

To: Interested Parties
From: General Counsel & VP, Policy Josh Kredit
Subject: Arizona Law on the Sale of Fetal Tissue and Funding of Planned Parenthood
Date: August 19, 2015

The undercover videos released by the Center for Medical Progress (CMP) expose the horrifying practices of Planned Parenthood, Arizona's largest abortion provider. Beyond that, the videos raise questions about where Arizona's law stands today in regard to these practices and whether any changes are needed to ensure this cannot occur in our state. The videos also raise the question of whether Arizona has any recourse available to ensure no taxpayer dollars flow to the abortion giant. This is an ongoing endeavor to investigate all options available to the State of Arizona to address the issues raised. Center for Arizona Policy is monitoring the actions being taken by other states and is consulting with national legal experts on what is feasible for Arizona.

Arizona Law on the Sale of Fetal Tissue

Separate from the federal prohibition on the sale of fetal tissue for valuable consideration,¹ in 1983 the Arizona legislature passed a law prohibiting research on aborted fetuses or embryos or on any part of an aborted fetus or embryo, unless under narrow circumstances. The law was amended in 1984 to state the following:

36-2302. Experimentation on human fetus or embryo prohibited; physician-patient privilege inapplicable

- A. A person shall not knowingly use any human fetus or embryo, living or dead, or any parts, organs or fluids of any such fetus or embryo resulting from an induced abortion in any manner for any medical experimentation or scientific or medical investigation purposes except as is strictly necessary to diagnose a disease or condition in the mother of the fetus or embryo and only if the abortion was performed because of such disease or condition.
- B. The physician-patient privilege as provided in section 13-4062, paragraph 4 shall not prevent the production of documents or records relevant to an investigation arising under this section. All documents or records produced in an action brought pursuant to this section shall be inspected by the court in camera, and before the documents or records are released to the requesting party, the court shall remove the names and other identifying information, if any, of the patients and substitute pseudonyms.
- C. This section shall not prohibit routine pathological examinations conducted by a medical examiner or hospital laboratory provided such pathological examination is not a part of or in any way related to any medical or scientific experimentation.

In 1998 a group of individuals (four people diagnosed with Parkinson's disease, a board member of the Arizona Chapter of the American Parkinson's Disease Association, Planned Parenthood of Central, Northern, and Southern Arizona, and three doctors) challenged this law in federal court.

At both the Federal District Court level and then before the Ninth Circuit Court of Appeals, A.R.S. § 36-2302 was found to be unconstitutional and in violation of the Due Process Clause of the Fourteenth Amendment. Specifically, "a criminal statute such as A.R.S. § 36-2303 that prohibits medical experimentation but provides no guidance as to where the state should draw the line between experiment and treatment gives doctors no constructive notice, and gives police, prosecutors, juries, and judges no standards to focus the statute's reach. The dearth of notice and standards for enforcement arising from the ambiguity of the words 'experimentation,' 'investigation,' and 'routine' thus renders the statute unconstitutionally vague."² Due to this decision, the section is permanently enjoined and unenforceable.

That said, even if the law was in effect today, the law does not appear to penalize the "facilitation" of the research or experimentation. For example, under A.R.S. § 36-2302 if enforceable, Planned Parenthood would not be breaking the law by obtaining the aborted fetuses or embryos and then transporting them to a company that does the research. The research company could then be subject to criminal liability, but Planned Parenthood would not be guilty of breaking any law. Moreover, criminal liability could be avoided altogether if Planned Parenthood were to transport the fetuses or embryos out of state to a state without a prohibition like A.R.S. § 36-2302.

Worth noting is that in 2010 Arizona prohibited human cloning, destructive human embryo research, the creation of human-animal hybrids, and the sale of human embryos.³ All of these laws are in effect today.

Next Steps for Policymakers

Some immediate measures are being taken to discover whether the sale of fetal tissue is occurring within Arizona. Additionally, the undercover CMP videos highlight several changes that must be made legislatively:

- On August 14, 2015, Arizona Department of Health Services (ADHS) finalized emergency rulemaking to require abortion providers to include the following information on each abortion report:
 - The final disposition of the fetal tissue from the abortion:
 - If the fetal tissue is transferred:
 - The name and address of the person receiving the tissue,
 - The amount of valuable consideration received, and
 - Whether a patient provided informed consent for the transfer of the fetal tissue.

(follow this link for complete information on the emergency rulemaking:
www.azpolicy.org/issues/Abortion%20Reporting%20Attorney%20General.pdf)

- Because the above rule was done through emergency rulemaking and can only be in effect for six months with one six month renewal permitted, legislation in the 2016 session will be needed to codify these reporting requirements.
- Another potential change that would facilitate the investigation of violations by abortion clinics under Arizona law centers on who is permitted to view individual abortion reports. Currently, individual abortion reports may only be shown to the Attorney General's Office if there is a court order. Clarifying that ADHS may cooperate with the Attorney General's Office in regard to these reports would help ensure proper compliance with abortion reporting and clinic regulations.
- A.R.S. § 36-2302 should be amended and clarified in compliance with the Ninth Circuit's opinion to be enforceable. Additionally, the statute should prohibit the "facilitation" of a violation of that section.
- Finally, the law should require fetal remains to be disposed of in a proper and respectful manner and within a specified period of time to ensure that Planned Parenthood cannot get around Arizona's laws and transport the remains out of state. Other states such as Indiana have taken similar steps recently (*NOTE: simply prohibiting the transportation of fetal remains outside of Arizona could raise constitutional interstate commerce issues that we should try to avoid*).

Taxpayer Funding of Planned Parenthood Arizona

In Arizona, other states, and at the federal level, laws have been enacted and upheld by the courts which prohibit taxpayer money from directly paying for elective abortions and which respect the rights of taxpayers to not directly subsidize the abortion industry. In Arizona, direct taxpayer funding for abortions is allowed in only four instances:

- To save the life of the mother per state law
- When a woman on Arizona's Medicaid program is seeking a "medically necessary" abortion per the Arizona Supreme Court decision in *Simat v. AHCCCS*
- In cases of rape pursuant to the federal "Hyde Amendment"
- In cases of incest pursuant to the federal "Hyde Amendment"

However beyond these instances, millions of taxpayer dollars continue to go to abortion providers annually through Medicaid and other programs. These public funds indirectly subsidize the abortion business by freeing up additional money to be spent on abortion services.

With the release of the CMP undercover videos, there have been renewed calls to defund Planned Parenthood of the taxpayer dollars it receives. In Arizona there are currently 10 abortion clinics in operation, six of which are Planned Parenthood clinics.⁴ Although it is difficult to track down the direct funding streams Planned Parenthood Arizona receives, most taxpayer dollars

going directly to Planned Parenthood Arizona flow from the Title X Federal Family Planning Program and the Title XIX Medicaid Family Planning Program. **There is no direct state funding for Planned Parenthood within Arizona, which leaves limited options, if any, for Arizona to completely defund Planned Parenthood within the state.**

In the last several years, a number of laws have been passed to restrict taxpayer dollars from going to abortion providers like Planned Parenthood. Arizona has ended taxpayer-funded abortion training, disqualified abortion providers from the charitable tax credit, ended taxpayer-funded insurance coverage for government employees' abortions, and prohibited elective abortion coverage to be offered on the Arizona's healthcare exchange under the Affordable Care Act.⁵

In 2012, the Arizona Legislature passed and Governor Brewer signed into law HB 2800, which sought to cut off abortion providers from receiving pass-through Medicaid funds as part of Arizona's joint federal/state Medicaid program. Planned Parenthood immediately challenged the law in court. Both at the Federal District Court level and then before a panel of the Ninth Circuit Court of Appeals, the law was struck down. Essentially, the court held that the state of Arizona could not add additional qualifications (cannot perform abortions) that are unrelated to the provision of services under the Medicaid program. A similar law was also struck down in Indiana for the same reasons.

Due to this court decision, approximately \$350,000 of taxpayer funds went to Planned Parenthood Arizona in Fiscal Year 2013, of which about \$50,000 is Arizona-specific money due to the Medicaid federal/state match agreement. The amount of taxpayer money Planned Parenthood Arizona receives each year has increased, and one cause could be the state's decision to expand Medicaid eligibility in 2013.

In regard to the other funding received by Planned Parenthood Arizona, Title X funds are administered and distributed within Arizona by the Arizona Family Health Partnership (AFHP). AFHP is a private, nonprofit organization that awards federal funding to clinics in Arizona such as Planned Parenthood. It is unclear whether the State of Arizona has any contracts with AFHP or is involved with the administering of these Title X funds from the federal government. Whether and how the State of Arizona could restrict these disbursements and redirect them away from abortion providers like Planned Parenthood is currently being researched.

¹ 42 U.S.C § 289g-2(a).

² Forbes v. Napolitano, 236 F.3d 1009, 1013 (9th Cir. 2000).

³ Ariz. Rev. Stat. §§ 36-2311 through 2313.

⁴ There are currently a total of 10 (soon to be 11) Planned Parenthood clinics within Arizona, but only six perform abortions.

⁵ Ariz. Rev. Stat. §§ 20-121; 35-196.02; 43-1088.