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COMMENTARY

Roe v. Wade:
Our Struggle Continues

Nancy Stearns†

In April, 1989, the Supreme Court heard oral arguments about the constitutionality of a 1986 Missouri statute intended to limit access to abortions.¹ Drafted with the assistance of the state's National Right to Life Committee affiliate, this law restricts the use of public funds, employees, and facilities to "encourage or counsel" women to have abortions; places obstacles to abortions after 16 weeks of pregnancy; and defines conception as the beginning of human life.² In its appeal of the U.S. district court decision striking down these provisions, Missouri has urged the Court to overrule or radically modify Roe v. Wade.³

Twice in the past six years, the Supreme Court has been asked to reexamine and overrule Roe.⁴ The Court's last major abortion ruling was decided by a narrow 5-4 margin. The Court has since lost Justice Powell, three years ago, and now the Court is divided on these issues.⁵

† Nancy Stearns was Staff Attorney at the Center for Constitutional Rights in New York City and is currently Assistant Attorney General, State of New York, Environmental Protection Bureau and Adjunct Professor of Law, Rutgers Law School. Prior to law school, she worked for the Student Nonviolent Coordinating Committee (SNCC) in Atlanta, Georgia (1963-1964). This Commentary is written in gratitude to the thousands of women who have joined together to fight against restrictive abortion laws. The views expressed in this Commentary are those of the author and do not necessarily represent those of Attorney General Robert Abrams or the New York State Department of Law.

¹ Reproductive Health Serv. v. Webster, 851 F.2d 1071 (8th Cir. 1988); probable jurisdiction noted, 57 U.S.L.W. 3451 (U.S. Jan. 10, 1989) (No. 88-605). Webster was argued before the United States Supreme Court on April 26, 1989 at 10:00 a.m. A decision in Webster is likely by early July.

² Webster, 851 F.2d at 1073-74, 1075, 1077; see also N.Y. Times, Jan. 10, 1989, at B5, col. 1.

³ 410 U.S. 113 (1973). The Court has been asked to reconsider Roe's "trimester approach for selecting test by which state regulation of abortion services is reviewed" and to discard that test "in favor of [a] rational basis test." Webster v. Reproductive Health Servs., 57 U.S.L.W. 3451 (U.S. Jan. 10, 1989) (No. 88-605). The Solicitor General, in his supporting brief urging the Court to hear Webster, argued that the Webster case "presents an appropriate opportunity" to overrule Roe v. Wade. N.Y. Times, Nov. 11, 1988, at A20, col. 1.

one of the justices in the majority. While the Court could decide most of the issues presented in Webster in Missouri's favor without specifically overturning Roe, the likely outcome of this case is unclear.\(^5\) It is clear, however, that women need to fight to retain our right to abortion.

In 1969, as a lawyer for the Center for Constitutional Rights, Nancy Stearns was part of the courtroom struggle to protect women's abortion rights. A look back into the history of those early battles can teach us much about how we should fight for abortion rights today.

When 350 women represented by five women lawyers went to court to challenge New York state's criminal abortion laws, their presence in the courtroom startled male judges and lawyers alike.\(^6\) Until that time, courts had only considered whether abortion laws violated the rights of those performing abortions, not whether they violated the rights of women denied abortions.\(^7\) Furthermore, they were not accustomed to dealing with teams of women lawyers who were directly raising their own constitutional rights. These women sought to define abortion as a women's issue.

The initial idea to wage the struggle for abortion rights in the New York courts came from the Women's Health Collective, a group of women who saw the courts as an effective arena to wage a political as well as legal battle in support of women's reproductive rights. They believed overwhelmingly that laws prohibiting abortion violated their constitutional rights.

Regardless of the outcome, the lawsuit provided the Women's Health Collective with a framework within which to organize women, and to educate them about how the health care system oppressed women. The unavailability of safe and legal abortion was the most glaring exam-

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\(^5\) Indeed, Justice O'Connor, who may be the swing vote in \textit{Webster}, has previously indicated that she believes that the trimester approach in \textit{Roe} should be rejected and replaced with the notion that a state has an interest in human life throughout pregnancy and that states can regulate abortions so long as those regulations are not "unduly burdensome." \textit{Akron} at 453-66 (1983) (O'Connor, J., dissenting).


\(^7\) Under most state laws, the person performing the abortion was the one subject to legal sanction. \textit{See}, e.g., \textit{Roe v. Wade}, 410 U.S. 113, 118 n.2 (1973) (listing the many state statutes which subject one who administers abortions to a criminal penalty). Occasionally, however, women who obtained illegal abortions were prosecuted. In Florida, for example, a young woman was indicted after she went to the hospital to be treated for complications resulting from an illegal abortion. \textit{State v. Wheeler}, No. 1400 (Felony Court Records, appeal filed Nov. 1971) renumbered 41.708 (indictment dismissed after Florida statute held unconstitutional in \textit{State v. Barquet}, 265 So.2d 431 (Fla. 1972)), \textit{cited in P. Vergata, C. Buss, B. Schain, D. Greenfield, Abortion Cases in the United States, 1 WOMEN'S RIGHTS LAW REPORTER, No. 2, 50-55 (Spring 1972)}.}
ple of the woeful inadequacies of the medical system, our lack of power when facing that system, and our lack of control over the most fundamental aspect of our lives.

To organize the lawsuit, the Women's Health Collective held meetings throughout New York City. At these meetings, members of the collective provided information about the medical and legal aspects of abortion and the politics of health care. Women who came to these meetings shared their own experience with doctors and with the problem of unwanted pregnancies. An overwhelming number of these women agreed to participate in the challenge to New York state's criminal abortion laws. The diverse histories of the 350 women who ultimately joined the challenge included women who had had abortions in the past; women who had been forced to endure nine months of pregnancy and then give up their children for adoption; and others who lived in fear of an accidental and unwanted pregnancy and the attendant anguish and disruption of their lives that they would suffer.

The courtroom became a focal point of political action. At the first hearing, women crowded the courtroom, carrying babies and holding coat hangers. At the close of the hearing, the women and babies left, leaving coat hangers strewn about the room as a symbol of the instruments of illegal abortion and their brutal impact on women's lives.

The lawsuit brought by the New York women never resulted in a judicial decision because, in early 1970, the New York state legislature amended the law to make abortion legal during the first twenty-four weeks of pregnancy. Even after the abortion law was changed, political activity continued. Before the new law took effect, thousands of New York women marched to Union Square, participants in what may have been the largest demonstration to date of women calling for safe and legal abortion. On August 26th of that year, in a nationally publicized demonstration, twenty thousand women marched down Fifth Avenue in

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8 Our "kinder, gentler" President, who extols the virtues of adoption rather than abortion, is apparently unconcerned with the anguish experienced by women who are forced to give up total control of their bodies for nine months to give birth to children they cannot raise. One of the women who testified in the New York case described the trauma of going through a pregnancy and then relinquishing her child for adoption:

What we were really doing was producing babies for this home to market. They counseled all the white girls to give their babies up for adoption and counseled Black girls to keep their babies, because there was no market for Black babies. The kind of trauma of giving a baby up for adoption leaves you with the feeling of... a mother who had abandoned [her] child. I was just breeding babies for someone else to take rather than think of myself as a mother who abandoned her baby. But the guilt. For months after I left the home, I'd wake up in the nights crying and sort of rocking my pillow.


9 N.Y. Times, April 11, 1970, at I, col. 1. The law was amended to permit licensed physicians to provide abortions to consenting women less than 24 weeks pregnant. After 24 weeks, abortion is legal only to save the life of the woman. N.Y. Penal Law § 25.05(3) (McKinney 1987).

support of women’s rights. Although not the only issue, safe and legal abortion was a focus of that demonstration as well. The new law took effect on July 1, 1970. Still, many women involved in the New York lawsuit continued their political work for the right to abortion as health advocates for women who flooded New York’s hospitals and newly formed clinics seeking abortions.

Women in other states followed the example set by New York’s legal-political strategy for change and organized lawsuits in which hundreds of women, rather than one or two women with “perfect facts,” were plaintiffs. Some courts refused to accept that women who were not pregnant had legal standing to challenge restrictive abortion laws. Still, it was important that hundreds of women joined the lawsuits, both as a personal-political statement for each of the women involved, and because of the need to educate an almost exclusively white and male judiciary about the fundamental importance to all women of the right to abortion. This strategy became a crucial part of the groundswell of challenges to restrictive abortion statutes throughout the country between 1969 and 1973, when the Supreme Court issued its ruling in Roe v. Wade.

In New Jersey, approximately 600 women plaintiffs adopted the strategy developed by New York women and challenged their state law in federal court. In Connecticut and Pennsylvania, 1000 women brought similar lawsuits. Teams of women lawyers represented the plaintiffs in all these cases. Women in Massachusetts, Rhode Island, and Tennessee also joined together to challenge their respective state laws. Women’s real life experience became an integral part of each court case. They came to tell the stories of their lives, stories traditionally kept secret. It took great courage to tell those stories before male judges and

11 Id. at 39.
13 This surge in hospital and clinic abortions reflects both the influx of out-of-state women to New York, and the fact that the number of abortions previously clandestinely obtained were instead obtained under safe, legal medical conditions. In the first two years that abortion was legal in New York, nearly two-thirds of the 400,000 abortions performed in New York City were performed on non-resident women. J. Pakter, D. O’Hare, F. Nelson, M. Svigir, Two Years Experience in New York City With the Liberalized Abortion Law — Progress and Problems, 63 AMERICAN JOURNAL OF PUBLIC HEALTH 524, 534 (1973). Approximately 70,000 New Yorkers obtained illegal abortions in New York every year prior to its legalization in 1970. Reported abortions rose by only 30% in the years following legalization. The Alan Guttmacher Institute, SAFE AND LEGAL: 10 YEARS EXPERIENCE WITH LEGAL ABORTION IN NEW YORK STATE 17, 23 (1980).
15 410 U.S. 113 (1973). By 1972, the abortion laws of at least 30 states and the District of Columbia had been challenged, either in the context of affirmative actions brought by women plaintiffs or in the context of criminal cases against persons performing abortions, or referring women for abortions. P. Vergata, C. Buss, B. Schain, D. Greenfield, supra note 7, at 50-55.
16 Although they did not involve the massive numbers of plaintiffs in the New York case, the complaints in both Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973) were modelled on the New York complaint and raised the legal arguments developed in that case.
17 Many of these women told their stories for the first time at an abortion speak-out held in New
lawyers, particularly before the hostile male lawyers representing the anti-abortion forces.

Many judges simply refused to hear these women speak. In the New York case, the three judge court assigned to the case quickly ruled that all testimony would be by way of deposition (for which they most certainly would not be present). In Rhode Island, when the women's testimony began, only one of the judges assigned to the case remained in the courtroom; the other two got up and left. In Connecticut, however, the entire panel heard the testimony of the women plaintiffs, who chronicled the many ways in which back alley abortions, or unwanted children, had disrupted and damaged their lives and plans. The influence of the Connecticut women's testimony on the Connecticut court is clear. Ruling that the Connecticut abortion law violated the right to liberty as well as the privacy of women, the court began by recognizing that

[t]he decision to carry and bear a child has extraordinary ramifications for a woman. Pregnancy entails profound physical changes. Childbirth presents some danger to life and health. Bearing and raising a child demands difficult psychological and social adjustments. The working or student mother frequently must curtail or end her employment or educational opportunities. The mother with an unwanted child may find that it overtaxes her and her family’s financial or emotional resources. The unmarried mother will suffer the stigma of having an illegitimate child. Thus, determining whether or not to bear a child is of fundamental importance to a woman.  

One year later, the Supreme Court held in Roe v. Wade that the Texas abortion statute violated women’s rights of privacy and personal liberty. Justice Blackmun’s description of the physical and emotional harm to women of an unwanted pregnancy, the stigma of an out-of-wedlock pregnancy, and the problems associated with bearing an unwanted child bears a striking resemblance to the language used by the Connecticut court. Our decision to influence the law by dramatizing women’s experiences with abortion appeared to have been successful.

Why recall this history of twenty years ago? We must never forget that Roe v. Wade did not just “happen.” That decision came only after the short but intense political and legal efforts of women across the country. The United States Supreme Court does not decide cases in a political vacuum, regardless of what might be taught in law school. Supreme Court justices, like other judges, and for that matter, legislators, read the newspapers, listen to the radio, watch TV and are aware of burning

York by the feminist group, Redstockings. See also Redstockings Manifesto in Sisterhood is Powerful: An Anthology of Writings from the Women’s Liberation Movement 533 (R. Morgan, ed. 1970).

20 Id. at 153.
social issues. Their decisions often reflect what at least appears to be the popular consensus about such issues. The pro-choice movement before Roe successfully influenced public opinion—and the courts—in a way it has failed to do since that time. Since 1973, when we won the right to abortion, our voices, crying out for the right most crucial to our self-determination, have not dominated the public debate about abortion.

Too many of us thought we had won the fight with Roe v. Wade and went on to other issues, or just went home. Those issues—sterilization abuse, the ERA, equal employment opportunities, child care, rape, sexual harassment—matter enormously to women, and I do not mean to suggest that the work around them should not have been done. I do, however, believe that we should not have so sharply curtailed our political activities in support of the right to abortion.

After Roe, anti-abortion forces chipped away at abortion rights by means of state statutes creating impediments to abortion. Despite excellent legal work and some victories in cases striking down state-level restrictions on the availability of abortion, the suits no longer seemed to be part of a movement.

In the late seventies, however, when Medicaid coverage for poor women's abortions was threatened, some women did resume political activity. The Committee for Abortion Rights and Against Sterilization

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21 Of course, they are sometimes ahead of the majority as was the Warren Court in deciding Brown v. Board of Education, 349 U.S. 294 (1955). That sort of ruling, however, may be the exception rather than the rule.

22 See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Pennsylvania law detailing the prerequisites for abortion including physician reporting of woman's marital status and informing woman of detrimental psychological effects of abortion); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (city ordinance requiring, among other things, that all abortions after the third trimester be performed in a hospital and mandating a 24 hour waiting period for an abortion after a woman has signed a consent form); Simopoulos v. Virginia, 462 U.S. 506 (1983) (Virginia law requiring that all abortions after the first trimester be performed in licensed outpatient clinics); H.L. v. Matheson, 450 U.S. 398 (1981) (Utah statute requiring physicians to notify the parents or guardians of minors who are going to have abortions); Harris v. McRae, 448 U.S. 297 (1980) (due process and first amendment challenges to Hyde Amendment. No requirement for states participating in Medicaid program to pay for medically necessary abortions for which federal reimbursement is unavailable under Hyde Amendment); Bellotti v. Baird, 443 U.S. 622 (1979) (Massachusetts statute requiring parental consent before a minor can obtain an abortion); Colautti v. Franklin, 439 U.S. 379 (1979) (Pennsylvania law mandating that every person performing an abortion must first determine whether the fetus is viable and, if it is, exercise care to preserve the fetus); Maher v. Roe, 432 U.S. 464 (1977) (Connecticut regulation limiting Medicaid benefits for abortions to "medically necessary" abortions); Beal v. Doe, 432 U.S. 438 (1977) (only abortions certified by physicians as medically necessary covered by Medicaid in Pennsylvania); Carey v. Population Services, Int'l, 431 U.S. 688 (1977) (New York law limiting the sale and display of contraceptives); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (Missouri law requiring, among other things, the written consent of the spouse of a woman seeking an abortion, and physicians' efforts to preserve the fetus' life and health. The Supreme Court upheld provisions of the Missouri law requiring written consent of women to first trimester abortions, and defining viability as the stage of fetal development when life of an unborn child may be continued indefinitely outside the womb by natural or artificial life support systems; and struck down spousal consent, parental consent, and proscription of saline abortion.); Connecticut v. Menillo, 423 U.S. 9 (1975) (Connecticut statute criminalizing "any person's attempt" at performing an abortion).
Abuse (CARASA) and the Reproductive Rights National Network were formed. Abortion rights weeks were conducted and demonstrations were held in various parts of the country including demonstrations at the Right to Life convention. Church women actively fought to defeat the Hyde Amendment riders to the yearly appropriation bills and hundreds of clergy signed a call to concern. However, even the national fight against the Hyde Amendment did not have the same degree of energy and cohesiveness as the challenges to criminal abortion laws only six or seven years earlier. In August 1977, the Hyde Amendment became law, and the federal government stopped funding Medicaid abortions except where a woman's life was in danger. In 1980, the Supreme Court rejected our challenges to the Hyde Amendment. However, although we lost the battle for federal Medicaid funding, our efforts played a crucial role in saving state Medicaid funding. It is crucial for us to realize that the Hyde Amendment fight concentrated on the right of poor women, many of whom are women of color, to have access to abortions. Too many of us failed to recognize that if one of us is denied the right to abortion, we all lose that right.

When we took on other issues and let abortion recede into the background, we sorely underestimated the determination, the political savvy, and the financial backing of the anti-abortion forces. Because of our lack of continued consistent political activity, since 1973, conservative men (and some women as well) have been the most visible and vocal participants in the abortion controversy. They seek to impose on us their religious beliefs about the fetus, to take away our self-determination and send us back to a world of which many of you who read this commentary fails to recognize that if one of us is denied the right to abortion, we all lose that right.

Two months after the passage of the Hyde Amendment, Rosie Jiminez, a 27-year-old college student and the mother of a four-year-old daughter, became the first reported Hyde Amendment casualty. She died from an infection caused by a backstreet abortion. The Abortion Surveillance Branch of the Center for Disease Control in Atlanta confirmed this as the first abortion-related death since February 2, 1976: "Not all states have discontinued public funding of abortions but... Texas withdrew financial support for abortions after federal support was withdrawn on August 4." "Rosie Jiminez: Don't Mourn, Organize." Reproductive Rights Newsletter, November, 1982, vol. 4, no. 3, at 14.


24 Harris v. McRae, 448 U.S. 297 (1980).


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have no personal memory—a world where we and our sisters desperately tried to self-abort with coat hangers, catheters, and other “home remedies”; where we stood on street corners waiting to be picked up, blindfolded and driven to the apartment of an illegal abortionist; where, if we were lucky and could borrow the money, we left the country in search of what we hoped would be a safe abortion, or tried to convince two psychiatrists that we would kill ourselves if forced to go through the pregnancy, in order to obtain a legal “psychiatric” abortion.

It is those well-financed anti-abortion forces that send busloads of demonstrators to Washington each year on the anniversary of Roe v. Wade to demonstrate outside of the United States Supreme Court, not us. It is those same forces that have created what Justice Marshall has described as the “extraordinary pressure” causing public officials to “cower” before “well-financed and carefully orchestrated lobbying campaigns” to place restrictions on the right to abortion.

Most recently, Operation Rescue, an activist anti-abortion group, has tried to conceal itself in the mantle of the civil rights movement through pickets and civil disobedience. Yet, as former Georgia State Assemblyman and civil rights activist Julian Bond has said:

Operation Rescue, you are no civil rights movement. . . .

The civil rights movement wanted to extend constitutional rights to all Americans. Operation Rescue wants to deny those rights to one class of citizens: women.

The civil rights demonstrators faced taunts and threats. Today’s antiabortionists taunt and threaten those who brave their picket lines. The civil rights movement fought for the right to cast a vote. The antiabortionists want to cast women’s votes for them.

The hue and cry raised by the anti-abortion forces has been a critical factor in shaping the current abortion debate. Through their alliance with the right in this country, anti-abortionists have helped elect two presidents, appoint countless federal judges and a solicitor general, who has asked the United States Supreme Court to reconsider Roe v. Wade in Webster v. Reproductive Health Services, which was heard by the court on April 26, 1989. Nonetheless, those supporting the right to choose remain the majority. Our voices must once again dominate the debate. If not, we may face a future many of us have long considered unthinkable.

27 In contrast, until this year when we are literally fighting for our lives, we had only one major national demonstration in support of the right to abortion organized by the National Organization for Women and one national speak-out organized by the National Abortion Rights Action League.
31 See supra, note 1.
We can reclaim that debate. Since January, when the Court announced it was going to hear Webster, we have resumed our political efforts of the early seventies. This time, however, we must be sure that our voices truly represent all women, and not primarily the white, middle-class women who played a dominant role in the fight twenty years ago. Although all women will suffer if we lose the right to abortion, low-income women, a disproportionate share of whom are women of color, will—and already—suffer the most. As Justice Marshall feared, “The effect will be to relegate millions of people to lives of poverty and despair.”

When you read this article, there will not be much time left in which to make our voices heard by the United States Supreme Court before they rule in Webster. Each remaining day is crucial.

We must form coalitions with minority and working class groups. We must continue to hold demonstrations, circulate petitions, write articles, speak out on radio and TV. We must write letters to our state and federal representatives, and urge pro-choice legislators in particular to speak out against overruling Roe and to support legislation that protects the right to abortion. We also need to organize legal observers and escorts to defend abortion clinics against the violent attacks of Operation Rescue.

Should we lose Webster, we must continue the fight in state legislatures. Over the past twenty years anti-abortion forces have successfully utilized a small swing vote to get their minority position enacted into law. Those same politicians who cowered before the anti-abortion forces must see that we are far greater in number than those who oppose us. They must be told that even if they make them illegal, they cannot stop abortions, they can only make them dangerous; they cannot “save” fetuses, they can only sacrifice women.

The right to abortion is fundamental to every woman’s life. Throughout history we have sought and obtained abortions even at risk to our own lives. If those legislators do vote to turn the clock back, to send us back to the butchers and back-alley abortionists, we will replace them and then we will go on to fight in the state courts. It would not be the first time that state courts interpret their state constitutions more expansively than the United States Supreme Court reads the U.S. Constitution.

33 For example over thirty amicus briefs were filed on behalf of Reproductive Health Services; and on April 9, 1989, nearly half a million women marched in Washington, D.C. in support of women’s right to abortion. N.Y. Times, Apr. 10, 1989, at 1, col. 4.
35 You can reach your federal representatives through the following addresses:
   You can telephone your federal representatives at (202) 224-3121.
36 For example, in 1976, the Supreme Court ruled that discrimination on the basis of pregnancy
Even if we win *Webster*, and the Court does not disturb *Roe v. Wade*, this time we must not make the mistake we made in 1973, and take our abortion right for granted. If we are to succeed, if we are to keep this crucial right, each one of us must participate in the fight. Any of the organizations listed below will welcome you with open arms. We all have much work to do — and we can’t wait.

**PRO-CHOICE ORGANIZATIONS**

The Alan Guttmacher Institute  
11 Fifth Avenue  
New York, NY 10003  
(212) 254-5656

American Civil Liberties Union Reproductive Freedom Project  
132 West 43rd Street  
New York, NY 10036  
(212) 944-9800

California Pro-Choice Hotline  
1-800-952-5678

Catholics for Free Choice  
1436 U Street NW  
Suite 301  
Washington, DC 20009-3916  
(202) 638-1706

Committee to Defend Reproductive Rights  
2845 24th Street  
San Francisco, CA 94110  
(415) 826-2100

Men Who Care About Women's Lives  
c/o Feminist Men's Alliance  
71 Ashton Avenue  
San Francisco, CA 94112  
(415) 337-2061

National Abortion Federation  
900 Pennsylvania Avenue SE  
Washington, DC 20003  
(202) 546-9060

National Abortion Rights Action League  
1101 Fourteenth Street NW  
Washington, DC 20002  
(202) 371-0779

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National Black Women's Health Project
1237 Gordon Street
Atlanta, GA 30310
(404) 753-0916

National Organization for Women
Legal Defense and Education Fund
99 Hudson Street
New York, NY 10013
(202) 925-6635

National Organization for Women
1000 16th Street NW
Suite 700
Washington, DC 20036
(202) 331-0066

National Women's Health Network
1325 G Street NW
Washington, DC 20005
(202) 347-1140

Planned Parenthood Federation of America
810 Seventh Avenue
New York, NY 10019
(212) 777-2002

Religious Coalition for Abortion Rights
100 Maryland Avenue NE
Washington, DC 20002
(202) 543-7032

Voters for Choice
2000 P Street NW
Suite 515
Washington, DC 20036
(202) 822-6640