

Supreme Court Upholds Federal Abortion Ban, Opens Door for Further Restrictions by States

In a tacit reversal of long-standing precedent, the U.S. Supreme Court on April 18 upheld the federal Partial-Birth Abortion Ban Act, even though the law lacks an exception to protect the health of the pregnant woman. Congress adopted and President Bush signed the ban into law in 2003, but it had been blocked as unconstitutional by three separate federal district court rulings, each of which was upheld by a federal appeals court. Supreme Court decisions over three decades—including the 2000 decision in *Stenberg v. Carhart* that struck down a similar Nebraska law—had made it clear that laws regulating abortion were required to include a health exception, both to protect a woman from being forced to carry to term a pregnancy that threatens her health and to prevent government from regulating abortion in such a way that forces women from a safer procedure to a riskier one. The Court’s 5-4 decision in *Gonzales v. Carhart*—its first ruling in an abortion case since Justice Sandra Day O’Connor was replaced by Samuel A. Alito Jr.—essentially overturned that precedent.

In the short term, the federal ban is unlikely to have a major impact on abortion service provision nationally. Although the law’s opponents had argued that it was so vaguely written that it could be interpreted to ban the most common abortion procedure performed throughout the second trimester (dilation and evacuation, or D&E), Justice Anthony M. Kennedy,

writing for the majority, clearly identifies a variant of that procedure, intact dilation and evacuation, or D&X, as the only one that is prohibited. Based on its last census of abortion providers in 2000, the Guttmacher Institute estimated that just 2,200 D&X procedures were performed in that year, or 0.17% of all U.S. abortions; virtually all of these procedures were performed in the late second trimester. Today in the United States, nearly 90% of abortions are performed in the first trimester (before 12 weeks’ gestation).

That said, there could be serious implications for individual patients and abortion providers. As Justice Ruth Bader Ginsburg notes in her dissent, “the safety advantages of [D&X] are marked for women with certain medical conditions, for example, uterine scarring, bleeding disorders, heart disease, or compromised immune systems.” Under the Court’s new precedent, physicians technically would be able to seek an exemption on a case-by-case basis to address such health concerns; the practicality of that option, however, is doubtful at best. Moreover, although the ruling emphasizes that a provider is subject to penalty under the law only if he or she begins an abortion with the intent of using the D&X procedure, the fear of prosecution, even if not actual conviction, may nevertheless stunt some providers’ willingness to perform even D&E abortions, especially in the late second trimester.

The longer-term implications of the Supreme Court’s decision to uphold the ban are extremely ominous. The ruling opens the door for states to enact—or reenact—restrictive abortion laws without health exceptions, with an understanding that the courts likely will uphold them. And Kennedy’s paternalistic and moralistic statement of the “reality” that “respect for human life finds an ultimate expression in the bond of love the mother has for her child,” coupled with his “unexceptionable” conclusion (notwithstanding “no reliable data to measure the phenomenon”) that “some women come to regret their choice to abort the infant life they once created and sustained,” appear to invite states to require women seeking an abortion to be provided with “informed consent” information designed to persuade them to continue the pregnancy. Proposals already on the table would require such women to view an ultrasound of the fetus or be told scientifically unsound “facts” linking abortion to breast cancer or future mental health problems. Finally, beyond these incremental restrictions on abortion access, the willingness of the newly constituted Court to depart so dramatically from earlier precedent is seen as a further indication of the fragility of *Roe v. Wade* itself.

Institute of Medicine: Abstinence Education Spending Requirement Hinders International Response to HIV/AIDS

A highly anticipated review of the first three years of the President's Emergency Plan for AIDS Relief (PEPFAR) unequivocally recommends greater flexibility in the global fight against HIV/AIDS, including doing away with minimum budget allocations for abstinence-until-marriage education currently required by federal law. Released March 30 by the Institute of Medicine (IOM), *PEPFAR Implementation: Progress and Promise* says PEPFAR must now transition from a program focused on emergency relief to one focused on sustainability. To this end, the congressionally mandated report calls for a greater emphasis on prevention than the law currently allows and says that "removal of the abstinence-until-marriage" earmark, among other changes, "could enhance the quality, accountability, and flexibility" of prevention efforts.

Indeed, the IOM calls for all of the congressionally mandated budget allocations to be removed to allow for greater responsiveness to the evolution of the epidemic and to the specific epidemiology in each focus country. Currently, at least 55% of all PEPFAR funds each year must go for treatment, 15% for palliative care and 10% for services specific to orphans and vulnerable children. This leaves only 20% for prevention, of which "not less than one-third" is reserved for abstinence-until-marriage programs.

The report notes that Congress included earmarks in the original PEPFAR authorizing legislation at a time when little information existed on how to meet the law's specified

five-year performance targets, which include preventing seven million infections, providing antiretroviral therapy to two million people and providing care for 10 million people. It concludes, however, that these "rigid congressional budget allocations among categories, and even more so within categories," have hindered flexibility and responsiveness on the local level. "Contrary to basic principles of good management and accountability," the report says, "the budget allocations have made spending money in a particular way an end in itself rather than a means to an end—in this instance, the vitally important end of saving lives today and in the future." PEPFAR must do better, it says, to harmonize its approach with the individual focus countries and to incorporate lessons learned over time. "Resource allocation that is the consequence of rather than the precursor for adaptive, evidence-based programming would better enable the initiative to have an optimal impact."

In addition to calling for a greater emphasis on prevention in general, the IOM stresses that more attention to improving the status of women and girls is critical to fighting HIV/AIDS over the long term. It recommends that more emphasis be placed on the particular vulnerabilities of women and girls and that a greater effort be made to document services provided to them as the program transitions to sustainability.

The IOM report is in keeping with the conclusions of a report issued last

year by the Government Accountability Office (GAO) that also criticized the abstinence-until-marriage spending requirement. At the behest of Congress, the GAO conducted a year-long investigation and determined that meeting the abstinence-until-marriage spending requirement led to cuts in proven programs aimed at preventing mother-to-infant HIV transmission and at promoting comprehensive ABC (abstinence, be faithful, use condoms) messaging. In addition, it found that although certain countries were granted exemptions from the abstinence-until-marriage spending requirement, these "waivers" necessitated increased abstinence funding above and beyond the one-third rate on the part of nonwaiver countries.

Many of the recommendations identified within the GAO and IOM reports dovetail nicely with legislation introduced earlier this year in the House. The Protection Against Transmission of HIV for Women and Youth (PATHWAY) Act, introduced on March 27 by Reps. Barbara Lee (D-CA) and Christopher Shays (R-CT), addresses the particular vulnerability of women and girls within the HIV pandemic. The legislation calls for the creation of a specific strategy to address the prevention needs of women and girls, and to remove the one-third abstinence-until-marriage spending requirement. Although Congress is not expected to begin considering legislation to reauthorize PEPFAR until next year, the debate over its future is already well underway. —Casey Alrich