

# US appeals court upholds Texas ban on Medicaid funds for Planned Parenthood

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In a ruling handed down August 21, the 5<sup>th</sup> US Circuit Court of Appeals in New Orleans upheld a Texas regulation that effectively cuts off funding to clinics operated by Planned Parenthood. These facilities provide health services to low-income women.

Earlier this year, the 5<sup>th</sup> Circuit also upheld a new Texas law requiring doctors to perform a sonogram and provide women with a detailed description of the fetus before carrying out an abortion.

The August 21 ruling overturned a preliminary injunction issued in April by a federal district court in favor of Planned Parenthood, which filed a lawsuit against Thomas Suehs, head of the Texas Health and Human Services Commission (THHSC).

The commission oversees the Women's Health Program (WHP), a joint federal-state program funded mostly through Medicaid, which provides cancer screenings, contraceptives and other medical services to some 130,000 women in Texas. The program contracts with various hospitals and clinics, including some operated by Planned Parenthood, to administer these services. Planned Parenthood currently treats around half of the 130,000 women in the program.

Last week's ruling sets aside a temporary injunction granted by the federal district court in Austin, Texas that barred THHSC's director from enforcing new regulations that cut off all WHP funding, from the state or federal government, to clinics that promote abortion or affiliate with organizations that do so. The new regulations were drawn up to target Planned Parenthood. This is despite the fact that Planned Parenthood clinics in Texas receiving WHP funds perform no abortions and are legally barred from doing so.

While THHSC Director Suehs began implementing the new regulations in March, they were authorized by legislation enacted last year and signed by Governor Rick Perry.

Technically, the 5<sup>th</sup> Circuit's ruling concerns only the temporary injunction, which barred THHSC from implementing the defunding regulations until the case goes to trial before the federal district court in October. But the ruling on the injunction clearly indicates that the 5th Circuit will likely rule against Planned Parenthood if the organization prevails in the lower court and Texas authorities appeal that

ruling.

"It is shocking that once again it appears that politics is getting in the way of women receiving access to basic health care," Melaney A. Linton, president of Planned Parenthood Gulf Coast Inc., said in a statement. "Today's ruling allows the state to deny low-income, uninsured Texas women health care from their trusted provider—Planned Parenthood... The state's ongoing efforts jeopardize the health of tens of thousands of Texas women."

Since its inception in 2005, the WHP has been saddled with burdensome regulations by the Texas legislature forbidding it from contracting with "entities that perform or promote elective abortions or are affiliates of entities that perform or promote elective abortions."

The new THHSC regulations for the WHP specifically define the terms "promote" and "affiliate" in the above-referenced statute that authorizes WHP. According to the new interpretations, Planned Parenthood clinics cannot receive WHP funds because they "promote" abortion simply by having the name "Planned Parenthood," even though they perform no abortions.

The plaintiffs in *Planned Parenthood v. Suehs* alleged that they would not be able to comply with the new regulation and argued that it violated their rights to freedom of speech, freedom of association and equal protection under the law. Judge E. Grady Jolly, appointed to the bench by Ronald Reagan, wrote the opinion for the 5<sup>th</sup> Circuit dissolving the lower court injunction.

His opinion stated that Texas had the right to fund or not fund health care providers as it saw fit, and Planned Parenthood had no constitutional right to promote abortion.

The court found that Texas had the right to regulate the use of "identifying marks" used by clinics receiving WHP funds. Because Planned Parenthood was the nation's largest provider of abortions and advocated for reproductive rights, clinics using its name necessarily bore "a pro-abortion mark," which was "after all, a way of promoting abortion," the court wrote.

"Texas' authority to directly regulate the content of its own program necessarily includes the power to limit the identifying marks that program grantees are authorized to use. Identifying marks represent messages. If the organizations participating in

the WHP are authorized to use marks associated with the pro-abortion point of view—like the Planned Parenthood mark—Texas’ choice to disfavor abortion is eviscerated, just as it would be if the organizations promoted abortion through pamphlets or video presentations,” the opinion stated.

Judge Jolly specifically declined to apply what is known as the “unconstitutional conditions doctrine” to the case. This doctrine forbids the states and the federal government from conditioning a benefit, such as a subsidy, on the recipient’s refraining from exercising a constitutional right. Instead of applying the doctrine, the court started with its reactionary conclusion and worked backwards to hide its right-wing political agenda behind legalistic phrases and unjustifiable logical leaps.

The attack on Planned Parenthood and on the right to have a legal medical procedure is part of a broader assault on democratic and constitutional principles. At the core, ideologically, of the anti-abortion drive are religious conceptions. Efforts to incorporate religious doctrine into public policy violate a founding principle of the American republic—the separation of church and state, as embodied in the Constitution’s first amendment establishment clause.

By judge Jolly’s logic, a state could cut off funding for appendectomies, tonsillectomies, hip replacements or other legal and legitimate medical procedure that one or another fundamentalist sect considered contrary to its principles.

His sanction of a political and legal witch-hunt against Planned Parenthood—a campaign that is being waged nationally by sections of the Republican Party—has the most sinister implications. A legitimate organization that operates entirely within the law is being singled out for destruction in the pursuit of a right-wing, anti-democratic political agenda. The assault on Planned Parenthood, moreover, affects millions of low-income Americans who depend on the organization for critical health services.

With unmatched cynicism, Texas Governor Perry called the ruling “a win for Texas women, our rule of law and our state’s priority to protect life.”

For their part, the Democrats are unwilling to carry out a principled defense of abortion rights and are fully engaged in the general attack on democratic rights being carried out under the cover of the “war on terror.” The Obama administration has begun phasing out support for WHP and expects to cut all federal funding for the program by November. Currently, federal funds pay for 90 percent, or about \$35 million, of the \$40 million Women’s Health Program budget through the Centers for Medicare and Medicaid Services.

Last December, the Obama administration overruled a Food and Drug Administration (FDA) recommendation that would have allowed emergency contraceptives to be sold over the counter with no age restrictions.

In the midst of a global economic crisis and deteriorating social conditions, the issue of abortion plays an increasingly

prominent role in American political life. The last two years, in particular, have seen escalating attacks on the right to have an abortion.

A study by the American Civil Liberties Union found that 21 states enacted legislation attacking the right to have an abortion in 2011. As of July 2, states have enacted 39 new restrictions on access to abortion, according to the “State Legislative Trends at Midyear” report by the Guttmacher Institute, a public policy group that collaborates with the World Health Organization.

The report states that of the 39 newly enacted abortion restrictions, 14 come from just three states: Arizona, South Dakota and Louisiana. States use a number of pernicious techniques to limit access to abortion, including:

- \* Requiring parental permission for minors seeking the procedure.

- \* Forcing pregnant women to undergo pre-abortion “counseling,” which has no medical basis.

- \* Limiting coverage of abortion by health insurers, thus making the procedure cost-prohibitive, or limiting the specific types of medical methodologies to those that are outdated, less safe, or both.

- \* Requiring a medically unnecessary ultrasound of the fetus, or requiring that the pregnant patient listen to the fetal heart beat (which in some cases can be done only with a highly intrusive intravaginal instrument).

- \* Enforcing a 24-72 hour waiting period before the procedure.

- \* Placing burdensome, medically unnecessary compliance hurdles on abortion clinics.

The Guttmacher Institute tracked changes in abortion regulation between the years 2000 and 2011. It found a dramatic increase in both the total number of restrictions on access to abortion and in the number of states enacting hurdles of the type listed above. By 2011, 55 percent of women of reproductive age living in the US resided in a state with four or more of these hurdles, up from 31 percent in 2000.

Part of this ongoing attack is the drive to force groups like Planned Parenthood out of business.



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