION 136-137 (1958); Frederick Taussig, ABORTION SPONTANEOUS AND INDUCED: MEDICAL AND SOCIAL ASPECTS 25 (1936); Marie Kopp, BIRTH CONTROL IN PRACTICE 222 (1934); Stix, *A Study of Pregnancy Wastage*, 13 MILBANK MEMORIAL FUND QUARTERLY 347, 355 (1935); MODEL PENAL CODE § 207.11, comment, p. 147 (Tent. Draft No. 9, 1959.). "It has been estimated that as many as 5,000 American women die each year as a direct result of criminal abortion. The figure of 5,000 may be a minimum estimate." Richard Schwarz, SEPTIC ABORTION 7 (1968) (citing to Taussig, 23-28, which discusses the original mathematical formula used for determining that somewhere between 8,000 and 10,000 women died each year from illegal abortion.); "One recent study at the University of California's School of Public Health estimated 5,000 to 10,000 abortion deaths annually." Lawrence Lader, ABORTION 3 (1966) (also citing to Edwin M. Gold et al, *Therapeutic Abortions in New York City: A Twenty-Year Review*, in New York Dept. of Health, Bureau of Records and Statistics (1963), which discussed Dr. Christopher Tietze's estimate of nearly 8,000 deaths from illegal abortion annually in the United States. The estimate was based on the number of illegal abortions in New York City, the only major municipality keeping abortion statistics.); "[M]ore than five thousand women may have died as a direct result [of criminal abortion in the United States in 1962]." Zad Leavy & Jerome M. Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 123, 124 (1962); "Taussig and others have concluded that the abortion death rate during the late 1920s was about 1.2% and amounted to over 8,000 deaths per year." Russell S. Fisher, *Criminal Abortion*, in Harold Rosen, THERAPEUTIC ABORTION, MEDICAL PSYCHIATRIC, LEGAL, ANTHROPOLOGICAL, AND RELIGIOUS CONSIDERATIONS 8 (1954).
- ²³ Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 117 (Nov. 1989).
- ²⁴ Carole Joffe, DOCTORS OF CONSCIENCE: THE STRUGGLE TO PROVIDE ABORTION BEFORE AND AFTER ROE V. WADE 60 (1995).
- ²⁵ Laurie D. Elam-Evans et al., Centers for Disease Control & Prevention, *Abortion Surveillance – United States, 1999*, 51 MORBIDITY & MORTALITY WEEKLY REP. 1, 28, tbl. 19 (2002).
- ²⁶ Council on Scientific Affairs, American Medical Association, *Induced Termination of Pregnancy Before and After Roe v Wade: Trends in the Mortality and Morbidity of Women*, 268 JAMA 3231, 3232 (1992).
- ²⁷ Anne Tinker & Marjorie A. Koblinsky, *World Bank Discussion Papers: Making Motherhood Safe*, at 40-41 (1993).