
Center for Reproductive Law and Policy v. George W. Bush

UNITED STATES SECOND DISTRICT COURT OF APPEALS

304 F.3d 183 (2002)

Authors' Note: The government action described below affected both foreign and domestic N.G.O.s. The plaintiff U.S. N.G.O. alleged that it was thus placed at a competitive disadvantage. The court did not deny the relief sought by the Center for Reproductive Rights because it disagreed with the plaintiff on the merits of its case against the president.

One question you might consider is whether the ability of foreign and domestic N.G.O.s to freely deal with one another—regarding conduct that is not illegal in the respective host nations—should depend on which president is in office.

Court's Opinion: Sotomayor, Circuit Judge:

This suit was brought by a domestic organization that advocates reproductive rights and by attorneys employed by the organization. Plaintiffs challenge the so-called “Mexico City Policy,” pursuant to which the United States government requires foreign organizations, as a condition of receiving government funds, to agree neither to perform abortions nor to promote abortion generally. ... The district [trial] court dismissed the case

BACKGROUND

... Plaintiff The Center for Reproductive Law & Policy (“CRLP”) is a nonprofit advocacy organization devoted to the promotion of reproductive rights. Individual plaintiffs Janet Benshoof, Anika Rahman, Katherine Hall Martinez, Julia Ernst, Laura Katzive, Melissa Upreti and Christina Zampas are CRLP staff attorneys engaged in the organization's global mission of reproductive law reform. Defendant George W. Bush is the President of the United States. Defendant Colin Powell is the U.S. Secretary of State and is thus responsible for “ensuring program and policy coordination among agencies of the United States Government in carrying out the policies set forth in the Foreign Assistance Act...” 22 U.S.C. § 6593(b)(2). Defendant Andrew Natsios is the Administrator of the United States Agency for International Development (“USAID”). At issue in this case is the so-called “Mexico City Policy”¹ of the United States government, whereby foreign non-governmental organizations (“NGOs”) receiving U.S. government funds must agree to a provision called the “Standard Clause,” which prohibits the organizations from engaging in activities that promote abortion (also referred to as the “challenged restrictions”).

The Foreign Assistance Act of 1961 (“FAA”) authorizes the President “to furnish assistance, on such terms and conditions as he may determine, for voluntary population planning.” 22 U.S.C. § 2151b(b)....

¹ The term derives from a United Nations conference held in Mexico City in 1984, at which the United States delegation presented a policy statement outlining the type of abortion-related restrictions at issue in this case.

The challenged restrictions originated in August 1984, when President Ronald Reagan announced the Mexico City Policy (“the Policy”). The Policy expressed the government's disapproval of abortion as an element of family planning programs and set forth various ways in which the government would prohibit its funds from being used to support abortion overseas. Among these, it was announced that “the United States will no longer contribute to separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations.”

Pursuant to the Mexico City Policy, USAID incorporated the “Standard Clause” into its family planning assistance agreements and contracts. The Standard Clause provides that in order to be eligible for USAID funding, a foreign NGO must certify in writing that it “will not, while receiving assistance under the grant, perform or actively promote abortion as a method of family planning in AID-recipient countries or provide financial support to other foreign nongovernmental organizations that conduct such activities.” The restrictions established in the Standard Clause extend to *all* activities of recipient NGOs, not merely to projects funded by USAID. Thus, in order to receive U.S. government funds, a foreign NGO may not engage in *any* activities that promote abortion. These restrictions do not apply to domestic NGOs such as plaintiff CRLP.

The Mexico City Policy was rescinded by President Bill Clinton in January 1993, but was reinstated by President George W. Bush in March 2001. President Bush issued an official memorandum that restored the abortion-related restrictions discussed above, including the Standard Clause. Accordingly, as a condition of receiving U.S. government funds, foreign NGOs again are required to agree not to perform or actively promote abortion as a method of family planning.²

Plaintiffs ... primary claim ... is that, as a result of the challenged restrictions, foreign NGOs are chilled from interacting and communicating with domestic abortion rights groups such as plaintiff CRLP, thus depriving plaintiffs of their rights to freedom of speech and association in carrying out the mission of the organization. ... Finally, plaintiffs attempt to bring a claim under customary international law, the substance of which appears to be identical to their First Amendment claim.

The district court dismissed the action in its entirety on the ground that plaintiffs lack standing under Article III of the Constitution. The court first noted that because the challenged restrictions apply only to foreign NGOs, not to domestic organizations such as CRLP, the Mexico City Policy does not affect plaintiffs directly.

...

DISCUSSION

I. First Amendment Claim

A. Plaintiffs' Allegations

² “Abortion as a method of family planning” does not include “abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions performed following rape or incest (since abortion under these circumstances is not a family planning act).” Restoration Memorandum, 66 Fed.Reg. at 17,306.

The crux of plaintiffs’ First Amendment claim is their contention that the restrictions chill foreign NGOs from collaborating with domestic NGOs like CRLP because such collaboration may be viewed as promoting abortion and thus would jeopardize the foreign NGOs’ receipt of U.S. government funds. Plaintiffs argue that such collaboration is essential to their ability to carry out their mission as advocates of reproductive rights and that depriving them of this ability violates their freedom of speech and association.

Specifically, plaintiffs allege that they depend on collaboration with foreign NGOs in order to advocate abortion law reform in foreign countries; to gather reliable information regarding abortion laws; to disseminate publications and reports; to reach audiences worldwide in order to promote abortion law reform; to access victims and witnesses of human rights abuses; to lobby the United States government to rescind the Restoration Memorandum; to influence international conferences, international legal tribunals, and world public opinion; to increase protection for the right to abortion in the United States; and to engage in open and free discussion about abortion.

Plaintiffs list several countries in which they currently have projects involving these activities and where foreign NGOs have agreed to the Standard Clause, and they allege that all of these activities are significantly hindered in those countries. ... Plaintiffs also invoke their right to receive information, claiming that the Standard Clause “interferes with Plaintiffs’ ability to obtain information necessary to accomplish their abortion law reform efforts from USAID recipient [foreign NGOs],” and impedes plaintiffs’ access to victims and witnesses of human rights abuses related to reproductive issues. Plaintiffs explain that foreign NGOs are often the only vehicle to provide access to both general information and first-hand accounts regarding conditions in foreign countries, and that obtaining such information is necessary for domestic NGOs to fulfill their mission of advocating reproductive rights—including their ability to lobby the United States government.

...

C. The Standing Issue

The district court dismissed the instant case, not on the merits ... but for lack of constitutional standing [§1.4 Lack of Standing to Sue Doctrine]. A federal court has jurisdiction only if ... (1) that the plaintiff has suffered an “injury in fact,” i.e., an invasion of a judicially cognizable interest which is concrete and particularized as well as actual or imminent, rather than conjectural or hypothetical; (2) that there is a causal connection such that the injury is fairly traceable to the challenged conduct; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

...

III. Equal Protection Claim

A. Plaintiffs Have “Competitive Advocate Standing”

... Though plaintiffs do not employ the term, this argument is essentially a theory that this Court has dubbed “competitive advocate standing.” We have acknowledged the

possibility that a plaintiff may have standing to bring an equal protection claim where the government's allocation of a particular benefit “creates an uneven playing field” for organizations advocating their views in the public arena. In order to “satisfy the rule that he was personally disadvantaged,” a plaintiff must “show that he personally competes in the same arena with the party to whom the government has bestowed the assertedly illegal benefit.”

Plaintiffs have standing under this theory. CRLP is an advocacy organization that communicates its viewpoint regarding issues of abortion and reproductive rights, and it competes with anti-abortion groups engaged in advocacy around the very same issues. The Standard Clause has bestowed a benefit on plaintiffs' competitive adversaries by rewarding their suppliers of information, the foreign NGOs, with government grants, while withholding those grants from suppliers of information who would deal with CRLP. This is precisely the type of situation that the doctrine of competitive advocate standing contemplates....

B. The Equal Protection Claim is Without Merit

... The Supreme Court has made clear that the government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds. Plaintiffs' equal protection challenge is thus without merit.

CONCLUSION

For the reasons stated, we affirm the district court's dismissal of this action, though on different grounds.