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Recent Developments: Rust v. Sullivan: Supreme Court Upholds Agency Regulations Prohibiting the Counseling, Referral or Provision of Information Concerning Abortion as a Method of Family Planning

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(Marshall, J., dissenting). Noting that the only change in the four year interim between the decisions in *Booth* and *Gathers* and *Payne* was the personnel of the Court, Marshall maintained that the real inquiry should be whether the majority satisfied the extraordinary showing of special justification required before overruling Court precedent. *Id.* at 2619-21.

Justice Stevens' dissent, joined by Justice Blackmun, emphasized that our capital punishment jurisprudence has allowed the sentencing jury to consider only mitigating evidence concerning the offense and the character of the defendant. *Id.* at 2626-27 (Stevens, J., dissenting). Justice Stevens asserted that evidence which served no purpose other than appealing to the "sympathies or emotions of the jurors has never been considered admissible." *Id.* at 2626. The dissent accused the majority of abandoning the "rules of relevance that are older than the Nation itself." *Id.* at 2627.

With this decision, the Supreme Court has overruled recently decided cases and disregarded precedent by holding victim impact evidence constitutionally permissible. A state may now allow a sentencing jury to consider victim impact evidence, and a prosecutor may argue victim impact to the sentencing jury. The Court's broad interpretation of "relevant evidence" will have far reaching implications for capital defendants, the families of their victims, and to society as a whole.

- Belinda P. Gardner

***Rust v. Sullivan*: SUPREME COURT UPHOLDS AGENCY REGULATIONS PROHIBITING THE COUNSELING, REFERRAL OR PROVISION OF INFORMATION CONCERNING ABORTION AS A METHOD OF FAMILY PLANNING.**

In a five to four decision, the Supreme Court in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), upheld regulations of the Public Health Services Act requiring recipients of Title X funds to refrain from engaging in abortion counseling, referral, and provision of information concerning abortion as a method of family planning. The Court gave extreme deference to the Department of Health and Human Services and upheld the regulations on the ground of statutory construction. In addition, the Court found the regulations were not violative of the First or Fifth Amendments.

Title X of the Public Health Service Act, 84 Stat. 1506 (1970) (current version at 42 U.S.C. §§ 300 to 300a-6), was originally enacted by Congress in 1970 to provide federal funding for family-planning services. *Rust*, 111 S. Ct. at 1764. The Act authorized the Secretary of Health and Human Services (the Secretary) to provide funding to public or nonprofit private entities to operate family planning projects. The Secretary was also authorized to promulgate such regulations as deemed necessary to carry out the intent of the statute. *Id.* (citing 42 U.S.C. §§ 300(a), 300a-4 (1970)). Section 1008 of the Act provided that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Rust*, 111 S. Ct. at 1764-65 (citing 42 U.S.C. § 300a-6 (1970)).

In 1988, after determining that

current regulations failed to properly implement the statute, the Secretary promulgated new regulations designed to provide "clear and operational guidance to grantees [of Title X funds] to preserve the distinction between Title X programs and abortion as a method of family planning." *Rust*, 111 S. Ct. at 1765 (quoting 53 Fed. Reg. 2923-24 (1988)). Specifically, the regulations attached three conditions for receipt of the funds. First, the "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." *Rust*, 111 S. Ct. at 1765 (quoting 42 C.F.R. § 59.8(a)(1)). Second, recipients of Title X funds may not engage in activities that "encourage, promote or advocate abortion as a method of family planning." *Id.* (quoting 42 C.F.R. § 59.10(a) (1989)). Third, the Title X project must be "physically and financially separate" from any prohibited activity so that an "objective integrity and independence from prohibited activities" remains. *Rust*, 111 S. Ct. at 1765 (quoting 42 C.F.R. § 59.9 (1989)).

The petitioners in this action were grantees of Title X funds suing on behalf of themselves and their patients. The petitioners challenged the facial validity of the new regulations on grounds that they were not authorized by Title X and violated the First and Fifth Amendment rights of Title X patients and the First Amendment rights of Title X health care providers. The District Court for the Southern District of New York granted summary judgment in favor of the Secretary. Both the Court of Appeals for the Second Circuit and the Supreme Court affirmed the lower court's decision.

In its analysis, the Supreme Court first addressed the Secretary's au-

thority to promulgate the regulations, and then reviewed the validity of the regulations and their constitutional ramifications. The Court found the language of section 1008, which provided that no Title X funds be appropriated where abortion is a method of family planning, to be ambiguous. *Id.* at 1767. The Court, therefore, reaffirmed the principle that if a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Rust*, 111 S. Ct. at 1767 (quoting *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)).

Accordingly, the Court looked to the legislative history of the Act for guidance. Finding that the history did not illuminate the meaning of section 1008, the Court held the Secretary's interpretation of the regulations should be accorded substantial deference, and, thus, such interpretation was a permissible construction of the statute. *Id.* at 1768. In so doing, the Court rejected petitioners' arguments that deference was improper because the agency's 1988 regulations were in sharp contrast to prior regulations of the same statute. *Id.* at 1769. The Court stated that an agency "must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances." *Id.* (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Aut. Ins. Co.*, 463 U.S. 29, 42 (1983)). Because the Secretary's regulations were based on critical reports of the General Accounting Office and the Office of the Inspector General, as well as a "shift in the attitude against the elimination of unborn children by abortion," the Court found the 1988 changes were justified. *Rust*, 111 S. Ct. at 1768.

The petitioners also challenged the "program integrity" requirement of the regulations on the ground that it frustrated the expressed intent of Congress that Title X programs be an integral part of a "broader, comprehensive, health-care system." *Id.* The Court again found the legislative history to be lacking, and afforded great deference to the Secretary in finding the regulation permissible. *Id.* at 1770.

Turning to the constitutional ramifications of the regulations, the Court held that while the constitutional arguments were not without force, "they do not carry the day." *Id.* at 1771. The Court found section 1008 did not violate the First Amendment, because the government may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." *Id.* at 1772 (quoting *Maier v. Roe*, 432 U.S. 464, 474 (1977)).

In addition, forbidding the counseling, referral, and provision of abortion information is constitutional as these provisions ensure that the ambit of Title X remains within the limited scope of providing services for family planning. "When the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 111 S. Ct. at 1773.

Finally, the Court held that although the traditional doctor-patient relationship is entitled to greater First Amendment protection, even when subsidized by the government, the 1988 regulations did not seriously impinge on that relationship. The Court emphasized that since the Title X program does not provide post-conception care, "a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the

doctor does not consider abortion an appropriate option for her." *Id.* at 1776.

Moreover, the Court held that the regulations did not violate a woman's Fifth Amendment right to choose whether to terminate her pregnancy. Reaffirming the principle set forth in *Webster v. Reproductive Health Services*, the Court stated that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Rust*, 111 S. Ct. at 1776 (quoting *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989)).

In justifying this principle, the Court stated that the government, by choosing not to fund abortion services, is leaving women in the same position as if it had decided not to provide any family planning services at all. *Rust*, 111 S. Ct. at 1777. Because the regulations in no way impede a woman's right to receive an abortion or a doctor's right to provide abortion related information and services outside the Title X context, the regulations were found constitutional. *Id.*

In a strong dissent joined by Justices Marshall, O'Connor, and Stevens in part, Justice Blackmun argued that the constitutional issues should not have been reached. In his opinion, the Secretary exceeded his statutory authority by promulgating the regulations. *Id.* at 1778 (Blackmun, J., dissenting). Justice Blackmun charged the majority with failing to adhere to the canon that federal statutes must be construed so as to avoid "serious doubt of their constitutionality." *Id.* Because the regulations raised serious questions of First and Fifth Amendment rights, Justice Blackmun believed they

should have been struck down on the grounds of constitutional construction. *Id.* at 1779.

Justice Blackmun next addressed the constitutional issues of the case, because he strongly disagreed with the disposition of the majority. In his opinion, the regulations imposed viewpoint based restrictions on the protected speech between a doctor and his patient, and, thus, unconstitutionally impeded a woman's ability to obtain abortion related services. *Id.* at 1784-85. Commenting on the majority's opinion, Justice

Blackmun stated that "[t]his is a course nearly as noxious as overruling *Roe* directly, for if a right is found to be unenforceable, even against flagrant attempts by the government to circumvent it, then it ceases to be a right at all." *Id.* at 1786.

The majority opinion in *Rust v. Sullivan*, takes the Court one step closer to overruling *Roe v. Wade*, 410 U.S. 113 (1973), and makes it nearly impossible for indigent women to gain access to abortion information and services. While the

government may be under no obligation to provide such services, it has an obligation to continue them once provided. In addition, this Court upheld a governmental regulation that denies women full access to medical information, thereby endangering and jeopardizing both their life and lifestyle. The Court's decision makes it nearly impossible for physicians receiving Title X funds to fulfill their Hippocratic oath, as they are banned from informing a patient of all safe options concerning her pregnancy.

- Laura Melia

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