

Isaacson v. Horne (2013)

In the 2013 case *Isaacson v. Horne*, the US Court of Appeals in the Ninth Circuit ruled that Arizona House Bill (HB) 2036, which prohibited abortions after twenty weeks of gestation, was unconstitutional. The Arizona State Legislature passed the law in 2012, which was then challenged by three physicians who filed a lawsuit against the state, arguing that the law violated women's constitutionally protected rights to abortions, rights that may only be infringed once fetuses are viable outside of the womb. In hearing the case, the Ninth Circuit US Court of Appeals relied on the precedent set by the US Supreme Court in *Roe v. Wade* (1973) that ruled that states could not constitutionally prohibit abortions prior to fetal viability at twenty-four weeks. The case *Isaacson v. Horne* strengthened the precedent in Arizona that laws prohibiting abortion prior to fetal viability are unconstitutional, and it upheld women's rights to decide to terminate their pregnancies prior to fetal viability.

On 12 April 2012, Arizona Governor Janice Brewer, in Phoenix, Arizona, signed Arizona House Bill (HB) 2036 into law. HB 2036 amended Title 36, Chapter 20 of the Arizona Revised Statutes, a law that regulates abortions in the state. HB 2036 prohibited pregnant women from having elective abortions if their fetuses had reached twenty weeks of gestation. The law defined gestational age as calculated from the first day of a pregnant woman's last menstrual period. The law allowed for exceptions in cases of medical emergencies, which the law defined as medical conditions in which a delay in abortion would result in death or substantial and irreversible damage to a major bodily function. The law was set to take effect on 2 August 2012.

The Arizona state legislature provided several reasons for enacting HB 2036, reasons it included in section 9 of the law. The legislature claimed that abortion could cause severe physical and psychological damage to women who undergo the procedure. It also claimed that abortion has a higher risk to women when the procedure is performed later in their pregnancies. Additionally, it claimed that the incidence of major complications to women after abortions increased after twenty weeks of pregnancy. The legislature also claimed that there was substantial medical evidence that indicated that fetuses could feel pain after twenty weeks of gestation. Finally, the legislature stated that Arizona had a legitimate concern to protect the public's health, including both pregnant women and their fetuses.

On 12 July 2012, three physicians in obstetrics and gynecology filed a lawsuit challenging the constitutionality of HB 2036. Paul Isaacson, William Clewell, of Phoenix, and Hugh Miller, of Tucson, Arizona, were physicians who performed abortions after twenty weeks in pregnancy. Throughout the lawsuit, several groups and attorneys represented the physicians. The physicians' lawyers included Christopher Lavoy in Phoenix, Arizona, Janie Schulman and Nancy Thomas from Los Angeles, California. The physicians were also represented by lawyers Janet Crepps and David Brown from the Center for Reproductive Rights, a group based in New York City, New York. Lastly, the physicians were represented by Susan Talcott Camp, Alexa Kolbi-Molinas, Daniel Pochoda, and Kelly Flood from the national and Arizona chapters of the American Civil Liberties Union based in New York City.

Isaacson and the physicians filed the lawsuit against several state officials on 12 July 2012 in the US District Court for Arizona in Phoenix. The lawsuit *Isaacson v. Horne* was filed against Thomas Horne, who was Attorney General of Arizona, the county attorneys for the two most populace counties in Arizona, William Montgomery for Maricopa County and Barbara LaWall for Pima County, the Arizona Medical Board, and Lisa Wynn, Executive Director of the Arizona Medical Board, headquartered in Scottsdale, Arizona. The group was represented by attorneys David Cole, Michael Tyron, Evan

Hiller, Clarisse McCormick, Deryck Lavelle, Douglas Irish, Kenneth Mangum, Louis Comus, William Montgomery, and Paula Perrera.

Lawyers for the physicians argued that HB 2036, which banned abortions beginning at twenty weeks, was unconstitutional because it violated the precedent set by the US Supreme Court in *Roe v. Wade* (1973). They argued first that it violated the right to privacy established by the US Supreme Court in *Roe v. Wade*. In that case the Supreme Court, in Washington, D.C., said that women have a constitutionally protected right to privacy when making the decision to terminate a pregnancy. The Court found that the right to privacy was inherent in both the Fourteenth and the Ninth Amendments to the US Constitution.

The due process clause of the Fourteenth Amendment, states that citizens have a right to life, liberty, and property and that the government cannot impinge those rights without proper legal process. The Ninth Amendment states that the rights explicitly enumerated in the constitution are not the only rights protected under the constitution. Therefore, the Ninth Amendment is used to argue that specific rights not explicitly stated in the constitution are still upheld as constitutionally protected rights. In *Roe v. Wade*, the US Supreme Court said that the right to determine whether or not to have children was constitutionally protected under the right to privacy, protected by the Fourteenth and Ninth Amendments of the constitution.

While the US Supreme Court ruled in *Roe v. Wade* that women have the right to terminate pregnancies, it did not suggest that the right was absolute. Rather, the Court set limitations that allowed states to regulate abortions when they had compelling interests. The Court ruled that during the first trimester of pregnancy states do not have a compelling interest to regulate abortions. The Court ruled that approximately after the first trimester of pregnancy, but before the fetus becomes viable outside the womb, states can regulate abortions to protect maternal health. However, the Court stated that the regulation of abortion does not include a complete ban on abortions prior to fetal viability. Finally, the US Supreme Court ruled that after fetal viability, a state might demonstrate a significant interest in protecting fetal life and therefore, may regulate or prohibit abortions as it saw fit.

The physician's lawyers in *Isaacson v. Horne* argued that HB 2036 violated *Roe v. Wade* because HB 2036 banned some abortions prior to fetal viability. They stated that while the point at which fetus become viable varies with each pregnancy, medical practitioners agreed that no fetus is viable at twenty weeks. They stated that the average point of fetal viability is between twenty-four to twenty-six weeks of gestation. The physician's lawyers also argued that during the twentieth week of gestation, healthcare providers conduct tests on pregnant women to determine if their fetuses have abnormalities, and is when many maternal health consequences begin to appear. They argued that by banning abortion beginning at twenty weeks, the Arizona law prevented women from having the time necessary to make the difficult decision of whether or not to terminate a pregnancy due to fetal abnormalities. They also argued that, for many women, the decision to terminate a pregnancy requires longer than twenty weeks of consideration. Additionally, the lawyers said that there are several circumstances of fetal abnormalities that don't present themselves until after twenty weeks. In those cases, the law would prohibit women from deciding to terminate their pregnancies. Finally, they argued that a woman seeking an abortion after twenty weeks because of medical conditions might be prohibited from doing so. In those cases, women would need to delay the abortion until the medical condition became a medical emergency. They argued that, in those cases, the law endangered the health of pregnant women by preventing them from receiving medical care to avoid medical emergencies.

On 25 July 2012, the case *Isaacson v. Horne* was argued in the US District Court for Arizona in Phoenix by judge James Teilborg. Lawyers for the physicians asked the court to issue a declaratory judgment, which would rule on the constitutionality of HB 2036 prior to trial. They also requested that the court issue a preliminary injunction, which would prevent the state from enforcing the abortion law until the court decided its constitutionality.

On 30 July 2012, the Arizona District Court denied the physician's request to issue a declaratory judgment or a preliminary injunction on HB 2036. The District Court ruled that because the physicians had not been prosecuted under the law, they did not present an opportunity for the Court

to determine if there was a specific application of the law that was unconstitutional. Then the District Court stated that it needed first to determine if the physicians presented enough evidence to suggest that the twenty-week abortion ban was unconstitutional in all cases.

To determine if the law was unconstitutional, the District Court cited the precedents set by three US Supreme Court decisions: *Roe v. Wade*, *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), and *Gonzales v. Carhart* (2007). The District Court first cited the decision in *Roe v. Wade* in which the Supreme Court established that women have the right to terminate pregnancies, though ruling that the right was not absolute and that states may regulate abortions after the first trimester. As the first trimester ends at thirteen weeks of gestation, the Arizona law banning abortions past twenty weeks gestation did not violate the precedent set in *Roe v. Wade*.

The Arizona District Court then cited *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which the US Supreme Court upheld the constitutionality of a Pennsylvania law requiring a variety of abortion-related restrictions and requirements. The Supreme Court ruled that states could regulate abortions prior to fetal viability as long as they do not create a significant obstacle to women expressing their right to terminate pregnancies. In *Isaacson v. Horne*, the Arizona District Court stated that the decision in *Casey* used a narrow definition of medical emergency. The Arizona District Court found that HB 2036 did not ban all abortions after twenty weeks, because it allowed for medical exceptions. Rather, the District Court stated that the law merely regulated abortions that occur after twenty weeks of gestation. The Court stated that the law still allowed for abortions up to twenty weeks and therefore did not impose a substantial obstacle or undue burden for women to exercise their rights to choose abortions. The District Court acknowledged that the law would require women to make an immediate decision to terminate their pregnancies in cases for which doctors detected a fetal deformities. However, the District Court ruled that such a time limitation was not a substantial obstacle. Additionally, the Court stated that hypothetical situations, such as when a fetal abnormality is detected after twenty weeks, cannot be the basis of the Court's decision. The Arizona District Court argued that the Arizona law did not create an undue burden on women seeking an abortion and therefore did not violate the precedent set in *Casey*.

The Arizona District Court then cited the US Supreme Court case *Gonzales v. Carhart*, which upheld as constitutional the Partial Birth Abortion Ban Act passed by US Congress in 2003. The Act prohibited intact dilation and extraction abortions, which antiabortion advocates called partial-birth abortions. Intact dilation and extraction abortions typically occur in the second and third trimester of pregnancy, in which the fetus dies after it is partially delivered. The Supreme Court held that the ban on intact dilation and extraction abortions did not impose an undue burden on women seeking abortions, as the act applied to only one method of abortion. The *Gonzales* case was filed by two physicians who performed second and third trimester abortions utilizing the intact dilation and extraction method. Though the physicians filed their case on behalf of themselves and their patients, the Supreme Court acknowledged that without a pregnant woman unable to obtain an abortion due to the Partial Birth Abortion Ban Act, it would be difficult to examine the constitutionality of the law. The Supreme Court said that the most appropriate means to challenge the Partial Birth Abortion Ban Act would be to have a pregnant woman file the suit.

The Arizona District Court used the precedent in *Gonzales* to reason that the hypothetical challenge, presented by the physicians against Arizona law HB 2036, did not present enough evidence to determine whether or not HB 2036 was unconstitutional. The Court concluded that a challenge to the law by an affected pregnant woman who couldn't exercise her choice to obtain an abortion would be a better method for the court to determine if the law was unconstitutional, rather than the current hypothetical case presented by physicians.

The District Court addressed the reasons the Arizona State Legislature had provided in passing the law, and the Court ruled that the state had shown a legitimate interest in regulating abortions past twenty weeks. The Court listed the two types of abortions that were commonly used past twenty weeks, medical induction and dilation and evacuation. The Court said that given the nature of those abortion procedures and the claims by the legislature claiming that fetuses can feel pain at twenty weeks, the state had a legitimate interest in limiting abortions after twenty weeks.

Lawyers of the physicians appealed the District Court's decision. The appeal was heard in the

Ninth Circuit US Court of Appeals in San Francisco, California, by judges Mary Schroeder, Andrew Kleinfeld, and Marsha Berzon. The physicians again asked the court to issue a declaratory judgment and preliminary injunction. On 1 August 2012, one day before HB 2036 was to go into effect, the US Court of Appeals issued a preliminary injunction to prevent Arizona from enforcing the law until the Court had reached its decision in the case.

On 21 May 2013, after hearing arguments for *Isaacson v. Horne*, the US Court of Appeals ruled that HB 2036 was unconstitutional. Judge Berzon wrote the opinion for the court, and Kleinfeld wrote a concurring opinion. The Court of Appeals stated that the physicians had been performing abortions after twenty weeks and would have continued to do so if not for fear of prosecution under HB 2036. The Court of Appeals ruled that the threat of criminal prosecution was a sufficient injury and allowed the physicians to challenge the law. The court recognized the importance and confidential nature of physician-patient relationships, and that often patients are not able to exercise their rights without compromising their privacy. The US Court of Appeals also addressed the use of the *Gonzales* case by the Arizona District Court. The Court of Appeals stated that the laws in the *Gonzales* case were very different than the Arizona law HB 2036 and, therefore, should not be compared. The court stated that the law in *Gonzales*, restricted a particular method of terminating pregnancies. In contrast, the Arizona law completely eliminated a woman's right to choose abortion after twenty weeks.

The Court of Appeals said that since *Roe v. Wade* the US Supreme Court had clearly ruled that women have a constitutional right to choose to terminate their pregnancies before the fetuses are viable. While states may regulate the method and manner of abortions following the first trimester, they may not eliminate abortion as a choice or impose substantial burdens on the choice prior to fetal viability. The Court also said that as many Supreme Court decisions made clear, fetal viability is the critical criterion. Though fetal viability varies and can change based on improvements in medical technology, no fetus is viable at twenty weeks. Therefore, Arizona's ban on abortion at twenty weeks was unconstitutional. The US Court of Appeals ruled that HB 2036 was unconstitutional and reversed the decision of the Arizona District Court.

Horne and other state defendants appealed the decision to the US Supreme Court. On 13 January 2014, the US Supreme Court denied the appeal and refused to hear the case. Therefore, the decision of the US Court of Appeals stood and HB 2036 was unconstitutional. As a result, HB 2036 became unenforceable and women in Arizona continued to receive elective abortions at and beyond twenty weeks.

Sources

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