

CHOICE/LESS 302: Stephanie Toti

Stephanie Toti: I've pretty much always wanted to be a lawyer, from the time that I was a little kid. I think I must have been a very argumentative kid because people would always say to me, "You have a lot of opinions. You should be a lawyer," and I just kind of accepted that as my identity.

It was always a dream of mine to argue at the Supreme Court. It seemed like a really exciting thing, but until last year, I had no idea whether that was a realistic goal or not.

Jenn Stanley: For Rewire Radio, I'm Jenn Stanley, and this is Choice/Less.

Stephanie Toti: My name is Stephanie Toti. I'm 39 years old, and I am a reproductive rights attorney. I got a fellowship at The Center for Reproductive Rights back in 2006. I started there just before the Supreme Court heard *Gonzales v. Carhart*.

Jenn Stanley: *Gonzales v. Carhart* banned a method of second trimester abortion that is known commonly, but incorrectly, as partial-birth abortion. You see, partial-birth abortion is rhetoric meant to evoke negative emotions, but it is not a scientific term, nor does it describe a medical procedure. Yet, all of the legislation in the United States against the procedure refer to it this way, with little to no mention of it by its correct medical terminology: intact dilation and extraction.

Before they were banned, intact D&Es made up less than 1% of all abortions performed in the United States. They were typically used when a fetus was diagnosed with a severe congenital abnormality. As the intact extraction allowed for better examination of the remains, sometimes the person miscarrying or having an abortion would choose an intact D&E so they could see the fetus and have some closure, which could help with the grieving process.

Stephanie Toti: That was my entrée into the world of reproductive rights and justice. Oral argument happened in that case just a few months after I started at The Center for Reproductive Rights. I was really eager to hear the argument. My new boss was arguing the case, and she did a great job, but because I was such a junior attorney, I was ineligible for admission to the Supreme Court Bar, which meant that I had to camp out overnight in order to get a seat in the courtroom.

I remember it still very vividly. I went down with a bunch of the other junior attorneys and the paralegals, and it was pouring rain. It was in November, so it was kind of cold and rainy, and we tried to pitch a tent, but the marshals came and confiscated our tent, because apparently you're not allowed to do that outside the Supreme Court. I had a sleeping bag, and it just got drenched, and I ended up just throwing it away. It was pretty miserable, and by the next morning, I was exhausted and soaking wet and looked a mess, but somebody, one of my colleagues, came and brought me a suit. I was able to change in the restroom and look presentable, and I got a seat in just about the last row of the courtroom, but I made it in, and I was so excited. I remember thinking, "Wow. This courtroom is so

big," but the Supreme Court is not big at all. I think it was just more of a reflection on how small and new I felt in that environment.

The case was very well argued, but unfortunately it was a bad decision, and basically the movement lawyers spent the next decade trying to right the ship.

Jenn Stanley: Stephanie worked her way up at The Center for Reproductive Rights for nearly a decade.

Stephanie Toti: I worked on dozens of cases at The Center, some successful. I also had some really heartbreaking defeats.

Jenn Stanley: By 2011, the number of abortion restrictions passed by states had skyrocketed, and the trend continued into 2012. Then, in 2013, Texas passed the sweeping anti-choice bill HB 2. It contained multiple restrictions under the same law, including a 20-week abortion ban, admitting privilege requirements, ambulatory surgical center requirements, reporting requirements, and restrictions on medication abortions. Stephanie and her team had been tracking the bill and were ready to challenge it immediately.

Stephanie Toti: We had been tracking HB 2 as soon as it was introduced during that legislative session. Before there was HB 2, there were a number of independent bills that had been introduced that had all the components of HB 2. They were called different things. All of the individual bills had failed during the legislative session, and we thought we dodged a bullet, but then the governor called a special session. It was reintroduced and ultimately defeated by Senator Wendy Davis' now-famous filibuster, but then the governor called another special session and made it clear that he was going to keep calling special sessions until this bill was enacted, and so finally it was. It became enacted as HB 2, and as soon as it passed, we knew we would have to challenge it because of the devastating impact it was going to have on abortion care access in Texas, but we weren't sure at the outset whether we would be successful or not.

Whole Woman's Health stepped up and indicated that it would like to serve as lead plaintiff in the case. It's a burdensome role to take on, but they were very eager to do it. Amy Hagstrom Miller and her team at Whole Woman's Health had operated in Texas for a long time, and I think they had just had enough of all of these restrictive laws and, year after year, the state layering some new burden onto their patients, so they said, "We absolutely want to challenge this."

There was an initial lawsuit to HB 2 that focused on the admitting privileges requirement and some restrictions on medication abortion. That suit was successful at the trial court level, and it was brought before any of these requirements took effect. The trial court blocked them from taking effect, but then its decision was reversed by the Fifth Circuit Court of Appeals, which said that it wasn't convinced that the laws would actually have a harmful impact on abortion access. Once that admitting privileges requirement took effect, more than half of the clinics in the state were forced to close.

After so many of the clinics had closed as a result of the admitting privileges requirement, we were then facing the ambulatory surgery center requirement, which was set to take effect. These provisions had staggered effective dates, so the admitting privileges requirement took effect first, and then the ASC requirement almost a year later was scheduled to take effect, and we knew once that one took effect, it would close almost all of the remaining clinics, leaving only a handful for the second largest state in the country. We knew that we would have to file another suit.

This was a really intensive litigation. Almost every stage of the proceeding ...not almost. Every stage of the proceeding had an expedited schedule. We filed the case in April, and it went to trial in August. In between, we did extensive discovery. We took and defended over three dozen depositions. It was a really intensive, grueling schedule. I spent the whole summer on the road, driving around Texas, flying to California, any place that we had witnesses, or the state had witnesses. It was an incredibly moving experience, working on this case and meeting with and talking with all of the people who would be affected by these laws.

Jenn Stanley: We've covered HB 2 quite a bit on this show. If you remember back to season one, Candice and Valerie both had to travel out of state to get abortions because of the restrictions put in place by this law, but perhaps the people most hurt by it were those living in the Rio Grande Valley.

Stephanie Toti: For people not familiar with Texas geography, the Rio Grande Valley is along Texas' southern border with Mexico. It's a very rural region. There is not a lot of infrastructure, dirt roads and that kind of thing. There's not great transportation down there, very little public transportation. It's isolated from other parts of Texas, and people who live in that community face a lot of barriers to accessing health care, and the laws that we were challenging, rather than trying to make the situation better for people in that community but rather them giving them more options and improving their access, it was going to make things much worse.

The abortion restrictions in HB 2 were layered on top of another set of restrictions, which had been put in place in the prior legislative session, that reduced access to family planning services in that community and in other parts of the state. People there were just facing a ton of obstacles, but these were women who, although the state was trying to limit their rights and take away their access to these services, these women were not victims. They were powerful, and they really wanted to be able to speak up and speak for themselves and tell their stories.

Jenn Stanley: Stephanie and her team were working exclusively on *Whole Woman's Health v. Hellerstedt* with little work-life balance, but it was paying off. It seemed like the case was going to make it all the way to the Supreme Court.

Stephanie Toti: I remember the court granted cert on a Friday in November, and it was Friday, the 13th. I got a call from the clerk's office at the Supreme Court to let me know that the court was going to take the case, and I remember the clerk said, "So, I have

some good news, and I have some bad news." I was on such pins and needles. I'm like, "Oh, god. What's this?" She's like, "The good news is the court has granted your petition for certiorari." And I'm like, "That's great." She's like, "The bad news is they've given you an expedited schedule." I was like, "Oh, that's fine. That's fine."

She's like, "So, your brief is going to be due December 28th in the court. Because it's expedited, it won't entertain any applications for an extension." I'm like, "Oh, that's fine. That's fine," and then I hung up. I was so excited. I'm like, "They granted cert," and everybody is cheering. We're letting the clients know, and then it starts to sink in that, "Oh, this brief is due December 28th. That's like three days after Christmas. First of all, that's only next month. Okay. So, everyone will just celebrate the holidays here in the office. It'll be fine. We'll get menorah. We'll get a tree. It'll be great."

Everyone was really great, and we all worked together through Thanksgiving and the winter holidays, and we got our briefs in, but it was a really exciting day when the court said it would take the case. Our clients and our witnesses in Texas were especially excited, and that's what it's all about. It's about the impact that this work is going to have on people who are affected by these laws.

Jenn Stanley: Although the Supreme Court is now more diverse than it's ever been, the elite group of lawyers who argue in front of it are not. According to a 2014 Reuters investigation, of the 66 top lawyers who frequently argued in front of the Supreme Court in the last decade, only eight were women, and Stephanie said that it seemed as though her gender led the opposing counsel to underestimate and disrespect her at times.

Stephanie Toti: There were definitely times when the lawyers representing the state did not always take me seriously or did not treat me as lead attorney for the plaintiffs, I think in part because I'm a woman, and I had a co-counsel who was male and is from a big law firm, was a partner at the law firm, and throughout the trial court proceedings, opposing counsel would always reach out to him whenever they had a question or needed a decision, from important matters to very mundane things like, "Can we get a two-day extension on our responses to whatever?" Those were typically inquiries that you would address to the lead counsel, and they would always address those inquiries to my co-counsel, and he would always refer them to me. That kind of thing happens, and I guess being a woman in this field, I'm sensitive to it, and I'm aware of it, but it doesn't affect the way that I conduct myself.

Jenn Stanley: For the months leading up to the trial date, Stephanie spent almost every waking hour focusing on the Supreme Court and her upcoming case.

Stephanie Toti: I had listened to dozens of prior Supreme Court cases. The audio from all Supreme Court arguments is archived and available online, and so I downloaded it all and listened to them like they were podcasts. I would listen to this audio ... We were working all the time, trying to write the briefs. I would listen to the audio when I was on the subway or when I was at the gym or when I was at the grocery store. It was also kind of intense because it was just SCOTUS all the time. Whenever I was

awake, it was either writing briefs or listening to audio, but it did really help me get prepared for the experience and to develop a comfort level with being in the courtroom, because listening to all of those prior arguments made me feel like I was there. Just getting to feel very familiar with the court helped with the nerves, but still, when I showed up on the day for the Whole Woman's Health argument, I was very nervous.

The Supreme Court usually hears its first argument at 9:00 AM. There can be as many as four arguments in a day, so sometimes there's two before lunch and two after, but on this day, the Whole Woman's Health case was the only argument that was set. It was set for 9:00 in the morning. I think I got to the courthouse around 8:00 AM and was astonished to see the size of the crowd that was already there. I mean, there were thousands of people in front of the courthouse. Most of them came to show their support for reproductive rights and justice, but it was just amazing to see all of the people and the banners and then to walk through all those people to find my way into the courthouse.

Then there's a lot of procedural things you need to do. You show up, and you're super nervous, but they're like, "Yeah. You have to stand on this line, and then you have to sign this form, and then you have to check in over there." So then I was focused on just doing all the logistical things that needed to be done, and then finally somebody shows you into the courtroom, and you're like, "Oh, wow. This is for real. This is really going to happen today."

Chief Justice: We'll hear argument this morning, case 15-274, Whole Woman's Health v. Hellerstedt. Ms. Toti?

Stephanie Toti: Mr. Chief Justice and may it please the court, the Texas requirements undermine the careful balance struck in Casey between states' legitimate interests in regulating abortion and women's fundamental liberty to make personal decisions about their pregnancies.

Supreme Court arguments typically last an hour. Each side has 30 minutes. I was sharing my side with the US Solicitor General. That's the person who argues in the Supreme Court on behalf of the federal government. In this case, it was still the Obama administration in the White House, and Don Verrilli was the Solicitor General. I had 20 minutes for argument, and he had 10. We were splitting the 30 minutes for the plaintiffs, but once I got up there and started arguing, as I was coming to the end of my time, I told the court that I wanted to reserve five minutes for rebuttal, which is pretty standard. As I started to walk back to my seat, Justice Ginsburg says, "Excuse me. Excuse me," and I thought, "Oh, Justice Ginsburg has another question. I better go back to the podium," so I walk back.

J. Ginsburg: ... so much of your time with the threshold questions, perhaps you can ... Can she have some time to address the merits?

Chief Justice: Why don't you take an extra five minutes, and we'll be sure to afford you rebuttal time after that?

Stephanie Toti: Thank you, Mr. Chief Justice.

That was incredibly exciting, that Justice Ginsburg got me some more time. The Chief Justice said yes, and then the argument continued. Chief Justice Roberts had said I could have another five minutes. Then, when the Texas attorney came up to argue, the court gave him more time, so it would be balanced. The argument went for almost an hour and a half that day.

... it would have made them generally applicable. All outpatient surgical providers would have to have admitting privileges or practice in an ASC, but that's not the case. Texas law expressly authorizes other surgical procedures, including those performed under general anesthesia, which early abortion is not, to be performed in a physician's office. Even other physicians that operate as an ASC aren't required to have admitting privileges. The facilities merely require to have a transfer agreement. These regulations target one of the safest procedures that a patient can have in an outpatient setting for the most onerous regulations.

Chief Justice: Thank you, counsel. Case is submitted.

Stephanie Toti: It was an amazing experience, to be arguing at the Supreme Court in general, and it was especially great to be able to look up at the bench and to see so many strong, female justices up there. Those justices had overcome so many obstacles in their own careers to make it to that position, and it really is inspiring. It was amazing just to be there in that setting. It was the first time in our history when there's been so many women on that bench, so it was great to be a part of that.

But coming out of the courthouse after the argument ... and you enter the courthouse on the ground level, but then you exit at the top of the stairs, and you walk down the stairs, and it's very dramatic. As I came out, I could see this sea of people, and they started chanting my name. It was such a surreal experience, really. I was just overwhelmed with emotion. It was amazing.

Jenn Stanley: In June of 2016, the Supreme Court ruled 5-3 in favor of Whole Woman's Health, saying that Texas cannot place restrictions on abortion care that create an undue burden for the people seeking abortions. Soon after, Stephanie left The Center for Reproductive Rights to assemble her own team of lawyers who could fill in the gaps in the current reproductive rights legal landscape. They're called The Lawyering Project, and they launch this fall.

Choice/Less is produced by me, Jenn Stanley, for Rewire Radio, with editorial oversight by Marc Faletti, our director of multimedia and executive producer. Jodi Jacobson is our editor in chief. Brady Swenson is our director of technology. Music for this episode is by Doug Helsel. Thank you to all the staff at Rewire, especially Rachel Perrone, Lauryn Gutierrez, and Stacey Burns, our communications and social media team, for getting the word out about Choice/Less.

For the next two weeks, I'll be working with guest producer Patrisse Cullors, co-

founder of Black Lives Matter and senior fellow at the non-profit MomsRising, on stories about birth justice in the age of Trump, so be sure to check that out. Thanks for listening.