

Center for Reproductive Law & Policy v. Bush: **Background on Judge Sonia Sotomayor's 2002 Opinion**

Federal appeals court Judge Sonia Sotomayor has been nominated by President Barack Obama to replace retiring Supreme Court Justice David Souter. Judge Sotomayor currently sits on the U.S. Court of Appeals for the Second Circuit. Although she has not ruled on the constitutional right to abortion, in 2002, Judge Sotomayor authored an opinion in a case brought by the Center for Reproductive Rights (at that time the Center for Reproductive Law & Policy). The lawsuit challenged the reinstatement of the Global Gag Rule or "Mexico City Policy" which prohibited U.S.-funded family planning organizations based overseas from providing abortion services or engaging in speech intended to ease restrictions on abortion.

In addition to restricting the use of U.S. Agency for International Development funds, the Global Gag Rule (GGR) prevented the organizations from using their own non-U.S. funds to provide abortion services, counsel women regarding abortion, or lobby their own governments for abortion law reform. First implemented by President Ronald Reagan in 1984, the Global Gag Rule was rescinded by President Bill Clinton in 1993, but later reinstated by President George W. Bush in 2001. Shortly after President Bush restored the policy, the Center filed *Center for Reproductive Law & Policy v. Bush*, asserting that the GGR violated its free speech, due process, and equal protection rights and those of its individual international human rights attorneys on staff by impeding their ability to work overseas with women's rights organizations seeking law reform to address the harmful consequences of unsafe abortion.

The case was dismissed by the federal district court assigned to hear it on the grounds that the Center and its attorneys did not have standing to pursue their claims because any injuries they would suffer as a result of the GGR were speculative and due

to independent choices made by foreign NGOs rather than direct government action. The Center appealed that decision to Judge Sotomayor's court, the U.S. Court of Appeals for the Second Circuit.

Writing for a three judge panel, Judge Sotomayor relied on previous Second Circuit and U.S. Supreme Court decisions to reject the Center's claims. *CRLP v. Bush*, 304 F.3d 183 (2d Cir. 2002). The opinion focused on the application of legal precedent and did not express a view on or discuss the impact of the Global Gag Rule on abortion law reform efforts around the world. Judge Sotomayor did not resolve the issue of whether the Center had standing to raise its free speech claims brought under the First Amendment. Rather, she found that the Center's free speech claim was ruled out by an earlier opinion of the Second Circuit, *Planned Parenthood Federation of America, Inc. v. Agency for International Development*, 915 F.2d 59 (2d Cir. 1990), which upheld a previous version of the GGR. Judge Sotomayor wrote:

Planned Parenthood not only controls this case conceptually; it presented the same issue. *Planned Parenthood* rejected the same First Amendment challenge to the same provision—the Standard Clause that was first instituted by President Reagan in the 1980s and was reinstated by President George W. Bush in 2001 and no intervening Supreme Court case law alters its precedential value. 304 F.3d at 190 (footnote omitted).

In addition to the First Amendment claim, the Center also alleged that the GGR violated its right to due process (the principle that the government must respect all of the legal rights that are owed to a person) by utilizing vague standards that failed to make clear what conduct was prohibited. Judge Sotomayor ruled that the Center lacked standing to pursue that claim because it was foreign NGOs,

and not the Center as a U.S. organization, who would be harmed by the lack of clarity. 340 F.3d at 196.

Finally, Judge Sotomayor rejected the Center's equal protection claim (the right of all persons to have the same access to the law and courts, and to be treated equally by the law and courts, both in procedures and in the substance of the law) on the merits, finding that, while the Center had standing to raise the claim, "[t]he 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." 340 F.3d at 198 (citing *Rust v. Sullivan*, 500 U.S. 173, 192-94 (1991)).

On January 23, 2009, President Obama rescinded the Global Gag Rule, noting that it "undermined efforts to promote safe and effective voluntary family planning programs in foreign nations."