A New Twist in the Abortion Funding Controversy: Planned Parenthood v. Arizona

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A NEW TWIST IN THE ABORTION FUNDING CONTROVERSY: PLANNED PARENTHOOD v. ARIZONA

In 1983 the United States Court of Appeals for the Ninth Circuit faced a novel situation: whether a discriminatory state funding program violated the Constitution of the United States. The Arizona legislature enacted an appropriations scheme for fiscal year 1980-81 under which no nongovernmental entity could receive state funds for family planning if that entity provided abortion counseling. Planned Parenthood challenged the constitutionality of that appropriations scheme in federal court. In Planned Parenthood v. Arizona, the district court found that the funding scheme violated Planned Parenthood's first amendment rights. The Ninth Circuit reversed and held that Arizona was not constitutionally required to fund abortion-

1. Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983).
2. Id. at 941 n.1. The court quoted the pertinent law:
   "No state money may be spent by the department of economic security by contract, grant, or otherwise, on abortions, abortion procedures, counseling for abortion procedures or abortion referrals. These restrictions are not applicable when it is necessary to save the life of a pregnant woman."
   "No state money, other than money for comprehensive medical and dental care and the developmentally disabled, may be given by the department of economic security by contract, grant, or otherwise to agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals. Governmental agencies or entities are exempt from the restrictions in this paragraph."
   Id. (quoting 1980 Ariz. Sess. Laws 842, 860 n*).

3. In this Recent Case, Planned Parenthood refers collectively to Planned Parenthood of Central and Northern Arizona and Planned Parenthood of Southern Arizona. See 718 F.2d at 941. Both litigants in the case offer abortion counseling and referrals. Planned Parenthood of Central and Northern Arizona also performs abortion procedures.
5. 537 F. Supp. at 92. The amendment states in relevant part: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend I. The amendment has been incorporated through the fourteenth amendment to apply to the states. E.g., Schneider v. State, 308 U.S. 147, 160 (1939).
related speech activities when it funded non-abortion speech activities. The appellate court therefore remanded the case to allow Arizona an opportunity to prove that withdrawal of all funds from Planned Parenthood was the only way to ensure that no state monies would be used for abortion counseling. The court recognized, in effect, that if Arizona failed to show that Planned Parenthood could not keep separate accounts for its abortion and non-abortion activities, the appropriations scheme would place an unconstitutional penalty on Planned Parenthood's right to offer abortion counseling. This penalty would be the result of requiring Planned Parenthood to choose either to receive government funding and provide only non-abortion-related services, or to reject government funding and continue to offer abortion-related services. The court, however, failed to realize that an unconstitutional penalty still exists.

Unlike prior abortion cases, Planned Parenthood's first amendment right to provide abortion counseling was at stake. Although the Supreme Court has held that the government need not fund abortion procedures when funding childbirth procedures for indigent women, the Court has not addressed the issue of abortion-related speech. The Ninth Circuit failed to realize that allowing Arizona to deny funds for abortion counseling created an unconstitutional content-based distinction. Consequently, Planned Paren-

6. 718 F.2d at 944; see infra note 29 and accompanying text.
7. 718 F.2d at 946.
8. Id. at 945. The court stated that a statute which simply prohibited the use of state money for abortion-related activity would infringe less on Planned Parenthood's right to offer abortion and engage in abortion counseling. Id.
9. See infra notes 37-48 and accompanying text.
10. Most abortion cases have applied a substantive due process analysis to determine whether the involved state action infringed upon a woman's right to decide whether to continue a pregnancy. See, e.g., Bellotti v. Baird, 443 U.S. 622, 645 (1979) (parental consent law unduly interferes with minor's right to an abortion); Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976) (spousal consent requirement interferes with a woman's right to decide whether to continue a pregnancy); Roe v. Wade, 410 U.S. 113, 153 (1973) (right of privacy is broad enough to include a woman's decision whether or not to terminate her pregnancy); cf. Harris v. McRae, 448 U.S. 297, 315 (1980) (prohibition of Medicaid payments for an abortion does not abridge a woman's decisional right).

A few abortion cases, however, have involved a first amendment speech claim. See, e.g., Bigelow v. Virginia, 421 U.S. 809 (1975) (free speech violation to prohibit dissemination of information about abortion); Planned Parenthood v. Kempiners, 568 F. Supp. 1490 (N.D. Ill. 1983) (a woman's first amendment right to receive information about abortion violated by state scheme that funded only non-abortion counseling); Young Women's Christian Ass'n v. Kugler, 342 F. Supp. 1048 (D.N.J.), aff'd, 493 F.2d 1402 (3d Cir. 1972) (statute prohibiting physicians from advising women on how to induce an abortion was unconstitutionally vague and deterred exercise of first amendment rights), cert. denied, 415 U.S. 989 (1974).

12. See infra notes 49-81 and accompanying text.
thhood’s first amendment speech rights have been violated by the Arizona funding program. In addition, a woman’s fundamental right to make an informed decision, in consultation with her physician, as to whether to continue a pregnancy is abridged by Arizona’s disparate funding scheme. This refusal to subsidize abortion counseling ensures that no counselor funded solely by state money may impart information about abortion to pregnant women who seek counseling on their pregnancy options.

This Recent Case will address these three problems with the Ninth Circuit’s opinion: that its penalty analysis is incomplete; that Planned Parenthood’s free speech rights continue to be abridged; and that women’s due process rights are infringed. Disparate state funding of family planning services has been analyzed rarely by the courts, and the Ninth Circuit is the highest federal court to rule on these issues. If not checked, the Ninth Circuit’s analysis threatens to be an important, but dangerously incorrect, precedent.

PROCEDURAL HISTORY OF Planned Parenthood

Congress enacted Title XX of the Social Security Act to assist states in providing social services. Under Title XX, a state may directly provide a service or the state may contract with private entities to provide a service.

13. See infra notes 82-108 and accompanying text.
14. In this Recent Case, the term “state-funded counselor” will refer to a family planning counselor funded solely by the state in a nongovernmental family planning organization under contract with a state to provide social services.

Another problem with the Arizona funding scheme, which will be mentioned only briefly here, is that governmental agencies providing family planning services are exempt from the denial of state funding based upon abortion services. One federal appellate court has held that discriminating between types of facilities for the grant of state funds is a denial of equal protection. See Planned Parenthood v. Minnesota, 612 F.2d 359 (8th Cir.), aff’d, 448 U.S. 901 (1980).

15. Three other federal courts have declared similar statutes unconstitutional. In Planned Parenthood Ass’n Chicago Area v. Kempiners, 568 F. Supp 1490 (N.D. Ill. 1983), the court held that funding non-abortion counseling but not funding abortion counseling violated a woman’s due process right to decide whether to abort. Id. at 1496. It also violated a woman’s first amendment right to receive information about abortion. Id. In Valley Family Planning v. North Dakota, 489 F. Supp. 238 (D.N.D. 1980), aff’d, 661 F.2d 99 (8th Cir. 1981), the district court held that North Dakota’s refusal to fund abortion referrals while funding non-abortion referrals unconstitutionally penalized Valley Family Planning’s free speech rights. 489 F. Supp. at 243. On appeal, the Eighth Circuit found the statute prohibiting funding of abortion referrals invalid under the Supremacy Clause, and thus did not reach the constitutional questions. 661 F.2d at 99. In Planned Parenthood v. Minnesota, 612 F.2d 359 (8th Cir.), aff’d, 448 U.S. 901 (1980), the court struck down a statute that denied state funding for pre-pregnancy counseling to abortion providers that performed abortion counseling as violating the equal protection clause because the statute exempted hospitals and health maintenance organizations.

17. 42 U.S.C. § 1397(e) (Supp. 1983). Title XX is a federal grant-in-aid program wherein the federal government provides 90% of the funding for a social program offered by the state and the state provides the remaining 10% of the necessary funds. The title programs under
Family planning service is one social service covered by Title XX.\textsuperscript{18} Arizona, as a participant under Title XX, contracted with Planned Parenthood to provide family planning services for Arizona residents. Planned Parenthood received governmental funding for its family planning services prior to fiscal year 1980-81.\textsuperscript{19}

For fiscal year 1980-81, however, the State of Arizona appended a footnote to its General Appropriations Bill that prohibited any nongovernmental organization offering "abortions, abortion procedures, counseling for abortion procedures or abortion referrals"\textsuperscript{20} from receiving state funding. Consequently, Arizona denied Planned Parenthood funding for fiscal year 1980-81, solely because one part of Planned Parenthood's comprehensive family planning program included abortion and abortion-related speech activity.\textsuperscript{21}

Planned Parenthood brought suit in federal district court challenging the constitutionality of Arizona's disparate funding scheme.\textsuperscript{22} Specifically, Planned Parenthood made two constitutional arguments. First, Planned Parenthood contended that the statute penalized it for exercising its right to counsel for abortion.\textsuperscript{23} Second, it argued that Arizona could not constitutionally distinguish between different points of view when funding family planning services.\textsuperscript{24} The district court accepted both arguments. It held that compliance with the appropriation bill's requirement that a provider forego counseling for abortion and abortion referrals penalized Planned Parenthood's first amendment right to disseminate abortion information.\textsuperscript{25} The court also
recognized that Arizona had created an impermissible content-based distinction\(^{26}\) without a compelling justification.\(^{27}\) The court granted summary judgment for Planned Parenthood and permanently enjoined Arizona’s disparate funding scheme.\(^{28}\)

On appeal, the Ninth Circuit reversed and held that Arizona was not required to fund abortion counseling even though the state funded non-abortion counseling.\(^{29}\) The Ninth Circuit relied on the Supreme Court’s decision in *Maher v. Roe*,\(^{30}\) which upheld the right of a state to fund childbirth expenses and not abortion expenses.\(^{31}\) The court of appeals perceived no distinction

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Planned Parenthood’s first amendment speech rights. The court declared that because Arizona cannot directly outlaw abortion speech, Arizona cannot indirectly attempt to curtail abortion speech. *Id.*

\(^{26}\) *Id.* at 91-92.

\(^{27}\) *Id.* at 93.

\(^{28}\) *Id.* In addition, the district court found the term “counseling for abortion procedures” unconstitutionally vague. *Id.* at 92. The court stated that it did not know whether the phrase forbade advocacy of abortion or merely mentioning abortion as one alternative to a pregnancy. Further, the court did not know whether it would make a difference if the client broached the subject. *Id.*

\(^{29}\) 718 F.2d at 944. The appellate court also reversed the vagueness finding of the lower court. *Id.* at 946. The Ninth Circuit, however, was unclear in defining the scope of the term “counseling for abortion procedures.” *Id.* On the one hand, the court refers to the Arizona Attorney General’s opinion that defines the term as an explanation of the abortion procedure. The Attorney General’s opinion explained that there should be no interference with the counselor-client relationship under this definition. *Id.* at 948 (quoting No. 173-252 Op. Ariz. Att’y Gen. 3 n.5 (Oct. 11, 1979)). On the other hand, the Ninth Circuit seemingly adopts the Attorney General’s definition, but then goes further to define the term to include only counseling about the actual abortion procedure with women who have decided to undergo an abortion. *Id.* at 949. This definition seems to be narrower than the Attorney General’s definition. Nonetheless, by either definition, counselors would be prohibited from describing abortion procedures to a woman who had decided to undergo an abortion and who desired more information.

This could lead to an anomaly. A state-funded counselor confronted by a client who said that she did not know what she wanted to do with a pregnancy could receive a description of an abortion procedure, whereas a woman who had decided to undergo an abortion could not receive the same description or even receive a referral to a facility where an abortion could be obtained. Moreover, if the definition of the term “counseling for abortion procedures” includes a description of the actual procedure, then a state grantee which advocated that abortion is immoral, when describing the “horrors” of the procedure to a woman who had decided to abort, would be violating the Arizona legislature’s prohibition. Prohibiting anti-abortionists from describing the procedure in an attempt to convince a woman to forego an abortion would presumably circumvent the purpose of the statute.


\(^{31}\) *Id.* at 479. The Supreme Court held in *Maher* that there was no equal protection violation when a state, participating under Medicaid, refused to reimburse expenses incident to non-therapeutic abortions for indigent women while reimbursing childbirth expenses. *Id.* at 474. The Court premised its holding upon the finding that no constitutional right had been infringed by the refusal to fund abortion expenses. *Id.* at 474. The Court announced that the right recognized in *Roe v. Wade*, 410 U.S. 113 (1973), was the right to decide to abort without interference from the state. 432 U.S. at 473-74. According to the *Maher* Court, the funding scheme placed no obstacles in a woman's decisionmaking process. *Id.* at 474.

For a critique of the Supreme Court’s decision in *Maher* and related cases, see Note, *The Supreme Court, 1979 Term—Exclusion of Therapeutic Abortions from Medicaid Coverage*, 94
between a disparate funding program for medical procedures and a disparate funding program for speech about medical procedures.\textsuperscript{12} Relying on the Supreme Court's decision in \textit{Maher}, the court found Arizona's refusal to fund abortion counseling constitutional.\textsuperscript{13}

The court noted, however, that the funding scheme denied all state money to Planned Parenthood even though only part of Planned Parenthood's total program involved non-abortion counseling.\textsuperscript{14} The court stated that Arizona's policy of not funding abortion counseling might be realized by simply prohibiting state grantees from using state funds for abortion-related speech activity, rather than withholding all funds.\textsuperscript{15} Consequently, the appellate court reversed the grant of summary judgment and remanded the case to provide Arizona an opportunity to prove that withholding all state funds from Planned Parenthood was the only way to ensure that no state money would be used for abortion counseling.\textsuperscript{16}

\section*{ANALYSIS}

\subsection*{A. The Penalty Analysis}

The Supreme Court has recognized that a state may not base the receipt of a government benefit on the forfeiture of a constitutional right.\textsuperscript{37} For example, in \textit{Speiser v. Randall},\textsuperscript{38} the Court struck down a law denying tax

\begin{itemize}
  \item \textsuperscript{12} 718 F.2d at 944.
  \item \textsuperscript{13} \textit{Id.}
  \item \textsuperscript{14} \textit{Id.} at 945.
  \item \textsuperscript{15} \textit{Id.} It was unclear to the court whether the statute was drawn narrowly enough to have the least amount of infringement on Planned Parenthood's rights. \textit{id.}
  \item \textsuperscript{16} \textit{Id.} at 946. It is interesting to note that the court remanded to allow Arizona the chance to prove that withholding all funds was the only way to ensure that no state money would be used for abortion-related activity. Later in the opinion, however, the court acknowledged that Planned Parenthood had already been keeping sufficiently separate records on its abortion and non-abortion activity. \textit{id.} at 948.
  \item \textsuperscript{37} See, e.g., Thomas v. Review Bd., 450 U.S. 707 (1981) (denial of unemployment benefits to one who quit work based on a conflict with religious beliefs after being transferred to a war munitions section penalized individual's free exercise of religion); Perry v. Sindermann, 408 U.S. 593 (1972) (dismissal from state university teaching position, if based on professor's speeches about the administration of the university, penalized professor's first amendment speech right); Shapiro v. Thompson, 394 U.S. 618 (1969) (denial of welfare benefits to persons who have not resided in a state for one year penalized fundamental right to travel).
  \item \textsuperscript{38} 357 U.S. 513 (1958).
\end{itemize}
exemptions to certain veterans solely because they refused to sign an oath pledging not to advocate the overthrow of the government. In the Court’s view, the denial of the tax exemption was the equivalent of the imposition of a criminal sanction—it served to deter expression of a particular view. The Court held, therefore, that once the government created the tax benefit, the receipt of that benefit could not be conditioned upon the recipient’s foregoing a constitutional right.

Similarly, Arizona conferred a benefit by subsidizing organizations providing family planning services, and Planned Parenthood has a first amendment right to disseminate information about abortion. Under the funding scheme enacted by the Arizona legislature, Planned Parenthood may receive state money for non-abortion-related activity only if it does not engage in abortion-related speech activity. Planned Parenthood was offered a choice: receiving state funds or continuing its abortion counseling service. Instead

39. Id. at 529.
40. Id. at 518. The Court analogized the deterrent effect on speech to a situation where the state had imposed a fine on the veterans’ speech. The Court recognized that basing the receipt of a tax exemption on foregoing a free speech right was indirectly producing a result that the state could not command directly. Id. at 526; see also Thomas v. Review Bd., 450 U.S. 707, 718 (1980) (first amendment infringement is substantial even where compulsion to forego the constitutional right is indirect); Sherbert v. Verner, 374 U.S. 398, 404 n.5 (1963) (citing American Communications Ass’n v. Douds, 339 U.S. 382, 402 (1950)) (indirect restraints on first amendment rights are just as coercive as criminal sanctions).
41. 357 U.S. at 518; see also Perry v. Sindermann, 408 U.S. 593 (1972), where the Supreme Court stated:
   For at least a quarter-century, this Court has made clear that even though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in free speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to “produce a result which [it] could not command directly.” Speiser v. Randall, 357 U.S. 513, 526. Such inference is impermissible.
42. Just as the tax exemption in Speiser was gratuitously given, so funding family planning services is a voluntary benefit given by Arizona. 718 F.2d at 941.
43. See Bigelow v. Virginia, 421 U.S. 809 (1975) (right to disseminate information about abortion is protected by the first amendment).
44. 718 F.2d at 941 n.1. The Arizona funding scheme seeks to control the type of information Planned Parenthood is allowed to disclose to its clients. Although the statute did not impose a criminal sanction on Planned Parenthood for abortion related speech, this indirect encroachment on Planned Parenthood’s free speech rights may only be justified by a vital governmental interest. See Elrod v. Burns, 427 U.S. 347, 363 (1976) (plurality opinion) (conditioning the retention of public employment on the employee’s support of a particular political party must serve a vital public interest). Arizona had no vital interest that justified this indirect encroachment. See infra notes 74-81 and accompanying text.
of striking down the disparate funding scheme as an unconstitutional penalty, the Ninth Circuit reasoned that if Arizona could prove that the denial of all funding was the only way to ensure that Planned Parenthood would not use state funds for abortion-related activity, then the statute would be permissible. Yet where a statute "on its face imposes a penalty on the exercise of constitutional rights," it is invalid and should be struck down. The court erred, therefore, in remanding the case to permit Arizona to prove that Planned Parenthood was unable to keep separate accounts on its abortion and non-abortion services. An unconstitutional penalty, narrowly construed, is still a penalty.

B. Planned Parenthood's First Amendment Claim

The Ninth Circuit held that Arizona was not constitutionally required to fund abortion counseling when it elected to fund non-abortion counseling. The court failed to recognize that Planned Parenthood's first amendment speech rights were infringed. In upholding Arizona's discriminatory funding system, the appellate court relied on Maher, which upheld a state's decision to provide Medicaid reimbursement for the childbirth, but not the abortion, expenses of indigent women. Likewise, in Valley Family Planning v. North Dakota, 489 F. Supp. 238 (D.N.D. 1980), aff'd, 661 F.2d 99 (8th Cir. 1981), North Dakota enacted a funding scheme that provided that no state money could be used by any person or public or private agency which performs, refers, or encourages abortion. 489 F. Supp at 240. The district court first held that disseminating information about abortion is protected speech under the first amendment. The court then held that it was unconstitutional for North Dakota to condition receipt of state funds on the recipient's surrendering of a constitutional right, i.e., speaking about abortion.

The court faced a similar appropriation scheme. That court struck down the statute as being facially invalid. The court held that a state may not constitutionally disqualify an otherwise eligible candidate for non-abortion funds solely because another part of the candidate's overall program included abortion-related activities. Id. at 1495.

Likewise, in Valley Family Planning v. North Dakota, 489 F. Supp. 238 (D.N.D. 1980), aff'd, 661 F.2d 99 (8th Cir. 1981), North Dakota enacted a funding scheme that provided that no state money could be used by any person or public or private agency which performs, refers, or encourages abortion. 489 F. Supp at 240. The district court first held that disseminating information about abortion is protected speech under the first amendment. The court then held that it was unconstitutional for North Dakota to condition receipt of state funds on the recipient's surrendering of a constitutional right, i.e., speaking about abortion. Id. at 242.

46. 718 F.2d at 946.
47. Planned Parent Ass'n v. Kempiners, 700 F.2d 1115, 1123 (7th Cir. 1983) (per curiam) (Cudahy, J., Separate Opinion).
48. Id. The duty of a federal court is to decide whether a statute is unconstitutional when a party is suffering a real injury such as deprivation of funds. Id.
49. The court admitted that Arizona had made advocation of non-abortion procedures a more attractive alternative, but that Arizona had not directly interfered with access to abortions or the free flow of information concerning abortion counseling. 718 F.2d at 944.
50. See supra notes 30-33 and accompanying text.
51. 432 U.S. at 479.
52. Id. at 471.
53. Id. at 474. The Court distinguished its decision from Roe v. Wade, 410 U.S. 113 (1973), in which the Court held that a woman had a fundamental right to decide whether to continue
Court held that because a woman's decisional right was not infringed, reimbursing childbirth expenses and not abortion expenses rationally served the state's interest in protecting potential life. The *Maher* Court recognized, however, that a refusal to subsidize, if based on constitutionally impermissibility reasons, would be invalid.

The Ninth Circuit found *Maher* to be controlling. The court perceived no distinction between upholding nonreimbursement for abortion procedures and allowing non-subsidization of abortion-related speech activity. The court stated that "Arizona's decision to refuse to fund abortion and abortion-related speech activities may make childbirth and advocacy of childbirth more attractive alternatives, but it has imposed no restriction on access to abortions or on the free flow of information concerning abortion." The Ninth Circuit, therefore, found no constitutional infirmity in allowing Arizona to fund only non-abortion speech.

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54. 432 U.S. at 474. The Supreme Court has at least two different tests which it applies to alleged constitutional defects. If a suspect classification or a fundamental right is infringed by state action, the Court imposes strict scrutiny, i.e., the state action must be necessary to further a compelling interest. If no suspect class or fundamental right is impinged upon, the state action must be rationally related to a legitimate state interest. *Id.* at 470 (citing *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)).

55. 432 U.S. at 478. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court recognized that a state does have an interest in protecting potential life, but this interest does not become compelling until the fetus is viable. *Id.* at 163. The Court determined the fetus to be viable during the third trimester of pregnancy. *Id.* A state, therefore, could not justify abridging a woman's decision-making process until viability. *Id.* at 164-65.

Conversely, in *Maher*, the funding scheme did not infringe upon a woman's fundamental right, and therefore, it need only survive lower level scrutiny. 432 U.S. at 478. Because the funding scheme influenced a woman to choose childbirth over abortion, it furthered a legitimate state interest in protecting potential life. *Id.* at 478.

56. 432 U.S. at 469-70. The use of government funds is subject to constitutional limitations. *Id.*

57. See supra note 49.

58. 718 F.2d at 944.

59. The Ninth Circuit's opinion cited a federal district court decision from Illinois involving a similar issue. *Id.* (citing Planned Parenthood Ass'n—Chicago Area v. Kempiners, 531 F. Supp. 320, 325 (N.D. Ill. 1981), vacated and remanded on other grounds, 700 F.2d 115 (7th Cir. 1983)). The Ninth Circuit used this opinion as support for its decision that Arizona did not have to fund abortion speech while funding non-abortion speech. *Id.* The Ninth Circuit erroneously declared that the district court upheld the Illinois statute. *Id.* Although the Ninth Circuit correctly quoted from the district court opinion, that section was analyzed as an equal protection claim. Indeed, the district court held the statute to be an unconstitutional violation of the first and fourteenth amendments. 531 F. Supp. at 327. The district court again affirmed its prior decision on the substantive issues. Planned Parenthood Ass'n Chicago Area v. Kempiners, 568 F. Supp. 1490 (N.D. Ill. 1983). The district court in *Kempiners* expressly found that Illinois, by refusing to fund abortion counseling while funding non-abortion counseling, had created an impermissible content-based distinction. 531 F. Supp. at 330-31. The district court stated that giving preferential treatment to one viewpoint in the form of a subsidy was forbidden by the first amendment. *Id.* at 331.
The flaw in the Ninth Circuit's holding is its failure to recognize Planned Parenthood as a free speech case, not an abortion case.\textsuperscript{60} The court missed the critical difference between refusal to fund one type of speech while funding another.\textsuperscript{61} The controlling distinction between an action (e.g. abortion procedure) and speech is that the Supreme Court rigorously guards against content-based speech distinctions.\textsuperscript{62} \textit{Maher} allowed a state to be non-neutral in funding different medical acts because the Court considered no fundamental right to be infringed.\textsuperscript{63} The content-based distinction in the Arizona statute does infringe Planned Parenthood's free speech rights. Planned Parenthood deserved the rigorous protection that the Supreme Court has accorded to subjects of content-based distinctions.

The Ninth Circuit ignored numerous Supreme Court decisions that require a state, absent a compelling reason, to be neutral with respect to the con-

\begin{itemize}
\item \textsuperscript{60} The Ninth Circuit failed to distinguish clearly between the individual interests at stake in \textit{Maher} and those at stake in the case before it. \textit{Maher} involved a woman's right to an abortion. 432 U.S. at 474. In \textit{Planned Parenthood}, the issue was Planned Parenthood's right to have its first amendment speech right infringed. See 718 F.2d at 942. The appellate court perceived no distinction between the two constitutional rights. \textit{Id.} at 942-46. But see Bigelow v. Virginia, 421 U.S. 809, 815 n.5 (1975) (right to disseminate information about abortion is governed by first amendment principles, not abortion law principles).
\item \textsuperscript{61} See Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940) (Supreme Court declared that the basic purpose of the first amendment was to ensure that all points of view are brought to the public's attention); see also Bates v. City of Little Rock, 361 U.S. 516, 523 (1960) (first amendment speech rights need to be protected diligently from subtle and indirect attempts by a state to stifle a particular view).
\item \textsuperscript{62} Content-based discrimination arises where a state "accords preferential treatment to the expression of views on one particular subject." Carey v. Brown, 447 U.S. 455, 461 (1980); see Widmar v. Vincent, 454 U.S. 263 (1982) (noting the importance of preventing content-based distinctions); Consolidated Edison v. Public Service Comm'n, 447 U.S. 530, 537 (1980) (first amendment hostile to state action based on content of speech); Police Dept. v. Mosley, 408 U.S. 92, 95 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").
\item \textsuperscript{63} 432 U.S. at 474; see supra note 31.
\end{itemize}
tent of fully protected speech.64 Partially protected speech65 and unprotected speech66 are scrutinized less strenuously.67 But the Supreme Court has recognized that informing others about abortion is fully protected speech.68 Once speech is accorded first amendment protection, the Court has steadfastly refused to allow the government to provide preferential treatment to one side of a controversial issue.69 Instead, the government must remain neutral to the content of fully protected speech.

64. The parameters of fully protected speech are expanding, with political speech enjoying rigorous protection. See Mills v. Alabama, 384 U.S. 214, 218 (1966) ("major purpose of [First] Amendment was to protect the free discussion of governmental affairs"). The Supreme Court, however, has extended strict protection beyond the political speech arena to many diverse areas. See, e.g., Widmar v. Vincent, 454 U.S. 263 (1981) (religious speech); Carey v. Brown, 447 U.S. 455 (1980) (labor picketing); City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (school board discussions); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (nude scenes at drive-in theaters). It can be argued that all speech deserves full protection unless it falls into a category defined by the court as deserving less than full protection. See infra 65-67 and accompanying text; cf. Roth v. United States, 354 U.S. 476, 484 (1957) (Court stated that "[all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [first amendment] guarantees.")

65. For example, commercial speech is partially protected speech. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980). It may also include conduct. Compare Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505-06 (1969) (wearing armbands is the equivalent of "pure speech" and is fully protected) with United States v. O'Brien, 391 U.S. 367, 376 (1968) (conduct, such as burning one's draft card, even when used to express an idea, will not be accorded full first amendment protection).


69. The first amendment is violated when a legislature attempts to ensure that only one side of a controversial issue is expressed to the public. First Nat'l Bank v. Bellotti, 435 U.S. 765, 785-86 (1978). Once a government has allowed discussion of certain topics, it should not discriminate among differing views. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 963 (1983) (Brennan, J., dissenting).

Indeed, in Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481 (1983), even the Justices who would have upheld the various ordinances regulating abortion services recognized that a counselor's first amendment right would be violated if a state required the counselor to communicate the state's position on the abortion controversy to clients. Id. at 2515 n. 16
Arizona, by enacting an appropriation scheme that funds non-abortion but not abortion counseling, has created a content-based distinction. Arizona funds a multitude of family planning services. Abortion counseling is simply one aspect of Arizona's family planning services. For the state to prohibit the use of state money for abortion-related speech, while continuing to fund non-abortion related speech, creates a content-based regulation. The receipt of funds is based solely on the content of speech. Although the Supreme Court has not squarely addressed disparate funding with respect to abortion related speech, the Court's previous decisions firmly hold that a regulation may not be based on content alone. In Planned Parenthood, the funding

(O'Connor, J., dissenting).

Further, when state action is directed at suppressing a particular viewpoint, the state must show that the differential treatment is necessary to further a compelling interest. First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978).

70. See supra note 2.

71. See Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980) (first amendment forbids not only restrictions on a particular view, but also restrictions on an entire topic); see also First Nat'l Bank v. Bellotti, 435 U.S. 765, 785-86 (1978) (courts must prohibit legislative attempts to suppress certain speech and thus give preferential treatment to the other side of a controversy); City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976) (essence of first amendment free speech clause is that government may not create a monopoly for the expression of one viewpoint on an issue).

72. That the expression of one's view depends on funding is irrelevant in a first amendment analysis. See First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 n.23 (1978). A refusal to subsidize can be a violation of the first amendment. In Widmar v. Vincent, 454 U.S. 263 (1981), the Supreme Court ruled that a state university, once it had opened its facilities for use by student groups, could not deny use of those facilities to student groups that wished to discuss religious issues. The Court declared that the university must be content-neutral toward speech. Id. at 277.

In Widmar, the state was using its funds to maintain facilities for student groups to use to express their ideas. The Court was stating, in effect, that the university may not regulate the use of its money in a manner that differentiated between content of speech. The Court essentially held that as long as the university used its money to provide facilities for student groups, the university could not restrict access to those facilities based on the content of a group's speech. Id.

Similarly, in Healy v. James, 408 U.S. 169 (1972), the Supreme Court found a first amendment violation where a state university denied official recognition to a student group. Id. at 193-94. Official recognition would have enabled the group to hold meetings in the university's facilities. Id. at 181. The Court declared that a state may not deny a government benefit because the state disapproves of the views expressed by a particular group. Id. at 185-86. The Court further stated that the fact that a group might be able to meet off campus did not alleviate the impermissible action of the university. Id. at 183; see also Southeastern Promotions v. Conrad, 420 U.S. 546, 556 (1975) (that a privately-owned theater might be available is inconsequential to the city's denial of the use of its theater for a production); Schneider v. State, 308 U.S. 147, 163 (1939) (an abridgement of one's exercise of first amendment speech rights in appropriate places cannot be justified by saying that the right may be exercised elsewhere).

The principles of Widmar and Healy declare that a state may not regulate the use of its property in a constitutionally impermissible manner. Money is state property just as is real estate. Moreover, Healy states that the government may not deny any benefit in a constitutionally impermissible manner. 408 U.S. at 181-83. Government funding is a government benefit. It is inconceivable that the decisions in Widmar and Healy would have been different had the state given each student group a stipend to rent private facilities instead of granting the use of state facilities. In addition, the possibility that state grantees might be able to find private
restriction gives preferential treatment to non-abortion counseling. Arizona’s funding scheme gives preferential treatment to one type of speech, and therefore, is constitutionally suspect. 73

A content-based distinction, however, may be justified where the state can demonstrate that such a distinction is necessary to serve a compelling state interest. 74 The governmental interest apparently relied on by Arizona is the protection of life. 75 Arizona’s interest in protecting potential life is insufficiently compelling. In abortion cases dealing with a woman’s fundamental right to choose whether to continue a pregnancy, protecting potential life has not been deemed a compelling state interest until the third trimester of a woman’s pregnancy. 76 Yet the Arizona funding scheme makes no reference to any time period. Under the trimester test, Planned Parenthood’s first amendment rights presumably could be overridden if its counsellors recommended abortions beyond the beginning of the third trimester. Absent a showing of any infringement of this state interest, Arizona’s interest is not sufficiently compelling to justify a content-based distinction. 77

Indeed, even in the third trimester, Arizona should not be permitted to maintain a speech preference because Arizona has other, narrower means to protect its interest. 78 Arizona may prohibit abortions after viability unless necessary to save the life or health of a pregnant woman. Because Arizona may protect its interest by prohibiting abortions in the third trimester, it need not curtail speech about abortion to achieve its goal. 79

funds to subsidize their abortion counseling program does not ameliorate the impermissible content-based regulation imposed by Arizona.

73. See Southeastern Promotions v. Conrad, 420 U.S. 546, 558-59 (1975) (attempts by a state to repress expression of a view is presumptively unconstitutional); see also supra note 62 (first amendment mandates a presumption of unconstitutionality where a state accords differential treatment to the content of speech).


75. Although the Ninth Circuit never articulated Arizona’s interest in creating the discriminatory funding scheme, the court found the Supreme Court decision in Maher v. Roe, 432 U.S. 464, 472, 478 (1977), to be controlling. In Maher the state’s interest was protection of potential life and encouraging normal childbirth. See Planned Parenthood, 718 F.2d at 943-44.

76. Roe v. Wade, 410 U.S. 113, 164-65 (1973). Only in post-viability, i.e., the third trimester, does a state’s interest in protecting potential life become sufficiently compelling to justify state interference with the abortion decision. Id.; see also Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481, 2492 (1983) (reaffirming Roe’s mandate that a state has a compelling interest only in post-viability fetal life).

77. See Harris v. McRae, 448 U.S. 297, 313 (1980) (during first trimester a state has no interest that justifies any intrusion in the pregnant woman’s decisional process); cf. Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481, 2492-93 (1983) (state regulations that do not interfere with free consultation between counselor and client and that are based on safeguarding women’s health may be permissible during the first trimester).

78. See Widmar v. Vincent, 454 U.S. 263, 270 (1981) (to justify a content-based regulation, the state must establish that the “regulation is narrowly drawn to achieve that end”); see also Carey v. Brown, 447 U.S. 455, 465 (1980) (a narrowly drawn content-based distinction may be permissible if no adequate alternative exists).

79. Although protection of potential life is a valid state interest as it relates to a woman’s fundamental right to decide whether to continue a pregnancy, Roe v. Wade, 410 U.S. 113, 165-66 (1973), it has never been considered a valid justification for a regulation on speech
Moreover, Arizona's content-based distinction inhibits the free flow of information about abortion. The result of the scheme is to keep women ignorant about abortion alternatives. Although pregnant women who seek counseling probably know that abortion is an alternative, the Arizona scheme promotes ignorance about the availability and health consequences of abortion. Promoting ignorance has been recognized as an impermissible result of a content-based distinction. Having insufficient justification for a content-based regulation, Arizona’s funding system is an unconstitutional abridgment of Planned Parenthood’s first amendment right of free speech.

C. The Woman’s Fundamental Right Claim

The Ninth Circuit’s decision to allow Arizona to deny funds for abortion counseling while funding non-abortion counseling not only allows Arizona to violate Planned Parenthood’s first amendment right, but also violates a woman’s fundamental right, as recognized in Roe v. Wade, to decide about abortion, see Bigelow v. Virginia, 421 U.S. 809, 822 (1975) (decision cited Roe v. Wade, and Doe v. Bolton, but did not discuss protection of potential life as a valid interest that would justify a free speech abridgement).

80. In NAACP v. Button, 371 U.S. 415 (1963), the Supreme Court dealt with a Virginia statute prohibiting anyone from soliciting legal business. The Court struck down the statute as violative of the first and fourteenth amendments. Id. at 437. The Court stated that Virginia could not prohibit a person from advising others of their legal rights and referring them to attorneys for legal assistance. Id. at 434.

Although Arizona has not made it a crime to advise a woman of her legal right to have an abortion, its funding scheme brings about the same result as would a criminal sanction. A state-funded counselor risks losing all financial support for the family planning service if the counselor advises a client of her abortion alternative. There is little difference between the Button decision and the situation in Planned Parenthood. Both involve a state restricting a person from advising another of a legal right and the various ways to effectuate those legal rights. Compounding the situation in Planned Parenthood is the fact that the counseling also includes medical advice. There is a first amendment violation, therefore, when Arizona prohibits a family planning counselor from advising a client of her legal and medical right to procure an abortion.

81. Carey v. Brown, 447 U.S. 455, 464-65 (1980); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). In Virginia Pharmacy the Court emphatically rejected the argument that a state should prohibit the publication of prices for prescription drugs because the state believed pharmacists would better protect consumers. Id. at 770. The Court stated that the alternative to this highly paternalistic approach [of keeping consumers in ignorance] . . . is to assume that [the] information is not in itself harmful, that people will perceive their own best interest if only they are well enough informed, and that the best means to that end is to open the channel of communication rather than to close them.

Id.; see Linmark Assoc. v. Township of Willingboro, 431 U.S. 85, 93-94 (1977) (basic constitutional defect was in preventing the flow of information); Bigelow v. Virginia, 421 U.S. 809, 829 (1975) (dissemination of abortion information furthers policy of first amendment); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (policy of first amendment prohibits states from restricting the amount of available knowledge).

82. 410 U.S. 113 (1973). The Supreme Court declared that the right to decide whether to continue a pregnancy is encompassed in one's fundamental right of privacy. Id. at 153. This right was reaffirmed in Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481 (1983).
whether to continue a pregnancy. The court of appeals failed to consider that funding only non-abortion speech infringes upon a woman’s decision making process.\(^8\) The appellate court again improperly relied on the Supreme Court’s decision in \textit{Maher} and thus failed to recognize how its outcome allows Arizona to infringe upon a woman’s fundamental right.\(^4\)

In \textit{Maher}, the Supreme Court extensively analyzed a state’s decision not to reimburse abortion expenses when the state reimbursed childbirth expenses for indigent women. It concluded that the disparate funding scheme did not impinge upon a woman’s right to choose whether to continue a pregnancy.\(^5\) The Court reasoned that funding one alternative but not the other did not prevent women from choosing the nonfunded abortion alternative.\(^6\) By reimbursing only childbirth expenses, the Court concluded that a state has only made childbirth a more financially attractive alternative.\(^7\) The Supreme Court, however, did not hold that all disparate funding schemes disfavoring abortion alternatives are constitutionally permissible. Indeed, in \textit{Maher} the Court declared that if a refusal to subsidize was based on impermissible reasons, the refusal would be unconstitutional.\(^8\) Therefore, each discriminatory funding scheme, must be carefully analyzed to determine whether it abridges a fundamental right.\(^9\) The Ninth Circuit, however, rotely

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\(^8\) Another federal court, when faced with a similar funding scheme, held that not funding abortion counseling unconstitutionally infringed upon a woman’s decisional right. Planned Parenthood Ass’n—Chicago Area v. Kempiners, 531 F. Supp. 320 (N.D. Ill. 1981), \textit{vacated and remanded on other grounds}, 700 F.2d 1115 (7th Cir. 1983). On remand, the district court adopted its previous analysis on the merits of the case. Planned Parenthood Ass’n—Chicago Area v. Kempiners, 568 F. Supp. 1490 (N.D. Ill. 1983); see supra note 59 and infra note 97.

\(^4\) For a discussion of the court’s inappropriate reliance on \textit{Maher} in a first amendment context, see supra notes 50-63 and accompanying text.

\(^5\) 432 U.S. at 474; see supra notes 30-33 and accompanying text.

\(^6\) 432 U.S. at 474; see also Harris v. McRae, 448 U.S. 297, 315 (1980) (refusal to use federal funds for reimbursement of abortion expenses while reimbursing childbirth expenses placed no governmental obstacle in women’s decision-making process).

\(^7\) 432 U.S. at 474. In Harris v. McRae, 448 U.S. 297 (1980), the Court elaborated, stating that the government’s unequal subsidization of the alternatives to a pregnancy only encouraged women to pick one of the alternatives. \textit{Id.} at 316. The Court emphasized that the government had placed no obstacle in the counselor-client relationship that would interfere with the decisional process. \textit{Id.} at 317. Indigency, according to the Court, was the reason a woman could not avail herself of all alternatives to a pregnancy. \textit{Id.} at 316. The Court concluded that the government was not required to remove obstacles it had not created. \textit{Id.} at 317.

In contrast, in \textit{Planned Parenthood} it is Arizona that has created an obstacle in the decisional process. Arizona has voluntarily created a family planning program that provides counseling on a limited and incomplete number of alternatives to pregnancy. Limiting the spectrum of available knowledge to women who are deciding whether to continue pregnancies is a state-created obstacle, unlike the indigency obstacle in \textit{Harris}. See supra notes 16-18 and accompanying text.

\(^8\) 432 U.S. at 469-70 The manner in which a state uses its funds is subject to constitutional norms. \textit{Id.}

\(^9\) See Planned Parenthood Ass’n Chicago Area v. Kempiners, 568 F. Supp. 1490, 1496 (N.D. Ill. 1983), where the court stated:

It is not a sufficient answer that the challenged conduct involves only a refusal to subsidize. If that were enough the state could, for example, deny welfare to
applied *Maher* without questioning whether the particular funding scheme unduly interferes with a woman’s decision to continue or terminate her pregnancy.\(^9\)

*Maher* is not controlling precedent in this case because the funding scheme in *Maher*\(^9\) did not interfere with a woman’s decision making process.\(^9\) Arizona’s decision to prevent state-funded family planning providers from engaging in abortion counseling limits the amount of information available to a woman seeking counseling, and thus unduly interferes with a woman’s decision. By refusing to allow the use of state money for abortion counseling, Arizona prohibits state grantees from informing their clients of all available options to a pregnancy.\(^9\)

In fact, one federal court struck down a statute similar to Arizona’s for the very reason that denying state money for abortion counseling while funding non-abortion counseling unduly interfered with a woman’s right to decide whether to continue a pregnancy.\(^9\) In *Planned Parenthood Association Chicago Area v. Kempiners*,\(^9\) the district court held that Illinois’ refusal to subsidize abortion counseling while subsidizing non-abortion counseling constituted direct state interference with a woman’s decision making process.\(^9\) The court reasoned that the right to choose whether to abort would be of slight value if the decision could not be made in an informed manner.\(^9\)

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blacks, Republicans, or persons who merely spoke out against the incumbent administration’s policies, and defend itself by arguing that [these] persons were no worse off than if the state had provided no welfare at all. The appropriate test is not whether the challenged conduct involves a refusal to subsidize, but rather whether that refusal is based on a constitutionally permissible criterion.\(^9\)

*Id.*

90. If a fundamental right is abridged by a funding scheme, the abridgement will only be allowed if necessary to further a compelling state interest. See *supra* note 54. If no fundamental right is infringed, then the scheme must only be rationally related to a legitimate state interest. *Maher*, 432 U.S. at 470.

91. See *supra* note 31 and accompanying text.

92. 432 U.S. at 474. Funding childbirth expenses only made childbirth a more financially attractive alternative. *Id.* In *Maher*, the state made no effort “to prevent women from making a fully informed decision.” *Planned Parenthood Ass’n Chicago Area v. Kempiners*, 568 F. Supp. 1490, 1498 (N.D. Ill. 1983). The funding scheme faced by the Ninth Circuit, however, directly affected women’s decisional processes by regulating the information received in counseling sessions.

93. See *Planned Parenthood Ass’n Chicago Area v. Kempiners*, 568 F. Supp. 1490, 1496-99 (N.D. Ill. 1983). The state was manipulating a women’s decision-making process by ensuring that she was counseled only on her non-abortion alternatives by state-funded family planning counselors. *Id.* at 1496; accord *Akron v. Akron Center for Reproductive Health*, 103 S. Ct. 2481, 2500 (1983) (state’s interest in ensuring that a woman’s decision to abort was informed did not permit the state to enact regulations which were designed to influence a woman’s choice between abortion and childbirth).


96. *Id.* at 1499.

97. *Id.* at 1498-99. The statute in *Kempiners*, like the one upheld by the Ninth Circuit, prohibited the use of state money for abortion counseling. 531 F. Supp. at 324. The federal
The court also recognized that the free flow of information between the counselor and the client was essential to the exercise of the decisional right. To obtain full knowledge of all available options, a woman must be able to rely on her counselor to give her all necessary information.

The *Kempiners* decision follows from the Supreme Court's recognition of the importance of freedom in the counseling relationship. In previous abortion cases, the Court stringently guarded the decision making process from undue state interference. Just last term in *Akron v. Akron Center for Reproductive Health*, the Court struck down a variety of laws that interfered with the counselor-client relationship. The Court recognized the necessity of allowing the counselor the freedom to decide the type and quantity of information that the client should receive. Although the decision in *Akron* involved an ordinance that required pregnancy counselors to impart certain facts to clients, the unconstitutional interference in the decision-making process is the same when a state prohibits a state-funded court in *Kempiners* declared that when a state funds only non-abortion counseling and does not fund abortion counseling, the state is attempting to create a program in which women seeking help in deciding whether to continue a pregnancy would be given incomplete and one-sided information.

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98. 531 F. Supp. at 328.
99 *Id.*
100. The Supreme Court stated:

> The detriment that the State would impose upon the pregnant woman by denying [the abortion option] altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon a woman a distressful life and future. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. . . .

> *All these are factors the woman and her responsible physician will consider in consultation.*

Roe v. Wade, 410 U.S. 113, 153 (1973) (emphasis added); see also *Akron v. Akron Center for Reproductive Health*, 103 S. Ct. 2481, 2491 (1983) (to fully vindicate a woman's decisional right, her physician must be allowed to exercise her best judgment in the counseling relationship); Collautti v. Franklin, 439 U.S. 379, 389 (1979) (important to allow physician enough discretion to determine the choice of abortion method to preserve life or health of mother); Planned Parenthood v. Danforth, 428 U.S. 52, 67 n.8 (1976) (state not allowed to control what physician must disclose to patient in the counseling session); Doe v. Bolton, 410 U.S. 179, 197 (1973) (woman has right to receive medical care according to her doctor's professional judgment).


102. The Supreme Court struck down, as undue interference with a woman's decisional right, a parental consent requirement, a twenty-four mandatory waiting period, and an informed consent provision that required a physician to impart certain information to a patient. *Id.*

103. *Id.* at 2491.

104. *Id.* at 2500. The Court described the list of required disclosures as a "parade of horrors" designed to persuade a woman to decide against abortion. *Id.* The Court held that the inflexible, mandated disclosure unduly interfered with a woman's decisional process by placing obstacles on her counselor upon whom she was entitled to rely for advice. *Id.* at 2501; see also Freiman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978), *aff'd*, 440 U.S. 941 (1979) (government may not mandate that certain information be disclosed to a woman who is deciding whether to abort without regard to whether the information is medically advisable).
counselor from informing clients about abortion. Both situations involve a state trying to control the type of information that clients receive. Because health counselors are the best judge of what information needs to be disclosed, the Arizona funding scheme unconstitutionally restricts the information state grantees may impart to clients.

CRITICISM AND IMPACT

The Ninth Circuit's decision in Planned Parenthood permits Arizona to abridge the constitutional rights of both Planned Parenthood and women who seek counseling from state-funded family planning organizations. The court erred in remanding the case and should have struck down the statute as unconstitutional. If Arizona can prove that Planned Parenthood is unable to keep separate accounts, the statute will be deemed constitutional. Arizona may, therefore, use the statute to deny funds to other nongovernmental family planning entities without first showing that these entities would be unable to keep separate accounts of their abortion and non-abortion activities. These entities would then be forced to challenge the statute, as applied to them, in court.

Moreover, by allowing Arizona to maintain a content-based distinction in funding family planning counseling, the Ninth Circuit has permitted the Arizona legislature to impose its view of morality on Arizona residents.

105. Planned Parenthood Ass'n Chicago Area v. Kempiners, 568 F. Supp. 1490, 1497-98 (N.D. Ill. 1983) (Akron was premised on the importance of the counseling relationship and the necessity of a state refraining from placing restrictions on the type of information counselors must utilize). Funding non-abortion counseling but not abortion counseling serves a state's interest in protecting potential life only by affecting a woman's decisional process. Id. at 1498.

106. In Akron, the city council sought to force certain information on a woman who was deciding whether to terminate a pregnancy. 103 S. Ct. at 2501. In Planned Parenthood, the Arizona legislature ensured that state grantees would not impart abortion information to a client by funding only non-abortion counseling and prohibiting the use of state money for abortion counseling. See Planned Parenthood Ass'n—Chicago Area v. Kempiners, 531 F. Supp. 320, 329 (N.D. Ill. 1981), vacated and remanded on other grounds, 700 F.2d 1115 (7th Cir. 1983).

107. Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481, 2501 (1983) (physician should determine, in her best medical judgment, what information is relevant to a woman's decision whether to continue a pregnancy); see also Whalen v. Roe, 429 U.S. 589, 604-05 n.33 (1977) (where state regulation of physician upon whom a woman is relying for abortion counseling has an impact on the decisional process, that regulation is unconstitutional); Planned Parenthood v. Danforth, 428 U.S. 52, 67 n.8 (1976) (cannot straightjacket a physician in the practice of her profession).

108. For a discussion of why Arizona has no compelling interest that justifies an infringement on a constitutional right, see supra notes 74-81 and accompanying text.

109. See NAACP v. Button, 371 U.S. 415, 432 (1963) (Supreme Court will scrutinize how a statute will apply in other situations besides the one before it in determining whether the statute violates the first amendment).

110. See Harris v. McRae, 448 U.S. 297, 332 (1980) (Brennan, J., dissenting) (refusal to use federal funds to reimburse abortion costs was a legislative attempt to impose one view of morality on an intimately personal decision); see also Note, Abortion Regulation: The Circumscription of State Intervention by the Doctrine of Informed Consent, 15 GA. L. REV. 681,
Abortion is one of the most controversial issues of the day and an issue on which people have very strong views. The United States Constitution, however, was designed to ensure that majoritarian views do not abridge the constitutional rights of a minority. By funding non-abortion counseling and not abortion counseling, the Arizona legislature granted preferential treatment to a view it favored, and therefore, forced its view of family planning on Planned Parenthood.

The decision also violates the substantive due process rights of women who seek counseling from state grantees. By upholding Arizona's refusal to fund abortion counseling while funding non-abortion counseling, the court has allowed Arizona to sponsor a family planning service that seeks to ensure that women receive incomplete and misleading information. Inadequate information could lead to unfortunate health ramifications.

According to the Arizona statute, a state-funded family planning counselor is unable to inform clients of their abortion alternative unless their life is threatened by pregnancy. There are a variety of severe and permanent

681 (1981) (groups that oppose abortion on moral grounds pressure legislatures to enact controversial laws regulating abortion) [hereinafter cited as Note, Abortion Regulation]. See generally Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (judiciary should vigilantly protect individuals in the exercise of unpopular actions and expression of unpopular views).

111. Chemerinsky, Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy, 31 BUFFALO L. REV. 107, 107 (1982) (abortion controversy as strong as ever); see also Note, Abortion Regulation, supra note 110, at 681 (abortion is still an intensely debated controversy).

112. Board of Educ. v. Pico, 457 U.S. 853, 879 (1982) (Blackmun, J., concurring) (Supreme Court decisions mandate that a state may not deny access to a particular view solely because the state disapproves of that view); see also Beal v. Doe, 432 U.S. 438, 454-55 (1977) (Marshall, J., dissenting) (governmental actions that are designed to encourage non-abortion alternatives are really intended to "impose a moral viewpoint that no State may constitutionally enforce"); Eisenstadt v. Baird, 405 U.S. 438, 457 (1972) (Douglas, J., concurring) (even though government might strenuously object to an idea or action, government may not inhibit the right of the public to learn about such ideas); Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) (Constitution designed to protect minorities from majoritarian viewpoints).

113. See Bellotti v. Baird (Bellotti II), 443 U.S. 622, 655 (1979) (Stevens, J., concurring) (implicit in right to decide whether to abort is right to make decision "in defiance of the contrary opinion of the sovereign"); Charles v. Carey, 627 F.2d 772, 777-78 (7th Cir. 1980) (allowing legislature to determine what information is required to make the abortion decision is the antithesis to the nature of the privacy right involved).


115. See supra notes 2 and 29. The fact that a state grantee might be able to refer a client to another counselor to discuss an abortion alternative does not save the funding scheme from abridging women's decisional right. The Supreme Court said that "[t]here is no evidence suggesting that the abortion procedure will be performed more safely" if there is a 24-hour delay. In accordance with the ethical standards of the profession, a physician will advise the patient to defer the abortion when he thinks this will be beneficial to her. Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481, 2503 (1983). The Supreme Court has recognized that time is an essential factor in the abortion decision as the longer a woman delays an abor-
medical complications, not life threatening, that may befall a pregnant woman when an abortion may be medically recommended. A state grantee would be unable to suggest that such a woman consider an abortion because her life is not threatened. Any psychological illness, absent suicidal tendencies, would not threaten the life of a woman, and therefore, a state-funded counselor would not be able to suggest an abortion as a means of preserving psychological health. A woman who is pregnant with a severely deformed fetus similarly would be unable to receive counseling on her abortion alternatives. Furthermore, the statute does not allow a state grantee to counsel a woman who is pregnant from rape or incest on her abortion option. The psychological damage that may result from carrying such a pregnancy to term is undeniable. That the Arizona statute denies counseling for abortion in these instances exemplifies the statute's basic flaw. The statute's paramount defect is that the Arizona legislature is making a medical decision that is best left to women themselves and health professionals. The lesson of Roe v. Wade and the command of the first amendment is 1) that women have a right to decide whether or not to have an abortion, and 2) that counselors must be free to exercise their best judgment as to what information clients need when making family planning decisions. Absent complete information, these fundamental concerns have little meaning.

In addition to affecting the rights of Planned Parenthood and Arizona women, the appellate court has paved the way for other states in the Ninth Circuit to enact similar funding laws. The abridgment of free speech rights and substantive due process rights may now be extended to family planning providers and women in eight other states. Moreover, a federal court of appeals decision is persuasive authority in the other circuits. The Eighth Cir-

116. Women's Health Services v. Maher, 482 F. Supp. 725 (D. Conn.), rev'd, 636 F.2d 23 (2d Cir. 1980). The district court reheard the case. 514 F. Supp. 265 (D. Conn. 1981). Severe and permanent health problems that may plague women if a pregnancy is carried to term include: "all auto-immune diseases (rheumatic arthritis, multiple sclerosis, lupus, etc.); chronic heart, liver, and kidney diseases; chronic anemia; diabetes; phlebitis; toxemia; . . . hypertension." 482 F. Supp. at 730-31.

117. 482 F. Supp. at 731; accord United States v. Vuitch, 402 U.S. 62, 72 (1971) (where abortion is necessary to preserve life of a pregnant woman, a physician should consider psychological, as well as physiological, factors).

118. Women's Health Services v. Maher, 482 F. Supp. 725, 731 (D. Conn.), rev'd, 636 F.2d 23 (2d Cir. 1980).


120. See supra note 100.

121. The decision of whether to have an abortion is limited by the Court to the period of fetal non-viability, i.e. prior to the third trimester. See supra notes 53 and 55.

cuit has twice reviewed similar statutes, but invalidated them on other grounds. The Ninth Circuit's decision, therefore, is the only federal appellate court decision to uphold this disparate funding scheme. Unless the Supreme Court intervenes to correct the errors in the Ninth Circuit's analysis, Arizona will continue to abridge the constitutional rights of family planning providers and Arizona women.

CONCLUSION

In Planned Parenthood, the Ninth Circuit held that Arizona was not constitutionally required to fund abortion counseling while funding non-abortion counseling. The court acknowledged that Arizona may not be able to withhold state funds from Planned Parenthood's non-abortion counseling solely because part of Planned Parenthood's total program involves abortion counseling. Nevertheless, the court remanded the case to allow Arizona to show that withholding all state money from Planned Parenthood is the only way to ensure that no state funds would be used for abortion counseling.

The Ninth Circuit erred in not striking down the Arizona appropriation scheme as a facially unconstitutional penalty on Planned Parenthood's first amendment speech rights. When the court held that Arizona was not required to subsidize abortion counseling while subsidizing non-abortion counseling, the court allowed Arizona to create a content-based distinction in violation of the first amendment. A woman's due process right to decide whether to continue a pregnancy is also infringed by the Arizona statute. The Ninth Circuit has allowed Arizona to impose its view of family planning on Planned Parenthood and Arizona residents. By permitting state-funded counselors to counsel for abortion only when a woman's life is threatened, Arizona has unduly restricted the exercise of both a woman's right to choose to terminate her pregnancy, and a health counselor's best judgment when counseling a client.

Sharon McConaha
