Written by **Warren Mass** on February 24, 2014

Supreme Court Refuses to Hear Arizona Case on Abortion Funding

The U.S. Supreme Court on February 24 declined to hear an appeal of a federal judge's ruling that struck down an Arizona state law that would have disqualified abortion providers from receiving government funding through Medicaid.

The petitioners, Arizona Health Care Cost Containment System Director Tom Betlach and Arizona Attorney General Tom Horne, had asked the High Court to review a ruling made by Judge Neil Wake of the U.S. District Court for the District of Arizona that granted a permanent injunction against the Whole Woman's Health Funding Priority Act of Arizona (HB 2800) signed into law by Gov. Jan Brewer last May. (For text of petition, click here.)

"This is a common sense law that tightens existing state regulations and closes loopholes in order to ensure that taxpayer dollars are not used to fund abortions, whether directly or indirectly," said Brewer after signing HB 2800. "By signing this measure into law, I stand with the majority of Americans who oppose the use of taxpayer funds for abortion."

After Wake struck down the law, the state of Arizona appealed his ruling to the Ninth U.S. Court of Appeals, which upheld Wake's decision. It was then that the Arizona officials appealed to the Supreme Court.

In their appeal, the petitioners made a strong states' rights argument, asking the High Court to consider

> Whether the Ninth Circuit's misplaced definition of "qualified" under 42 U.S.C. § 1396a(a)(23) engenders a Spending Clause violation under *Pennhurst* and strips Arizona of powers reserved to it under the Tenth Amendment; namely, the power to regulate health care in furtherance of state law and policy by disqualifying from Medicaid participation those providers who perform nonfederally qualified abortions.

The petitioners' reference to *Pennhurst* pertains to *Pennhurst State School and Hospital v. Halderman*, a 1981 case that decided, stated the petitioners, that

> … the federal Medicaid statute is only legitimate under the Spending Clause to the extent that states voluntarily and knowingly accept Medicaid's terms in choosing to participate. Otherwise, enforcement of the legislative "contract" would undermine the status of the states as independent sovereigns in our federal system.

In stating their case, the petitioners summarized the position of Arizona's state courts, which hold that

> "the state has a justifiably strong interest in preserving life," *Planned Parenthood Arizona, Inc. v. American Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 188 n.5 (Ariz. App. 2011) (internal quotation marks omitted), and that abortion is "inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life," *Harris v. McRae*, 448 U.S. 297, 324 (1980) (upholding federal statute prohibiting use of Medicaid funding for certain abortions).

In concluding their petition, Betlach and Horne emphasized the right of Arizona to make its own determinations regarding spending it funds, by quoting the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Arizona, as part of its participation in the federal Medicaid program, provides "family planning services" for low-income women. The federal government pays 90 percent, with the state funding the balance.

The legal dilemma that Arizona currently finds itself in can be viewed as a natural consequence of accepting federal aid, which always leads to federal control. States that truly want to protect their state sovereignty as defined in the Tenth Amendment should refuse all federal funding. Federal funding does not even make economic sense, since the funds received are collected from the taxpayers and sent first to Washington, where the federal bureaucracy takes its cut, with the balance being sent to the states with strings attached.

This was the second time this year that the Supreme Court has refused to hear an appeal to overturn a ruling by a lower court against an Arizona abortion law. On January 13, the High Court declined to hear a challenge by Attorney General Horne to another Ninth Circuit Court ruling on May 9, 2013, that Arizona House Bill 2036 — barring abortions after 20 weeks, except in the case of medical emergencies — is unconstitutional. Pro-abortion groups filing legal challenges against the measure said it was more stringent than similar laws in other states because the way Arizona measures gestation meant it would bar abortions two weeks earlier than in other states.

At the time the High Court refused to hear the appeal, Reuters News quoted a statement from Cecile Richards, president of Planned Parenthood Federation of America, who said, "A dangerous and blatantly unconstitutional law like Arizona's abortion ban should have never passed in the first place."

Richards did not explain why banning a serious, yet medically unnecessary, procedure such as abortion is dangerous, or exactly which part of the Constitution prohibits the states from passing laws dealing with the regulation of abortion.

The last time the Supreme Court agreed to hear an abortion case was in 2007, when it ruled five-to-four to uphold a federal law that banned a late-term abortion procedure.

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