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MEMORANDUM

TO: Elena Kagan, Jennifer Klein and Deborah Fine

FROM: Kathryn Kolbert and Nancy Stearns, The Center for Reproductive Law and Policy

DATE: March 15, 1996

RE: ***STANDING TO SUE OPM IF IT REINSTATES ABORTION COVERAGE FOR FEDERAL EMPLOYEES***

Nancy Stearns, an attorney with CRLP, has researched whether there are any plaintiffs who would have standing to sue for a failure to comply with the requirements of P.L. 104-52 if OPM reinstated abortion coverage for federal employees. The primary issue is whether anyone could sufficiently allege injury to meet the standing requirements. We believe the answer is no, and have detailed below the basis of our conclusion for each of the several categories of plaintiffs that might try to bring a suit.

<u>Congressional Standing</u>

There are more than a half-dozen cases dealing with congressional standing. As a general rule, members of Congress have standing to challenge actions of the

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executive which deprive them of powers and duties granted to them by the Constitution, but they have no more standing than the ordinary citizen to complain that the executive branch is not complying with the laws they have passed.

For example, members of Congress have standing to challenge an allegedly improper exercise of a pocket veto by the President, because that presidential action (or inaction) deprived them of their constitutionally granted power to vote to override a veto. Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985). Similarly, members of the Senate have standing to challenge the President's proposed termination of a treaty without the consent of the Senate, because the President's action would deprive them of the opportunity to vote on the termination, a power they claimed was granted by Article II, § 2 of the Constitution. Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), vacated, 444 U.S. 996 (1979). See also Moore v. United States House of Representatives, 733 F.2d 946, 951-52 (D.C. Cir. 1984) (representatives had standing to challenge revenue bill which, they alleged, was initiated in the Senate rather than the House as required by the Constitution).

In contrast, a member of Congress was found not to have standing to challenge the operation of a federal facility which he alleged was being operated in violation of a law limiting the number of detainees and period of time they could be detained. In Chiles v. Thornburgh, 865 F.2d 1197 (11th Cir. 1989), Senator Chiles argued that by failing to comply with the law that he had supported, the defendants had deprived him of the effectiveness of his vote and that deprivation constituted a legally cognizable injury. But the court rejected his argument stating:

> Senator Chiles is basically arguing that as a Senator he has a right to see that the laws which he voted for, are complied with. Such a claim of injury, however, is nothing more that a "generalized grievance[] about the conduct of the government." Flast v. Cohen, 392 U.S. 83, 106, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). The Supreme Court has repeatedly made clear that an injury to the "'right possessed by every citizen, to require that the [g]overnment be administered according to law'" is insufficient to support a claim of standing.

Id. at 1207, citing Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 483 (1982). See also Harrington v. Schlesinger, 528 F.2d 455, 459 (4th Cir. 1975) (rejecting standing of congressman who claimed an interest in ensuring enforcement of laws for which he voted: "Once a bill has become law, however, [legislators'] interest is indistinguishable from that of any other citizen"); Holtzman v. Schlesinger, 484 F.2d 1307, 1315 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974) (representative had no standing to challenge Cambodia bombing since she did not allege a denial of right to vote).

In our opinion, any claim by a member of Congress challenging OPM's reinstatement of abortion coverage would be no different than the rejected claim of Senator Chiles discussed above.

Taxpayer Standing

Although the area of taxpayer standing is somewhat murkier than Congressional standing, our conclusion is the same. Under the general principles of standing, there are three threshold requirements. The party invoking the court's jurisdiction must establish three elements:

> First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical'". Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly . . . trace[able]to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992). "Particularized" injury means that "the injury must affect the plaintiff in a personal and individual way." 112 S. Ct. at 2136, n. 1.

Traditionally, courts held that taxpayers could not sufficiently differentiate their injury from that of every other citizen sufficiently to meet the standing requirements. Frothingham v. Mellon, 262 U.S. 447 (1923). In Frothingham, the taxpayer challenged as unconstitutional the Maternity Act of 1921, which established a federal program of grants to the States to undertake programs to reduce maternal and infant mortality. The taxpayer alleged that Congress had exceeded its powers under Art. I and had invaded the legislative province reserved to the States under the Tenth Amendment. Rejecting taxpayer standing, the Court noted that a federal taxpayer's "interest in the monies of the treasury . . . is comparatively minute and indeterminable" and "the effect upon future taxation, of any payment out of the [Treasury's] funds ... [is] remote, fluctuating and uncertain." 262 U.S. at 487.

In Flast v. Cohen, 392 U.S. 83 (1968), however, the Court lowered the barriers to standing, permitting taxpayers to attack a federal statute on the ground that it violated the Establishment and Free Exercise clauses of the Constitution. In Flast, several taxpayers alleged that expenditure of federal funds under the Elementary and Secondary Education Act for private religious schools violated both the religion clauses of the First Amendment. Examining when a taxpayer has standing, the Court noted that the taxpayer must first establish a link between his status as taxpayer and the type of legislative enactment attacked. A taxpayer is a proper party to allege the unconstitutionality

> only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute.

392 U.S. at 102. Next the taxpayer must establish a nexus between his status and

> the precise nature of the constitutional infringement alleged. . . . [T]he taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

392 U.S. at 102-103. Noting that the Establishment Clause acted

as a specific constitutional limitation on the taxing and spending power of Congress, the Court indicated that it was not necessarily the only clause that specifically limited the taxing and spending power conferred by the Constitution. It left to other cases to decide what other constitutional provisions might contain such limitations, and who would have the proper standing as a taxpayer to raise the question. Taxpayers would have to allege that their tax money was being extracted and spent in violation of specific constitutional protections against such abuses of legislative power.

In Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982), the Court rejected the standing of Americans United for Separation of Church and State Inc., which was composed of 90,000 taxpayers members, to challenge a transfer of property by the Department of Health, Education and Welfare to the Valley Forge Christian College, allegedly in violation of the Establishment Clause. The Court distinguished the case from Flast, where taxpayer standing was limited to a challenge directed at unconstitutional exercises of congressional power, whereas Americans United were challenging a decision of HEW to transfer property. Secondly, the complained of transfer was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8, but rather by the Property Clause, Art. IV, § 3, cl.2.

Here, even assuming abortion coverage does involve expenditures of federal funds, a challenge to OPM's action could not allege that Congress had exercised its Taxing and Spending authority in violation of the First Amendment or some other constitutional proscription or even that OPM acted in violation of the Constitution. Rather, the plaintiff could only allege that his/her tax money was being spent for abortions by OPM in violation of P.L. 104-52. But such a claim would amount to no more than a claim that government should comply with law. As the Supreme Court stated in Lujan:

> We have consistently held that a plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the pubic at large--does not state an Article III case or controversy.

Lujan, 112 S. Ct. at 2143.

Even if the plaintiffs asserted their desire to see the law enforced because of their personal religious opposition to abortion, that desire would not constitute a particularized injury. Nor would it constitute a Free Exercise or Establishment claim, since taxpayers are not being required to have an abortion in violation of their religious beliefs and no particular religious belief is being established by making insurance coverage available.[1] Rather, it would merely be a generalized

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[1] In Erzinger v. Regents of the University of California, 137 Cal. App. 3d 389, 187 Cal. Rptr. 164 (Ct. App. 4th Distr., Div. 1, 1982), the court rejected students' claims that being required to pay a mandatory student fee, a portion of which would be used for medical insurance that covered abortion violated their First Amendment rights, since plaintiffs made no showing that the University forced them to join any pro-abortion organization, use the health services, have abortions, receive pregnancy counseling, perform abortions or endorse abortions.

disagreement with a government policy, akin to conscientious objectors' desire not to pay federal income taxes to support a war. Although a conscientious objector might have a religious defense to serving in the military, his/her religious beliefs would be inadequate to provide standing as taxpayers to challenge the expenditure of federal funds for the military:

> Nothing in the Constitution prohibits the Congress from levying a tax upon all persons, regardless of religions, for support of the general government. The fact that some persons may object, on religious grounds, to some of the things that the government does is not a basis upon which they can claim a constitutional right not to pay a part of the tax.

Autenrieth v. Cullen, 418 F.2d 586, 588 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970)(denying standing to plaintiffs to challenge the use of their tax dollars to support the Vietnam War, since they made no allegation that the Congress in enacting the Income Tax Law breached a specific limitation upon its taxing and spending power).

Nor would an anti-abortion group have standing because

> ...a mere 'interest in a problem' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA.

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 226 (1974).

Federal Employee Standing

Federal employees might constitute another possible class of plaintiffs, but their claim of injury would be no better than that of taxpayers to establish standing. Here, as in Erzinger, OPM is not requiring employees to join an insurance plan. When abortion coverage was available there were insurance plans that did not offer abortion coverage to which they could subscribe, and they are not being required to have abortions or to advocate abortion. In short, even assuming federal funds are being spent on abortion coverage, federal employees who oppose abortion are not injured by OPM reinstating abortion coverage for other employees, particularly in light of the fact that their premiums remained the same whether or not the coverage was available.

"Guardian of Fetus" Standing

Since P.L. 104-52 does not prohibit abortions, but merely prohibits the use of federal funds to pay insurance claims for abortions, we also believe that a claimed "guardian of a fetus" would not be able to assert injury for purposes of standing. He could not show that any particular fetus would be aborted (i.e. injured) because of OPM's action.[2] Like the claim of a taxpayer, the "guardian" could only argue that he generally wanted to see federal law complied with and that fetuses should not be aborted.

Furthermore, as summarized in the opinion of the court in Benton v. Kessler, CV-92-3161 (E.D.N.Y. Sept. 30, 1992), 1992 D.

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[2] If he could demonstrate that abortion coverage enabled the woman to have an abortion, the inverse might be true as well, that denial of insurance coverage prevents women from obtain abortion and thus constitutes an undue burden under Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

Ct. LEXIS 14747, there is sufficient law to conclude that even in a case challenging restrictive abortion laws, persons who seek to intervene to represent the interest of a pre-viable fetus do not have standing. Moreover, the law governing intervention may well be more liberal than that governing the requirements of standing under Article III, Diamond v. Charles, 476 U.S. 54, 106 S.Ct. 1697 (1986). As the court stated in Benton, "...whatever interest fetuses might have in being born in general, they have no interest at all in the outcome of this suit." Slip opinion at 8.

CONCLUSION

We conclude, therefore, that there is no one with standing to challenge an action by OPM reinstating federal employees' abortion coverage. The Supreme Court has recognized a situation could exist in which no one would have standing to challenge a political decision when it stated:

> Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."

Schlessinger v. Reservists Committee, 414 U.S. at 227.

We look forward to discussing this with you.

Both *Williams* and *Reed* involved promotions. It may be, as the district court held, that there is some difference between failure to promote and failure to transfer if the rule is as stated by the district court: " 'The focus is on what event, in fairness and logic, should have alerted a lay person to act to protect his right or when he should have perceived discrimination occurring.' " *Serpe v. Four Phase Systems, Inc.*, No. C–82–0464–WWS (Dist.N.Cal., Nov. 22, 1982), quoting *Elliott*, 79 F.R.D. at 585. If, however, we judge the system, as we must, in terms of what "deters the employee from seeking his full employment rights," we are unable to distinguish a systematic refusal to transfer from a systematic refusal to promote.[2] If the systematic discrimination exception does not apply here, it is not because a transfer can be distinguished from a promotion, but because there was no systematic discrimination. The district court did not make a finding of fact on that issue.

By nothing said in this opinion have we intended to comment on the validity of the plaintiff's claim based on a refusal to transfer or on the question of whether there was a systematic discrimination.

The judgment is affirmed as to all claims except the claim of discrimination based on the refusal to transfer Serpe to the sales division. As to that claim the judgment is reversed with directions to the district court to determine whether, as a matter of fact, there was a systematic refusal to place women in sales positions. If the court finds in the affirmative on that issue, it shall then decide the refusal to transfer claim on its merits.

2. In *London v. Coopers & Lybrand*, 644 F.2d 811 (9th Cir.1981), involving a discharge, this language appears:

> Absent special circumstances, a single act by an employer adverse to an employee's interests, such as a discharge, layoff, or failure to transfer or promote, begins the running of the statute of limitations and the natural effects of the alleged discriminatory act are not regarded as "continuing."

644 F.2d at 816. Since this case involved a discharge, what was said as to promotions and transfers is dictum. We further believe that, at least insofar as transfers and promotions are concerned, the statement was intended to apply only to isolated acts that occur on only one specific occasion *and* are in no way the result of any general policy of discrimination. In any event, the proper rule with respect to continuing violations both in promotion and transfer cases is that set forth in *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918 (9th Cir.1982).

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona non-profit corporation; Planned Parenthood of Southern Arizona, an Arizona non-profit corporation; Jack Bashaw, M.D., on behalf of himself, his patients, and all others similarly situated, Plaintiffs-Appellees,

v.

The STATE OF ARIZONA; Bruce E. Babbitt, individually and as Governor of the State of Arizona; William Jamieson, individually and as Director of the Department of Economic Security; Robert K. Corbin, individually and as Attorney General of the State of Arizona, their employees, agents, representatives, successors, and those acting in concert with them and all others similarly situated, Defendants-Appellants.

No. 82–5437.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 18, 1983.

Decided Oct. 18, 1983.

Family-planning entities in Arizona brought action challenging constitutionality of the footnote to Arizona appropriation bill that forbade expenditure of state social welfare funds to support nongovernmental organizations that perform abortions and engage in abortion-related activities. The United States District Court for the District of Arizona, Walter Early Craig, J., on a motion for summary judgment, declared the footnote unconstitutional and permanently enjoined its enforcement, 537 F.Supp. 90, and plaintiffs appealed. The Court of Appeals, Choy, Circuit Judge, held that: (1) the state of Arizona would be given opportunity to prove that withdrawing all state funds from Planned Parenthood was the only way to ensure that it would not use state funds to support its abortion-related activities, and (2) the statute was not unconstitutionally vague.

Reversed and remanded.

1. Abortion and Birth Control ⚖.50
Constitutional Law ⚖82(10), 90.1(1)

State of Arizona could not unreasonably interfere with right of family-planning organization to engage in abortion or abortion-related speech activities, but the state was not required to support, monetarily or otherwise, those activities. U.S.C.A. Const. Amend. 1.

2. Abortion and Birth Control ⚖.50

"Freeing-up theory," under which state funding of selected programs of an entity would "free-up" funds to support disfavored activities, could not justify withdrawing all state funds from otherwise eligible entities merely because they engaged in abortion-related activities disfavored by the state. Ariz.Laws 1980, ch. 244, § 1, subd. 25.

See publication Words and Phrases for other judicial constructions and definitions.

3. Judgment ⚖181(15)

In action brought by family-planning organization challenging constitutionality of footnote to Arizona appropriation bill that forbade expenditure of state social welfare funds to support nongovernmental organization that performed abortions and engaged in abortion-related activities, issue as to whether Arizona's withdrawing of all state funds was the only way to ensure that Planned Parenthood would not use state funds to support its abortion-related activities precluded summary judgment. Ariz. Laws 1980, ch. 244, § 1, subd. 25.

4. Constitutional Law ⚖42.2(1)

As only one of two entities of family-planning organization performed abortions, footnote to Arizona appropriation bill that forbade expenditure of state social welfare funds to support nongovernmental organizations that performed abortions and engaged in abortion-related activities was not clearly applicable to the entity which did not perform abortions, and, therefore, that entity had standing to challenge the statute on ground that its terms were vague.

5. Constitutional Law ⚖42.2(1)

Family-planning organization, which challenged constitutionality of a footnote to Arizona appropriation bill that forbade expenditure of state social welfare funds to support nongovernmental organizations that performed abortions and engaged in abortion-related activities, had standing to contend that the statute did not give adequate notice of what sorts of statements its members and staff must refrain from making in order for it to remain eligible to receive state family-planning services funds.

6. Statutes ⚖47

A statute is unconstitutionally vague if persons of common intelligence must necessarily guess at its meaning and differ as to its application for, in that situation, the statute fails to give a person of ordinary intelligence fair notice of conduct proscribed or required by the statute and encourages arbitrary and erratic behavior on part of those officials charged with enforcing the statute.

7. Statutes ⚖47

A law that interferes with right of free speech should receive relatively more stringent scrutiny when examined for vagueness; on the other hand, court is more tolerant of possible vagueness in laws that impose civil rather than criminal penalties because consequences of imprecision are qualitatively less severe, and court's tolerance is even greater in a case where consequence of noncompliance with the enactment is not a civil penalty, but merely reduction of a government subsidy. U.S.C.A. Const.Amends. 1, 14.

8. Statutes ⇐47

Potential for disagreements over precise meaning of a statute cannot be enough to render the statute void for vagueness. U.S.C.A. Const.Amend. 14.

9. Abortion and Birth Control ⇐1.30

Footnote to Arizona appropriation bill that forbade expenditure of state social welfare funds to support nongovernmental organizations that provide "counseling for abortion procedures" was not impermissibly vague. Ariz.Laws 1980, ch. 244, § 1, subd. 25; U.S.C.A. Const.Amend. 14.

10. Federal Courts ⇐917

Discretion of an appellate court to review its earlier decisions should be exercised sparingly in order to avoid undermining policy of finality that underlies "law-of-the-case" doctrine, which states that decision of a legal issue by an appellate court must be followed in all subsequent proceedings in the same case at either trial or appellate level.

See publication Words and Phrases for other judicial constructions and definitions.

11. Federal Courts ⇐917

Law-of-the-case doctrine applies unless evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.

12. Federal Courts ⇐723

In absence of a class action suit, "capable of repetition, yet evading review doctrine" is limited to situations where two elements combine: challenged action was of limited duration, too short to be fully litigated prior to its cessation or expiration; and there is a reasonable expectation that the same complaining party will be subjected to the same action again.

See publication Words and Phrases for other judicial constructions and definitions.

13. Federal Courts ⇐724

Review of mooted issue regarding issuance of preliminary injunction against enforcement of Arizona statute would not be granted under "capable of repetition, yet evading review" exception to doctrine of mootness.

14. Federal Courts ⇐917

No exceptions to law-of-the-case doctrine applied to warrant Court of Appeals to review previous ruling that questions raised by imposition of preliminary injunction against the state of Arizona's enforcement of statute were mooted by imposition of permanent injunction.

15. Injunction ⇐200

In action in which family-planning organization obtained permanent injunction against enforcement of footnote to Arizona appropriation bill that forbade expenditure of state social welfare funds to support nongovernmental organizations that performed abortions and engaged in abortion-related activities, district court properly computed amount of attorney fee award to Planned Parenthood's attorneys by determining number of allowable hours spent on the case, multiplying that number by their customary hourly rate, and increasing the resulting amount by a multiplier of ten percent by considering controversy surrounding issues involved in the litigation, importance of those issues, contingent nature of fee arrangement between plaintiff and its attorneys, novelty and complexity of issues involved, time pressure placed on plaintiff's attorneys, and reputation, experience, and ability of those attorneys.

Lawrence J. Rosenfeld, Dushoff & Sacks, Phoenix, Ariz., for plaintiffs-appellees.

Anthony B. Ching, Phoenix, Ariz., for defendants-appellants.

Appeal from the United States District Court for the District of Arizona.

Before CHOY and ALARCON, Circuit Judges, and D. WILLIAMS,* District Judge.

CHOY, Circuit Judge:

Planned Parenthood instituted this suit to challenge the constitutionality of a footnote to an Arizona appropriation bill that forbade the expenditure of state social welfare funds to support nongovernmental organizations that perform abortions and engage in abortion-related activities. The district court, on a motion for summary judgment, declared the footnote unconstitutional and permanently enjoined its enforcement. *Planned Parenthood of Central & Northern Arizona v. Arizona,* 537 F.Supp. 90 (D.Ariz. 1982). The State now appeals the summary judgment, the attorneys' fee awarded to Planned Parenthood, and a preliminary injunction issued during the course of the litigation.

I. *Background*

Arizona is a participant in a Title XX federal grant-in-aid program that provides federal funds for family planning services offered as a part of a state's social welfare program. During the period relevant to this suit, the federal government reimbursed a state for 90% of expenditures made for qualified family planning services, whether the state provided those services itself or contracted with private organizations to provide them. 42 U.S.C. § 1397a(a)(1) (Supp. III 1979), *amended by* 42 U.S.C. § 1397a (Supp. V 1981); 45 C.F.R. §§ 228.70 *et seq.* (1978) (recodified 1980; repealed 1981). The providing agency or organization had to secure a 10% matching fund from state or private sources in order to complete funding for the services and to remain eligible for the 90% federal assistance. 45 C.F.R. §§ 228.53–.54 (1978) (recodified 1980, repealed 1981).

The State of Arizona had been providing the 10% matching funds to private organizations that provided family planning services under contract with the State. However, effective throughout the fiscal year from July 1, 1980, to June 30, 1981, the State of Arizona enacted a footnote to its General Appropriations Bill that forbade the Department of Economic Security from giving state money to any nongovernmental "agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals." 1980 Ariz.Sess.Laws 842, 860 n. *.[1]

Planned Parenthood of Central and Northern Arizona and Planned Parenthood of Southern Arizona (collectively referred to as Planned Parenthood) are private, nonprofit, tax-exempt Arizona corporations that provide a full range of family planning services, including Title XX services provided under contract to the State of Arizona. Planned Parenthood of Central and Northern Arizona performs abortions and both organizations offer abortion referrals and abortion counseling. Thus, the Arizona Department of Economic Security, in order to comply with the statutory footnote, withheld state funding from Planned Parenthood.

Despite the loss of state funding, Planned Parenthood continued to operate as a provider of state family planning services and to receive federal Title XX funds. Under an arrangement with the State of Arizona, private funds contributed by Planned Parenthood, instead of state funds, were used to meet the 10% matching-fund require-

* The Honorable David W. Williams, Senior United States District Judge for the Central District of California, sitting by designation.

1. The footnote at issue read, in relevant part:

No state money may be spent by the department of economic security by contract, grant or otherwise, on abortions, abortion procedures, counseling for abortion procedures or abortion referrals. T restrictions are not applicable w it is necessary to save the life of a pregnant woman.

No state money, other than money for comprehensive medical and dental care and the developmentally disabled, may be given by the department of economic security by contract, grant or otherwise to agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals. Governmental agencies or entities are exempt from the restrictions in this paragraph.

1980 Ariz.Sess.Laws 842, 860 n. *.

ment. The fiscal 1980–1981 contract between Arizona and Planned Parenthood called for $47,000 in family planning services. Planned Parenthood brought suit in the district court to enjoin enforcement of the footnote to the appropriations bill.

On October 7, 1980, the district court preliminarily enjoined the defendants from complying with the challenged footnote, thus forcing the State to provide 10% of the total contract amount (i.e., $4,700) in state funds to Planned Parenthood. The State of Arizona appealed the preliminary injunction, but the appeal was dismissed as moot after the district court declared the Arizona footnote unconstitutional and issued a permanent injunction on February 8, 1982. The district court's reasons for declaring the footnote unconstitutional were (1) that it infringed Planned Parenthood's freedom of speech and (2) that it was void for vagueness. On this appeal, the State of Arizona challenges the merits of the district court's decision declaring the footnote unconstitutional and enjoining its enforcement, the correctness of the issuance of the preliminary injunction, and the award of attorneys' fees.

II. *Free Speech Claim*

In setting forth their positions, both Planned Parenthood and the State of Arizona invoke principles of law well established in Supreme Court doctrine. The thrust of Planned Parenthood's argument is that the effect of the Arizona footnote is to penalize Planned Parenthood for exercising its constitutional right to freedom of speech;[2] "abortion referral" and "counseling for abortion procedures" are constitutionally protected speech, and the State of Arizona cannot declare such activities to be illegal. *See Bigelow v. Virginia,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) (statute making it a misdemeanor to sell or circulate any publication encouraging or prompting the procuring of an abortion declared an infringement of freedom of speech).

Planned Parenthood argues, and the district court agreed, that the challenged Arizona statute is an unconstitutional attempt to do indirectly what the State could not do directly. In other words, Planned Parenthood maintains that instead of instituting a criminal penalty that restricts freedom of speech, the State is attempting to dissuade constitutionally protected speech activities by withdrawing a government benefit from those who engage in such activities.

The Supreme Court has clearly articulated that government may not restrict exercise of constitutionally protected rights, even when that restriction takes the form of withholding a benefit, rather than applying a penalty, for that exercise.

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall,* 357 U.S. 513, 526 [78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)]. Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972).

For example, in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), a Seventh Day Adventist challenged a South Carolina law denying unemployment benefits to persons who failed without good cause to accept employment. The

2. The first amendment prohibition against infringement of freedom of speech is applicable to the states through the fourteenth amendment. *Bigelow v. Virginia,* 421 U.S. 809, 811, 95 S.Ct. 2222, 2227, 44 L.Ed.2d 600 (1975); *Schneider v. State,* 308 U.S. 147, 160, 60 S.Ct. 146, 150, 84 L.Ed. 155 (1939).

State declined to recognize as good cause her refusal to work on Saturday for religious reasons. The Supreme Court emphasized that the law placed her in a position of having to choose between denying the precepts of her religion and forfeiting benefits. Therefore, the Court found that the operation of the statute imposed a burden on the plaintiff's free exercise of her religion:

> In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry.... Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.
>
> ... It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

Id. at 403–04, 83 S.Ct. at 1793–94 (footnotes omitted).

Similarly, the Supreme Court struck down a California statute that limited a tax exemption to those members of the exempted class who affirmed their loyalty to the state government. California was under no obligation to grant such an exemption; the benefit was gratuitous. Yet, the Court found that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of the first amendment right of expression. *Speiser v. Randall,* 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). *See also Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (denial of unemployment benefits to Jehovah's Witness who left job for religious reasons declared unconstitutional); *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (dismissal from nonpolicymaking position on basis of political affiliation declared unconstitutional); *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (denial of welfare benefits to new residents unconstitutionally infringes right to travel).

We, of course, are bound by and endorse such precedent, but we do not agree that the principle articulated in *Perry* is dispositive of the present case. The Supreme Court has also unequivocally stated that a state has no constitutional obligation to fund or promote abortion and "is not required to show a compelling interest for its policy choice to favor normal childbirth." *Maher v. Roe,* 432 U.S. 464, 477, 97 S.Ct. 2376, 2384, 53 L.Ed.2d 484 (1977). As the Court acknowledged in *Maher,* "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Id.* at 475, 97 S.Ct. at 2383 (footnote omitted).

Planned Parenthood argues that the State has waived its option to refuse to fund abortion or abortion-related activities by affirmatively deciding to fund family planning programs. According to Planned Parenthood, once the State has made an affirmative decision to fund family planning programs, the State cannot withhold funds from otherwise eligible providers solely because they promote and engage in constitutionally protected family planning methods the State disfavors. However, the Supreme Court's opinion in *Maher* expressly rejected similar logic.

In *Maher,* the Court rejected the holding of the district court panel that "abortion and childbirth ... are simply two alternative medical methods of dealing with childbirth" and that if a state decides to fund one, it must also fund the other in order to avoid "weight[ing] the choice of the pregnant mother against choosing to exercise her constitutionally protected right" to have an abortion. *Id.* at 468, 97 S.Ct. at 2379. The Supreme Court held that a state could refuse to fund abortion while funding childbirth because its refusal "place[d] no obstacles . . . in the pregnant woman's path to an abortion." *Id.* at 474, 97 S.Ct. at 2382. And, the Court said that the "State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there." *Id.* Similarly, Arizona's decision to refuse to fund abortion and abortion-related speech activities may make childbirth and advocation of childbirth more attractive alternatives, but it has imposed no restriction on access to abortions or on the free flow of information concerning abortion.

Supreme Court precedent in the area of private-school education is analogous. In *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), the Court invalidated an Oregon criminal law requiring the parent or guardian of a child to send him to public school, thus precluding the choice of a private school. The Court held that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534–35, 45 S.Ct. at 573–74. Later in *Norwood v. Harrison,* 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973), the Court explicitly rejected the argument that *Pierce* established a "right of private or parochial schools to share with public schools in state largesse," for "[i]t is one thing to say that a state may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid." *Id.* at 462, 93 S.Ct. at 2809.

[1] We conclude that the State of Arizona may not unreasonably interfere with the right of Planned Parenthood to engage in abortion or abortion-related speech activities, but the State need not support, monetarily or otherwise, those activities.

A federal district court in Illinois, faced with a case similar to the present one, upheld as constitutional the portion of a state grant-in-aid program disqualifying applicants that provide abortion counseling and referral services. That court aptly described the situation:

> Planned Parenthood's application for funds under the Act indicates that it would have used the funds for a program which includes abortion-related services. Therefore, it is Planned Parenthood which seeks to interfere with the right of [the State] to decline to encourage abortions, rather than the converse. Planned Parenthood seeks to compel [the State] to adopt a position of neutrality; subsidizing childbirth and abortion-related counseling and referral services on an equal basis. However, as [*Harris v.*] *McRae* [448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980)] and *Maher* clearly indicate, there is no requirement that the state be neutral vis-a-vis abortion. It is free to express its preference for childbirth, by subsidizing it and not abortion.

Planned Parenthood Association—Chicago Area v. Kempiners, 531 F.Supp. 320, 325 (N.D.Ill.1981), *vacated and remanded on other grounds,* 700 F.2d 1115 (7th Cir.1983).

The question we must address in order to resolve this case is whether the Arizona statute embodies merely the State's refusal to fund activities it disfavors, or whether the State unduly interfered with Planned Parenthood's exercise of its right to perform abortion and abortion-related services. The State's constitutional purpose of promoting childbirth over abortion "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama,* 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325 (1964), *quoted in Griswold v. Connecticut,* 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965). We think it significant that the State allowed Planned Parenthood to continue as a Title XX provider of family planning services by contributing private funds in lieu of receiving state funds, thus making Planned Parenthood eligible for federal matching funds. The Arizona footnote withdrew only 10% of the governmental funding Planned Parenthood had been receiving for family planning services; the organization continued to receive the 90% of the funding that came from federal sources. Arizona could have placed a much more onerous burden on Planned Parenthood by refusing to operate as the channel through which the organization received federal Title XX funds. The fact that the statute withdrew only state, and not federal, funds from Planned Parenthood indicates that the Arizona legislature's main concern was to ensure that state funds not be used in a manner contrary to state social welfare policy and not, as Planned Parenthood argues, to deter the organization from engaging in constitutionally protected activities.

However, it is not clear that the statute was drawn as narrowly as possible to permit the State to control use of its funds while infringing minimally on exercise of constitutional rights. The statute withheld all state funds from nongovernmental entities offering "abortions, abortion procedures, counseling for abortion procedures or abortion referrals." A more narrowly drawn statute, which would accomplish the stated purpose of ensuring that state funds not be spent on activities the state legislature disfavors, would simply forbid entities receiving state funds from using those funds for abortions and the related activities listed above.

Arizona argues that such a narrowly drawn statute was infeasible for two reasons. The first is that the administrative difficulty of monitoring Planned Parenthood's use of the funds would make such monitoring impossible or highly impractical. The second reason is that even if the State could monitor Planned Parenthood's use of state funds in order to ensure that those funds did not support disfavored activities, state funding of any of Planned Parenthood's programs would "free up" funds to support abortion-related activities. We will deal with the second of these arguments first.

[2] Other courts have looked upon the freeing-up theory with disfavor, *see, e.g., Planned Parenthood of Minnesota v. Minnesota,* 612 F.2d 359, 361 (8th Cir.), *aff'd mem.,* 448 U.S. 901, 100 S.Ct. 3039, 65 L.Ed.2d 1131 (1980); *Planned Parenthood Association—Chicago Area v. Kempiners,* 568 F.Supp. 1490, 1495 (N.D.Ill.1983), and we hold that as a matter of law, the freeing-up theory cannot justify withdrawing all state funds from otherwise eligible entities merely because they engage in abortion-related activities disfavored by the state. Applying the logic of the freeing-up argument to another setting shows its hazards. It can be argued that by providing welfare benefits to a pregnant indigent woman, a state would be freeing up whatever other funds she may have at her disposal for use in paying for an abortion. Thus, the freeing-up argument, when coupled with the holding of *Maher v. Roe,* 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) (states are not constitutionally required to fund therapeutic abortions as part of their Medicaid programs), would lead to the conclusion that a state could refuse all Medicaid benefits to an otherwise eligible applicant because she had exercised her right to have an abortion. Although the Supreme Court has never addressed such a situation, the Court did mention in a footnote to *Harris v. McRae* that a statute withdrawing all Medicaid benefits from an eligible recipient who had an abortion would pose "[a] substantial constitutional question" and implied that such a statute would impose an unconstitutional penalty on the Medicaid recipient. 448 U.S. 297, 317 n. 19, 100 S.Ct. 2671, 2688 n. 19, 65 L.Ed.2d 784 (1980).[3]

3. Even before the *Harris* opinion, the Supreme Court had noted the distinction between refusing to fund abortion and withdrawing all welfare benefits from an indigent woman who had obtained an abortion:

> Appellees rely on *Shapiro v. Thompson,* 394 U.S. 618 [89 S.Ct. 1322, 22 L.Ed.2d 600]

[3] The State's first argument against a more narrowly constructed statute—that monitoring Planned Parenthood's use of funds is administratively impossible—is a question of fact. Because the district court declared the statute at issue to be unconstitutional on a motion for summary judgment, the State has never had an opportunity to prove its contention. We, therefore, reverse the summary judgment and remand to give the State the opportunity to prove that withdrawing all state funds from Planned Parenthood was the only way to ensure that Planned Parenthood would not use state funds to support its abortion-related activities.

III. *Vagueness*

The district court found the statute to be void because the term "counseling for abortion procedures" is vague. The State of Arizona questions both the standing of Planned Parenthood to challenge the statute on the vagueness ground and the district court's finding of vagueness. While we hold that Planned Parenthood did have standing to challenge the statute as unconstitutionally vague, we further hold that the term "counseling for abortion procedures" is not so vague as to render the statute void.

[4] The general rule with respect to standing to challenge a law as unconstitutionally vague is that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy,* 417 U.S. 733, 756, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439 (1974); *see Broadrick v. Oklahoma,* 413 U.S. 601, 608, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973); *Dombrowski v. Pfister,* 380 U.S. 479, 491–92, 85 S.Ct. 1116, 1123–24, 14 L.Ed.2d 22 (1965). The State of Arizona argues that since the challenged statute withholds state funds from entities that perform abortions and since there is no contention that the terms "abortions" or "abortion procedures" are vague, Planned Parenthood has no standing to challenge the statute, for the statute clearly applies to Planned Parenthood's activities. The flaw in this argument is that only one branch of Planned Parenthood—Planned Parenthood of Central and Northern Arizona—performs abortions. Therefore, the State withheld funds from Planned Parenthood of Southern Arizona on the basis of its activities that were construed as "counseling for abortion procedures" or "abortion referral." Planned Parenthood challenged both of these terms as vague in the district court (although the court found only the former term to be vague). Therefore, Planned Parenthood had standing to challenge the statute on the ground that its terms are vague.

[5] However, even if both Planned Parenthood entities performed abortions, we would have found standing to challenge the Arizona funding footnote. A different test of standing applies when the contention is that a statute places a prospective limitation on an individual's exercise of his first amendment expression right and the statute is so vague that a person of reasonable intelligence cannot determine what the boundaries of that limitation are. The Supreme Court noted this distinction in *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission:*

> The Wisconsin court's reliance on *Broadrick v. Oklahoma,* 413 U.S. 601 [93 S.Ct. 2908, 37 L.Ed.2d 830] (1973), for the proposition that one whose conduct falls squarely within an otherwise valid proscription may not challenge that proscrip-

(1969), and *Memorial Hospital v. Maricopa County,* 415 U.S. 250 [94 S.Ct. 1076, 39 L.Ed.2d 306] (1974). In those cases durational residence requirements for the receipt of public benefits were found to be unconstitutional because they "penalized" the exercise of the constitutional right to travel interstate.

. . . .

If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro,* and strict scrutiny might be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions.

Maher v. Roe, 432 U.S. 464, 474 n. 8, 97 S.Ct. 2376, 2383 n. 8, 53 L.Ed.2d 484 (1977).

> tion on grounds of vagueness, is inapposite. The challenged portion of the order is designed to govern speech and conduct in the future, not to punish past conduct, and as such it is the essence of prior restraint.

429 U.S. 167, 177, 97 S.Ct. 421, 427, 50 L.Ed.2d 376 (1976).

Even in its *Broadrick* decision, the Supreme Court acknowledged that the special protection afforded to first amendment rights includes use of a more liberal test of standing in overbreadth cases:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. As a corollary, the Court has altered its traditional rules of standing to permit—in the First Amendment area—"attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

413 U.S. at 611–12, 93 S.Ct. at 2915–16 (citations omitted). As an otherwise eligible recipient of state funds, Planned Parenthood has standing to contend that the statute did not give adequate notice of what sorts of statements its members and staff must refrain from making in order for Planned Parenthood to remain eligible to receive state family planning services funds. *See, e.g., Hynes v. Mayor of Oradell,* 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976) (candidate for political office and campaign workers successfully challenged statute regulating campaign activities as not adequately specifying which campaign activities required advance notice to police department).

While we are satisfied that Planned Parenthood had standing to challenge the footnote on a vagueness claim, we find that the claim is without merit.

[6] A statute is unconstitutionally vague if persons of "common intelligence must necessarily guess at its meaning and differ as to its application," *Connally v General Construction Co.,* 269 U.S. 385, 391 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), for in that situation, the statute "fails to give a person of ordinary intelligence fair notice" of conduct proscribed or required by the statute, *United States v. Harriss,* 347 U.S 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 98[illegible] (1954), and encourages arbitrary and erratic behavior on the part of those officials charged with enforcing the statute, *see Papachristou v. City of Jacksonville,* 405 U.S 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 11[illegible] (1972); *Thornhill v. Alabama,* 310 U.S. 88 60 S.Ct. 736, 84 L.Ed. 1093 (1940). The Supreme Court has set out the hazards of vague laws in even greater detail:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104 108–09, 92 S.Ct. 2294, 2298–99, 33 L.Ed.2d 222 (1972) (footnotes omitted), *quoted in Village of Hoffman Estates v. The Flipside*

Hoffman Estates, Inc., 455 U.S. 489, 498, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982).

[7] The level of scrutiny we must apply to a law challenged on the vagueness ground is not fixed. "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depend in part on the nature of the enactment." *Flipside*, 455 U.S. at 498, 102 S.Ct. at 1193. A law that interferes with the right of free speech should receive relatively more stringent scrutiny. *Id.* at 499, 102 S.Ct. at 1194; *see Grayned*, 408 U.S. at 109, 92 S.Ct. at 2299. On the other hand, we are more tolerant of possible vagueness in laws that impose civil rather than criminal penalties "because the consequences of imprecision are qualitatively less severe." *Flipside*, 455 U.S. at 499, 102 S.Ct. at 1194; *see Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948). Our tolerance should be even greater in a case, such as the one before us, where the consequence of noncompliance with the enactment is not a civil penalty, but merely reduction of a government subsidy.

[8] In reviewing the challenged Arizona law, we are mindful that "due process does not demand unattainable feats of statutory clarity," *United States v. Maude*, 481 F.2d 1062, 1068 (D.C.Cir.1973), and that "absolute precision in drafting laws is not demanded," particularly where the law does not impose a criminal penalty. *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1229 (11th Cir.1982). We note that in the present case Planned Parenthood represented to this court that it has kept separate accounts and ledgers for the abortion-related activities covered by the challenged footnote since the time that footnote went into effect. This demonstrates that Planned Parenthood was able to derive sufficient guidance from the statute to determine which activities were disfavored by the State of Arizona. Planned Parenthood argues that while it understands the statute's scope, it has been unable to receive an interpretation of the footnote from the Arizona officials administering the program, and so the organization fears that its interpretation will differ from that of the State. Substantial numbers of lawsuits arise out of disagreements over the precise meaning of a statute. The potential for such differences of opinion cannot be enough to render a statute void for vagueness.

Moreover, although the program administrators may have declined to give a legal opinion interpreting the challenged term, the state attorney general issued an opinion concerning a predecessor to the footnote actually enacted in which he expounded upon the limits of the phrase "counseling for abortion procedures." *Cf. Smith v. Goguen*, 415 U.S. 566, 580 n. 29 (majority opinion) & 597 (Rehnquist, J., dissenting) 94 S.Ct. 1242, 1251 n. 29 & 1259, 39 L.Ed.2d 605 (1974) (looking to opinions of state attorney general for guidance in determining vagueness of statute). According to the attorney general's opinion, the term "counseling for abortion procedures" applies to "counseling insofar as such counseling explains abortion procedures. That is not to say that a doctor . . . may not use the word 'abortion' in his consultation with his patient. The footnote should not be construed to interfere with the doctor-patient privilege and the doctor's obligation to his patient." Ariz.Att'y Gen.Op. No. I79-252 at 3 n. 5 (Oct. 11, 1979). This definition serves to answer the rhetorical questions the district court put forth in explaining its rationale for declaring the law void for vagueness. 537 F.Supp. at 92.

[9] Throughout its brief to this court, Planned Parenthood used the terms "counseling for abortion procedures" and "abortion counseling" interchangeably. Had the state legislature used the latter term, Planned Parenthood's vagueness claim would have been stronger. We find that "counseling for abortion procedures" is a more narrowly drawn term. The term "abortion procedure" is commonly used to refer to the actual operation performed by medical personnel in carrying out the abortion. *See, e.g., Roe v. Arizona Board of Regents*, 113 Ariz. 178, 180, 549 P.2d 150, 152 (1976). Thus, the reasonable person would understand the statute to refuse funding for counseling activities closely tied to the actual abortion operation, such as preparing a woman who has already decided to have an abortion for the medical treatment she is about to undergo.

We reverse the district court's finding that the term "counseling for abortion procedures" is impermissibly vague.

IV. *Preliminary Injunction*

Although the district court, on February 8, 1982, decided this case on the merits and instituted a permanent injunction against enforcement of the Arizona statute, the State of Arizona seeks to appeal the preliminary injunction granted by the district court on October 6, 1980. The State invokes the eleventh amendment in arguing that the district court erroneously granted the preliminary injunction. We have twice declined to hear the appeal on the ground that imposition of the permanent injunction made the question moot.

On January 4, 1982, we dismissed the first appeal on the basis of Planned Parenthood's representation that a permanent injunction had been granted. In fact, the district court announced orally that it would issue a permanent injunction on April 6, 1981, but did not enter a written order until February 8, 1982. Arizona thus claims that it was deprived of its rightful appeal on January 4, 1982, because of Planned Parenthood's misrepresentation. On March 25, 1982, we rejected Arizona's second attempt to appeal the imposition of the preliminary injunction, determining that the question of whether or not there actually had been a permanent injunction in effect on January 4, 1982, was mooted by the uncontested fact that a permanent injunction was in effect as of February 8, 1982.

[10, 11] In asking for reconsideration of our March 25, 1982, ruling, Arizona is asking us to ignore the "law-of-the-case" doctrine, which states that the decision of a legal issue by an appellate court must be followed in all subsequent proceedings in the same case at either the trial or appellate level. *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 833 (9th Cir.1982). The discretion of an appellate court to review its earlier decisions should be exercised sparingly in order to avoid undermining the policy of finality that underlies the rule. *Id.* at 834; *see Lathan v. Brinegar*, 506 F.2d 677, 691 (9th Cir.1974) (en banc). Thus, the law-of-the-case doctrine applies "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *White v. Murtha*, 377 F.2d 428, 432 (5th Cir.1967), *quoted in Moore*, 682 F.2d at 834.

Arizona argues that we should hear its current appeal of the preliminary injunction notwithstanding the imposition of the permanent injunction and our previous decision that the appeal was moot, because the constitutional question raised is one that is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). In other words, Arizona argues that it and other states will in the future be subject to such questionable preliminary injunctions, but may never be able to receive a hearing from an appellate court because imposition of a permanent injunction will always moot the appeal.

[12] In the absence of a class-action suit, the "capable of repetition, yet evading review" doctrine is limited to situations where two elements combine: (1) the challenged action was of limited duration, too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975) (per curiam). The doctrine has been invoked in cases where a court order, by its own terms, expired in a few days or in cases where the question raised was mooted by the termination of a nonjudicial activity that is usually of short duration. *See, e.g., Nebraska Press Assn. v. Stuart*, 427 U.S.

539, 546–47, 96 S.Ct. 2791, 2796–97, 49 L.Ed.2d 683 (1976) (pre-trial publicity order expired once jury impaneled); *Carroll v. President of Princess Anne,* 393 U.S. 175, 178–79, 89 S.Ct. 347, 350–51, 21 L.Ed.2d 325 (1968) (10-day order); *Roe v. Wade,* 410 U.S. 113, 125, 93 S.Ct. 705, 712, 35 L.Ed.2d 147 (1973) (human gestation period too short to allow completion of appellate procedure); *Trans International Airlines, Inc. v. International Brotherhood of Teamsters,* 650 F.2d 949, 956 n. 5 (9th Cir.1980) (great majority of economic strikes do not last long enough for complete judicial review).

[13] A preliminary injunction is not a court order that expires after the passage of a prescribed or fixed amount of time; it remains in effect until the district court can hold a full hearing on and decide the merits of the case. A preliminary injunction may well be in effect long enough to allow appellate review. Indeed, we hear many appeals of preliminary injunctions. *See, e.g., Painting and Decorating Contractors Association v. Painters and Decorators Joint Committee,* 707 F.2d 1067 (9th Cir.1983); *Los Angeles Memorial Coliseum Commission v. National Football League,* 634 F.2d 1197 (9th Cir.1980); *Munoz v. County of Imperial,* 604 F.2d 1174 (9th Cir.1979), *vacated,* 449 U.S. 54, 101 S.Ct. 289, 66 L.Ed.2d 258 (1980). It is true that Arizona or some other state may be subjected to a similar preliminary injunction in the future. However, it is quite possible that another preliminary injunction against a state may be in effect long enough to allow appellate review of the issues Arizona now seeks to raise. Therefore, this situation does not meet the criteria for invoking the "capable of repetition, yet evading review" exception to the doctrine of mootness. Moreover, because of the complexity and importance of the eleventh amendment question the State of Arizona seeks to bring before us, we believe it would be preferable to address such issues in a context that presents live, rather than hypothetical, issues.

[14] None of the exceptions to the law-of-the-case doctrine apply in the present situation. We are bound by our ruling on March 25, 1982, that the questions raised by the imposition of a preliminary injunction against the State of Arizona were mooted by the imposition of the permanent injunction, and we dismiss Arizona's appeal of the preliminary injunction.

V. *Attorneys' Fees*

[15] Because we are remanding this case, we vacate the attorneys' fee award pending the outcome on reconsideration. However, we note that we find nothing improper in the manner in which the district court computed the attorneys' fee.

The district court computed the amount of the award by first determining the number of allowable hours Planned Parenthood's attorneys spent on the case and multiplying this number by their customary hourly rate. The resulting product, $36,278, was labeled the "lodestar" amount. The district court then considered the controversy surrounding the issues involved in the litigation, the importance of those issues, the contingent nature of the fee arrangement between the plaintiffs and their attorneys, the novelty and complexity of the issues involved, the time pressure placed on the plaintiffs' attorneys, and the reputation, experience, and ability of the plaintiffs' attorneys. On the basis of these factors, the district court decided to increase the lodestar amount by a multiplier of 10%.

Arizona argues that 42 U.S.C. § 1988 provides for an award of "reasonable attorneys' fees," and that a reasonable attorneys' fee would be an amount equal to the number of attorney hours expended multiplied by the customary hourly rate charged by the attorneys (i.e., the district court's lodestar amount). According to Arizona, any sum awarded beyond the lodestar amount is more closely akin to punitive damages than to reasonable attorneys' fees. However, Arizona's definition of a reasonable attorneys' fee award contradicts clear precedent in this court. In *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 70 (9th Cir.1975), *cert. denied,* 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976), we established 12 factors that a district court should consider in

determining a reasonable attorneys' fee award. Among those considerations were (1) the time and labor required; and (2) the customary fee. If the State of Arizona were correct in its assertion, only these two factors would be relevant considerations. Yet *Kerr* set forth 10 additional factors. *Id.* The list of factors adopted in *Kerr* closely parallels the factors considered by the district court in the present case.

In addition to setting forth a list of factors, we explicitly stated in *Kerr* that failure to consider such factors when determining the amount of an attorneys' fee award is an abuse of discretion. *Id.* Thus, the district court's adjustment of the attorneys' fee award to reflect factors other than the number of hours of attorney time expended and the normal hourly rate was not only allowed, but required, by the *Kerr* decision. The district court considered the necessary factors and there is nothing to suggest that the court abused its discretion in any way in determining the appropriate "multiplier" or adjustment factor. *Cf. Hensley v. Eckerhart,* — U.S. ——, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983) ("exceptional success" may justify enhanced attorneys' fee award).

REVERSED and REMANDED.

Mark R. FULLER and Jacqueline R. Fuller, Plaintiffs-Appellants,

v.

EQUITABLE SAVINGS AND LOAN ASSOCIATION, an Oregon Corporation, Defendant-Appellee.

No. 82–3355.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 4, 1983.

Decided Oct. 18, 1983.

Purchasers brought suit against lender for alleged b[illegible]h of contract alleging that due-on-sale clause in deed of trust afforded them option of paying assumption fee of two points in lieu of increased rate of interest. The United States District Court for the District of Idaho, Marion J. Callister, Chief Judge, held that due-on-sale clause permitted lender to require increase in interest rate, and purchasers appealed. The Court of Appeals, Choy, Circuit Judge, held that district court's determination that deed of trust unambiguously provided that lender could choose whether to require an assumption fee or higher interest rate when purchaser assumed seller's loan was not clearly wrong.

Affirmed.

1. Contracts 🔑176(1)

Interpretation of a written contract is a question of law.

2. Federal Courts 🔑785

In a diversity case, the Court of Appeals will not overturn a resident district judge's interpretation of law of that state unless it is clearly wrong.

3. Contracts 🔑143(2)

Under Idaho law, a contract is ambiguous if it is reasonably subject to conflicting interpretation.

4. Mortgages 🔑272

Under Idaho law, district court's determination that the deed of trust unambiguously provided that the lender could choose whether to require an assumption fee or a higher interest rate when the purchaser assumed seller's existing loan was not clearly erroneous.

R. Vern Kidwell, Holden, Kidwell, Hahn & Crapo, Idaho Falls, Idaho, Don G. Carter, McEwen, Newman, Hanna & Gisvold, Portland, Or., for defendant-appellee.

Eugene L. Bush, Sharp, Anderson, Bush & Nelson, Mark R. Fuller, Idaho Falls, Idaho, for plaintiffs-appellants.

release from *all* confinement. Even assuming the judgment was ambiguous, the subsequent denial of the motion for release by the sentencing judge was persuasive evidence that he intended the probation to commence upon release from Oklahoma confinement. The denial of the motion for release from probation supervision is AFFIRMED.

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona non-profit corp.; Planned Parenthood of Southern Arizona, an Arizona non-profit corp.; Jack Bashaw, M.D., on behalf of himself, his patients, and all others similarly situated, Plaintiffs-Appellees,

v.

The STATE OF ARIZONA; Bruce E. Babbitt, individually and as Governor of the State of Arizona; William Jamieson, individually and as Director of the Department of Economic Security; Robert K. Corbin, individually and as Attorney General of the State of Arizona, their employees, agents, representatives, successors, and those acting in concert with them and all others similarly situated, Defendants-Appellants.

No. 85-1612.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 12, 1986.

Decided May 15, 1986.

Family-planning entities in Arizona brought action challenging constitutionality of a footnote to Arizona Appropriation Bill that forbade expenditure of state social welfare funds to support nongovernmental organizations that perform abortions and engage in abortion-related activities. The United States District Court for the District of Arizona, 537 F.Supp. 90, declared the footnote unconstitutional and permanently enjoined its enforcement. On appeal, the Court of Appeals, 718 F.2d 938, Choy, Circuit Judge, reversed and remanded. On remand, the United States District Court for the District of Arizona, Walter Early Craig, J., granted summary judgment declaring the footnote unconstitutional. State appealed. The Court of Appeals, Sneed, Circuit Judge, held that: (1) footnote was unconstitutional; plaintiffs submitted convincing evidence on feasibility of monitoring funds to assure that no state funds were allocated to abortion-related services, and State had not controverted that evidence, and (2) plaintiffs were entitled to attorney fees, including amounts for challenged activities, and for appeal, but use of multiplier was improper.

Affirmed in part; reversed in part.

1. Constitutional Law ⚷90.1(1)

Footnote to Arizona Appropriation Bill, prohibiting giving of state social welfare funds to nongovernmental agencies or entities offering abortions, abortion procedures, counseling for abortion procedures, or abortion referrals, was unconstitutional denial of family-planning entities' freedom of speech; family-planning entity submitted convincing evidence on feasibility of monitoring funds to assure that no state funds were allocated to abortion-related services, and State had not controverted that evidence. U.S.C.A. Const.Amend. 1; Ariz.Laws 1980, Ch. 244, § 1, subd. 25.

2. Civil Rights ⚷13.17(18)

Family-planning entity challenging constitutionality of footnote to Arizona Appropriation Bill prohibiting giving of state social welfare funds to nongovernmental organizations for abortion-related services was entitled to award of attorney fees for all attorney's efforts, notwithstanding State's objection to four categories of attorney effort, including time spent for unsuccessful attempt to name State as defendant, attempt at garnishment to collect previously awarded attorney fee judgment, time spent on whether preliminary injunction appeal was moot, and time spent on void-for-vagueness issue. 42 U.S.C.A. § 1988.

3. Courts ⚷90(2)

Court of Appeals was not bound by earlier panel consideration of attorney fee issue, where panel had vacated fee award when it remanded case for further fact finding on First Amendment claim. U.S.C.A. Const.Amend. 1.

4. Civil Rights ⚷13.17(19)

Neither success in lawsuit of family-planning entity challenging constitutionality of footnote to Arizona appropriation bill prohibiting giving of state social welfare funding to nongovernmental organizations for abortion-related services, nor contingent nature of recovery, under theory that controversial nature of abortion issue made it "risky" to represent challenger, justified use of multiplier in calculation of attorney fees. 42 U.S.C.A. § 1988.

5. Federal Civil Procedure ⚷2737.4

"Undesirable" nature of case is appropriate factor in determining attorney fees.

6. Civil Rights ⚷13.17(23)

Family-planning entity, which successfully challenged constitutionality of footnote to Arizona Appropriation Bill governing giving of state funds for abortion-related services, was entitled to attorney fees on appeal. 42 U.S.C.A. § 1988.

Larry Rosenfeld, Sacks, Tierney & Kasen, Phoenix, Ariz., for plaintiffs-appellees.

Anthony B. Ching, Sol. Gen., Phoenix, Ariz., for defendants-appellants.

Appeal from the United States District Court for the District of Arizona.

Before SNEED and HALL, Circuit Judges, and KELLEHER *, District Judge.

SNEED, Circuit Judge:

This is an appeal from a district court's grant of a summary judgment holding unconstitutional, as sought to be applied against Planned Parenthood and its patients, a portion of an Arizona appropriation bill and awarding attorneys' fees to the plaintiffs. We affirm the district court's judgment on the merits, modify the attorneys' fee award, and award attorneys' fees on appeal.

I.

FACTS

Arizona participates in a Title XX federal grant program that provides federal reimbursement for 90% of the expenditures Arizona makes for certain family planning services. Arizona allocates 10% matching funds to pay for these services. *See Planned Parenthood v. Arizona*, 718 F.2d 938, 941 (9th Cir.1983) (*Planned Parenthood I*). This controversy has its origins in a restriction on use of the state funds for abortion-related activities. The restriction was contained in a two-paragraph footnote to the Arizona bill appropriating the state's ten percent matching funds. It consists of two paragraphs and reads as follows:

> No state money may be spent by the department of economic security by contract, grant or otherwise, on abortions, abortion procedures, counseling for abortion procedures or abortion referrals. These restrictions are not applicable when it is necessary to save the life of the pregnant woman.
>
> No state money, other than money for comprehensive medical and dental care and the developmentally disabled, may be given by the department of economic security by contract, grant or otherwise to agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion refer-

* Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

rals. Governmental agencies or entities are exempt from restrictions in this paragraph.

1980 Ariz. Sess. Laws 842, 860 n *.

Planned Parenthood of Central and Northern Arizona and Planned Parenthood of Southern Arizona (collectively referred to as Planned Parenthood) brought suit to enjoin enforcement of this footnote. They argued that the footnote is an unconstitutional restriction on their freedom of speech and is void for vagueness. In 1982, the district court held that the footnote is unconstitutional on both first amendment grounds and vagueness grounds. In 1983, this circuit held that the statute is not unconstitutionally vague. *Planned Parenthood I*, 718 F.2d at 949. Its resolution of the first amendment issue was more complex.

The first paragraph of the Arizona statute prohibits the use of state funds for abortion-related services. Relying on *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d (1977), *Planned Parenthood I* upheld this portion of the statute. *See* 718 F.2d at 942–44. The second paragraph of the statute prohibits use of state funds by organizations that offer abortion-related services, even if the state funds themselves are not used for abortion-related services. Planned Parenthood in our first encounter characterized this portion of the statute as a penalty designed to chill the exercise of the constitutional right to provide abortions. The State argued to the *Planned Parenthood I* panel that this second paragraph of the statute was constitutional because, since it was impossible for the state to monitor use of the funds to prevent their use for abortion-related services, it was a measure necessary to the enforcement of the constitutionally proper first paragraph. The *Planned Parenthood I* panel remanded "to give the State the opportunity to prove that withdrawing all state funds from Planned Parenthood was the only way to ensure that Planned Parenthood would not use state funds to support its abortion-related activities." *Id.* at 946.

On remand, the district court received depositions on this issue and granted summary judgment for Planned Parenthood. The State appeals. It argues, first, that the district court erred in granting summary judgment for Planned Parenthood, second, that the district court included improper costs in the fee award; and, third, that the district court erred in awarding Planned Parenthood an upward adjustment of the attorneys' fee award above the "lodestar" amount. Planned Parenthood also seeks attorneys' fees for the cost of defending against the State's appeal.

II.

MOOTNESS

The State in its first argument appears to frame a strange and simplistic proposition. It proceeds as follows. Planned Parenthood of Northern and Central Arizona spent funds on "counseling for abortion procedures or abortion referrals" that had their source, *in part*, in State funds. This expenditure demonstrates that "withdrawing all state funds from Planned Parenthood ... [is] the only way to ensure that Planned Parenthood would not use state funds to support its abortion-related activities." *Id.* at 946. This, in turn, removed any cloud of possible unconstitutionality from paragraph two of the Arizona footnote and rendered any dispute on this issue moot.

The flaw in the argument is that Planned Parenthood's expenditure by no means demonstrates that withdrawal of funds is necessary to prevent violation of the footnote's first paragraph. The argument of the State renders this court's remand in *Planned Parenthood I* an exercise in futility. Had we assumed, as the State does in its argument, that *any* expenditure on abortion-related activities necessarily is derived from state funds at least to the extent of ten cents on the dollar, the remand would have been pointless. The constitutionality of the second paragraph on the basis of this assumption should have been confronted in *Planned Parenthood I.* Not having done so, we obviously rejected the

State's assumption. We proceeded on the basis that it was the burden of the State to show that ear-marking of state funds for non-abortion-related activities and a system of tracing reasonably susceptible to auditing by state officials was not possible to create.

Thus, the question before us is whether the State has made such a showing. It is not moot. *See* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533, at 212 (1984).

III.

CONSTITUTIONALITY OF THE STATUTE

We review the district court's grant of summary judgment *de novo*. *See, e.g., Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983).

Turning to the merits, we note that neither of the parties have attempted to persuade us to reconsider the *Planned Parenthood I* decision. Moreover, it is clear that on remand the showing made by the State does not establish the impossibility of monitoring funds. Affidavits by State officials charged with distributing the funds, which are not controverted, established that monitoring was feasible. *See* Excerpt of Record (E.R.) at 40–41 (deposition of Guy Mikkelsen); *id.* at 43 (deposition of Betty DeGraw).

Planned Parenthood also produced substantial evidence before the district court on the issue of feasibility of monitoring. Finally, in its brief to this court, the State has conceded that the spending practices of the Southern Arizona branch of Planned Parenthood adequately segregate state funds from abortion-related services. Appellant's Opening Brief at 9 n. 3.

The State contends that the spending practices of Planned Parenthood of Northern and Central Arizona demonstrate the impossibility of monitoring. This is simply not so. The State to monitor effectively need not be present at every client and patient interview. The fact is that the State has not attempted to monitor expenditures by Planned Parenthood. The most that can be said is that misuse of funds is possible so long as the State fails to monitor spending. This is a far cry from evidence that monitoring is not possible.

[1] In short, Planned Parenthood has submitted convincing evidence on the feasibility of monitoring the funds. The State has not controverted that evidence and even admits that Planned Parenthood of Southern Arizona has successfully segregated state funds from its abortion-related expenditures. We hold, after a *de novo* review, that the district court's grant of summary judgment on the constitutionality of paragraph two of the Arizona footnote as applied against Planned Parenthood and its patients was proper.

IV.

ATTORNEYS' FEES IN THE DISTRICT COURT

Because Planned Parenthood prevailed in the litigation, the district court awarded it attorneys' fees under the Civil Rights Attorney Fee Award Act of 1976, 42 U.S.C. § 1988. It calculated the award in two steps. First, it multiplied the number of hours Planned Parenthood attorneys spent on the case by the customary hourly rates of those attorneys. This produced the "lodestar amount." Second, it increased that award by a multiplier of ten percent. The State objects to this award on two fronts. First, it argues that the award included "excessive, redundant, or otherwise unnecessary" costs. Appellant's Opening Brief at 12–13. Second, it challenges the application of the multiplier in light of *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

At the outset we note that determination of attorneys' fees "is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." *Rutherford v. Pitchess*, 713 F.2d 1416, 1420 (9th Cir.1983); *see Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983) (emphasizing "the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters"). We also acknowledge that looking over the shoulders of attorneys to examine their charges is not a task welcomed by judges. Fee shifting makes our scrutiny necessary, however. Even though our competence to undertake this scrutiny is limited at best, we must assume the burden because at present no other bearer is available. Somebody must decide what fees should appropriately be shifted to the loser. No doubt our "incompetence" in this area is no greater than it is in many others in which we are compelled to render decisions; and it is, I suspect, our limited ability to avoid decisionmaking, in comparison to that enjoyed by the other two great branches of government, that induces many litigants to crowd our portals.

So, in full awareness of our limitations, we address the issue of attorneys' fees.

A. *The "Excessive" Costs Issue*

The State relies on *Hensley v. Eckerhart* for its argument that the district court's award forces the State to reimburse Planned Parenthood for improper expenses. *Hensley* discussed the adjustments district courts should make in section 1988 awards when plaintiffs have been only partially successful. In the course of that discussion, the Court explicated its views on calculation of the lodestar amount. The Court's ideas regarding excess cost are both reasonable and not unusual:

> Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority."

461 U.S. at 434, 103 S.Ct. at 1939 (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C.Cir.1980) (en banc)) (emphasis by *Copeland* court).

Hours expended in pursuit of unsuccessful claims in civil rights cases were treated as follows:

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation....

Id. 461 U.S. at 435, 103 S.Ct. at 1940.

[2] Neither hours not properly billed to one's client nor hours expended on discrete and unsuccessful claims exist in this case. The State lists four categories of attorney effort to which it objects:

> time spent for the unsuccessful attempt to name the State of Arizona as a defendant; their attempt at garnishment to collect the previously awarded attorneys' fees judgment; the time spent on whether the preliminary injunction appeal was moot pursuant to this Court's request; and the time spent on the void-for-vagueness issue which this Court has decided in the defendant's favor.

Appellant's Opening Brief at 12. We think that a reasonable client who had received the results obtained in this litigation would not cavil at being billed for these ancillary efforts. We also think that it is improper in this case to categorize any of these efforts as discrete claims. The thrust of this lawsuit was Planned Parenthood's effort to continue receiving state funds. All of these activities are aimed at that result. We hold that all of the challenged activities are properly compensable by an attorneys' fee award under section 1988.

B. *Use of a Multiplier Issue*

[3] We approach the use of a multiplier somewhat differently, however. In *Planned Parenthood I*, the panel concluded that "there is nothing to suggest that the court abused its discretion in any way in determining the appropriate 'multiplier' or adjustment factor." 718 F.2d at 951. First, because the panel vacated the fee award when it remanded the case for further factfinding on the first amendment claim, we are not bound by the *Planned Parenthood I* panel's consideration of the attorneys' fee issue. It is clear that the court's evaluation of the use of the multiplier was dicta. *See* 718 F.2d at 951.[1] Moreover, because the Supreme Court has recently decided a case on this question, *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), we are less inclined than we might ordinarily be to adopt the conclusions of the prior panel without independent consideration. *See Kimball v. Callahan*, 590 F.2d 768, 771–75 (9th Cir.), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979); *White v. Murtha*, 377 F.2d 428, 431–32 (5th Cir. 1967); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 790–91 (1981).

[4] Planned Parenthood suggests two justifications for imposition of a multiplier in this case: the plaintiff's success in the lawsuit and the contingency of recovery. Our examination of *Blum v. Stenson* convinces us that neither of these factors justifies the use of a multiplier in this case.

In *Blum v. Stenson*, the Court discussed the manner in which a plaintiff could justify a section 1988 fee award in excess of the lodestar amount. The Court stated that "[t]he burden of proving that such an adjustment is necessary to the determination of a reasonable fee is on the fee applicant." 465 U.S. at 898, 104 S.Ct. at 1548. The Court went on to reverse the district court's imposition of a multiplier because the plaintiff "introduced no evidence that enhancement was necessary to provide fair and reasonable compensation." *Id.* at 901, 104 S.Ct. at 1550.

Planned Parenthood attempts to justify use of the multiplier by pointing to the success of their efforts. This is inadequate justification. As the Supreme Court pointed out in *Blum v. Stenson*, *see id.* at 900, 104 S.Ct. at 1549, adequate compensation for the success of a civil rights plaintiff will normally be secured by an award based on the number of hours billed and the billing rate of the attorneys. Many clients with reasonable bargaining power would insist upon paying no more. We do not think the State of Arizona should be required to shoulder a greater burden.

The Supreme Court also addressed the factors of risk and contingency of recovery as bases for upward fee adjustments. The Court seemed to approve an adjustment based on "risks associated with the litigation or claim that the risk of nonpayment required an upward adjustment to provide a reasonable fee." *Id.* at 901, 104 S.Ct. at 1550; *accord LaDuke v. Nelson*, 762 F.2d 1318, 1332–33 (9th Cir.1985) (EAJA case); *Hall v. Borough of Roselle*, 747 F.2d 838, 843 (3d Cir.1984) (section 1988 case). The Court's language apparently refers to the contingent fee arrangement common to many areas of the law. At oral argument, however, counsel for Planned Parenthood conceded that the fee arrangement in this case was not contingent.

[5] Planned Parenthood's argument is slightly different. It argues that the controversial nature of the abortion issue makes "risky" the representation of clients

1. On this point we stated: "[W]e vacate the attorneys' fee award pending the outcome on reconsideration. However, we note that we find nothing improper in the manner in which the district court computed the attorneys' fee." In this circuit, dicta are "not part of the law of the case." *Russell v. Commissioner*, 678 F.2d 782, 785 (9th Cir.1982). We are, therefore, free to disregard our earlier statements on this point.

like Planned Parenthood. It argues that controversial representation may have an adverse effect on the law firm's other business by soiling its reputation. We recognize that the "undesirable" nature of a case is an appropriate factor in determining attorneys' fees. *See, e.g., Kerr v. Screen Extras Guild,* 526 F.2d 67, 69–70 (9th Cir. 1975), *cert. denied,* 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976); *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 719 (5th Cir.1974), *cited with approval in* S.Rep. No. 1011, 94th Cong., 2d Sess. 6 (legislative history of § 1988), *reprinted in* 1976 U.S.Code Cong. & Ad.News 5908, 5913.

Nevertheless, we reject this contention as a justification for the imposition of a multiplier in this case. Controversial representation is just as likely to bolster the reputation of a law firm as it is to harm it. Planned Parenthood may have its enemies; but it also has many friends. It is hardly a pariah. Moreover, there is no evidence in the record that the representation actually posed a substantial risk to the law firm's business or that any risk presented was not adequately taken into consideration in setting the hourly rate. The Supreme Court's opinion in *Blum* predisposes us against the use of a multiplier unless the successful plaintiff has demonstrated that a lodestar amount does not represent a fully compensatory fee. The plaintiffs in this case have made no such showing, but rely instead on abstract arguments in their brief. Accordingly, we reverse the district court's judgment to the extent that it applied a multiplier in calculating the fee award.

V.

ATTORNEYS' FEES ON APPEAL

[6] Planned Parenthood seeks attorneys' fees on appeal under section 1988. As the Supreme Court has noted, "a prevailing [civil rights] plaintiff ' "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." ' " *Hensley v. Eckerhart,* 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983) (quoting S.Rep. No. 1011, 94th Cong., 2d Sess. 4 (quoting *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)), *reprinted in* 1976 U.S.Code Cong. & Ad.News 5908, 5912). Planned Parenthood clearly has prevailed on the merits of this appeal. There are no circumstances making such an award unjust. We hold, therefore, that Planned Parenthood is entitled to attorneys' fees for the reasonable expenses of this appeal. The judgment of the district court is affirmed in part, reversed in part.

AFFIRMED IN PART, REVERSED IN PART.

UNITED STATES of America, Plaintiff-Appellant,

v.

Gig and Jeannette EBERHARDT, Defendants-Appellees.

UNITED STATES of America, Plaintiff-Appellant,

v.

Tom WILSON and Sonny Erickson, Defendants-Appellees.

UNITED STATES of America, Plaintiff-Appellant,

v.

Diane Sue MATTZ, Atone ("Tony") W. Folkins, and Randy Mattz, Defendants-Appellees.

Nos. 85–1212, 85–1213 and 85–1233.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 17, 1986.

Decided May 16, 1986.

Defendants were charged with unlawful sale of anadromous fish caught within Indian reservation, and they moved to dismiss. United States Magistrate granted motion, and Government appealed. The United States District Court for the Northern District of California, Eugene F. Lynch, J., 611 F.Supp. 813, affirmed. In second case, other defendants were charged with selling fish in violation of federal regulations, and defendants moved to dismiss. The United States District Court for the Northern District of California, Thelton E. Henderson, J., granted motion, and Government appealed. The Court of Appeals, Poole, Circuit Judge, held that Department of Interior did not exceed its statutory authority in promulgating fishing regulations for Indian reservation which prohibited commercial fishing by Indians on that part of river flowing through reservation.

Reversed and remanded.

Beezer, Circuit Judge, filed concurring opinion.

1. Indians ⇐32.10(1)

Department of Interior fishing regulations prohibiting commercial fishing by Indians on that part of river flowing through Indian reservation do not apply to non-Indians.

2. Indians ⇐4

General trust statutes furnished Department of Interior with broad authority to supervise and manage Indian affairs and property commensurate with trust obligations of United States. 25 U.S.C.A. §§ 2, 9.

3. Indians ⇐32.10(1)

Department of Interior had authority under general trust statutes to regulate Indian fishing on reservation consistent with its obligation to manage and conserve Indian resources. 25 U.S.C.A. §§ 2, 9.

4. Indians ⇐2

Only Congress can modify or abrogate Indian tribal rights, and it will be held to have done so only when its intention to do so has been made absolutely clear.

5. Indians ⇐2

Congressional intent to abrogate tribal rights may be found in express provisions of act or in its surrounding circumstances and legislative history.

6. Indians ⇐32.10(1)

Demonstration of congressional intent to work abrogation of Indians' fishing rights was not necessary to justify Department of Interior regulations prohibiting commercial fishing on that part of river flowing through Indian reservation.

7. Indians ⇐32.10(7)

Unlike Congress, states may not qualify Indian fishing rights, but, states may regulate Indian rights in interest of conservation by appropriate exercise of their police power.

8. Fish ⇐13(1)

Game ⇐7

Violation of state conservation laws protecting fish and wildlife is federal offense. Lacey Act Amendments of 1981, § 3(a)(2), 16 U.S.C.A. § 3372(a)(2).

9. Indians ⇐32.10(7)

To be valid, state must show that any regulation of Indian fishing rights is both reasonable and necessary for conservation purposes.

10. Indians ⇐32.10(7)

State regulations of Indian fishing rights which are both reasonable and necessary for conservation purposes may extend to manner of fishing, size of take, and restriction of commercial fishing.

11. Indians ⇐32.10(3)

Department of Interior was not required to justify ban on commercial fishing on Indian reservation by showing that fish resources of reservation were facing imminent extinction.

12. Indians ⇐32.10(1)

Indian fishing regulations promulgated by Department of Interior may be set aside if they are arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.A. § 706(2)(A).

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R. Scott Greathead, General Counsel

February 9, 1996

Melanne Verveer
Office of the First Lady
OEOB Room 100
Washington, D.C. 20500

Dear Melanne,

I enjoyed meeting with you this past week and thank you for your inquiry about *Sanger v. Reno*, No. CV-96-0526 (CPS) (E.D.N.Y. filed Feb. 7, 1996). This case, filed on behalf of the National Abortion and Reproductive Rights Action League, the Feminist Majority Foundation, the National Abortion Federation, Planned Parenthood of New York City and others is a challenge to 18 U.S.C. § 1462(c) as amended by section 507 of the new Telecommunications Act which, among other things, criminalizes the use of the internet and other interactive computer services for the transmission of commercial and non-commercial speech about abortion. At a hearing yesterday on our motion for a temporary restraining order before New York Eastern District Chief Judge Charles P. Sifton,[1] the Department of Justice agreed that § 1462(c), both before and after amendment, is unconstitutional, but unfortunately, notified the Court that they planned to seek dismissal of the case because there is no serious threat of prosecution. Although we trust that the current Attorney General has no plans to directly enforce this problematic language, other U.S. Attorneys and more realistically, Attorneys General in future, more conservative administrations will have the opportunity to enforce this law, absent a court judgment that the statute is unconstitutional and the entry of an order permanently enjoining it. By agreeing that the law is unconstitutional but arguing that plaintiffs should be denied permanent relief, the administration is missing an excellent opportunity to demonstrate its commitment to

[1] The remainder of the case will be heard by a three-judge district court including Judge Sifton and two other judges appointed by Second Circuit Chief Judge Jon O. Newman.

Member, Bar of ...

women's rights and free speech. My hope is that the administrations position with change before the filing of briefs in the case on March 8, 1996.

At our meeting on Monday, I agreed to forward Judy Gold information on *Benten v. Kessler*, No. CV-92-3161 (CPS) (E.D.N.Y. filed July 7, 1992) a challenge to the Reagan and Bush Administration ban on the personal importation of RU-486. In the case, which is also currently pending before Judge Sifton, we seek an order that the import ban was promulgated without proper notice and comment; is arbitrary and capricious; and imposes an undue burden on women's access to an important and safe method of abortion or in the alternative, we seek a revocation of the import ban by the FDA. Unfortunately, despite a Presidential directive issued on January 22, 1993, ordering the Secretary of Health and Human Services to "promptly instruct the FDA to determine whether there is sufficient evidence to warrant exclusion of RU-486 from the list of drugs that qualify for the personal use importation exemption," 58 Fed. Reg. 7459 (1993), no further action has been taken, and the Department of Justice has repeatedly told the Court that the ban remains operative. In contrast, when campaigning, the administration has repeatedly relied upon these 1993 executive orders, implying that the RU-486 ban was withdrawn. Again failure to remove the import ban given the President's strong pro-choice position is confusing at best and sends the wrong message to the women's community at this critical time. I hope the inconsistency can be resolved before more attention is drawn to the question when the Court rules on the matter.

Similarly, as we discussed at the meeting on Monday, the administration has sent a mixed message on abortion coverage for public employees -- opposing the restriction but signing the bill into law. After researching the issue for some time now, I believe that the President, via the office of Personnel Management, has the power to restore federal employees' health insurance coverage for abortion to those plans which offered it in their 1996 policy year brochures and that there are sound political reasons to take that bold step.

Although Public Law 104-52, prohibits the use of federal funds to pay for abortion coverage in the Federal Employee Health Benefit Plan, it does not prohibit federal employees from obtaining health insurance for abortion at no cost or when paid for by the employees themselves. It is our understanding that when OPM eliminated abortion coverage in January of this year, there was no change in either the government or the employee premiums. Thus it is fair to conclude that there is no cost to providing abortion services under these plans. Indeed, this is consistent with the fact that if coverage is denied, a significant percentage of women, particularly low income ones, will carry the pregnancy to term at a much greater cost to the insurer. But even if abortion coverage does entail some minimal cost,[3] it can be attributed for accounting purposes to the employee share of the premium, since the federal government contributes the same amount of money for those plans which include and exclude abortion in their 1996 coverage. Although affording plan enrollees the option to eliminate the charge against employee premiums via an opt-out check off will give the administration an answer to the employee who objects to the use of their monies for abortion, the additional administrative expense of the checkoff may deem that alternative problematic. Simple notice to the employee that the Government will segregate the funds of those individuals who object to making payment may be sufficient.

We have been seriously considering a legal challenge to Public Law 104-52 and have come up with a number of theories that would enable us to pursue litigation. But at this particular time, we think there are both political and legal advantages should the Administration simply restore the coverage and if necessary defend against legal attacks from those who wish to terminate these important health benefits. Taking this action, which will affect millions of American workers, sends a powerful message to pro-choice Americans that the President believes that individuals rather than government should have the right to purchase insurance to protect their families, particularly when there are no government monies involved. Recent polling data demonstrates that the public is concerned about the FEHBP restriction more than other abortion funding measures. It apparently captures the fear of many, working Americans that government may someday limit their ability to buy insurance. Moreover, as a legal matter, the caselaw would strongly support administrative decisionmaking as Courts have long been reluctant to overturn reasonable executive action.

If this idea has any appeal, I would be happy to prepare a detailed memorandum for you more fully outlining

[3] Recently, for example, Massachusetts calculated the cost of abortion coverage for their Public Employees at $.40 per month.

why we think this is possible and may in fact be required[3] and to meet with the Office of Personnel Management to explain and answer several more difficult legal questions about this approach.[4]

Lastly, as we discussed on Monday, I want to thank the President for his commitment to veto H.R. 1833. As you well understand, I am always extraordinarily concerned when legislation has the potential to undermine *Roe v. Wade* and this particular bill strikes at the heart of the health exception. I want to reiterate however, that the only antidote to the strong message developed by the anti-abortion forces is the stories of women, like Viki Wilson and Tammy Watts who need late abortions. I urge the President to join a group of women who have undergone these procedures when he vetoes the bill, to drive home that punitive measures will have devastating effect on real women.

I look forward to talking with you soon about these concerns and will be happy to provide additional information or assistance if it would be helpful to you.

Very truly yours,

Kathryn Kolbert

Kathryn Kolbert

cc: Jeremy Ben-Ami

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[3] For example, because federal funds are not being used to pay for abortion coverage, depriving federal employees of that coverage violates the Federal Employees Health Benefits Act, which was intended by Congress to ensure that federal employees have health benefits equivalent to those available in the private sector. It also discriminates against federal employees on the basis of sex in violation of the Pregnancy Discrimination Act. Although this act does not require that employers fund health insurance for abortion, it does not similarly give employers permission to prevent employees from purchasing such coverage. Denying federal employees abortion coverage may also violate their rights to equal protection and due process and impose undue burdens on women's rights to choose abortion in violation of the Fifth Amendment.

[4] For example P.L. 104-52 also prohibits the use of federal funds to pay for the administrative costs of any health plan which provides abortion. This mandate may be avoided by establishing one plan which pays for all administrative costs, and another program which incurs no costs or by arguing that this restriction is in conflict with the FEHB Act and constitutionally invalid.