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### **March for Life**

Thousands upon thousands gathered for the annual March for Life on January 24. The crowd was so large that it took hours to pass by the designated starting point. It was packed with young people from various colleges and parishes throughout the United States, carrying pro-life banners and signs of all types.

The actual marching—down Constitution Avenue to the Supreme Court—was preceded by a rally near the Washington Monument. Speakers reminded attendees and those watching online that the theme this year celebrated the 100th anniversary of the ratification of the Nineteenth Amendment to the Constitution, which granted women the right to vote. March for Life President Jeanne Mancini emphasized that the suffragists by and large opposed abortion, which they saw as a means of oppressing women.<sup>1</sup> Jim Daly, president of Focus on the Family, told the crowd that, at a recent pro-life rally in New York City, protestors representing the Black Lives Matter movement, on hearing that abortion takes more black lives than the police do, threw down their signs and joined the rally.

For the first time since the March began in 1974, the president of the United States spoke in person to the crowd. (President Barack Obama was the first president to speak to the annual convention of Planned Parenthood.) Coming amidst

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1. See Jeanne Mancini, “Early Feminists Were Right about Unborn Human Life,” *Daily Signal*, January 3, 2020, <https://www.dailysignal.com/2020/01/03/early-feminists-were-right-about-unborn-human-life/>.

the effort to impeach and remove President Donald Trump, the March and rally attracted attention from the media, which usually ignores it.<sup>2</sup>

President Trump spoke strongly for life and against abortion, and the large crowd was appreciative. President Trump would carry the pro-life theme forward in his State of the Union address nine days later: “Whether we are Republican, Democrat, or independent, surely we must all agree that every human life is a sacred gift from God.”<sup>3</sup>

### Executive Actions and Policy

A few days prior to the March, President Trump declared January 21 to be National Sanctity of Human Life Day, “[reaffirming] our commitment to protect the precious gift of life at every stage, from conception to natural death.” In the proclamation, the president “[called] on the American people to continue to care for women in unexpected pregnancies . . . [and] to listen to the sound of silence caused by a generation lost to us.”<sup>4</sup> He also noted various steps taken by his administration to protect life: ensuring that Title X family planning funds do not go to abortion providers and that states may exclude abortion providers from their Title X projects; protecting the conscience rights of health care providers; and expanding exemptions from the Affordable Care Act’s insurance requirements for religious organizations.

He mentioned another highly important action that may not be as well known and appreciated: “My administration is also building an international coalition to dispel the concept of abortion as a fundamental human right. So far, 24 nations representing more than a billion people have joined this important cause.”<sup>5</sup> To understand the significance of this, it is important to recall an event from twenty-five years ago—the International Conference on Population and Development (ICPD), which was held under the auspices of the United Nations in Cairo in 1994. Two visions collided at that conference. One vision saw population growth as the root problem to be remedied by drastic measures; the other saw poverty as the root problem. This was the first international governmental conference to also include large numbers of representatives of civil society, that is, nongovernmental organizations.

Unfortunately, many of these NGOs supported, or directly advocated for, abortion as central to controlling population growth as part of family planning. This was the view of the most powerful nation in the world, the United States, led at the time by President Bill Clinton. Hence the United States and the European Union pushed hard for recognition of an international human right to abortion.

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2. See, for example, Doug Stanglin, David Jackson, and Joshua Bote, “At March for Life, Trump Says the Unborn Have Never Had a ‘Stronger Defender,’” *USA Today*, January 24, 2020, <https://www.usatoday.com/story/news/nation/2020/01/24/march-for-life-washington-anti-abortion-activists-president-trump/4551608002/>.
  3. Donald Trump, State of the Union Address (February 4, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-state-union-address-3/>.
  4. Donald Trump, Proclamation on National Sanctity of Human Life Day, 2020, January 21, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-national-sanctity-human-life-day-2020/>.
  5. *Ibid.*

That vision of the human future came close to winning the day. However, the Holy See rallied Latin American and Muslim countries in opposition. There was a real, intense diplomatic fight, but in the end, abortion was not recognized as a human right. The preamble of the final document stated that it did not create any new international human rights. The actions for women's health and safe motherhood noted that "in no case should abortion be promoted as a method of family planning. . . . Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process."<sup>6</sup> In addition, several nations included official statements as part of the final document, stating that nothing in that document endorsed abortion as a right.

Although the final document was not a legally binding treaty, the struggle over the content of that document was not "sound and fury, signifying nothing."<sup>7</sup> The final document had always been intended by all participating countries—that is, by all nations in the United Nations—to guide international lending and development. The fact is that developing countries depend on assistance from the United States, the European Union, and international lending institutions such as the UN Capital Development Fund. If the hammer of "universally recognized human right standards" could be employed against the developing countries to force them, despite their cultural norms to the contrary, to recognize abortion as a human right, it would be almost impossible for them to resist the pressure. Thus the pro-life victory at Cairo was very important.

Nonetheless, in the remaining years of the Clinton administration, there was unceasing pressure to recognize abortion national and internationally. In the United States, the pro-abortion forces hoped to accumulate evidence of soft norms, such as statements from other UN meetings, that would convince the US Supreme Court that there was a universal consensus in favor of abortion. This would presumably make the Court less likely to reverse *Roe v. Wade*. Internationally, the argument employed by the United States and other pro-abortion lenders against developing countries was this: If we cannot trust you to abide by international standards providing for abortion, how can we trust you to abide by the terms of any agreements we enter into with you?

After George W. Bush was elected president, the pressure abated. However, the Iraq War caused a promising international pro-life coalition to break apart. Of course, with the election of President Obama, the pressure was on again. Nonetheless, abortion was never recognized as a human right between Cairo and today. However, in my summer 2019 column, I recounted how the UN Human Rights Committee, in the fall of 2018 and for the first time since the International Covenant on Civil and Political Rights became effective in the 1970s, interpreted the right to life in article 6 to require that abortion be available. This was a truly astonishing ruling—contrary to the plain words of the treaty—that may be an

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6. United Nations Population Fund, *Programme of Action Adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994* (New York: UNFPA, 1994), 8.25.

7. *Macbeth*, updated ed., ed. Barbara A. Mowat and Paul Werstine (New York: Simon and Schuster, 2013), 5.5.30-31. References are to act, scene, and line.

indication of the desperation felt by pro-abortion forces in light of the United States' commitment to support the right to life internationally.

That brings us to the significance of the Trump administration's actions. Speaking to the UN General Assembly on September 26, President Trump said the following: "Americans will also never tire of defending innocent life. We are aware that many United Nations projects have attempted to assert a global right to taxpayer-funded abortion on demand. . . . Global bureaucrats have no business attacking the sovereignty of nations that wish to protect innocent life."<sup>8</sup>

In effect, the president reinstated, greatly expanded, and invigorated the pro-life coalition that had begun during the Bush administration. Unlike under President Bush, the Trump administration made this a high priority. The US Department of Health and Human Services (HHS) was designated to lead the effort as part of global health. The position taken by US delegations at international meetings is now unambiguously pro-life.

This effort by the Trump administration had begun before the meeting of the General Assembly. For instance, at the G7 meeting in August 2019, the administration pushed back strongly against recommendations from the G7's Gender Equality Advisory Council that included reference to a fundamental right to abortion.<sup>9</sup> In the end, however, there was no reference to abortion in the final document.

The president also hosted a meeting on September 23 before the General Assembly began to gather support for a coalition to protect religious liberty. This is important for many reasons, including the fact that religious liberty includes freedom of conscience, which is increasingly under threat as anti-life measures advance in the health care field. President Trump said, "Today, I ask all nations to join us in this urgent moral duty. We ask the governments of the world to honor the eternal right of every person to follow their conscience, live by their faith, and give glory to God."<sup>10</sup> These actions came not a moment too soon. An important international meeting on the twenty-fifth anniversary of the Cairo conference was taking place in Nairobi, Kenya, in October and was aimed at affirming what was not true—that the Cairo conference recognized an international right to abortion. The United States participated in that meeting. Its delegation, led by Valerie Huber of HHS, strongly criticized the meeting itself: "While the Cairo ICPD Program of Action was negotiated and implemented with and by the entire UN General Assembly membership, only a small handful of governments were consulted on the planning and modalities of the 2019 Nairobi Summit. Therefore, outcomes from this summit are not intergovernmentally negotiated, nor are they the result of a consensus process. As a result, they should not be considered normative."

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8. Donald Trump, Remarks to the 74th Session of the United Nations General Assembly (September 25, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-74th-session-united-nations-general-assembly/>.

9. Biarritz Partnership for Gender Equality, "Gender Equality Advisory Council's Call to Action" (2019), 3, <https://www.elysee.fr/admin/upload/default/0001/05/c47fb3263f613522a886e2636b40f0d55ec5ef6e.pdf>.

10. Donald Trump, Remarks at the United Nations event on religious freedom, September 23, 2019, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-united-nations-event-religious-freedom-new-york-ny/>.

Regarding the aim of the original Cairo conference to “address the critical challenges and interrelationships between population and sustained economic growth,” the United States noted, “It is noteworthy that . . . the population growth predictions included in the ICPD Program of Action . . . have not come to pass. Indeed, in most regions of the world today, fertility is below population replacement rates. As a result, family planning should focus both on the voluntary achievement of pregnancy as well as the prevention of unwanted pregnancy.”

Regarding abortion itself, the statement noted, “There is no international right to abortion; in fact, international law clearly states that ‘everyone has the right to life.’”

Finally, the United States noted that it spoke not just for itself but on behalf of a coalition of eleven countries.<sup>11</sup>

The Trump administration aims to create a coalition and a pro-life legacy that survives the end of the administration. At a meeting at Blair House in Washington, DC, on January 26, HHS Secretary Alex Azar welcomed representatives of like-minded pro-life countries:

It is not just one or two countries that care about national sovereignty, the family, protecting the unborn, and ensuring a genuinely positive vision for women’s health. . . .

Together, our nations can join together to support more sensible language in U.N. and [World Health Organization] resolutions, which puts the focus back on critical women’s health needs. . . .

Looking back, in 2019, we came together on three joint statements that declared our strong support for a positive global women’s health agenda and for standing firm against the assertion of rights [such as abortion] that simply do not exist. In all, 24 countries signed on to one or more of the joints statements, and it should be an encouragement to all of us that these countries are home to well over 1 billion human beings.<sup>12</sup>

### **The Supreme Court**

At this writing, things are unsettled at the Supreme Court. In mid-March, because of the coronavirus, the Court postponed pending arguments. They have not been rescheduled. When they will be rescheduled is quite uncertain. Given the recommendation of the White House Coronavirus Task Force to strictly follow the prevention guidelines through all of April, it does not seem likely that oral arguments will resume in April. Will they resume in May? Or June? It is impossible to predict. It is possible that oral arguments will resume, not in person, as normal, but by remote means (e.g., Zoom or Skype). That would be unprecedented, but so are the times.

If oral arguments are not resumed in the spring or summer, the Court may decide to begin the next term, which ordinarily begins in October, earlier—say, after Labor Day—and to delay pending oral arguments until then. It is also possible the Court will proceed without oral arguments of the current pending cases.

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11. US Department of Health and Human Services, Join Statement on the Nairobi Summit in the ICPD25 (November 14, 2019), <https://www.hhs.gov/about/agencies/oga/global-health-diplomacy/protecting-life-global-health-policy/joint-statement-on-the-nairobi-summit-on-the-icpd25.html>.

12. Alex M. Azar II, Remarks at the Blair House (January 16, 2020), <https://www.hhs.gov/about/leadership/secretary/speeches/2020-speeches/remarks-at-the-blair-house.html>.

All this is significant for the timing of certain important cases that were due to be heard during this current term. One of the most important of these is *Little Sisters of the Poor v. Pennsylvania*, which involves the HHS mandate. Most readers probably think the HHS mandate cases have been decided and the threat to Catholic hospitals and schools eliminated, but that is not true. The Pennsylvania case gives the Court the opportunity to end this litigation once and for all.

To recap briefly,<sup>13</sup> President Obama issued regulations requiring health care providers, including religious organizations, to provide coverage of basic health services that included contraceptives and abortifacients. These regulations were challenged in court under the Religious Freedom Restoration Act of 1993, which protects against a substantial infringement of religion under a neutral and generally applicable law unless the government has a compelling reason and uses the least intrusive means.<sup>14</sup> Eventually, after the Supreme Court ruled that the RFRA applied to small businesses as well as nonprofits, the religious organizations successfully secured injunctions in the lower federal courts against enforcement of the mandate. The Trump administration subsequently issued regulations ratifying these results. That should have ended the matter.

However, litigation continued. Challengers claimed that the new regulations were invalid because they had not been adopted in compliance with the Administration Procedure Act, which requires certain periods of notice and comment by interested parties before regulations are issued. The federal courts in Pennsylvania agreed and reapplied the Obama-era regulations to the Little Sisters. The court found that the Little Sisters did not meet the requirements of the RFRA for protection from the Obama regulations and thus had to comply with them. Consequently, the Little Sisters appealed to the Supreme Court.

The issues before the Court, whenever they are argued, will involve whether the Trump-era regulations are valid. If they are, the Little Sisters will be protected. However, even so they will be protected only for the duration of the Trump administration. Since every administration can change its regulations, a subsequent administration that does not wish to exempt the Little Sisters (and other religious organizations) could reinstitute the Obama-era regulations.

The only way to avoid that is for the Court, finally, to address the RFRA question and decide that its provisions protect religious organizations in this context. This would finally put the entire matter (involving endless litigation since 2011) to rest for this administration and for any that follow. Given a conservative majority on the Court that favors robust protection for religious freedom, it is to be hoped that the Court will take the opportunity to decide the RFRA issue decisively in favor of the Little Sisters.

Usually the Court announces its most controversial decisions on the last day of the term and then leaves town for the summer. Usually the term concludes at

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13. I have extensively discussed all the developments concerning the mandate in many prior columns of the Washington Insider.

14. Religious Freedom Restoration Act of 1993, Pub. L. 103-131, 107 Stat. 1488 (1993), §2(a)(2) and (3), §3(a) and (b)(2).



the end of June. However, it is unclear this year whether the term will end as usual; the Court might stay in session throughout the summer.

In any case, a decision that is likely to come on the last day of the term, whenever that is, is *June Medical Services v. Russo* (formerly *June Medical Services v. Gee*). This is the most important abortion case to come to the Court since 2016 when it decided *Whole Women's Health v. Hellerstedt*, which was announced on the last day of that term.<sup>15</sup>

*June Medical* involves a law in Louisiana that requires abortionists to have admitting privileges at a local hospital. A similar law in Texas was the subject of *Hellerstedt*. In that case, the Supreme Court struck down the state law. What has changed in the interim is the composition of the Court.

When *Hellerstedt* was decided, the Court had only eight members: Justice Antonin Scalia had died and had not been replaced. The decision was five to three; the five voting to strike down the Texas law were Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor. The three voting against it were John Roberts, Clarence Thomas, and Samuel Alito. Since then, Neil Gorsuch replaced Scalia, and Kennedy retired and was replaced by Brett Kavanaugh. Thus the court, which had a liberal majority when it decided *Hellerstedt*, now has a conservative majority. It seems reasonable to think the conservatives wish to modify or reverse the previous decision.

*Hellerstedt* itself had been a departure from the Supreme Court's 2007 decision in *Gonzales v. Carhart*. *Gonzales* had, for the first time since *Planned Parenthood v. Casey* in 1992, made plain that statutes regulating abortion were to be treated, as were laws in all other areas of life, with a presumption of constitutionality. Nonetheless, *Hellerstedt* struck down the Texas law despite extensive findings by the Texas legislature. In dissent Justices Alito, Thomas, and Roberts noted dissatisfaction with the test employed by the majority, which asked if the law created an "undue burden" on women seeking abortion (a test originally announced in *Casey*). They felt such tests were created chiefly to make it easier for abortion proponents, unique of plaintiffs in other areas of law, to challenge state laws restricting abortion. Thus it is possible the Court will now reject the undue burden test, subjecting abortion laws to the same standard as other laws, that of "rational basis." In other words, if a law has a rational basis—which would be proved if a legislature held hearings and so on—it will be upheld. That would be a revolution in abortion law. It would mean that most, if not all, state restrictions, instead of being struck down by liberal judges under the undefined undue burden analysis as has happened regularly since *Casey*, would be upheld.

If the Court does not go that far, it appears likely that it will at least address the "standing" rules applying to abortion cases. Again, unlike in other areas of law, the courts have allowed abortion clinics to challenge state restrictions on behalf of women who cannot get abortions, so-called third-party standing. In most areas

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15. For a more in-depth consideration of these issues, see William L. Saunders, "Abortion Comes to the Supreme Court: High Court Will Review Case on Louisiana Law," *National Catholic Register*, October 17, 2019, <https://www.ncregister.com/daily-news/abortion-comes-to-the-supreme-court-high-court-will-review-case-on-louisian>.

of law, standing rules require that the plaintiff have an actual injury from the law at issue—no one else can stand in for him or her. If a woman were required to sue on her own behalf when, and if, she is injured (e.g., if a woman wants an abortion but cannot get one because of a law requiring the abortionist to have admitting privileges), the number of suits would drop drastically. Similarly, in most areas of the law, facial challenges are not permitted (challenging the law before it goes into effect). Rather, suits proceed on an as-applied basis. This is a prudential approach that reduces the caseload for courts, because a lawsuit is permitted only when there is an actual dispute under a law as applied to a particular person. Again, it seemed *Gonzales* had applied this to the abortion context, but *Hellerstedt* seemed to hold to the contrary. It is to be hoped the decision in *June Medical* will make it clear that, as is usually the case in other litigation, abortion challenges must be as-applied, not facial.

Thus it should be clear that many pro-life issues are at stake in *June Medical*, which has an opportunity to correct *Hellerstedt*. Hopefully, oral argument in the case, which is scheduled for the end of April, will proceed.

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