

High Court Strikes Down 'Partial-Birth' Ban, Upholds Protections for Clinic Clients

By a razor-thin majority of 5–4, the U.S. Supreme Court on June 28 declared unconstitutional Nebraska's law criminalizing so-called partial-birth abortion. The breadth of the ruling in *Stenberg v. Carhart* immediately calls into question the laws of most, if not all, of the other 30 states that have enacted "partial-birth" abortion bans, most of which have been struck down by lower courts over the last several years.

Writing for the majority, and agreeing with the large majority of lower courts that have examined the issue, Justice Stephen G. Breyer ruled that the Nebraska statute was invalid for two reasons: It was overly broad, and it did not include an exception to protect the woman's health.

The state argued that the law was meant to ban only the controversial and infrequently used "dilation and extraction" (D&X) procedure. However, Breyer said "its language makes clear that it also covers a much broader category of procedures," including the more commonly used "dilation and evacuation" (D&E) procedure, which is often performed during the second trimester of pregnancy well before the point of fetal viability.

Of equal if not greater significance in abortion jurisprudence was the majority's conclusion that the Nebraska law was unconstitutional because it lacked an exception to the ban to protect the woman's health. Since its landmark abortion ruling in *Roe v. Wade* in 1973, the Court has consistently said that states may not impose restrictions on abortion, even after fetal viability, that do not make allowances for procedures necessary to protect a woman's health. Because it "lacks the requisite exception" to permit abortions when the woman's health

is endangered, the Nebraska law failed this test crucial test, Breyer declared. Citing a substantial body of medical opinion that the D&X procedure may sometimes be the safest option available to a physician in a particular case, Breyer said that a state "may promote but not endanger a woman's health when it regulates the methods of abortion."

Voting in the majority with Breyer were Justices Ruth Bader Ginsburg, Sandra Day O'Connor, David H. Souter and John Paul Stevens. Chief Justice William H. Rehnquist and Justices Anthony M. Kennedy, Antonin Scalia and Clarence Thomas dissented.

The ruling was immediately hailed by supporters of abortion rights, many of whom noted that, in particular, the Court's rationale vindicates President William J. Clinton, who has twice vetoed measures passed by Congress precisely because they did not "allow women to protect themselves from serious threats to their health."

According to Catherine Weiss of the American Civil Liberties Union, the Court's action signals to lawmakers at both the federal and the state levels that "doctors, not legislators, should be making medical decisions."

Despite the Court's sweeping language and reasoning, however, the day was one for both "champagne and shivers," according to Janet Benshoof of the Center for Reproductive Law and Policy, which represented the Nebraska physician who challenged that state's law. The shivers were occasioned, Benshoof said, by the narrow margin of the vote, only months before a presidential election that likely will determine the Court's posture on abortion-related matters for years to come. In addition, O'Connor, who provided the swing vote needed to

invalidate the Nebraska law, indicated that if she were reviewing a law that were more narrowly drawn and included an exception for the health of the woman, "the question presented would be quite different than the one we face today."

Balancing Privacy and Protest

Also on June 28, the Court in *Hill v. Colorado* upheld a Colorado statute creating an eight-foot "bubble zone" around individuals near a health care facility. Specifically, the 1993 law makes it a crime, within 100 feet of a health care facility's entrance, for anyone to approach within eight feet of a clinic visitor, unless given permission to do so, in order to distribute leaflets, display signs or engage in oral protest, education or counseling. Rep. Diana DeGette (D-CO), who had written the Colorado law when she was in the state legislature, said that the law was written "to protect First Amendment rights [to free speech] as well as the patient's right to get into a clinic without being harassed." The Court, in an opinion written by Justice Stevens, agreed by a vote of 6–3.

According to Stevens, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." In attempting to balance these two important rights, the Court ultimately decided that the Colorado law "does not 'ban' any messages....It merely regulates the places where communications may occur" and that it "leaves ample room to communicate a message through speech." While it would not be permissible to intrude on an individual's right to free speech just because the speech may be offensive to some, Stevens concluded that this protection "does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." Justices Scalia, Thomas and Kennedy dissented from the majority's decision.

Title X 'Gag Rule' Is Formally Repealed

The Clinton administration has finally acted to formally repeal the Reagan-Bush-era Title X "gag rule," which the president suspended through executive action during his first week in office. A long-awaited final rule, published in the *Federal Register* on July 3, reaffirms and codifies Title X's long-standing policy requiring counselors in federally funded family planning clinics to provide a woman facing an unintended pregnancy with nondirective counseling on all of her options and with referrals for services upon request.

The gag rule, originally promulgated in 1988, overturned that policy by prohibiting health care professionals in Title X family planning clinics from providing any abortion-related information or referrals, even when specifically requested to do so. Counselors instead were required to give *all* pregnant women referrals for prenatal care and delivery. In addition, the gag rule required physical and financial separation of any of a clinic's privately funded abortion-related activities from its Title X project activities.

Opposed by 78 major national health organizations, 36 state health departments and the nation's 25 schools of public health, the gag rule was challenged in court on the grounds that it interfered with medical providers' ability to discuss the full range of legal medical options with patients. The Supreme Court, however, voted 5-4 in *Rust v. Sullivan* in 1991 to uphold the rule as a permissible exercise of executive power. Shortly thereafter, by large margins in both the House and the Senate, Congress voted to repeal the gag rule but fell just short of the two-thirds majority necessary in the House to override then-president George Bush's veto.

President William J. Clinton suspended the gag rule in January 1993 through an executive memorandum. The president directed the secretary

of health and human services to formalize this action through federal regulation. Accordingly, interim and proposed regulations were published in February 1993.

Because the gag rule was never fully implemented—due first to the various court challenges over the years and then to the publication of the interim rule—the long-awaited July 3 action is likely to have little impact on the administration of the Title X program in the short term. It does, however, codify with the force of law the mandate that pregnant women be offered neutral and factually accurate information about all of their legal medical options, including "prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination," as well as referrals for services, including abortion, upon request. Also critically important is the new rule's clarification that the financial separation of Title X activities from any non-Title X abortion services sufficiently demonstrates compliance with the law's prohibition on use of Title X funds for abortion; physical separation of abortion-related activities is not required.

CDC Finds Downward Trend in Teenage Pregnancy Continues

The nation's teenage pregnancy rate fell 8% between 1995 and 1997, continuing a trend that started in the early 1990s and has brought the rate to its lowest level in more than two decades. According to the new figures released in July by researchers at the Centers for Disease Control and Prevention (CDC), the rate decreased from 98.3 pregnancies per 1,000 women aged 15-19 in 1995 to 94.8 per 1,000 in 1996 and 90.7 per 1,000 in 1997. Statistically significant declines occurred in most states, and no state had a significant increase. CDC researchers noted that the downward trend has been attributed to "stable rates of sexual experience and activity," increased

use of condoms and increased use of long-acting hormonal methods introduced in the early 1990s. Despite the decline, the U.S. rate remained considerably higher than that of most other developed countries.

The new teen pregnancy numbers were released just one month after CDC researchers published results from the 1999 Youth Risk Behavior Survey, which asked students in grades 9-12 about a range of behaviors, including sexual behaviors that contribute to unintended pregnancy and sexually transmitted diseases. The report found that 50% of students had had sexual intercourse, including 8% before age 13, and that 16% had had four or more partners. While these rates were down significantly since the early 1990s, the proportion of students who were sexually active in the three months preceding the survey—36% in 1999—was not. And while researchers also found a drop in the use of oral contraceptives, they found that the use of condoms increased significantly between 1991 and 1999, to 58% among sexually active students at last intercourse.

Contraceptive Coverage Movement Continues in State Houses, Courts

Delaware and Rhode Island enacted measures on June 7 and July 8, respectively, requiring all state-regulated private-sector insurance plans that cover outpatient prescription drugs to cover the full range of prescription contraceptives approved by the Food and Drug Administration. The two states join 11 others that have enacted similar laws in the past three years: California, Connecticut, Georgia, Hawaii, Iowa, Maine, Maryland, Nevada, New Hampshire, North Carolina and Vermont. Like many of the other states' laws, both new statutes allow religious employers to opt out of providing contraceptive benefits ("State Contraceptive Coverage Laws: Creative Responses to Questions of 'Conscience,'" *TGR*, August 1999, page 1).

A contraceptive coverage mandate also was approved on July 11 by the Council of the District of Columbia. This measure passed without an exemption for religious employers, despite the vocal objections of the city's Catholic archdiocese. In an attempt to head off congressional action blocking the bill from going into effect, Mayor Anthony A. Williams (D) pledged to "pocket veto" it. The council is expected to rewrite the legislation with a religious exemption when it returns from recess in September.

On July 19, meanwhile, Planned Parenthood of Western Washington and Planned Parenthood Federation of America filed a lawsuit in federal court on behalf of a Seattle woman whose employer, a chain of pharmacies, does not cover contraceptives under its employee health plan. The suit, the first of its kind, asserts that the company's policy constitutes employment-based gender discrimination in violation of Title VII of the federal Civil Rights Act. Sixty organizations, led by the National Women's Law Center and including Planned Parenthood, urged the Equal Employment Opportunity Commission in June 1999 to issue a guidance supporting this same claim.

No Setbacks Suffered, Few Gains Made During Beijing Platform Review

Representatives of nearly every national government and thousands of nongovernmental organizations (NGOs) gathered for a special session of the United Nations General Assembly, known officially as "Women 2000: Gender Equality, Development and Peace for the Twenty-First Century" and informally as "Beijing +5." The weeklong session set out to evaluate what governments have done since the 1995 World Conference on Women in Beijing, when more than 180 countries endorsed a Platform for Action to empower the world's women.

Despite fears that the review process would end with a watered-down consensus on the Beijing platform, delegates in the end were able to agree to an "outcomes" document, which identifies new challenges and barriers to progress for women and outlines additional activities. At the same time, attempts to break new ground on issues of women's sexual and reproductive rights proved extremely contentious. Western and international women's groups pressed to expand the Beijing document's definitions of women's sexual rights to more clearly state, for instance,

support for safe abortions, but their efforts faced strong opposition from a group of largely Islamic and Roman Catholic countries, as well as the Vatican. While virtually no progress was made on these specific issues, the outcomes document preserves language on the human rights of women, including that women have the "right to have control over and decide freely and responsibly on matters related to their sexuality" and should be able to do so "free of coercion, discrimination and violence." The final document also recognizes the rapid progression of the HIV/AIDS pandemic and its devastating impact on women.

While delegates were meeting at the United Nations, more than 1,000 women and men participated in a full day of NGO-led workshops and performances entitled "Focus on Women's Health Around the World." During the opening keynote, U.S. Secretary of Health and Human Services Donna E. Shalala spoke of the importance of health—including reproductive health—in the broader Beijing agenda. "When women have the power to make their own choices about family planning...then, and only then, will they have the tools they need to keep themselves and their families healthy." ☉