FIRST & FIFTH AMENDMENTS—ABORTION—REGULATIONS WHICH PROHIBIT TITLE X PROJECTS FROM ENGAGING IN ABORTION COUNSELING, REFERRAL, AND ACTIVITIES ADVOCATING ABORTION AS A METHOD OF FAMILY PLANNING ARE NOT VIOLATIVE OF THE FIRST OR FIFTH AMENDMENTS—*Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

The United States Supreme Court recently addressed an unusual issue involving constitutional limitations on the federal government's authority to restrict the allocation of federal funds to clinics where abortion is recognized as a method of family planning. *Rust v. Sullivan*, 111 S. Ct. 1771 (1991). The Court held that the challenged regulations, which prohibit certain federally funded clinics from providing referral, counseling, or other activities advocating abortion, do not violate the first amendment free speech rights of the federal funding recipients, their staffs, or their patients. *Id.* at 1772. The majority further concluded that such regulations do not impermissibly infringe upon a woman's fifth amendment right to determine whether to terminate her pregnancy. *Id.*

Congress enacted Title X of the Public Health Service Act ("Title X") in 1970 to provide federal funding for "'a broad range of acceptable and effective family planning methods and services.'" *Id.* at 1764 (quoting 42 U.S.C. § 300(a) (1982)). Pursuant to this act, any grant or contract governed by Title X must comply with such regulations as promulgated by the Secretary of the Department of Health and Human Services (the "Secretary"). *Id.* (quoting 42 U.S.C. § 300a-4 (1982)). Moreover, section 1008 of Title X provides that no federal funds are to be allocated to programs where abortion is recognized as a method of family planning. *Id.* at 1764-65 (quoting 42 U.S.C. § 300a-6 (1982)).

In 1988, the Secretary drafted new regulations to make clear that Congress intended the phrase "family planning" to refer solely "to '*preconceptual* counseling, education, and general reproductive health care,' and [to] expressly exclude 'pregnancy care.'" *Id.* at 1765 (quoting 42 C.F.R. § 59.2 (1989) (emphasis added)) (footnote omitted). The new regulations attached three conditions on the right of Title X projects to receive federal funds. *Id.* First, absent exigent circumstances in which a woman's pregnancy places her life in peril, the regulations stipulate that Title X projects may not counsel or refer clients as to "'the use of abortion as a method of family planning.'" *Id.* at 1765, 1773 (quoting 42 C.F.R. § 59.(a)(1)-(2) (1989)). In this regard, all Title X clients already pregnant are to be furnished with "'a list of available providers that promote the welfare of mother *and* unborn child.'" *Id.* at 1765 (quoting 42 C.F.R. § 59.8(a)(2) (1989) (emphasis added)). This list of referrals, however, can not be used in any manner to encourage or support abortion as a method of family planning. *Id.* (citing 42 C.F.R.

§ 59.8(a)(3) (1989)). Second, the new regulations broadly proscribe Title X fund recipients from engaging in any activity which might "'encourage, promote or advocate abortion as a method of family planning.'" *Id.* (quoting 42 C.F.R. § 59.10(a) (1989)). Specifically prohibited activities include: lobbying in support of pro-abortion legislation, sponsoring pro-abortion speakers, making payments to groups advocating abortion, using litigation to make abortion available, and developing and disseminating materials promoting abortion. *Id.* (citing 42 C.F.R. § 59.10(a)(1)-(5) (1989)). Third, the new regulations mandate that Title X projects be "'physically and financially separate'" from entities engaging in prohibited abortion activities. *Id.* at 1766 (quoting 42 C.F.R. § 59.9 (1989)). To comply with this condition, Title X projects must be found to have "'an objective integrity and independence from prohibited activities,'" following an examination of their accounting records, facilities, and personnel. *Id.* (citing 42 C.F.R. § 59.9 (1989)).

Prior to the implementation of the 1988 regulations, Title X recipients and doctors supervising Title X funds filed two separate suits, which were later consolidated, on behalf of their patients and themselves in the United States District Court for the Southern District of New York. *Id.* Challenging the regulations' facial validity, the plaintiffs sought declaratory and injunctive relief in an effort to prevent the application of the regulations. *Id.* Specifically, the plaintiffs alleged that the regulations were not authorized pursuant to Title X, and that they violated the first and fifth amendments to the United States Constitution. *Id.* Initially granting the plaintiffs' request for a preliminary injunction, the district court subsequently rejected both the constitutional and statutory challenges to the new regulations and granted the Secretary's motion for summary judgment. *Id.* (citing *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988)).

On appeal, the United States Court of Appeals for the Second Circuit affirmed the lower court's grant of summary judgment. *Id.* (citing *New York v. Bowen*, 889 F.2d 410 (2d Cir. 1989)). The court of appeals concluded that the new regulations were consistent with section 1008 of Title X in that they legitimately effectuated Congress' intent to prohibit the use of federal funds in programs where abortion is recognized as a method of family planning. *Id.* (quoting U.S.C. § 300a-4 (1982)). Moreover, the appellate court proclaimed that the new regulations did not violate the first amendment rights of women or health care providers, explaining that the federal government has no duty to subsidize the exercise of constitutionally protected rights. *Id.* at 1767. The court further opined that "the regulations [did] not violate the First Amendment by 'condition[ing] receipt of a benefit on the relinquishment of constitutional rights' because Title X grantees and their employees

'remain free to say whatever they wish about abortion outside the Title X project.'" *Id.* (quoting *Sullivan*, 889 F.2d at 412). In rejecting the plaintiffs' fifth amendment challenge, the Second Circuit held that the regulations did not impermissibly impede a woman's right to choose to terminate her pregnancy. *Id.* (citing *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)).

Because the First and Fifth Circuits had previously invalidated the new regulations essentially on constitutional grounds, the United States Supreme Court granted certiorari to resolve the split among the circuits. *Id.* at 1764 & n.1 (citing *Planned Parenthood Federation of America v. Sullivan*, 913 F.2d 1492 (10th Cir. 1990); *Massachusetts v. Secretary of Health & Human Services*, 899 F.2d 53 (1st Cir. 1990)). In a five-to-four decision authored by Chief Justice Rehnquist, the Supreme Court affirmed the grant of summary judgment in favor of the Secretary, holding that the challenged regulations: (1) were a permissible construction of section 1008 of Title X; (2) did not violate the first amendment rights of Title X fund recipients, their respective staffs, or their patients; and (3) did not impermissibly impede upon a woman's fifth amendment right to terminate her pregnancy. *Id.* at 1778.

Stressing that the petitioners were challenging only the regulations' facial validity, Chief Justice Rehnquist first addressed the issue of whether the regulations arbitrarily and capriciously exceeded the Secretary's power under Title X. *Id.* at 1767. Finding that the language of section 1008 was ambiguous for failing to specifically address matters of abortion counseling, advocacy, referral, or program integrity, the Chief Justice asserted that the Secretary's interpretation of the statute must be afforded substantial deference since he is charged with administering the statute. *Id.* (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). The majority explained that the regulations could not be invalidated as exceeding the Secretary's authority under Title X if they reflect a possible construction of the statute's plain language and do not conflict with the express intent of Congress. *Id.* The Court went on to hold that the broad language of Title X in fact authorized the regulations promulgated by the Secretary, reasoning that Title X neither defined the term "method of family planning" nor delineated the categories of medical or counseling services entitled to Title X funding. *Id.* at 1768. Finding that the legislative history of Title X was ambiguous with respect to the congressional intent regarding the availability of abortion-related services, the majority accordingly deferred to the Secretary's construction of section 1008. *Id.* Further concluding that a "reasoned analysis" supports the Secretary's revised interpretation of section 1008, the Chief Justice also rejected the petitioners' contention that the regulations are entitled to little or no

deference because they reverse the Secretary's longstanding policy permitting nondirective abortion counseling and referral services. *Id.* at 1769.

Turning next to the challenged regulations' requirement of separate facilities, personnel, and records for prohibited abortion-related activities, the majority held that these "program integrity" standards were also based on a permissible construction of section 1008 and, therefore, "not inconsistent with Congressional intent." *Id.* at 1770. The Chief Justice explained that the Secretary's view that the separation requirements are necessary to ensure that Title X grantees do not use federal funds for unauthorized purposes is not unreasonable and thus entitled to substantial deference. *Id.* at 1769-71. Moreover, the Court maintained that the legislative history of Title X and the prohibition contained in section 1008 demonstrates Congress' intent that Title X funding be kept separate and distinct from abortion-related activities. *Id.* at 1770.

Chief Justice Rehnquist then proceeded to address the petitioners' contention that the regulations raise serious constitutional questions and should, therefore, be declared facially invalid. *Id.* at 1771. In assessing the merits of the petitioners' constitutional challenges, the majority determined that it was not necessary to invalidate the regulations in order to save the statute because the petitioners' arguments, though somewhat meritorious, did not "carry the day." *Id.* Moreover, the majority held that the regulations do not violate the first amendment rights of Title X fund recipients, their respective staffs, or their clients by impermissibly imposing viewpoint-based discriminatory conditions on government subsidies. *Id.* According to the Court, in restricting the funding of abortion-related speech, the government is merely exercising its inherent authority to decline to promote or encourage abortion-related activity. *Id.* at 1772 (citing *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977)). Chief Justice Rehnquist further explained that the government can, consistent with the federal Constitution, choose to fund a program encouraging certain activities which promote public interest without concurrently funding an additional program which deals with the issue in an alternative fashion. *Id.* The Chief Justice then averred that many federal programs would become "constitutionally suspect" if the Court were to conclude that the government unconstitutionally imposes viewpoint-discriminatory conditions when it chooses to fund a program committed to furthering certain permissible goals. *Id.* at 1773.

The *Rust* Court then summarily dismissed the petitioners' assertion that the new regulations do not allow abortion referral or counseling even when a woman's life is in immediate danger as a result of her

pregnancy. *Id.* In pointing out that the regulations do not absolutely proscribe abortion referral or counseling, Chief Justice Rehnquist noted that specific provisions of the regulations permit Title X recipients to engage in otherwise prohibited abortion-related activities in certain imminent circumstances. *Id.* (citing 42 C.F.R. §§ 59.8(a)(2), 59.5(b)(1) (1989)). The Justice further proffered that such counseling would unlikely be considered a "method of family planning" prohibited by section 1008. *Id.*

The Chief Justice proceeded next to reject the petitioners' contention that the regulations unconstitutionally condition the receipt of a benefit on "the relinquishment of a constitutional right." *Id.* at 1773-74. Chief Justice Rehnquist explained that the regulations do not insist that a Title X grantee abdicate abortion-related speech in order to receive federal funding, but simply require that such activities be kept separate and distinct from the activities of the Title X project. *Id.* at 1774. The Court went on to distinguish certain "unconstitutional conditions" cases, noting that such cases involved scenarios in which the government had placed a condition on the subsidy's recipient rather than on a particular program or service. *Id.* (citing *Regan v. Taxation with Representation*, 461 U.S. 547 (1977); *Perry v. Sindermann*, 408 U.S. 593 (1972)). Additionally, the majority opined that Congress had not, consistent with the Court's jurisprudence, denied Title X grantees the right to participate in abortion-related activities. *Id.* at 1775 (citations omitted).

The majority also concluded that the challenged regulations do not violate the free speech rights of a Title X grantee's staff. *Id.* Chief Justice Rehnquist explained that individuals voluntary employed at a Title X project are free to pursue abortion-related activities outside the project. *Id.* Any limitation on the employees' first amendment rights, according to the Chief Justice, was a result of their decision to work for a Title X project. *Id.* Summarily dismissing the question of whether the new regulations violate any first amendment protection afforded the doctor-patient relationship, the Court proffered that the challenged regulations do not significantly burden that relationship. *Id.* at 1776.

The Supreme Court next addressed the petitioners' assertion that the regulations unconstitutionally infringe upon a woman's fifth amendment right to choose to terminate her pregnancy. *Id.* The majority began by emphasizing that the government is not constitutionally obligated "to subsidize an activity merely because the activity is constitutionally protected." *Id.* (citing *Webster*, 492 U.S. at 511). The Chief Justice explained that, consistent with *Webster*, it is constitutionally permissible for the government to allocate funds for medical services relating to childbirth while refusing to sponsor any services related to abortion. *Id.* (citing *Webster*, 492 U.S. at 510). Moreover, according to the Court,

such an allocation does not prevent a woman from terminating her pregnancy—in fact, she is left with the same choices that would have existed had the government chose not to fund family planning services at all. *Id.* at 1777. Further pointing out that the challenged regulations do not restrict a doctor from providing or a woman from receiving abortion-related information outside the federally funded clinic, the majority held that the regulations do not violate a woman's fifth amendment right to make an informed and voluntary choice regarding abortion. *Id.*

The Court concluded by assessing the petitioners' claim that the new regulations may effectively preclude Title X clients, most of whom are indigent, from seeking a health-care service for abortion-related services. *Id.* at 1778. Again, the majority averred that these women are "in no worse position than if Congress had never enacted Title X." *Id.* Chief Justice Rehnquist further explained that the financial constraints restricting an indigent woman's ability to terminate her pregnancy are not the result of government intrusion, but rather the result of her indigence. *Id.* (citing *McRae*, 448 U.S. at 316).

In Part I of his spirited dissent, Justice Blackmun, joined by Justices Marshall and O'Connor, proclaimed that the regulations implicate important constitutional values. *Id.* at 1778-79 (Blackmun, J., dissenting). The Justice noted that the regulations impose "viewpoint-based restrictions upon protected speech" and infringe upon a woman's right to choose to terminate her pregnancy. *Id.* Accordingly, Justice Blackmun would have reversed the court of appeals' decision, without deciding the constitutionality of the regulations, on the ground that a constitutional construction of section 1008 "'is not only 'fairly possible' but entirely reasonable.'" *Id.* at 1780 (Blackmun, J., dissenting) (quoting *Machinists v. Street*, 367 U.S. 740, 750 (1961)).

In Part II of his dissent, Justice Blackmun, joined by Justices Marshall and Stevens, averred that the government's power to condition the receipt of federal funds upon the suppression of constitutional rights does not extend to the imposition of content- or viewpoint-based conditions. *Id.* (citing *Speiser v. Randall*, 357 U.S. 513, 518-19 (1959)). Moreover, the Justice maintained that the government, "[b]y refusing to fund those family-planning projects that advocate abortion *because* they advocate abortion," has impermissibly attempted to suppress a particular viewpoint. *Id.* at 1781 (Blackmun, J., dissenting) (emphasis in original). The dissent then proceeded to characterize the majority's reliance on *Regan* as misguided, reasoning that while the government may, consistent with *Regan*, place limitations on the use of Title X funds for lobbying activities, the challenged regulations are not limited to lobbying activities but extend to all speech encouraging, promoting, or advocating abortion.

Id. These regulations, the Justice explained, cannot be justified simply because they are conditions imposed upon the recipients of a governmental benefit. *Id.*

Further attacking the majority's conclusion that the regulations do not violate the first amendment rights of Title X staff members because any limitation on this right "is simply a consequence of their decision to accept employment at a federally funded project," Justice Blackmun expostulated that the government cannot require an individual to relinquish their first amendment rights as a prerequisite for public employment. *Id.* (citing *id.* at 1775). Justice Blackmun then criticized the majority's assertion that individuals voluntarily employed at Title X projects are free to pursue abortion-related activities outside the project in an attempt "to circumvent this principle." *Id.* at 1783 (Blackmun, J., dissenting) (citing *id.* at 1775). Under the majority's reasoning, the Justice maintained, any governmental restriction on an employee's speech would be tolerated so long as that restriction is imposed upon a federally-funded workplace. *Id.*

In Part III of his dissent, Justice Blackmun, again joined by Justices Marshall and Stevens, turned to the petitioners' contention that the challenged regulations violate the fifth amendment. *Id.* Maintaining that *McRae* and *Webster* were incorrectly decided, the Justice asserted that even if these decisions were accepted, the majority's analysis is still flawed. *Id.* at 1785 (Blackmun, J., dissenting). This is not a case, Justice Blackmun opined, where individuals are seeking governmental aid to exercise fundamental rights, but one where the petitioners are asserting the fifth amendment right of a women to be free from governmental interference in deciding whether or not to terminate her pregnancy. *Id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973)). Justice Blackmun averred that the government, by suppressing abortion-related speech, is impermissibly interfering with a Title X patient's ability to exercise her freedom of choice. *Id.* at 1785. (Blackmun, J., dissenting).

Furthermore, Justice Blackmun determined that the challenged regulations are "doubly offensive" because they additionally impinge on the doctor-patient relationship. *Id.* (Blackmun, J., dissenting). The Justice criticized the majority's attempt to distinguish *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) and *Thornburg v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), on the basis that the governmental interference with respect to the doctor-patient relationship in those cases applied to all physicians practicing within a jurisdiction while the regulations at issue in *Rust* only pertain to Title X employees. *Rust*, 111 S. Ct. at 1786 (Blackmun, J., dissenting). The Justice explained that the Constitution protects personal rights, and that this interference "by the [g]overnment is no less

substantial because it affects few rather than many." *Id.*

In a separate opinion, Justice Stevens dissented on the ground that the majority, in evaluating the petitioners' claim, failed to pay enough attention to the language of Title X or to the interpretation accorded the act for eighteen years. *Id.* at 1786-87 (Steven, J., dissenting). Moreover, the Justice emphasized that the statute does not state nor suggest that Congress intended to suppress or censor the speech of grant recipients or government employees. *Id.* at 1787 (Stevens, J., dissenting). Read in the context of the entire act, the Justice maintained, the prohibition in section 1008 is patently directed at conduct, rather than the giving of information or advice by Title X grant recipients. *Id.* Additionally, Justice Stevens reasoned that the regulations promulgated by the Secretary in 1971 and 1986 merely prohibited Title X grant recipients from *performing* abortions—they made no attempt to censor or mandate speech. *Id.* at 1787-88 (Stevens, J., dissenting) (citing 42 C.F.R. § 59.5(a)(9) (1972); 42 C.F.R. § 59.1-59.13 (1986)). The Justice concluded by stating that the 1970 act did not authorize the Secretary's entirely new approach of censoring the speech of grant recipients and their employees. *Id.* at 1788 (Stevens, J., dissenting).

Justice O'Connor also authored a separate dissent, concluding "that neither the language nor the history of § 1008 compels the Secretary's interpretation." *Id.* at 1789 (O'Connor, J., dissenting). Moreover, the Justice asserted that the Secretary's interpretation of the prohibition contained in section 1008 raised serious first amendment concerns. *Id.* On this basis alone, Justice O'Connor would have reversed the lower court's decision and invalidated the challenged regulations. *Id.*

Analysis

In *Rust*, the United States Supreme Court casts aside its established first amendment jurisprudence and failed to adequately protect the fundamental free speech rights of Title X fund recipients, their workers, or their patients. In determining whether the government could constitutionally condition a grant or subsidy on the relinquishment of first amendment rights, the Court had previously applied a "strict scrutiny" analysis, insisting that the government show a "compelling interest." *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). As Justice Blackmun pointed out in his dissenting opinion, the majority did not balance or even consider the interplay between free speech claims of Title X physicians and the government's alleged interest in suppressing the speech involved. *Rust*, 111 S. Ct. at 1784 (Blackmun, J., dissenting).

Furthermore, the majority incorrectly dismissed the petitioners' claim

that the regulations abridge the free speech rights of the grantee's staff. *See id.* at 1775. As Justice Blackmun correctly averred, the Court has consistently held that the government cannot prevent its own employees from exercising their first amendment rights, even while on the government's time. *Id.* at 1782-83 (Blackmun, J., dissenting) (citations omitted). At the very least, the Court should have balanced the Title X employees' interest in providing truthful information and professional advice to a pregnant woman against that of the government in making certain that there is absolutely no abortion-related activities conducted by Title X projects.

The only interests which the 1988 regulations sought to protect were (1) the government's interest in not allowing federal funds to be spent for purposes outside the scope of the Title X program and (2) ensuring that Title X grantees avoid creating the appearance that the government is supporting abortion-related activities. *Id.* at 1769. Yet "less restrictive alternatives" than those imposed by the new regulations are available to the government. As one appellate court has proffered, "the government could easily withdraw the 'physically separate' facilities requirement, make the 'counseling' regulations less slanted, and provide various types of 'bookkeeping' rules." *Secretary of Health & Human Services*, 899 F.2d 53, 74 (1st Cir. 1990).

Moreover, the majority attempts to rationalize the regulations' requirement that any forbidden counseling activity be "physically and financially separate" from any Title X project activity by noting that the Title X grantee can continue to provide abortion-related services so long as these activities are conducted through programs separate and independent from the project. *Rust*, 111 S. Ct. at 1774. It is irrational, however, to believe that family planning clinic operators, without incurring inordinate costs, could realistically build separate rooms, entrances, or buildings solely for the purpose of allowing a patient, in the midst of a family planning session in a Title X project, to move to a separate facility for counseling about the availability of an abortion.

The Court devoted little attention to the petitioners' argument that the regulations violate a woman's right, under the fifth amendment, to choose to terminate her pregnancy. Relying on *Webster*, *Harris*, and *Maher*, the Court feebly asserted that, because the regulations merely implement a funding decision to support childbirth over abortion, they impose no obstacle whatsoever on a woman's choice between those two alternatives. *Id.* at 1776-77. As Justice Blackmun maintained, however, Chief Justice Rehnquist's reliance on these decisions is misplaced. The statutes involved in *Webster*, *Harris*, and *Maher* only dealt with the funding of abortions and did not attempt to restrict the conduct of physicians or place limits on the first amendment right of free speech.

The Secretary's regulations in the case *sub judice* clearly infringe upon a woman's freedom of reproductive choice by denying her access to important, truthful information and interfering with the physician-patient privilege despite the majority's continued insistence to the contrary.

The ruling in *Rust* exemplifies the continued trend of the Supreme Court to limit a woman's right to receive abortion-related services despite its landmark decision in *Roe*, which upheld a woman's right to choose whether or not to terminate her pregnancy. *See Roe*, 410 U.S. at 113. Although it seems improbable, the Court, hopefully, will soon recognize that by chiseling away at the vitality of the first and fifth amendments, it is seriously encroaching upon the precious and fundamental rights that it once so vehemently protected.

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