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## A Wall of Legislative Obstacles in the Path of a Woman Exercising Her Right to an Abortion: *Planned Parenthood Arizona, Inc. v. Betlach*

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## NOTE

A WALL OF LEGISLATIVE OBSTACLES IN  
THE PATH OF A WOMAN EXERCISING HER  
RIGHT TO AN ABORTION: *PLANNED  
PARENTHOOD ARIZONA INC. V. BETLACH*

BY ANGELA BRESLIN

## INTRODUCTION

(The Constitution) is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.<sup>1</sup>

Abortion rights are controversial; on this we can all agree. Emotions and opinions aside, constitutionally protected rights must be enforced by courts through invalidating legislative actions that infringe on those rights. A woman has a constitutional right to an abortion.<sup>2</sup> In 2012, the Arizona legislature attempted to limit that right. The legislature enacted a statute that would have deprived any physician who performs elective abortions, or any facility where elective abortions are performed, from receiving Medicaid funding for *any* of their services, including family planning and preventive care.<sup>3</sup> In *Planned Parenthood Arizona Inc. v. Betlach* (“*Betlach*”), a physician, three individuals, and

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 113, 117 (1973) (quoting Justice Holmes’s dissent in *Lochner v. New York*, 198 U.S. 45, 76 (1905)).

<sup>2</sup> *Roe v. Wade*, 410 U.S. at 153.

<sup>3</sup> ARIZ. REV. STAT. ANN. § 35-196.05(B) (Westlaw 2014).

Planned Parenthood sued to have the statute declared invalid as a violation of federal law. The district court granted summary judgment to the plaintiffs and permanently enjoined the State from enforcing the statute, and the Ninth Circuit affirmed.<sup>4</sup>

However, had this statute gone into effect, individuals living in Arizona would have suffered numerous consequences and violations of their rights. Firstly, no Medicaid recipient in Arizona could have obtained federally subsidized healthcare services from healthcare providers who also performed elective abortions or from facilities where such abortions were performed.<sup>5</sup> In other words, the legislation would have deprived women in Arizona of their *choice* in provider for family-planning and preventive-care services.<sup>6</sup>

The statute would have also cut off funding to physicians and facilities that also perform elective, or “nontherapeutic,”<sup>7</sup> abortions. Arizona citizens already pay for elective abortions privately because Medicaid does not cover them.<sup>8</sup> Under the statute, a Medicaid recipient would have had to pay out of pocket for all family-planning and preventive-care services from any physician who also happens to perform elective abortions.<sup>9</sup> Thus, women who rely on Medicaid reimbursements for family-planning services and preventive care would have had to find other physicians in order to afford their care.<sup>10</sup> This

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<sup>4</sup> *Planned Parenthood Ariz., Inc. v. Betlach*, 922 F. Supp. 2d 858 (D. Ariz. 2013), *aff’d*, 727 F.3d 960 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283 (2014); *see also* *Planned Parenthood Ariz., Inc. v. Betlach*, 899 F. Supp. 2d 868 (D. Ariz. 2012), *appeal dismissed*, 727 F.3d 960 (9th Cir. 2013).

<sup>5</sup> ARIZ. REV. STAT. ANN. § 35-196.05(B) (Westlaw 2014).

<sup>6</sup> Medicaid’s choice-of-provider provision prohibits the limiting of a woman’s choice of physician for subsidized family-planning and preventive-care services, with few narrow exceptions. 42 U.S.C.A. § 1396a(a)(23) (Westlaw 2014).

<sup>7</sup> A nontherapeutic abortion is one that is not medically necessary for the health of the mother. *E.g.*, *Harris v. McRae*, 448 U.S. 297, 315 (1980).

<sup>8</sup> The Constitution does not require states to use federal funding from Title XIX of the Social Security Act (Medicaid) for abortions. *See Harris v. McRae*, 448 U.S. 297, 297-98 (1980) (holding that funding restrictions on medically necessary abortions in the Hyde Amendment, as applied to Medicaid participants, do not violate “liberty” protected by the Due Process clause of the 5th Amendment as recognized in *Roe v. Wade*, 410 U.S. 113, 153 (1973)); *see, e.g.*, *Maher v. Roe*, 432 U.S. 464, 465-66 (1977) (holding that States are not required to use Medicaid funding for nontherapeutic abortions); *see also Rust v. Sullivan*, 500 U.S. 173, 175, 198-99 (1991) (holding that government-funded programs, such as Title X, can set limitations on the scope of funding, such as prohibiting employees of Title X funds from counseling, referring, and advocating for abortion, so long as the conduct regulated is within the scope of the funding, but the government cannot regulate conduct outside the scope of the federal funding).

<sup>9</sup> *Planned Parenthood Ariz., Inc. v. Betlach*, 899 F. Supp. 2d at 887.

<sup>10</sup> *See* Complaint for Injunctive and Declaratory Relief ¶ 39, *Planned Parenthood Ariz., Inc. v. Betlach*, 922 F. Supp. 2d 858 (D. Ariz. 2013) (No. 12CV01533), *aff’d*, 727 F.3d 960 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283 (2014), 2012 WL 2892201. All three plaintiffs were recipients of Medicaid and had long-time physicians who would no longer be able to provide their family-

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cutoff would have further reduced the number of physicians within Arizona who perform abortions, especially in medically underserved and low-provider areas within the state.<sup>11</sup> When women do not have actual access to doctors who perform elective abortions, they cannot exercise their constitutionally protected right to pre-viability abortions.<sup>12</sup>

*Roe v. Wade* is one of the best-known cases because it first memorialized women's constitutional right to abortion.<sup>13</sup> However, the past four and a half decades are riddled with legislative attempts to erode the quality of a woman's choice in exercising that constitutional right.<sup>14</sup> Legal abortions have been denied public funding.<sup>15</sup> Legislation has attempted to deny elective abortions to women who did not first obtain written consent from their husbands.<sup>16</sup> Twenty-four-hour waiting periods have been imposed, forcing women to travel long distances and take multiple days off from work or school.<sup>17</sup> In some federally funded programs, physicians are prohibited from counseling, referring, or advocating abortion as an option in family planning.<sup>18</sup> Additionally, certain types of medically supported abortion procedures have been

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planning and preventive-care services and receive their Medicaid reimbursements. *Id.* ("If the Act goes into effect, they will be prevented from receiving services from their provider of choice, will have their health care interrupted, and may encounter difficulties finding alternative care.").

<sup>11</sup> As of 2008, there were already fewer than twenty physicians in the entire state of Arizona who performed abortions. GUTTMACHER INST., TRENDS IN ABORTION IN ARIZONA, 1973–2008 (Jan. 2011), available at [www.guttmacher.org/presentations/state\\_ab\\_pt/arizona.pdf](http://www.guttmacher.org/presentations/state_ab_pt/arizona.pdf); see also Complaint for Injunctive and Declaratory Relief, *supra* note 10, ¶ 39 (alleging that plaintiffs lived in "low provider" and "medically underserved" areas).

<sup>12</sup> *Roe v. Wade*, 410 U.S. 113, 163 (1973) (defining the compelling point for which a state may interfere with a woman's right to choose to have an abortion is after viability, when a fetus could survive outside the woman's womb).

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Mazurek v. Armstrong*, 520 U.S. 968 (1997); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

<sup>15</sup> See *Maher v. Roe*, 432 U.S. at 470; see also *Harris v. McRae*, 448 U.S. at 310 (validating withholding of Medicaid funding even for medically necessary abortions).

<sup>16</sup> This legislation was invalidated as an unconstitutional infringement of a woman's right to an abortion. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. at 69; accord *Casey*, 505 U.S. at 898.

<sup>17</sup> *Casey*, 505 U.S. at 838-39 (1992) (holding the twenty-four-hour waiting period as constitutional).

<sup>18</sup> *Rust v. Sullivan*, 500 U.S. at 192 (holding as constitutionally firm to deny participating Title X physicians and their staff from soliciting, referring, or counseling abortion as an option to their patients).

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outright prohibited.<sup>19</sup> These back-door attempts to overrule the U.S. Supreme Court's decision in *Roe v. Wade* must be called out for what they are: wolves in sheep's clothing.<sup>20</sup> Many of these legislative attempts to erode the force of *Roe v. Wade* have been found to be constitutional in isolation, but when these legislative acts are looked at as a whole, they equate to nothing more than a scheme to substantially impede a woman's access to abortion.<sup>21</sup>

The facts of *Betlach* exemplify legislative backdoor infringement of a woman's Fourteenth Amendment right to an abortion.<sup>22</sup> Using Medicaid requirements as a cloak, the Arizona legislature attempted to deny access to legal abortions by reducing, if not effectively eliminating, the physicians and the facilities that could provide abortions within the state.

The narrow issue addressed by the Ninth Circuit in reviewing *Betlach* was whether the legislation at issue contravened the federal Medicaid Act.<sup>23</sup> The court swiftly invalidated the legislation, basing its holding on traditional statutory interpretation.<sup>24</sup> The Ninth Circuit's holding, however, will have a limited impact on the bigger issue: infringement of a woman's constitutional right to an abortion. In *Betlach*, there was a federal statute that directly conflicted with Arizona's enacted statute.<sup>25</sup> However, the door is still left open for similar anti-abortion legislation to go into effect when there is no conflicting federal statute on point. Until the bigger issue is resolved, this type of legislation will continue to impede a woman's access to an abortion. Accordingly, until the issue is addressed head-on, the future

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<sup>19</sup> See, e.g., *Stenberg v. Carhart*, 530 U.S. at 930 (finding statute prohibiting partial-birth abortions invalid because it did not have an exception for the woman's health and it would have prevented many alternative forms of abortion); *Gonzales v. Carhart*, 550 U.S. at 133 (2007) (finding prohibition of "intact D & E" abortion procedure as valid legislation).

<sup>20</sup> See Erik Eckholm, *Access to Abortion Falling as States Pass Restrictions*, N.Y. TIMES (Jan. 3, 2014), [www.nytimes.com/2014/01/04/us/women-losing-access-to-abortion-as-opponents-gain-ground-in-state-legislatures.html](http://www.nytimes.com/2014/01/04/us/women-losing-access-to-abortion-as-opponents-gain-ground-in-state-legislatures.html).

<sup>21</sup> See e.g., *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13-51008, 2014 WL 5040899, at \*29 (5th Cir. Oct. 9, 2014) (Dennis, J., dissenting from denial of rehearing en banc) ("[w]e cannot look at women's ability to overcome an obstacle in isolation and use that predicted ability to overcome barriers to somehow conclude that the obstacle is not substantial or undue."); Elizabeth Nash et al., *Laws Affecting Reproductive Health and Rights: 2013 State Policy Review*, GUTTMACHER INSTITUTE, [www.guttmacher.org/statecenter/updates/2013/statetrends42013.html](http://www.guttmacher.org/statecenter/updates/2013/statetrends42013.html) (last visited Aug. 28, 2014) ("Over the course of the year, 39 states enacted 141 provisions related to reproductive health and rights. Half of these new provisions, 70 in 22 states, sought to restrict access to abortion services.").

<sup>22</sup> See *Roe v. Wade*, 410 U.S. at 163.

<sup>23</sup> *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 727 F.3d 960, 963 (9th Cir. 2013).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

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appears increasingly bleak for future claims against legislative infringement of this constitutionally protected right.

This Note addresses the limited impact of the Ninth Circuit's holding, especially for women living in states hostile to abortion rights.<sup>26</sup> These legislative attempts to infringe on a woman's right to an abortion are based on opinion and emotion, not reason and common sense. An objective view of the legislation stacked against a woman in exercising her right, including legislation against physicians who provide the service, illustrates how all of these obstacles have effectively become a wall. A woman's constitutional right should not continue to be chipped away, one state statute at a time, until there is no real choice to a woman's right to an abortion. Moreover, this type of legislation falls hardest on women and families who cannot afford access to alternative care.<sup>27</sup> If and when there are no physicians or clinics available to perform legal abortions, then the state has effectively made the woman's choice for her. It is indisputable that a right is not a right at all if it cannot be exercised.

This Note argues for a revival of the *Casey* Test.<sup>28</sup> The test should be applied to statutes as a whole, asking whether the purpose or effect of a statute places a substantial obstacle in the path of a woman in exercising her legal right to choose to terminate her pregnancy before viability.<sup>29</sup> Part I of this Note looks into the legal and procedural background of *Betlach*, including all of the plaintiffs' original claims and the decision's limited impact. Part II analyzes how the legislation in *Betlach* would have failed under the *Casey* test. Specifically, Part II addresses how this type of legislation, both in purpose and effect, places a substantial obstacle in the path of a woman accessing an abortion. Finally, this Note concludes with a recommendation for future plaintiffs

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<sup>26</sup> For more information on states hostile to abortion rights, see Rachel Benson Gold & Elizabeth Nash, *Troubling Trend: More States Hostile to Abortion Rights as Middle Ground Shrinks*, 15 GUTTMACHER POL'Y REV. 1 (2012), available at [www.guttmacher.org/pubs/gpr/15/1/gpr150114.html](http://www.guttmacher.org/pubs/gpr/15/1/gpr150114.html); see also Nash et al., *supra* note 21.

<sup>27</sup> Complaint for Injunctive and Declaratory Relief, *supra* note 10, ¶¶ 33-37 (alleging that Planned Parenthood Arizona had thirteen medical centers in areas the federal government classified as "medically underserved"). The federal government made the classification based on four variables, one of which is the percentage of the population with incomes below the poverty level. Additionally, five of their centers in Arizona are in "low provider" areas, based on similar criteria, including high percentage of the population under the poverty level. See, e.g., *Find Shortage Areas: HPSA & MUA/P by Address*, U.S. DEP'T OF HEALTH & HUM. SERVICES, <http://datawarehouse.hrsa.gov/geoadvisor/shortagedesignationadvisor.aspx> (last visited Aug. 28, 2014); *Guidelines for MUA and MUP Designation*, U.S. DEP'T OF HEALTH & HUM. SERVICES, [www.hrsa.gov/shortage/mua/](http://www.hrsa.gov/shortage/mua/) (last visited Aug. 28, 2014).

<sup>28</sup> *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 878 (1992).

<sup>29</sup> *Casey*, 505 U.S. at 878.

to raise the infringement issue, allowing courts to address the impact this type of anti-abortion legislation as a whole has on a constitutionally protected right.

#### I. THE LEGAL CONTEXT AND PROCEDURAL BACKGROUND OF *PLANNED PARENTHOOD ARIZONA INC. v. BETLACH*

The legal framework and procedural background of *Betlach* provide context for the Ninth Circuit's limited holding. The legal framework explains the possible motivations behind Planned Parenthood's strategic decisions, which are readily displayed in the case's procedural history. Ultimately, the plaintiffs chose to narrow the issue before the court to the dispositive claim only. As a result, the court was not given the opportunity to address the other constitutional issues. Though the plaintiffs were justified in their strategic decision, and the Ninth Circuit accurately decided the case, the holding has a limited impact on future plaintiffs.

#### A. THE CONSTITUTIONAL RIGHT TO ABORTION

The U.S. Supreme Court's decisions in *Roe v. Wade* and *Planned Parenthood v. Casey* provide the legal framework to discuss a woman's right to an abortion.<sup>30</sup> *Roe v. Wade* established a woman's ability to choose abortion, before viability, as a right protected by the Constitution.<sup>31</sup> This right is derived from both the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment because it is a protected "liberty" interest.<sup>32</sup>

Writing for the Court, Justice Blackman said that, in regard to a woman's decisional autonomy over her body in consultation with her physician, "If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."<sup>33</sup> In other words, the state may not interfere with a woman in accessing and obtaining an abortion from a licensed physician. The point at which the state may interfere is viability, when the fetus can survive outside the mother's body.<sup>34</sup> The Court approximated the viability point at the end of the first trimester.<sup>35</sup> Prior to this point, the "abortion decision and its effectuation

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<sup>30</sup> *Roe v. Wade*, 410 U.S. 113 (1973); *Casey*, 505 U.S. 833.

<sup>31</sup> *Roe v. Wade*, 410 U.S. at 163.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

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must be left to the medical judgment of the pregnant woman's attending physician."<sup>36</sup> The Court recognized the state's interest in protecting the mother by allowing for state regulation that promoted the health of the mother subsequent to the end of the first trimester.<sup>37</sup> When the fetus is considered viable, the state is permitted to regulate or prohibit abortions in order to protect the health of both the mother and the viable fetus.<sup>38</sup> However, the state is not permitted to ban an abortion when it is "necessary to preserve the life or health of the mother."<sup>39</sup>

*Roe v. Wade* laid the baseline for protection of a woman's choice to terminate her pregnancy before viability, while *Casey* set the boundaries on legislative interference and allowed for some state inference even before viability.<sup>40</sup> The Court in *Casey* held that legislation is invalid when it places an undue burden on a woman's right to an abortion if it creates a substantial obstacle, in purpose or effect, in a woman's path to accessing an abortion pre-viability.<sup>41</sup> The *Casey* Court's application of what constitutes an undue burden set the guidelines for how the lower courts weigh *substantial interference*, which violates the constitutional protection, versus *incidental interference*, which does not violate the Constitution.<sup>42</sup>

Unfortunately, the review of a woman's constitutionally protected right has morphed into a piecemeal approach. This approach asks whether state legislation infringes on a woman's right to an abortion by analyzing the statute section by section, with little to no regard for the total effect that the statute, as a whole, has on that right.<sup>43</sup>

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<sup>36</sup> *Id.* at 164.

<sup>37</sup> *Id.* at 163.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 163–64.

<sup>40</sup> *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 872-73 (1992). The Court also did away with the trimester framework of *Roe v. Wade* and replaced it with a line between pre-viability and post-viability that defines when a State may regulate abortions and what standard of scrutiny applies. *Id.* at 870.

<sup>41</sup> *Id.* at 877.

<sup>42</sup> *Id.* (finding the requirement of spousal written consent a substantial obstacle in the path of a woman in obtaining an abortion, pre-viability, but finding information distributed to the mother promoting alternatives to abortion, twenty-four-hour waiting periods, and certain reporting requirements not unduly burdensome).

<sup>43</sup> *See, e.g., Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13-51008, 2014 WL 5040899, at \*24 (5th Cir. Oct. 9, 2014) (Dennis, J., dissenting from denial of rehearing en banc) (criticizing the panel for the "threadbare consideration of the purpose and effect of the law, each in isolation, and without reference to important contextual realities in which the law will operate"); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406 (5th Cir. 2013); *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595 (6th Cir. 2006) (finding no undue burden because plaintiffs were not able to demonstrate that a large fraction of women would be affected by one clinic's closure); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004).

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## B. PROCEDURAL BACKGROUND OF PLANNED PARENTHOOD ARIZONA INC. V. BETLACH

The procedural background of *Betlach* explains, in part, how this particular anti-abortion legislation was not subjected to the *Casey* test. Arizona's statute states, "[Arizona] or any political subdivision of [Arizona] may not enter into a contract with or make a grant to any person that performs nonfederally qualified abortions or maintains or operates a facility where nonfederally qualified abortions are performed for the provision of family planning services."<sup>44</sup> Planned Parenthood is a nonprofit organization that has thirteen clinics within Arizona and provides a range of family-planning services and preventive care.<sup>45</sup> Planned Parenthood clinics in Arizona treat about 3,000 Medicaid recipients each year and receive approximately \$350,000 for their services, not including their privately funded nontherapeutic abortion services.<sup>46</sup>

The summer before the legislation would have gone into effect, Planned Parenthood received a letter from its contractor for Medicaid reimbursements requesting that Planned Parenthood return a signed form stating that it would not perform elective abortions or continue to operate any facility where elective abortions were performed.<sup>47</sup> The letter stated that if Planned Parenthood did not return the form completed, it would no longer receive any Medicaid reimbursements for its federally qualified services, family planning, and preventive care.<sup>48</sup> The reimbursements Planned Parenthood had been receiving without issue for

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*But see Doe v. Rampton*, 366 F. Supp. 189, 194 (D. Utah 1973) (refusing to piece out the statute and evaluate constitutionality for each particular part but invalidating the statute as a whole: "Each and every challenged part of these statutes was intended to and does contribute, when each statute is read as a whole, to that improper purpose and effect. . . . [T]he Court is neither obliged nor free to scrutinize the minutiae of these statutes to cull out those parts that, given a strained interpretation, might be thought to have an independent constitutionality. The Court cannot and will not edit these statutes in order to alter the legislative purpose. . . . We find all of the statutes and portions of statutes contested herein invalid *in toto*.").

<sup>44</sup> Planned Parenthood Ariz. Inc. v. Betlach, 727 F.3d 960, 964 (9th Cir. 2013);

ARIZ. REV. STAT. ANN. § 35-196.05(F)(4) (Westlaw 2014) (defining a "[n]onfederally qualified abortion" as "an abortion that does not meet the requirements for federal reimbursement under title XIX of the [S]ocial [S]ecurity [A]ct."), *invalidated by* Planned Parenthood Ariz. Inc. v. Betlach, 727 F.3d 960.

<sup>45</sup> Planned Parenthood Ariz. Inc. v. Betlach, 727 F.3d at 964.

<sup>46</sup> *Id.*

<sup>47</sup> The Medicaid contractor was Arizona Health Care Cost Containment System (AHCCCS). *Id.* at 965.

<sup>48</sup> *Id.*

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nearly twenty years would essentially cease, unless Planned Parenthood stopped providing elective abortion services.<sup>49</sup>

In July 2012, Planned Parenthood, along with three individuals and a physician, filed a complaint to prevent the statute from going into effect and eliminating their Medicaid reimbursements.<sup>50</sup> The complaint alleged that the legislation directly violated the freedom-of-choice provision in the Medicaid Act, as well as the Due Process Clause, Supremacy Clause, Equal Protection Clause, and Contracts Clause of the U.S. Constitution.<sup>51</sup> The U.S. District Court for the District of Arizona granted a preliminary injunction, finding that the Medicaid freedom-of-choice provision<sup>52</sup> conferred individual rights enforceable under 42 U.S.C. § 1983.<sup>53</sup> Additionally, the district court found that the plaintiffs would likely succeed on the merits of their Medicaid Act violation claim, and that Planned Parenthood would suffer irreparable harm if the preliminary injunction were not granted.<sup>54</sup>

With the preliminary injunction granted, the plaintiffs filed for summary judgment as to the alleged Medicaid violation, based on the conclusions of law determined by the district court.<sup>55</sup> Specifically, the district court found that the state legislation violated the federal Medicaid Act by the explicit language in the Act's choice-of-provider provision.<sup>56</sup> Moreover, the Seventh Circuit had addressed a virtually identical issue that further supported the district court's determination. The Seventh Circuit case, *Planned Parenthood of Indiana v. Indiana*, affirmed a preliminary injunction barring enforcement of Indiana legislation that denied Medicaid funding to physicians who performed elective abortions or facilities where elective abortions were performed.<sup>57</sup> Indiana's legislation ignored Medicaid's requirement that recipients may use funds to pay for family-planning services from any qualified physician within

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<sup>49</sup> *Planned Parenthood Ariz., Inc. v. Betlach*, 899 F. Supp. 2d 868, 886 (D. Ariz. 2012), *appeal dismissed*, 727 F.3d 960 (9th Cir. 2013).

<sup>50</sup> Complaint for Injunctive and Declaratory Relief, *supra* note 10.

<sup>51</sup> *Id.* ¶ 4. This Note focuses only on limited impact of the Ninth Circuit's holding on the issue of a woman's constitutional right to an abortion protected by the Fourteenth Amendment of the Constitution. Other constitutional claims, though arguably appropriate as well, will not be discussed. Of the constitutional issues raised in the complaint, none regarded a woman's constitutional right to an abortion, protected by the Due Process Clause of the Fourteenth Amendment. *Id.*

<sup>52</sup> 42 U.S.C.A. §§ 1396a(a)(23), 1396d(a)(4)(C) (Westlaw 2014).

<sup>53</sup> *Planned Parenthood Ariz., Inc. v. Betlach*, 899 F. Supp. 2d at 876-80 (applying the *Blessing* three-factor test and determining that the federal statute creates an enforceable right).

<sup>54</sup> *Id.*

<sup>55</sup> *Planned Parenthood Ariz., Inc. v. Betlach*, 922 F. Supp. 2d 858, 860 (D. Ariz. 2013).

<sup>56</sup> *See Planned Parenthood Ariz., Inc. v. Betlach*, 899 F. Supp. 2d at 883-84.

<sup>57</sup> *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 988 (7th Cir. 2012).

the state.<sup>58</sup> Like Arizona's scheme, the Indiana legislation was intended to stop any indirect subsidization of abortions.<sup>59</sup> The Seventh Circuit found that Indiana's legislation directly violated Medicaid's free-choice-of-provider provision by limiting Medicaid recipients' choice among qualified providers.<sup>60</sup>

On summary judgment in *Betlach*, the narrow question before the district court was whether Arizona's legislation violated the Medicaid Act as a matter of law, an inquiry that depended only on whether the state law was incompatible with the federal law.<sup>61</sup> The district court ultimately held that Arizona's legislation was invalid because the state statute directly contradicted Medicaid Act's free-choice-of-provider provision, as a matter of law.<sup>62</sup> Therefore, Planned Parenthood was granted summary judgment based solely on statutory grounds.<sup>63</sup>

Thereafter, Arizona appealed the district court's summary judgment that permanently enjoined the enforcement of the legislation against such Medicaid providers as Planned Parenthood.<sup>64</sup> The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's ruling that the Medicaid Act's free-choice-of-provider provision confers a private right of action under 42 U.S.C. § 1983 and that the state legislation violated the Medicaid Act as a matter of law.<sup>65</sup> More specifically, the court of appeals found that the Arizona legislation violated the Medicaid Act by denying recipients a choice in a qualified provider for their family-planning services, a freedom explicitly granted by the Medicaid free-choice-of-provider provision.<sup>66</sup>

Though the plaintiffs in this case were able to prevail on this narrow claim, the success had a limited impact in furthering a woman's fundamental right to terminate her pregnancy before viability. Since Planned Parenthood's summary judgment was granted purely on the state statute's violation of the federal Medicaid Act, no constitutional arguments in the complaint were addressed by the district court or the court of appeals.<sup>67</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 967.

<sup>60</sup> *Id.* at 978–80.

<sup>61</sup> *Planned Parenthood Ariz., Inc. v. Betlach*, 922 F. Supp. 2d 858, 860 (D. Ariz. 2013).

<sup>62</sup> *Id.* at 864.

<sup>63</sup> *Id.* at 866.

<sup>64</sup> *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013).

<sup>65</sup> *Id.* The court also found that there was no need to address the appeal of the preliminary injunction since the district court entered a final judgment while the preliminary injunction was on appeal and the permanent injunction mooted the preliminary-injunction appeal. *Id.*

<sup>66</sup> *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d at 963.

<sup>67</sup> Complaint for Injunctive and Declaratory Relief, *supra* note 10.

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This holding ensured that the Arizona legislation would not go into effect, protecting Arizona residents, but it remains uncertain what will happen to other legislative attempts to erode *Roe v. Wade* when confronting federal statutes that lack an explicit free-choice-of-provider provision. In other words, when federal statutes do not create and spell out a woman's right to freedom of choice in her provider for family-planning services or preventive care, a woman's constitutional right to an abortion is still at risk.

## II. THE LEGISLATION IN *BETLACH* WOULD HAVE FAILED UNDER THE *CASEY* TEST

Had there not been a federal statute on point that disposed of the issue in *Betlach*, the plaintiffs could have raised the issue against unconstitutional infringement of a woman's right to an abortion pre-viability.<sup>68</sup> Raising the issue gives courts an opportunity to address the burden this kind of legislation places in the path of woman in exercising her right to an abortion. The following sections highlight how a court would find Arizona's legislation invalid under *Casey's* undue-burden test.<sup>69</sup> Specifically, Arizona's legislation places a substantial obstacle to a woman accessing abortion services in *both* purpose and effect.

### A. ARIZONA'S LEGISLATION PLACES AN UNDUE BURDEN *IN PURPOSE* ON A WOMAN EXERCISING HER RIGHT TO AN ABORTION

Arizona legislators created the legislation to erect another barrier for women attempting to exercise their right to obtain abortion services. In their amicus curiae brief, twenty-nine of Arizona's senators, representatives, and representatives-elect supported the legislation and unambiguously stated that they did not want any federal funding to "indirectly" support abortion services in the State of Arizona.<sup>70</sup> The amicus curiae brief stated, "Through this restriction, the State acknowledged that an abortion business benefits from taxpayer funding when the business' proprietor receives such funds to pay for healthcare services (in this case, family planning services)."<sup>71</sup> In this manner, the legislators expressed a clear intent not to allow the "abortion business" to

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<sup>68</sup> Complaint for Injunctive and Declaratory Relief, *supra* note 10.

<sup>69</sup> *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

<sup>70</sup> Amicus Curiae Brief of 29 Arizona Senators, Representatives, and Representatives-Elect in Support of Defendants-Appellants and Reversal of the District of Arizona at 1, *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960 (No. 12-17558), 2012 WL 6850110.

<sup>71</sup> *Id.* at 2.

benefit from Medicaid funding, even when it is legally obtained through traditionally Medicaid-funded services, such as preventive care and family planning. By targeting abortion services and attacking the “abortion business” as a whole, Arizona legislators were attempting to completely cut off federal funding to all abortion providers within the state who have been receiving reimbursements for their qualified Medicaid services for over twenty years, with no better justification other than not wanting to “indirectly” support abortion services.

When state legislators target all facilities that offer elective abortion services and label them as part of a “business” that should not be indirectly funded federally, they are attacking the necessary components for a woman to effectuate a legal, pre-viability abortion. The purpose behind the statute is to prevent women from being able to obtain an abortion by adding another obstacle: unavailability of facilities and physicians who can perform such services. In sum, the state legislators purposefully targeted a specific type of service as part of a business that should not be allowed to participate like other businesses when performing Medicaid qualified services because they do not agree with the service provided.

When legislators make it harder for physicians to sustain a business in Arizona they are intentionally placing an obstacle in the path of a woman to obtain an abortion. The only option left for facilities that depend on federal funding as part of their business operations, like Planned Parenthood, is to stop performing elective abortions.<sup>72</sup> This is no choice at all. What the legislators deem as the state’s “public policy” is nothing short of a take-it-or-leave-it situation that forces physicians and abortion facilities’ hands to “refrain” from performing elective abortion services within the state, because those legislators do not agree with the service.<sup>73</sup>

The Arizona legislators’ stated purpose was to further reduce the number of abortions performed in the State of Arizona. In support of this argument, Arizona legislators referenced a study showing the relationship between public funding and the incidence of abortion within the state.<sup>74</sup> In 2009, the Guttmacher Institute had conducted a Literature Review that demonstrated a strong consensus that abortion rates are reduced when public funding is restricted.<sup>75</sup> The legislators used this study to try to demonstrate that by taking away any federal funding to

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<sup>72</sup> *Id.* at 5.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 9–10.

<sup>75</sup> *Id.* at 13.

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corporations or facilities such as Planned Parenthood of Arizona, abortion services would not be “indirectly subsidized” with federal funds.<sup>76</sup> The Guttmacher studies, however, demonstrate less of a link between federal funding “subsidizing” abortions in such facilities and more of link between declining federal funding and declining numbers of women exercising their right to abortion.<sup>77</sup> What Arizona legislators refused to acknowledge was that these abortions performed in the state were legal and that women had a constitutionally protected right in accessing them. This was a purposeful attempt by Arizona state legislature to overturn *Roe*, which is an invalid purpose.<sup>78</sup>

Targeting and denying funding for Medicaid qualified services to physicians and facilities simply because they also happen to perform privately funded abortions is a direct attempt to cut all abortion services entirely out of the equation, the purpose of which is to further anti-abortion policy. Legislation of this type does nothing but place obstacles in the paths of women trying to exercise their constitutional right to abortion. Without federal funding, many physicians cannot provide necessary medical services to their patients, and more women are deterred from accessing such services. This legislation was meant to punish rather than support women’s rights.

B. ARIZONA’S LEGISLATION PLACES AN UNDUE BURDEN *IN EFFECT*  
ON A WOMAN EXERCISING HER RIGHT TO AN ABORTION

The effect of Arizona’s legislation would have been to place a substantial obstacle in the path of a woman trying to access abortion services in Arizona by both removing physicians already in low-provider areas and further decreasing providers within the state as a whole. The net effect of this legislation is outlined by the facts presented in the complaint, the findings of fact at the preliminary-injunction phase, and the statistical analysis of Arizona’s abortion rates.<sup>79</sup> Thus, the legislation would fail the second prong of the *Casey* test because eliminating federal funding would have the effect of pushing both the physicians who perform abortions and the facilities where they are performed out of areas already in need of physicians specialized in family planning and

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<sup>76</sup> *Id.* at 9–16.

<sup>77</sup> STANLEY K. HENSHAW ET AL., GUTTMACHER INST., RESTRICTIONS ON MEDICAID FUNDING FOR ABORTIONS: A LITERATURE REVIEW (2009), available at [www.guttmacher.org/pubs/MedicaidLitReview.pdf](http://www.guttmacher.org/pubs/MedicaidLitReview.pdf).

<sup>78</sup> See *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996) (invalidating state legislation for having the purpose of overriding *Roe*).

<sup>79</sup> *Planned Parenthood Ariz., Inc. v. Betlach*, 899 F. Supp. 2d 868 (D. Ariz. 2012).

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preventive care, as well as abortions.<sup>80</sup> We know this because five of the Planned Parenthood centers are in areas classified as “low provider,”<sup>81</sup> and thirteen are in areas classified as “medically underserved.”<sup>82</sup>

Although the complaint focused on the direct effect on women and families who would not be able to access family-planning and preventive-care services from their personal physicians, another effect of such legislation would be that without Medicaid reimbursement, many clinics such as Planned Parenthood would not have been able to remain in operation. This is especially true in areas where the majority of the patients rely on Medicaid funding for their care. Arizona already has low-provider and medically underserved areas where Planned Parenthood is one of the few medical resources.<sup>83</sup> Thus, a woman in such an area would have little to no options for accessing family-planning services, preventive care, or terminating her pregnancy, if she so chooses.<sup>84</sup>

The *Casey* court found it constitutionally valid for state legislation to incidentally burden a woman’s access to an abortion, as long as the purpose was valid.<sup>85</sup> The Arizona legislators may argue that the incidental burden of their legislation, reducing physicians and facilities in the state, does not amount to a substantial burden because the burden is only incidental. This argument weakens, however, when the legislation is looked at as a whole. Removing a significant number of physicians from the state or entirely out of low-provider areas when a woman cannot afford to take multiple days off of work for a drive across the state to find a physician, combined with the twenty-four-hour waiting period, amounts to a state’s legislative “veto” of the woman’s right to access abortion services.<sup>86</sup> Legislation such as this cannot be looked at in isolation. When this type of state action is stacked on top of the other anti-abortion legislation already in place in Arizona, the state legislators

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<sup>80</sup> Complaint for Injunctive and Declaratory Relief, *supra* note 10, ¶ 33. The “medically underserved” classification is based on four variables: 1) the ratio of primary medical care physicians per 1,000 populations, 2) the infant mortality rate, 3) the percentage of the population with incomes below the poverty level, and 4) the percentage of the population age 65 or over. *See id.*

<sup>81</sup> *Id.* ¶ 33.

<sup>82</sup> *Id.*; see also *Guidelines for MUA and MUP Designation*, *supra* note 26. To find an overview of statistical information, see *Find Shortage Areas: HPSA by State & County*, U.S. DEP’T OF HEALTH & HUM. SERVICES, <http://hpsafind.hrsa.gov/HPSASearch.aspx> (last visited Oc. 5, 2014) (select “Arizona,” “All Counties,” and “Primary Medical Care”).

<sup>83</sup> Complaint for Injunctive and Declaratory Relief, *supra* note 10, ¶ 33.

<sup>84</sup> *See id.* ¶ 33.

<sup>85</sup> *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

<sup>86</sup> *See id.* at 897 (finding that requiring a husband’s consent before abortion service can be provided was an unconstitutional veto power over a woman exercising her right to an abortion pre-visibility).

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can no longer claim that this legislation does not amount to a substantial burden in the path of a woman who seeks to have an abortion.

The type of legislation at issue in *Betlach* is analogous to the legislation in *Casey*, in which the Court refused to uphold legislation that required a husband's written consent in order for a woman to obtain an abortion.<sup>87</sup> The Court properly found such requirements are unduly burdensome on a woman's right to an abortion because they give the spouse "veto power" over her right to choose an abortion pre-viability.<sup>88</sup> Like spousal veto powers, when state legislators push all abortion providers out of the State of Arizona, they effectively "veto" a woman's choice in the matter. Clinics such as Planned Parenthood would not be able to remain in medically underserved areas within the state, where their patients cannot pay out-of-pocket for their family-planning and preventive-care services, nor compete with clinics that do receive federal subsidies for the same family-planning services and preventive care.<sup>89</sup> Such legislation places a complete wall between a woman's choice and her ability to effectuate her choice when there are no longer physicians or facilities within the state that perform elective abortions. Such legislation would have given Arizona state legislators veto power over a woman's constitutionally protected choice, a veto power the *Casey* court refused to allow.

## CONCLUSION

The legislation at issue in *Betlach* would fail under *Casey*'s undue-burden test, in both purpose and effect, when looked at realistically and in combination with existing legislation. The current piecemeal approach used by courts to address potential obstacles in the path of a woman accessing an abortion needs to come to an end. Instead, such legislation should be reviewed as a whole and found invalid in its entirety. State legislators should not be allowed to override constitutional rights because they do not agree with them.<sup>90</sup> Plaintiffs must assert their constitutional rights, even when controversial. Judicial review must be given the opportunity to account for the denial of a

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<sup>87</sup> *Id.* at 874.

<sup>88</sup> *Id.* at 897; *see also* *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (invalidating a husband-consent requirement as an unconstitutional infringement of a woman's right to an abortion pre-*Casey*).

<sup>89</sup> *See* *Maher v. Roe*, 432 U.S. 464, 482-83 (1977) (Brennan, J., dissenting) (recognizing that denying federal funding for elective abortion services makes choosing to have an abortion impossible for indigent women).

<sup>90</sup> *See* U.S. CONST. art. VI, § 2.

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woman's constitutionally protected choice because of legislators stacking legislation against her and her physician. Courts should be given the opportunity to apply the *Casey* test to anti-abortion legislation. The facts of *Betlach* exemplify the argument plaintiffs should make when there is not a federal statute expressly in conflict with a state's anti-abortion legislation, as there happened to be in *Betlach*. The wall blocking women from exercising their right to a legal abortion remains tall and wide, blocking the poorest first. To call this legislation anything other than an attack on that constitutional right is to misconstrue the issue entirely.