

Nelson v. Planned Parenthood Center of Tucson (1973)

The 1973 case *Nelson v. Planned Parenthood Center of Tucson* established the legality of abortion in Arizona. The Arizona Court of Appeals ruled that the Arizona Revised Statutes 13-211, 13-212, and 13-213, collectively called the Arizona abortion statutes, were unconstitutional. The statutes had made illegal receiving, providing, or advertising abortions. After the Arizona Appeals Court heard the case, it decided that the Arizona abortion statutes were constitutional. However, two weeks later the US Supreme Court decided in *Roe v. Wade* (1973) that abortion was constitutional at the federal level. The Arizona court followed the precedent set by the US Supreme Court and amended its decision to rule that the Arizona abortion statutes were unconstitutional. Afterwards, Planned Parenthood, other family planning clinics, and hospitals were legally allowed in Arizona to advertise, discuss, and offer abortions as an option to their patients.

In 1901, the Arizona State Legislature in Phoenix, Arizona, established the Arizona abortion laws, comprised of Arizona Revised Statutes 13-211, 13-212, and 13-213, which were later renumbered 13-3603, 13-3604, and 13-3605. Statute 13-211 made it illegal for anyone to provide an abortion. Statute 13-212 made it illegal for any pregnant woman to solicit or receive any procedure that caused an abortion. Statute 13-213 made it illegal to advertise contraception or abortion services. By the 1970s, reproductive health organizations had made several attempts to challenge the Arizona laws. However, all were unsuccessful and Arizona courts upheld the legality of the statutes.

In 1971, the Planned Parenthood Association of Tucson, Arizona, an organization that provided Arizona women with contraception and family planning services, challenged the constitutionality of the Arizona abortion laws in the United States District Court of Arizona in Phoenix. The case was *Planned Parenthood Association v. Nelson* (1971). Robert Tamis, a physician practicing in obstetrics and gynecology in Phoenix, and several married couples joined the lawsuit with Planned Parenthood. Tamis argued that the statutes prevented him from performing abortions for women likely to give birth to infants with severe mental or physical birth defects. The married couples argued that the statutes prohibited them from obtaining abortions if they wanted them. The Planned Parenthood Association argued that the statutes prevented their organization from arranging and advertising abortion services for fear of criminal prosecution under the laws. Both the Planned Parenthood Association and Tamis acknowledged that they had not been prosecuted or threatened under the law for violating the statutes, and that they did not intend to commit any of the acts prohibited by the statutes so long as the statutes remained in force.

The Planned Parenthood Association requested the United States District Court of Arizona to issue a declaratory judgment on the constitutionality of the statutes. By requesting a declaratory judgment, Planned Parenthood asked the court to decide whether or not the statutes were constitutional before going to trial. Additionally, Planned Parenthood requested an injunction on the statutes, which would prevent the laws from being enforced while the lawsuit was ongoing. The law firms Dushoff, Sacks, and Corcoran in Phoenix and Miller, Pitt, and Feldman in Tucson represented Planned Parenthood and others who joined the lawsuit.

Planned Parenthood brought the case against Gary Nelson, the Arizona Attorney General, whose office was headquartered in Phoenix. Nelson's legal team consisted of John Neubauer, the state's Chief Civil Deputy Attorney, Moise Berger, the Maricopa County Attorney, William Carter, the state's Deputy County Attorney, and Rose Silver, Pima County Attorney. The case was presented in the United States District Court of Arizona and heard by Circuit Judge William Browning and District Judges Charles Muecke and William Copple.

On 11 June 1971, the United States District Court of Arizona stated in the case *Planned Parenthood*

Association v. Nelson that it refused to issue a declaratory judgment on the constitutionality of the Arizona abortion laws. The court ruled that it had no jurisdiction to rule on the constitutionality of the statutes because Planned Parenthood had failed to demonstrate a controversy. The court said that for it to rule on the constitutionality of a law, a controversy needed to exist, and it ruled that none did in this case. The court stated that Planned Parenthood had also failed to demonstrate irreparable damage, such as people being prosecuted under Arizona's abortion statutes having their constitutionally protected rights violated. The court also stated that Planned Parenthood had failed to first use other state level courts to resolve its complaint before requesting a judgment from a federal court. The court noted that in the case *Hodgson v. Randall* (1971), the US Supreme Court in Washington, D.C., ruled that a Minnesota physician who had performed an abortion, but was not prosecuted under the Minnesota law, was not entitled to a declaratory judgment from a federal court, because there was no controversy present and the state level courts are able to issue declaratory judgments. The District Court stated that Planned Parenthood should have requested that a state level court, not the federal District Court, issue a declaratory judgment on the constitutionality of the statutes, and that the state court's decision would have been sufficient to resolve any controversy. The court dismissed the complaint.

After the US District Court ruled that the case was not appropriate for the federal level court system, the Tucson chapter of Planned Parenthood filed the case in the state level court system. The Planned Parenthood Center of Tucson filed the case *Planned Parenthood Center of Tucson Inc., v. Nelson* in the Arizona Superior Court in Tucson against Nelson, the Arizona Attorney General. Physicians who practiced obstetrics and gynecology in southern Arizona joined the Planned Parenthood Center of Tucson's lawsuit. Those physicians included Herbert Pollock, John McEvers, Max Costin, Nathaniel Bloomfield, Arnold Lilien, Louis Brunsting, Stuart Edelberg, Damon Raphael, Robert Oliver, and David Trisler. An unmarried pregnant woman alias as Jane Doe also filed the lawsuit alongside Planned Parenthood Center of Tucson. The alias preserved her anonymity during the trial, and was changed to Jane Roe later in the trial. Lawyers Stanley G. Feldman and Elaine Pollack represented the Planned Parenthood Center of Tucson. John O'Dowd, assistant attorney general, and John Neubauer, deputy county attorney, represented Nelson.

In response to Planned Parenthood Center of Tucson's lawsuit, Nelson filed a motion asking the Superior Court to dismiss the lawsuit, arguing it did not demonstrate a justifiable controversy. On 9 September 1971, judge Richard Royston in the Arizona Superior Court heard Nelson's motion to dismiss the case, and denied it, thus allowing the case to proceed through the court system. However, on 5 April 1972 judge Jack Marks in the Arizona Superior Court in Tucson reheard the motion. Marks granted Nelson's motion and dismissed the lawsuit for not having a justifiable controversy. On 12 April 1972, Marks rescinded his dismissal and allowed the case to proceed. However, it was later revealed that Jane Roe, the pregnant woman who was filing the case alongside Planned Parenthood, had obtained a legal abortion in another state. On 9 May 1972, Marks reinstated the original dismissal of the complaint, ruling that without the pregnant woman, Planned Parenthood Center of Tucson again lacked a justifiable controversy.

After Marks dismissed the case, Planned Parenthood Center of Tucson brought a case against him in May 1972, arguing that he arbitrarily dismissed the case. In the case *Planned Parenthood Center of Tucson, Inc., v. Marks* (1972) Planned Parenthood claimed that judge Marks had dismissed their complaints arbitrarily and that the Arizona Superior Court had erred by failing to issue a declaratory judgment on their complaint. On 30 May 1972, Division Two of the Arizona Court of Appeals in Tucson, Arizona, heard the case *Planned Parenthood Center of Tucson, Inc., v. Marks*. The Court of Appeals found that Planned Parenthood Center of Tucson presented enough evidence indicating that the Arizona abortion laws presented a justifiable controversy. The Court of Appeals reversed Marks's dismissal of the original case *Planned Parenthood Center of Tucson Inc., v. Nelson* and ordered the Arizona Superior Court to rehear the case and issue a declaratory judgment on the constitutionality of the Arizona abortion statutes.

Following the Court of Appeals decision in *Planned Parenthood Center of Tucson v. Marks*, the Arizona Superior Court reheard the case *Planned Parenthood Center of Tucson v. Nelson*, which challenged the constitutionality of the Arizona abortion statutes, on 29 September 1972. Lawyers Feldman and Pollock continued to represent Planned Parenthood Center of Tucson. Those lawyers

argued that the Arizona abortion laws were unconstitutional for several reasons.

First, the lawyers argued that the statutes were vague and overbroad because they did not allow for therapeutic abortions in the cases of rape, incest, or severe mental or physical deformities of the fetus. Planned Parenthood also argued that the statutes violated women's rights to privacy noted by the US Supreme Court in *Griswold v. Connecticut* (1965), which had established a constitutional right to privacy inherent in the Fourteenth Amendment to the US Constitution. Additionally, Planned Parenthood's lawyers argued that the statutes limited physicians' rights to make medical recommendations, and hindered their ability to treat and care for patients.

The lawyers further argued that the abortion statutes represented an overreach of police power because there was no state interest in regulating abortion. Planned Parenthood's lawyers also argued that because the statutes were based on religious values, the laws unconstitutionally established religion in the law. Finally, they argued that the statutes discriminated against women of low socioeconomic status who couldn't travel to another state for legal abortions.

On 29 September 1972, the Arizona Superior Court ruled that a fetus was not entitled to constitutionally protected rights. Therefore, the Superior Court found that the Arizona abortion statutes, 13-211, 13-212, and 13-213, were overbroad and violated women's rights to privacy guaranteed by the Fourteenth Amendment. Additionally, the court ruled that the statutes violated the rights of physicians to fulfill their professional and ethical obligations to their patients. The Arizona Superior Court wrote a declaratory judgment stating that the Arizona abortion statutes were unconstitutional and issued an injunction preventing the state from enforcing the abortion statutes.

Following the decision of the Arizona Superior Court in *Planned Parenthood Center of Tucson v. Nelson*, Nelson appealed the decision to the Arizona Court of Appeals in January 1973. The case name was changed to *Nelson v. Planned Parenthood Center of Tucson* to represent Nelson appealing the court decision. Judges Joseph Howard, James Hathaway, and Herbert Krucker heard the case in Division Two of the Arizona Court of Appeals in Tucson.

On 3 January 1973, the Court of Appeals ruled in the case *Nelson v. Planned Parenthood Center of Tucson* that the Arizona abortion laws were constitutional. Howard wrote the opinion of the court. He stated that the Court of Appeals did not find the Arizona abortion statutes to be unconstitutionally vague. Furthermore, the court ruled that though a fundamental right to privacy existed, as demonstrated by *Griswold v. Connecticut*, that right did not extend to a right, as Howard said, to "destroy life" through an abortion. Howard explained that the US Supreme Court's decision in *Griswold v. Connecticut* protected the rights of privacy of adults to prevent pregnancies through contraception. However, the Court of Appeals ruled that after conception, states have a legitimate interest in protecting the rights of an embryo or fetus that is incapable of protecting itself. Howard stated that there were numerous legislative and judicial examples of states' power and interest in protecting children. Howard claimed that the power of states to protect children extended to include fertilized eggs, embryos, or fetuses.

Additionally, Howard stated that Arizona's abortion statutes were not overbroad. Though Planned Parenthood argued that the statutes were overbroad because they did not make exceptions for cases of rape or fetuses with physical or mental deformities, the Court of Appeals ruled that legislation could ultimately decide that the protection of all life is important. In the majority opinion, Howard went on to state that Planned Parenthood's claim that the statutes were unconstitutional based on religion was without merit. He stated that many federal and state laws have roots in Judeo-Christian ethics and that sanctity for life can be found outside of religious concepts.

Lastly, the Court of Appeals ruled against Planned Parenthood's argument that the Arizona abortion statutes unfairly discriminated against poor women. Howard stated that even if abortion were legalized, women of lower socioeconomic status still might not be able to afford abortions. The court noted that no precedent gave women an absolute constitutional right to an abortion. Judge Hathaway concurred with the decision written by Howard.

Chief Judge Krucker wrote a dissenting opinion. Krucker wrote that he agreed with the decision of the lower court, stating that the statutes were unconstitutional. He stated that *Griswold v. Connecticut* and *Eisentadt v. Baird* (1972), which extended the constitutional right to privacy established

in *Griswold* to unmarried people, demonstrated the right of women to determine whether or not to bear children. Krucker argued that the abortion statutes forced women to carry pregnancies, even those resulting from rape or incest. He also stated that the laws forced women to risk the potential health complications associated with pregnancy and delivery. Krucker said that the laws forced women to have infants that had physical or mental birth defects. Krucker stated that a woman's interest in terminating a pregnancy outweighs any state interest in the birth of a child. He concluded that the Arizona abortion statutes were overbroad and unconstitutional.

Several weeks later, on 22 January 1973, the US Supreme Court announced its decision in *Roe v. Wade*. In *Roe v. Wade*, Norma McCorvey, a pregnant woman under the alias Jane Roe, challenged the constitutionality of several Texas abortion laws that made abortion illegal. The US Supreme Court ruled that the Texas abortion laws were unconstitutional under the Due Process Clause of the Fourteenth Amendment. The Court found that the constitutionally protected right to privacy in the Fourteenth Amendment extends to women's decisions to have abortions. The Court ruled that while the right to terminate a pregnancy was not absolute, a woman should be free to terminate a pregnancy during the first trimester of pregnancy without state interference or regulation. States could not constitutionally regulate abortion at all during the first trimester. The new precedent set by the US Supreme Court meant that all state abortion laws that completely banned abortion were unconstitutional.

Following the US Supreme Court decision, the Arizona Court of Appeals amended its decision in *Nelson v. Planned Parenthood Center of Tucson* and ruled that the Arizona abortion statutes were unconstitutional. The Supreme Court is the highest-level court in the US and its decisions supersede all state level courts. Upon rehearing the case, the Court of Appeals issued its decision on 30 January 1973. The court stated that it was held to the US Supreme Court's interpretation of the US Constitution. Because the Arizona abortion statutes were similar to those deemed unconstitutional by the US Supreme Court in *Roe v. Wade*, the Arizona Court of Appeals found that Arizona statutes 13-211, 13-212, and 13-213 were unconstitutional. The Court of Appeals issued an injunction on the statutes, preventing the enforcement of the Arizona abortion statutes, and effectively legalized abortion in Arizona.

Sources

1. Advertising to produce abortion or prevent conception; punishment. Ariz. Rev. Stat. Section 13-213 (Enacted 1901, Renumbered 1977). <http://www.azleg.gov/viewdocument/?docName=http://www.azleg.gov/ars/13/03605.htm> (Accessed September 23, 2016).
2. Definition; punishment. Ariz. Rev. Stat. Section 13-211 (Enacted 1901, Renumbered 1977). <http://www.azleg.gov/viewdocument/?docName=http://www.azleg.gov/ars/13/03603.htm> (Accessed September 23, 2016).
3. *Eisenstadt v. Baird*. 405 U.S. 438 (1972) https://scholar.google.com/scholar_case?q=Eisenstadt+v.+Baird+&hl=en&as_sdt=806&case=14131534241682283357&scilh=0 (Accessed September 22, 2016).
4. Fourteenth Amendment to the US Constitution. (1868). <https://www.law.cornell.edu/constitution/amendmentxiv> (Accessed September 22, 2016).
5. *Griswold v. Connecticut*. 381 US 479 (1965) [https://scholar.google.com/scholar_case?q=in+Griswold+v.+Connecticut+\(1965\),+&hl=en&as_sdt=806&case=12276922145000050979&scilh=0](https://scholar.google.com/scholar_case?q=in+Griswold+v.+Connecticut+(1965),+&hl=en&as_sdt=806&case=12276922145000050979&scilh=0) (Accessed September 22, 2016).
6. *Hodgson v. Randall*. 402 U.S. 967 (1971).
7. *Nelson v. Planned Parenthood*. 505 P.2d 580 (1973). https://scholar.google.com/scholar_case?q=planned+parenthood+v+nelson&hl=en&as_sdt=806&case=4498669354214043954&scilh=0 (Accessed September 22, 2016).
8. *Planned Parenthood Association v. Nelson*. 327 F. Supp. 1290 (1971). https://scholar.google.com/scholar_case?q=planned+parenthood+v+nelson&hl=en&as_sdt=806&case=12953035526560760163&scilh=0 (Accessed September 22, 2016).
9. *Planned Parenthood Center of Tucson, Inc., v. Marks*. 497 P.2d 534 (1972). https://scholar.google.com/scholar_case?q=planned+parenthood+v+marks&hl=en&as_sdt=806

- &case=8096668908022921592&scilh=0 (Accessed September 22, 2016).
10. Roe v. Wade. 410 US 113 (1973). https://scholar.google.com/scholar_case?q=roe+v+wade&hl=en&as_sdt=806&case=12334123945835207673&scilh=0 (Accessed March 30, 2015).
 11. Soliciting abortion; punishment; exception. Ariz. Rev. Stat. Section 13-212 (Enacted 1901, Renumbered 1977). <http://www.azleg.gov/viewdocument/?docName=http://www.azleg.gov/ars/13/03604.htm> (Accessed September 23, 2016).