

Controversial South Dakota Abortion Law Overturned by Voters

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South Dakota voters, by a 56% to 44% margin, rejected an attempt by the state legislature to create the nation's most restrictive abortion law. A coalition of the law's opponents succeeded in placing the law on the South Dakota ballot for the November general election under South Dakota's referendum process. Placing the issue on the ballot suspended imposition of the law unless approved by the voters.¹ Supporters of the ban hoped to set up a US Supreme Court challenge that would result in *Roe v. Wade* being overturned. However, opponents of the ban saw an opportunity to use South Dakota's referendum process to avoid a direct court challenge and obtain a statement of public sentiment about how far abortion limits should go.

HB 1215, referred to as the "Women's Health and Human Life Protection Act" (the Act), repeals prior legislation authorizing abortion and setting limits that track the trimester analysis adopted in *Roe v. Wade*.² It adopts findings from the South Dakota Task Force to Study Abortion that "abortion in South Dakota should be prohibited", and "that the guarantee of due process of law under the Constitution of South Dakota applies equally to born and unborn human beings."³ The Act specifies that, "[n]o person may knowingly administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being."⁴ Although the Act purports to allow abortion to save the life of the mother, it also specifically directs that "the physician shall make reasonable medical efforts under the circumstances to preserve the life of the mother and the life of her unborn child in a manner consistent with conventional medical practice."⁵ The Act specifies that fertilization creates an "unborn human being" who is entitled to the same protection of South Dakota's laws as if born alive.⁶ Finally, the Act applies sanctions to abortion providers but cannot be used to sanction the pregnant woman.⁷ Violation of the Act is classified as a Class 5 felony under South Dakota law, punishable by a prison term of up to five years and a fine of up to \$10,000.⁸

Supporters of the ban note that the Act also states that, "Nothing in...this Act may be construed to prohibit the sale, use, prescription or administration of a contraceptive measure, drug or chemical if it is administered prior to the time when a pregnancy could

¹ Stephanie Simon, "Abortion Foes Energized by Their Losses," LOS ANGELES TIMES, Nov. 9, 2006, available at <http://www.latimes.com/news/nationaworld/politics/la-na-abort9nov09,1,5117928.story?coll=la-news-politics-national>

² H. B. 1215, 81st Leg. § 6 (S.D. 2006)

³ *Id.* at § 1.

⁴ *Id.* at § 2.

⁵ *Id.* at § 4.

⁶ *Id.* at § 1.

⁷ *Id.* at § 2.

⁸ *Id.* at § 2.

be determined through conventional medical testing and if the contraceptive measure is sold, used, prescribed, or administered in accordance with the manufacturers instructions.”⁹ This language presumably allows for the use of birth control pills and the so-called “morning after” pill, but many in the anti-abortion movement believe that these medications are also abortifacients. Thus, despite the language about determination of pregnancy being the trigger point for imposition of a penalty under the law, opponents of the law point out that pregnancy is specifically defined in the act as including the moment of fertilization,¹⁰ and providers of either birth control pills or emergency contraception could arguably be subject to the sanctions of South Dakota’s law.

The issue of restricting abortion access is not likely to go away anytime soon. However, the degree to which such restrictions may be imposed will continue to bedevil legislators as well as provide fund raising opportunities for the myriad pro-choice and anti-abortion activists who press this fight. The vote in South Dakota is a mixed message at best. While rejecting the breadth of the ban created by the South Dakota legislature, voters there also re-elected the strongest proponents of the ban as well as the governor who signed the bill into law.¹¹ They also defeated four opponents of the ban in primary elections in June.¹²

Since the pronouncement of the opinion in *Roe v. Wade*, states have enacted parental notification laws, special informed consent laws for abortion, mandatory counseling and waiting periods for those seeking abortions, increased regulation of abortion clinics and requirements that certain abortions be performed only in hospitals, limitations on the types of procedures that can be used for abortions, reporting laws for minors seeking contraception or treatment for sexually transmitted diseases, limitations on insurance coverage for abortion and for contraception, and “conscience laws” allowing providers to opt out of procedures that are inconsistent with their personal beliefs. More recently laws have been adopted that allow pharmacists to refuse to fill prescriptions, specifically prescriptions for emergency contraception and birth control pills, based on their personal beliefs about whether such pills do or do not act as an abortifacients.¹³

Nevertheless, there does seem to be an uneasiness that the limitations being discussed around the country may impinge on women’s access to reproductive health care in ways that are not acceptable to the public at large. Couple increasingly restrictive laws, especially the “conscience laws,” with the widely reported actions taken by the attorney general of Kansas seeking access to medical records in abortion clinics,¹⁴ and the uneasiness grows, as demonstrated in the 2006 general election, to rejection of

⁹ *Id.* at §3.

¹⁰ *Id.* at §5(3).

¹¹ Simon, *supra* note 1.

¹² Associated Press, *News Briefs*, June 8, 2006.

¹³ See generally Guttmacher Institute, *State Policies in Brief*, available at <http://www.guttmacher.org/statecenter/spibs/index/html> (last viewed Nov. 9, 2006).

¹⁴ Jodi Rudoren, *Trial Opens in Challenge to Law Over Teenage Sex*, N.Y. TIMES, Jan. 31, 2006 available at <http://www.nytimes.com/2006/01/31/national/31sexhtml?pagewanted=print>.

overreaching policies and, in some cases (though clearly not all), the individuals who pushed those policies.¹⁵

Where does the fight go from here? The Supreme Court heard arguments this week on the recently adopted federal Partial Birth Abortion Ban. This law prohibits a specific late-term abortion procedure, even if, in the judgment of the physician provider, the procedure could save the health of the mother. Questions from the members of the Court focused on the medical details of the procedure and health implications for the woman according to published news reports.¹⁶ No matter what the Court's ruling, or the outcome of the November 7 elections, anti-abortion activists will continue to push for expanded "informed consent" laws, whether medically accurate or not, and pro-choice activists will warn that women's medical privacy and access to contraception are at risk. Lost in the discussion will be the centrist views of most Americans who want the ability to discuss sensitive medical issues with a provider they trust and the privacy to make complex medical decisions for themselves.

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¹⁵ Simon, *supra* note 1.

¹⁶ Charles Lane, WASH. POST, *Few Clues to Court's Abortion Stand*, HOUS. CHRONICLE, Nov. 9, 2006, at A3.