

## Forbes v. Napolitano (2000)

Forbes v. Napolitano (2000) was a US court case that established that Arizona researchers could use fetal tissues from induced abortions for basic scientific research, for instance, as a source of stem cells. The case challenged the constitutionality of the Arizona Revised Statute (ARS) 36-2303 in the Ninth Circuit US Court of Appeals, a law that banned researchers from using fetal tissues from abortions for any type of medical experimentation or investigation. The Ninth Circuit US Court of Appeals decision in Forbes v. Napolitano set a precedent in Arizona that allowed researchers and physicians to use tissues from aborted fetuses for medical research and treatments. Arizona later passed a state law in 2016 that sought to make obsolete the decision reached in Forbes v. Napolitano by revising ARS 36-2303 to avoid the problems the court had found with it.

In 1983, the Arizona state legislature in Phoenix, Arizona, passed a law that prohibited researchers from using any part of a human fetus or embryo from an induced abortion in medical research. The law was amended in 1984 to be included as part of the Arizona Revised Statutes (ARS) as statute 36-2302. The law made exceptions for physicians to conduct routine examinations of aborted fetuses in order to diagnose maternal or fetal diseases, if those were the reason for the abortions. The law amended section 32-1854 of the ARS, which classified fetal experimentation as unprofessional conduct. Physicians or researchers found to have violated the law faced criminal and civil prosecution with punishment of up to eighteen months in jail, fines up to \$150,000, probation, and suspension or revocation of their licenses.

On 14 January 1998, patients, physicians, and advocates for treatments for Parkinson's disease that used fetal tissue filed a lawsuit challenging the constitutionality of the statutes in the US Federal District Court for Arizona in Phoenix. The patients filing the suit included Fred Forbes, Ann Anderson, Margaret Bohn, and John Summers, who had Parkinson's disease and were prevented in Arizona from receiving an experimental treatment that used fetal tissue. Joining the suit were Arizona physicians Stuart Snider and George Melcher, who treated patients with Parkinson's disease. Robert Tamis, a physician in Phoenix who had been investigated for performing experiments on aborted fetuses to determine if blood pressure drugs could pass the placental barrier, also joined the lawsuit. Christopher Tisch, a board member of the Arizona chapter of the American Parkinson Disease Association, headquartered in Tucson, Arizona, joined the lawsuit. Also joining the lawsuit was Planned Parenthood of Arizona, which had main offices in Tucson and Phoenix. Planned Parenthood of Arizona was a reproductive health organization that provided Arizona women with contraception, family planning, and abortion services.

In the complaint, the physicians Snider and Melcher alleged that the statutes prevented them from using fetal tissue in experimental treatments for Parkinson's disease. The experimental treatments involved transplanting fetal brain tissue into the brains of Parkinson's patients. Parkinson's disease develops gradually, affecting the nervous system such that neurons in the brain malfunction and die. Many of the neurons that are damaged by Parkinson's disease produce dopamine, a chemical that acts as a neurotransmitter, sending signals to nerve cells that regulate movement and coordination in human limbs and bodies.

In 1979, two independent groups of researchers had published articles that demonstrated that researchers could transplant tissue from a dopamine-rich part of brain tissues of fetal rats into adult rats with Parkinson's disease to reduce the disease symptoms. By the 1990s, many researchers were conducting clinical trials to transplant human fetal tissue into adults suffering from Parkinson's disease. The fetal tissue would then replicate and help replace neurons that were damaged by Parkinson's disease, leading those treated to produce more dopamine. In the trials, the researchers

found that the treatment helped alleviate the symptoms of Parkinson's disease in humans.

Snider and Melcher alleged in the lawsuit that although the treatment was experimental and had yet to be established as a clinically acceptable or competitive option for patients, the fetal tissue transplantation showed considerable promise for patients with Parkinson's disease. Furthermore, they argued that fetal tissue was preferred because there was less likelihood that the patient's body would reject the foreign cells. The physicians opposed the statute because the law prevented them from fulfilling their obligations to their patients by prescribing and managing the best course of treatment. The physicians also argued that research using fetal tissue had already led to developments important in treating human illnesses, such as the Polio vaccine.

The nine plaintiffs were represented by lawyers Bebe Jill Anderson and Julie Frances Kowitz from the Center for Reproductive Law and Policy, an advocacy group based in New York City, New York, and Michael Owen Miller from Tucson, Arizona. The lawyers filed the lawsuit in the US Federal District Court for Arizona on 14 January 1998. In the lawsuit, they asked the court to determine if ARS 36-2302, which prohibited experimentation on aborted fetuses, and ARS 32-1401 and ARS 32-1854, which declared fetal experimentation unprofessional conduct, violated the US Constitution. They requested the court to issue a declaratory judgment, which would assess the constitutionality of the statutes prior to going to trial. Additionally, they requested the court to issue an injunction on the statutes, which would prevent the state of Arizona from enforcing the laws until the Court ruled on their constitutionality.

The lawyers for the patients and physicians argued that the statutes were unconstitutional for several reasons. First, they argued that the statutes violated the Due Process Clause of the Fourteenth Amendment of the US Constitution, which protects citizens' rights to life, liberty, and property from governmental intrusion without proper legal process. That clause means that US citizens have a constitutional right to be informed of state laws that could potentially deprive them of life, liberty, or property. The lawyers argued that the Arizona statutes were unconstitutionally vague. They argued that the state did not adequately inform citizens of the medical procedures that were illegal because the statutes did not explicitly define the terms experimentation, investigation, or routine pathological examination. They argued that without those definitions, physicians and researchers couldn't know which medical procedures could be prosecuted under the law.

Second, the lawyers of the patients and physicians argued that the statutes prevented patients from receiving medical care. They argued that the statutes prohibited patients with Parkinson's disease from receiving the experimental treatment, thereby violating patients' rights to privacy and liberty under the Fourteenth Amendment. The lawyers also argued that the statutes prevented doctors from conducting research and providing their patients with the best possible medical care. The lawyers emphasized the care of women undergoing abortion procedures. They argued that the statutes prevented women from obtaining medical procedures following an abortion that could help them make more informed reproductive health decisions.

Finally, the lawyers argued that the statutes violated the Equal Protection Clause of the Fourteenth Amendment by preventing women from making anatomical donations after cases of induced abortions but not after cases of spontaneous abortion or stillbirth. Under the Equal Protection Clause, states must treat individuals in the same manner as other individuals in similar situations and conditions. The lawyers argued that because women who have miscarriages can donate their fetuses for medical research, women who choose to terminate pregnancies should also be able to donate their fetuses for medical research. The lawyers argued that because the law prevented women who choose to terminate pregnancies from doing so, it created an unconstitutional distinction between women who choose to abort and those who do not.

Lawyers for the patients and physicians brought the case against all the county attorney in Arizona in a defendant class action lawsuit. A defendant class action lawsuit would put all Arizona county attorneys into one group, or class, ensuring that the outcome of the case would apply to all counties in Arizona. On 23 February 1998, the Arizona District Court agreed to include all county attorneys into one class. The Arizona Attorney General for Arizona represented all Arizona County Attorneys and the Attorney General's Office. In 1999, Grant Woods was the attorney general for the state of Arizona, so the case was named against him. Lawyers Bruce Skolnik and Charles Pyle represented

Woods. Judge William Browning reviewed the case *Forbes v. Woods*(1999) in the US District Court for Arizona and released the Court's declaratory judgment.

On 30 September 1999, the US District Court for Arizona issued its decision in the case of *Forbes v. Woods*. The District Court ruled that the statutes included vague language, specifically for the terms experimentation, investigation, and routine. The District Court cited three cases as influential to its decision. In *Jane v. Bangerter* (1996) the Tenth Circuit US Court of Appeals in Denver, Colorado, held that a Utah statute prohibiting the experimentation on fetuses, which the law called live unborn children, was unconstitutional because of its vagueness. In the case *Margaret S. v. Edwards* (1986) the Fifth Circuit US Court of Appeals in New Orleans, Louisiana, found that a Louisiana law banning experimentation on fetuses or post-abortion fetal tissue was unconstitutional because of its vague language. Finally, the Arizona District Court cited *Lifchez v. Hartigan* (1990) in which the Seventh Circuit US Court of Appeals in Chicago, Illinois, ruled that an Illinois statute prohibiting any non-therapeutic experimentation on human fetuses was unconstitutional because of the vagueness of the term experimentation.

The Arizona District Court used the precedent set in those cases to rule that there is no single definition of experimentation within the scientific and medical community. Additionally, the Arizona District Court ruled that the terms of investigation and of routine were equally vague. They stated that there had been no standard or guideline discussed by the College of American Pathologists, a national pathologist group headquartered in Northfield, Illinois, nor had the office of the Arizona Medical Examiner defined which pathological examinations were routine and which were not. Therefore, the District Court stated that what a physician or researcher might consider routine could violate the statute. The District Court ruled that because it was impossible for physicians to know what procedures were prohibited by the law, and for law enforcement agents to know which procedures to enforce, the vague terms violated the Due Process Clause of the Fourteenth Amendment and were unconstitutional.

Following the ruling of the District Court, the office of Arizona's Attorney General appealed the decision to the Ninth Circuit US Court of Appeals in San Francisco, California. In 1999, Woods's term in office ended and Janet Napolitano was elected to the position of Arizona Attorney General. As the new Arizona Attorney General, the appealed case was against Napolitano, representing all Arizona county attorneys. Therefore, the case was renamed as *Forbes v. Napolitano*.

Upon appeal, lawyers for Napolitano argued that the District Court's misused the precedents set in of *Jane v. Bangerter*, *Margaret S. v. Edwards*, and *Lifchez v. Hartigan* to make its decision. They argued that in those cases the laws applied generally to using fetal tissue in experiments, whereas the Arizona law applied only to using fetal tissue from induced abortions. The lawyers for Napolitano argued that as the Arizona law was much more specific, the cases that the District Court used in their decision did not apply. The lawyers also argued that the statute was clear because physicians could avoid prosecution by not performing any tests or procedures on any fetal tissues from induced abortions.

On 3 October 2000, Judges Joseph Sneed, Mary Schroeder, and Richard Paez heard the oral argument in the case *Forbes v. Napolitano* in the Ninth Circuit US Court of Appeals. On 29 December 2000, the Court of Appeals ruled that the Arizona law banning experiments using fetal tissue was unconstitutional. Schroeder wrote the majority opinion for the court. Sneed concurred with Schroeder's decision. Schroeder explained that the Due Process Clause of the Fourteenth Amendment guaranteed individuals the right to know whether or not their actions are prohibited by law. Schroeder continued by explaining that laws need to be written so that prohibited conduct is defined and people can understand which of their possible actions will result in the state prosecuting them. Schroeder stated that specificity was also necessary to prevent law enforcement officers from arbitrarily enforcing laws. The Appeals Court ruled that the words experimentation, investigation, and routine were vague regardless of whether they were applied to aborted fetuses or to fetuses generally. The court further explained that physicians cannot refuse to perform all tests on aborted fetuses, because a broad refusal ignores the exceptions in the statute that allow for routine pathological examinations. The court argued that exceptions in the statute added more confusion and vague language.

The Appeals Court ruled that the statutes prohibited medical experimentation but failed to provide physicians, researchers, and law enforcement officials with guidance to distinguish between experimentation and treatment, and with how to apply the statute. The words experimentation, investigation, and routine made the statutes unconstitutionally vague, and therefore, the Appeals Court ruled the statutes unconstitutional, and affirmed the decision of the District Court.

Sneed wrote a concurring opinion. He said that fetal tissue research might lead to advancements in medicine. Additionally, Sneed stated that because laws about fetal tissue were inherently linked to abortion regulation, those laws could only be constitutional if there was compelling state interest for regulation. Sneed said that there is no compelling state interest for regulating fetal tissue research. Therefore, he found the laws unconstitutional.

The decision in *Forbes v. Napolitano* legalized the use of aborted fetal tissue in medical research and treatments in Arizona. It enabled Arizona researchers to continue to study and experiment using human fetal tissues, embryonic tissues, and stem cells. However, on 30 March 2016, Doug Ducey, Arizona governor, signed into law Senate Bill (SB) 1474, which rewrote the original ARS 36-2302 law that had unconstitutionally banned fetal tissue experimentation. SB 1474, again prohibited the use of any fetal tissue resulting from induced abortions in research, experimentation, study, or transplantation, except in cases to diagnose the health of the woman or fetus. The law also prohibited the sale, transfer, or distribution of human fetal tissue. The law included definitions for the terms abortion, experimentation, and pathological study.

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