

Planned Parenthood Committee of Phoenix v. Maricopa County (1962)

In the 1962 case *Planned Parenthood Committee of Phoenix v. Maricopa County*, the Arizona Supreme Court ruled that Arizona Revised Statute 13-213, which banned the public advertising of contraceptive or abortion medication or services, was constitutional. However, the court also ruled that that Arizona Revised Statute 13-213 did not apply to Planned Parenthood's distribution of contraceptive information, allowing Planned Parenthood to continue distributing the information. Following the case, the Arizona law was challenged several times and eventually deemed unconstitutional in the 1973 case *State v. New Times INC.* The case *Planned Parenthood Committee of Phoenix v. Maricopa County* established that Planned Parenthood's distribution of medical literature was not advertising as described in the law, and it initiated a decade long discussion about the constitutionality of the laws preventing the distribution of materials related to contraception or abortion.

The Planned Parenthood Committee of Phoenix was founded in 1937 as the Mother's Health Clinic in Phoenix, Arizona. In 1942, the clinic merged with the Planned Parenthood Federation of America, headquartered in New York, New York, and became the Planned Parenthood Committee of Phoenix. In 1953, due to an expanding patient base and limited funding, Planned Parenthood moved into donated clinic space in the Phoenix Memorial Hospital in Phoenix. The Planned Parenthood Committee of Phoenix educated parents on planning and spacing births and provided the resources necessary to do so, including contraceptives. Toward that end, Planned Parenthood regularly distributed literature to the general public providing information about contraception.

Though distribution of contraceptives under medical direction was legalized after the US Court of Appeals case *United States v. One Package of Japanese Pessaries* (1936), a 1901 Arizona State statute still banned the advertising and distribution of materials relating to contraception and abortion in Arizona. According to historian Mary Melcher, the law was largely unenforced throughout the early 1900s. But in 1959, Tom Sullivan, the Maricopa County Manager, advised the Maricopa County Health Department, headquartered in Phoenix, that the distribution of contraceptive literature was banned. Additionally, Sullivan threatened to issue a complaint against Gladys McLean, the executive director of the Planned Parenthood Committee of Phoenix, for violating the Arizona statute by distributing educational material related to contraception.

In response to Sullivan's threat, on 17 June 1959, Stanford Farnsworth, the director of the Maricopa County Health Department, issued a warning to all Maricopa County Health Department division heads that no information about contraception should be given out by health department personnel. He issued that statement under the assumption that Planned Parenthood's activities violated the Arizona law. Additionally, in that same warning, Farnsworth prohibited the display or distribution of literature about contraception in all healthcare facilities. In response to Farnsworth's prohibitions, hospital staff stopped referring patients to Planned Parenthood and the clinic's activities slowed.

On 2 November 1959, the Planned Parenthood Committee of Phoenix board of directors voted to file a lawsuit questioning the constitutionality of the Arizona statute. Their lawsuit would focus on the constitutionality of an Arizona Revised Statute 13-213. The Arizona statute 13-213, passed in 1901, stated that any person who wrote or published an advertisement of a medicine or service facilitating an abortion or the prevention of conception, or who advertised those services, was guilty of a misdemeanor crime. Violation of the law was punishable by both fines and jail time.

Also in 1959, the Planned Parenthood Committee of Phoenix, represented by attorney Sheldon

Mitchell, filed a declaratory judgment action with the Superior Court of Arizona for Maricopa County in Phoenix. A declaratory judgment action asks the court to rule on the constitutionality of a law prior to a trial. The declaratory judgment action filed by Planned Parenthood tested the constitutionality of the Arizona Statute 13-213 against the state and federal constitutions. In January 1961, the Superior Court judge, Jack Ogg, upheld the statute as constitutional. The Planned Parenthood Committee of Phoenix and Mitchell appealed the decision to the Supreme Court of Arizona in Phoenix, Arizona.

On 31 October 1962, five justices heard the case in the Arizona Supreme Court: Chief Justice Charles Bernstein, Jesse Udall, Lorna Lockwood, Fred Struckmeyer, and Renz Jennings. A group of Maricopa County attorneys including Robert Pickrell, Philip Haggerty, Charles Stiham, and Charles Ronan represented Maricopa County. Mitchell continued to represent Planned Parenthood Committee of Phoenix.

In the Arizona Supreme Court case, Planned Parenthood argued that the 1901 Arizona statute was unconstitutional for two reasons. First, they argued that the law violated the constitutional freedom of speech and freedom of press guaranteed in the First Amendment to the US Constitution. The Arizona statute prevented Planned Parenthood from speaking about or publishing materials on contraception or abortion. Additionally, they argued that the statute imposed a prior restraint and censorship on publishing and advertising, which further violated the First Amendment as applied to the states by the Fourteenth Amendment to the US Constitution. The Fourteenth Amendment protects a citizen's right to life, liberty, and property. The Fourteenth Amendment states that citizens cannot be deprived of those rights by the government without appropriate legal process.

Secondly, Planned Parenthood argued that the Arizona statute was an improper use of state police power. Police power is the ability of states to regulate citizens' behaviors in order to protect their health and safety. The Fourteenth Amendment to the US Constitution prohibited states from exercising such power unless the behaviors demonstrably violated the overall public good. According to Planned Parenthood, the 1901 Arizona statute punished acts that were not inherently against the public good. The statute prevented the distribution of materials related to contraception and abortion, which Planned Parenthood argued were not acts in conflict with the public good. Furthermore, according to Planned Parenthood, the law did not demonstrate any legitimate public good for violating the due process requirements of the Fourteenth Amendment. Planned Parenthood argued that the goal of the Arizona statute could not have been to discourage sexual promiscuity, because the state did not have other laws that criminally punished sexual behavior.

Chief Justice Bernstein wrote the opinion of the court, which was issued on 31 October 1962. All other justices concurred. According to the court, its first goal in the case was to determine if the Arizona statute pertained to Planned Parenthood activities. To do that, the court examined the definition of advertising and its use in the Arizona statute. The court determined that the broad definition of advertising included every activity designed to capture the attention of the reader. However, the court argued in its decision that the definition of advertising in the 1901 Arizona statute was more limited. The court argued that specific phrasing in the statute suggested that advertising was a more formal announcement through mass media outlets such as newspapers. The court cited that the statute specifically referred to the act of targeting attention for purchasing, investing, or patronizing.

The court used the precedent set in the California Court of Appeals case *People v. McKean* (1925) to illustrate the formality needed to define the word advertising. In the case, a physician was charged with violating an abortion law by verbally offering to assist in providing an abortion. However, the California court ruled that a verbal offer was not a violation of the law, because the statute was written to require a more formal advertisement or notice. The Supreme Court of Arizona used the precedent set by *People v. McKean* to support their definition of advertising as only pertaining to paid advertising.

After the court defined advertising within the Arizona statute, the court examined whether or not Planned Parenthood's activities fell under the definition of advertising. The court first argued that the law did not pertain to dissemination of contraceptive information by doctors or nurses to patients via verbal means or referrals, the bulk of Planned Parenthood's business. According to the

court, advertising didn't include person-to-person consultation by clients who were already willingly seeking contraceptive information.

Next, the court decided whether Planned Parenthood's literature, pamphlets, and articles in newspapers or magazines were advertising. The court argued that all of those methods were not instances of advertising as defined by the Arizona law. Rather, the articles and press releases published in newspapers and magazines were individual commentaries and informational articles on topics of public interest. Additionally, the pamphlets and leaflets that Planned Parenthood displayed contained general information about the organization's services, overpopulation, and abortion, information that wasn't governed by the Arizona statute.

The court then gave examples of hypothetical instances in which the Arizona law would apply. For example, if literature or pamphlets gave instructions or information about a specific brand name contraceptive device and placed that device on public display, then that literature would be considered advertising and would fall under the statute.

After determining that Planned Parenthood's activities did not fall under the definition of advertising within the Arizona statute, the court determined that the Arizona statute did not apply to Planned Parenthood. That meant that Planned Parenthood could legally continue their activities in providing contraceptive information to their clients.

The court then looked at the constitutionality of the Arizona law itself. The court determined that the Arizona statute restricted freedom of speech and of press through post conduct punishment. Instead of restricting contraceptive advertising through prior restraint in the form of licensing requirements or censorship, the statute punished people after they published advertising on contraception. The court stated that post conduct punishment did not violate the constitution in the same way that restricting freedom of speech through prior restraint did. Additionally, the court argued that the law did not prohibit the discussion or advocacy of contraception and other general ideas that Planned Parenthood wished to promote. The law also did not ban the expression of general ideas through media or limit any private discussion or recommendation of contraceptives or abortions. Specifically, the law only limited the public advertising of specific trade branded devices or methods of contraception or abortion. Because the statute did not prevent public discussion of contraception, the court argued it did not violate the First Amendment to the US Constitution.

The court further supported the claim by pointing to several US Supreme Court cases that had already established that not all freedom of speech or press was constitutionally protected. One such case was US Supreme Court decision *Dennis v. United States* (1951). In the US Supreme Court case *Dennis v. United States*, the court ruled that First Amendment freedom of speech did not grant citizens freedom of speech, press, and assembly when creating a plot to overthrow the US government. According to the US Supreme Court, the government could regulate freedom of speech and press when those activities presented harm to society. However, the government must balance the regulation of individuals' freedoms with an interest in the welfare or safety of its citizens. The Arizona court used the precedent set by *Dennis v. United States* to explain how First Amendment rights may be restricted in certain cases. Therefore, the state of Arizona needed to show that it was protecting a public interest by limiting freedom of speech.

Next, the court questioned whether there was a reasonable public interest protected by the Arizona statute that would justify the restriction of First Amendment freedoms. As established by previous US Supreme Court cases, First Amendment rights could be restricted if it was in the best interest of the citizens. Therefore, the Arizona court had to determine that the Arizona statute protected the welfare of Arizona citizens to justify restricting First Amendment rights to advertise contraceptive information. The court stipulated that the Arizona statute could reasonably protect the morals and health of the community. They argued that the increased sale of contraceptives due to advertising could lead to an increase in sexual activity of unmarried people. They also claimed that the public interest served by the law was substantial enough to outweigh the private interest of freedom of speech through advertising. Using that logic, the court ruled that the Arizona law's protection of citizens from sexual promiscuity was substantial enough to warrant a restriction on First Amendment rights.

On 31 October 1962, the Arizona Supreme Court, in a unanimous decision, upheld the decision of

the Arizona Superior Court and found the 1901 Arizona statute to be constitutional. Despite Planned Parenthood losing the case, the Supreme Court's ruling stated that Planned Parenthood's activity did not fall under the law. According to Melcher, that decision cleared the way for reproductive health providers to continue practicing without fear of punishment under the law.

Several cases followed *Planned Parenthood Committee of Phoenix v. Maricopa County* and fought the constitutionality of the Arizona statute regarding the advertising of material related to abortion or contraception. In 1973, the US Supreme Court issued its decision in *Roe v. Wade* (1973), in which the court ruled that there is an inherent right to privacy in the US constitution that extends to reproductive healthcare decisions, including women's rights to have abortions. Later that year, using the precedent set in *Roe v. Wade*, an Arizona Court of Appeals decided in *State v. New Time* (1973) that all of Arizona's abortion laws, including Arizona statute 13-213, were unconstitutional.

Sources

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