Harris and *Whole Woman's Health* Collide: No Funding Provisions Unduly Burden Reproductive Freedom

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This Note analyzes the pro-life crusade to defund Planned Parenthood and exclude private insurance plans that cover abortions from all subsidized insurance markets, ostensibly in accordance with decades-old case law that upheld the Hyde Amendment and other laws that prohibit Medicaid and Title X family planning program funds from being used to pay for abortions. That jurisprudence was based on two premises: (1) that governments have a legitimate interest in favoring live birth over abortion, and (2) that funding restrictions do not constitute unwarranted governmental interference with reproductive freedom because they do not impede abortion access but only disfavor it. While the truthfulness of those premises is debatable, this Note does not argue that old case law should be overturned. Rather, it argues that more recent case law is applicable to proposed No Taxpayer Funding for Abortion provisions, which go beyond simply denying government funds for abortions and are actually intended to undermine abortion rights by shutting down abortion providers and coercively forcing private insurers to drop abortion coverage as a standard feature of their health plans. Specifically, if enacted, these provisions should be subject to the undue burden standard laid out in Whole Woman's Health v. Hellerstedt. *Further, this Note concludes that the No Taxpayer Funding for Abortion provisions should be deemed unconstitutional under the undue burden standard or, in the alternative, because they violate the unconstitutional conditions doctrine.*

† J.D. Candidate 2019, University of California, Hastings College of the Law; Executive Notes Editor, *Hastings Law Journal*. I choose to dedicate this Note to all those who had to make the so-called "choice" between having an abortion or carrying an unwanted pregnancy to term, and to those who had no "choice." Many thanks to Professor Jennifer Templeton Dunn and to Stephanie Toti for their guidance and encouragement in writing this Note and to If/When/How, the Center for Reproductive Rights, and the Center on Reproductive Rights and Justice for their tireless work on behalf of women everywhere and for believing in this Note when it was still in an early, unpolished state. I would also like to thank the editors of the *Hastings Law Journal* for their hard work and dedication in bringing this Note to print.

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INTRODUCTION

"The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[1] To that point, the latest findings of a longitudinal "Turnaway Study" found that women forced to carry unwanted pregnancies to term are nearly four times more likely to live below the federal poverty level than women who are able to access abortion care.[2] Moreover, the aggregate effects of restrictions that prevent women from accessing birth control and abortion care weaken the

1. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) (plurality opinion) (citation omitted). Indeed, widespread access to contraceptives and abortion care has opened up educational and career opportunities for women, and is responsible for one-third to one-half of women's wage gains relative to men since the 1960s. *Compare* Martha J. Bailey et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages*, 4 AM. ECON. J.: APPLIED ECON. 225, 227 (2012) (crediting one-third to one-half of women's wage gains relative to men since the 1960s to contraceptive access), *with* Kelli Garcia, *Hostile to Women, Hostile to Abortion: The Wage Gap and Abortion Restrictions*, NAT'L WOMEN'S L. CTR. (Apr. 14, 2015) https://nwlc.org/blog/hostile-women-hostile-abortion-wage-gap-and-abortion-restrictions (finding that seven out of ten of the states with the worst wage gaps have six or more abortion restrictions).

2. Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 407, 410–11 (2018).

national economy by instigating reductions in full-time employment, increases in single-parent households and reliance on public assistance.[3] Thus, the federal government has a stake in helping women avoid unintended pregnancies and ensuring adequate access to abortion services.

But, the current administration espouses "pro-life" values[4] and has embedded several anti-abortion provisions into numerous Obamacare[5] replacement plan proposals. For example, the American Health Care Act (AHCA), which was passed by the United States House of Representatives ("the House") on May 4, 2017, contained provisions that would (1) disqualify any Planned Parenthood clinic that continues to provide abortion services from receiving federal grants and reimbursements for providing family planning and other preventative healthcare services, excluding abortion care,[6] and (2) ban insurance plans that offer abortion coverage as a standard feature from all subsidized markets.[7]

These provisions were appropriated from an earlier failed budget reconciliation act that passed in the House but ultimately died on the Senate floor.[8] The AHCA and each of the other proposed healthcare reform bills seem to have suffered the same fate, but the prolific and enduring nature of the so-called No Funding provisions demonstrates the pro-life movement's undying desire to see those provisions enacted. If enacted, the No Funding provisions would most likely debilitate Planned Parenthood—the nation's largest abortion

3. *Id.* at 411. Indeed, it is estimated that for every $1 invested in family planning programs, federal and state governments save $7.09 in welfare funding. Jennifer J. Frost et al., *Return on Investment: A Fuller Assessment of the Benefits and Cost Savings of the US Publicly Funded Family Planning Program*, 92 MILBANK Q. 667, 696 (2014).

4. *See, e.g.*, Letter from Donald J. Trump, Presidential Candidate, to "Pro-Life Leader" (Sept. 2016), https://www.sba-list.org/wp-content/uploads/2016/09/Trump-Letter-on-ProLife-Coalition.pdf ("I am writing to invite you to join my campaign's Pro-Life Coalition . . . .").

5. The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C. (2012)), which is often called the Affordable Care Act (ACA) or Obamacare, was signed into law by President Barack Obama on March 23, 2010. The term "Obamacare" was first used by opponents of the legislation, but was subsequently appropriated by supporters and was eventually used by President Obama himself. Gregory Wallace, *'Obamacare': The Word that Defined the Health Care Debate*, CNN (June 25, 2012, 1:20 AM), https://www.cnn.com/2012/06/25/politics/obamacare-word-debate.

6. *See* American Health Care Act of 2017, H.R. 1628, 115th Cong. § 103 (2017) ("[N]o Federal funds . . . may be made available . . . for payments to a prohibited entity" and further expressing that a prohibited entity is one that, *inter alia*, provides abortions other than those necessary to save the life of the mother or to terminate pregnancies that "result from an act of rape or incest."). Not only does Planned Parenthood fall within the bill's definition of "prohibited entity," it is *the only* entity that falls within the definition. H.R. REP. NO. 115–52, at 59 (2017) ("[O]nly Planned Parenthood . . . would be affected.").

7. *See* H.R. 1628 §§ 202–03 ("The term 'qualified health plan' does not include any health plan that includes coverage for abortions (other than any abortion necessary to save the life of the mother or any abortion with respect to a pregnancy that is the result of an act of rape or incest.").

8. *Compare* American Health Care Act of 2017, H.R. 1628, 115th Cong. (2017), *with* No Taxpayer Funding for Abortion Act, H.R. 3, 112th Cong. (2011). Another reconciliation act containing the No Funding provisions was also pending enactment concurrently with the AHCA, but it too died on the Senate floor. *See* No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2017, H.R. 7, 115th Cong. (2017).

provider—financially, thereby impeding abortion access.[9] Additionally, they would coerce *private* insurers to stop offering abortion coverage as a standard plan feature, making it harder to find and purchase abortion coverage. This Note argues that the described No Funding provisions or any provisions similarly designed to defund Planned Parenthood and/or force insurance plans that offer abortion coverage as a standard plan feature out of the subsidized insurance market would unjustifiably infringe on reproductive freedom. Proponents of such provisions argue, paradoxically, that the provisions do not infringe on reproductive freedom because they do not prohibit or restrict abortion *access*, but simply deny public funding for abortions in accordance with case law that sustains governments' right to favor live birth over abortion.

To fully understand and appreciate the tensions between the constitutional right to terminate a pregnancy and governments' right to refuse to pay for abortions, a bit of background is in order. Thus, Part I will discuss the history of funding restrictions in the context of the abortion wars before arguments against the No Funding provisions are made in Part II. Subpart II.A argues that the No Funding provisions would unduly burden both abortion and contraceptive access. Subpart II.B argues that, even if the No Funding provisions are viewed as mere funding restriction that do not burden abortion access, they violate the unconstitutional conditions doctrine.

I. HISTORY AND BACKGROUND

A. THE RISE OF FUNDING RESTRICTIONS AS A PROXY FOR OVERTURNING *ROE*

In 1973, the United States Supreme Court held that the fundamental right to privacy "encompass[es] a woman's decision whether or not to terminate her pregnancy."[10] However, just four years later, Congress passed the Hyde Amendment, which prohibits federal dollars from being used to fund abortions, with just a few exceptions.[11] The amendment's leading sponsor, Republican Congressman Henry Hyde of Illinois, was frank about the amendment's purpose of hindering abortion access from the very beginning. During a congressional debate on the proposed bill, he explained the significance of the amendment, stating, "I certainly would like to prevent . . . anybody [from] having an

9. *See* discussion *infra* Subpart II.A.1.

10. Roe v. Wade, 410 U.S. 113, 153 (1973).

11. Hyde Amendment of 1977, Pub. L. No. 95–205, § 101, 91 Stat. 1460, 1460 (1977). The Hyde Amendment prohibited federal dollars from being used to fund abortions "except where the life of the mother would be endangered if the fetus were carried to term" from 1981 until 1993. Hyde Amendment of 1989, Pub. L. No. 101–166, 103 Stat. 1159, 1177 (1989). In 1993 the Hyde Amendment was modified to also authorize federal funding for abortions that result from rape or incest. Hyde Amendment of 1993, Pub. L. No. 103–112, 107 Stat. 1082, 1113 (1993). For an analysis of the inadequacy of these exceptions, see Stephanie Poggi, *Abortion Funding for Poor Women: The Myth of the Rape Exception*, CTR. FOR AM. PROGRESS (Apr. 28, 2005, 9:00 AM), https://www.americanprogress.org/issues/women/news/2005/04/28/1427/abortion-funding-for-poor-women-the-myth-of-the-rape-exception/.

abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the . . . Medicaid bill."[12]

On June 30, 1980, the United States Supreme Court decided two cases which upheld the constitutionality of both the Hyde Amendment and analogous state versions of the Hyde Amendment.[13] The Court declared, in *Harris v. McRae*, that the Constitution protects against unwarranted government interference with freedom of choice in the context of abortion, but that "it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."[14] Thus, the Court drew a line in the sand. On one hand, women have a fundamental right to choose to terminate pregnancy prior to viability and neither the federal or state governments may not prevent them from doing so. However, governments are not required to ensure that women are actually able to procure abortion services. In other words, governments do not have to pay for abortion services.

In the wake of the Court's decision to uphold the Hyde Amendment, thirty-four states and the district of Columbia have enacted analogous statutes that prohibit state dollars from being used to fund abortions.[15] Statutes in twenty-seven of those states directly parallel the Hyde Amendment, prohibiting state dollars from being used to fund abortions except those necessary to save the life of the mother or arising out of rape or incest.[16] Seven states carved out additional, but limited exceptions: Indiana, Utah, West Virginia, and Wisconsin extend coverage to "abortions necessary to avoid grave, long-lasting damage to the woman's physical health," and Iowa, Mississippi, Virginia, and West Virginia cover abortions related to fetal impairment.[17] In contrast, South Dakota's statute limits abortion coverage beyond the restrictions of the Hyde Amendment by prohibiting state funds from being used to cover abortions that

12. Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, 10 GUTTMACHER POL'Y REV. 12, 12 (2007) (third alteration in original) (quoting House Representative Henry Hyde).

13. *See* Harris v. McRae, 448 U.S. 297, 326–27 (1980) (involving various constitutional challenges to the Hyde Amendment and the assertion that certain provisions of the Social Security Act required states participating in the Medicaid program to fund all medically necessary abortions, even if federal reimbursement was unavailable); *see also* Williams v. Zbaraz, 448 U.S. 358, 369 (1980) (equal protection challenge to an Illinois statute that prohibited state medical assistance payments for abortions that weren't necessary to save the life of the mother). State interpretations of what "necessary to save the life of the mother" means vary widely; for an interesting (and heartbreaking) story about Florida's very narrow interpretation of the exception, see NAT'L WOMEN'S LAW CTR., THE HYDE AMENDMENT CREATES AN UNACCEPTABLE BARRIER TO WOMEN GETTING ABORTIONS 1 (2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/07/Hyde-Amendment.pdf ("Medicaid refused to cover the abortion of a woman with cancer who needed chemotherapy but could not receive treatment because she was pregnant. Although delaying chemotherapy would likely cause her death, [her] death was not considered 'imminent,' so her case did not fit within the narrow life exception.").

14. 448 U.S. at 317–18.

15. *State Funding of Abortion Under Medicaid*, GUTTMACHER INST., (Nov. 16, 2018) https://www.guttmacher.org/print/state-policy/explore/state-funding-abortion-under-medicaid [hereinafter *State Funding of Abortion Under Medicaid*].

16. *Id.*

17. *Id.*

arise out of rape or incest.[18] Thus, women living in thirty-four of our nation's fifty states generally cannot obtain any state or federal assistance with abortion costs.

Of course, the Hyde Amendment and state versions of the Hyde Amendment have a disparate impact on the poor, particularly women of color.[19] Under *Roe-Harris* treatment of abortion rights, abortion rights of the affluent are protected, but governments are allowed "to interfere with the reproductive decisions of the poor."[20] In fact, lack of funding is the number one barrier to abortion access, forcing one in four low-income women who would elect to have an abortion but for financial barriers to carry an unwanted pregnancy to term.[21] Thus, Henry Hyde's amendment is doing exactly what he wanted it to do, serving as a powerful "proxy for overturning *Roe*."[22] As Justice Brennan declared in his *Harris* dissent, "the Hyde Amendment is nothing less than an attempt by Congress to circumvent the dictates of the Constitution and achieve indirectly what *Roe v. Wade* said it could not do directly."[23]

The California Supreme Court echoed Justice Brennan's sentiments in striking down a California version of the Hyde Amendment, stating that the benefits of the funding restrictions did not "manifestly outweigh the impairment of the constitutional rights" because the economic advantages of the restrictions were "illusory" and the proffered state interest in protecting fetal life did not overshadow women's fundamental right to terminate pregnancy.[24] The court further opined that the State's objective could have been achieved by alternative means "less offensive" to the reproductive choice.[25] California's Supreme Court does not stand alone in its rebellion against *Harris*; nine other states have

18. *See* Boonstra, *supra* note 12, at 13; *see also State Funding of Abortion Under Medicaid*, *supra* note 15. What's up with South Dakota? This is just the tip of the iceberg with respect to the state's assault on abortion rights—there is only one abortion clinic in the entire state, the Sioux Falls Planned Parenthood clinic, and the state requires women seeking abortion care to obtain state-directed counseling that includes information designed to discourage them from having abortions, and then wait seventy-two hours before the procedure is provided (the longest waiting period in the country), thereby necessitating two trips to the facility. *See* Blair Hickman, *What It Takes to Get an Abortion in South Dakota*, JEZEBEL (Apr. 15, 2011, 1:05 PM), https://jezebel.com/5792156/what-it-takes-to-get-an-abortion-in-south-dakota.

19. *See* Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL'Y REV. 2, 4 (2008). "Minority women, women who are poor and women with little education are more likely than women overall to report dissatisfaction with either their contraceptive method or provider." *Id.* That dissatisfaction leads to inconsistent contraceptive use and unintended pregnancies. *Id.* Moreover, "[c]ultural and linguistic barriers also can contribute to difficulties in [consistent and effective use of birth control]." *Id.* In fact, "[i]n the United States, the abortion rate for black women is almost five times that for white women . . . [and] [t]he abortion rate among Hispanic women . . . is double the rate among whites." *Id.*

20. Jill E. Adams & Jessica Arons, *A Travesty of Justice: Revisiting* Harris v. McRae, 21 WM. & MARY J. WOMEN & LAW 5, 6 (2014).

21. *Restricting Medicaid Funding for Abortion Forces One in Four Poor Women to Carry Unwanted Pregnancies to Term*, GUTTMACHER INST. (Aug. 7, 2009), https://www.guttmacher.org/print/news-release/2009/restricting-medicaid-funding-abortion-forces-one-four-poor-women-carry-unwanted.

22. Boonstra, *supra* note 12, at 12.

23. Harris v. McRae, 448 U.S. 297, 331 (1980) (Brennan, J., dissenting).

24. Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779, 781 (Cal. 1981).

25. *Id.* at 786.

policies that direct their Medicaid programs to pay for all or most medically necessary abortions pursuant to court orders.[26] Additionally, five states have voluntarily instituted such policies.[27]

B. THE FUNGIBILITY PRINCIPLE AS A BASIS FOR EFFORTS TO EXPAND THE FUNDING RESTRICTIONS UPHELD IN *HARRIS*

Although the Hyde Amendment and analogous state statutes generally prohibit government dollars from being used to fund abortions directly, the pro-life movement asserts that subsidizing persons and entities that use their own funds for abortion-related activities is indirectly supporting abortion because money is fungible.[28] This notion—the fungibility principle—underlies the No Funding provisions, which are ostensibly intended to (1) prevent government legitimization of abortion, and (2) protect taxpayers who are morally opposed to abortion from having to subsidize the procedure.

The fungibility principle posits that every tax dollar given to Planned Parenthood for contraceptive and other preventative health services through Medicaid or Title X of the Public Health Service Act[29] frees up a private dollar,

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26. *State Funding of Abortion Under Medicaid*, *supra* note 15. These states include Alaska, Connecticut, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Oregon, and Vermont. *Id.*

27. *Id.* (identifying Hawaii, Illinois, Maryland, New York, and Washington as having voluntary pay policies).

28. Joerg Dreweke, *"Fungibility": The Argument at the Center of a 40-Year Campaign to Undermine Reproductive Health and Rights*, 19 GUTTMACHER POL'Y REV. 53, 53 (2016); Susan A. Cohen, *What's Behind the Antiabortion Campaign over 'Fungibility'?*, 1 GUTTMACHER PUB. POL'Y REV. 1, 1–2 (1998).

29. Title X of the Public Health Service Act, 42 U.S.C. §§ 201–300 (2012), authorizes the Secretary of Health and Human Services to

> make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents.

42 U.S.C. § 303(a). Title X programs are crucial to low income populations. *See* C.I. FOWLER ET AL., TITLE X FAMILY PLANNING ANNUAL REPORT: 2016 NATIONAL SUMMARY, at ES-1 (2017), https://www.hhs.gov/opa/sites/default/files/title-x-fpar-2016-national.pdf ("The Title X National Family Planning Program . . . is *the only* federal program dedicated solely to supporting the delivery of family planning and related preventive health care. The program is designed to provide contraceptive supplies and information to all who want and need them, with priority given to persons from low-income families." (emphasis added)). In fact, "[f]or many clients, Title X providers are their only ongoing source of health care and health education." *Id.* Although the provision of abortion services seemingly aligns with the primary purpose of Title X, Title X funds cannot be used to pay for abortions except under very limited circumstances. *See* 42 C.F.R. § 59.1 (2017) (the purpose of Title X is to provide the "educational, comprehensive medical, and social services necessary to aid individuals to determine freely the number and spacing of their children"); *see also* 42 U.S.C. § 300a-6 (providing that none of the funds appropriated under Title X "shall be used in programs where abortion is a method of family planning"). Indeed, it was

> the intent of both Houses that funds authorized under this legislation be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent.

116 CONG. REC. 39,873 (1970). Subsequent Congresses have reiterated this requirement through annual

which then becomes available to cover the costs of abortion services or advance Planned Parenthood's abortion rights agenda.[30] Similarly, under the fungibility principle, subsidizing insurance plans that offer abortion coverage as a standard feature is subsidizing abortion and should be viewed as governmental endorsement of the procedure. While counterarguments to the fungibility principle will be taken up in Part II, the following sections will focus only on how abortion rights opponents are using the fungibility principle to justify attempts to expand the reach of *Harris*.

1. The Movement to Defund Planned Parenthood

The earliest calls to defund Planned Parenthood were based on "open hostility to contraception" and concerns about "non-marital, non-reproductive sex."[31] However, modern calls to defund Planned Parenthood are predominantly centered around the organization's status as a major player in the abortion wars—Planned Parenthood is the nation's largest provider of abortions and an earnest litigant in efforts to expand abortion rights.[32] Given the organization's emphasis on abortion rights, antiabortion activists assert that transferring government funds to Planned Parenthood should be viewed as government sponsorship of abortion advocacy. In this context, the fungibility principle has nothing to do with how Planned Parenthood spends government funds and "everything to do with how they spend their own."[33]

But the scope of Planned Parenthood's practice does not provide a sufficient basis for exempting it from participating in federally funded family planning programs.[34] Medicaid law entitles Medicaid beneficiaries to a right to receive healthcare services from "any . . . organization that is (i) Qualified to furnish the services; and (ii) Willing to furnish them to that particular beneficiary."[35] At the same time, the regulations allow States to set "reasonable

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appropriations provisos, stating "amounts provided to said projects, under such title shall not be expended for abortions . . . ." *See, e.g.*, Consolidated Appropriations Act, 2018, Pub. L. No. 115–141, 132 Stat. 348 (2018); Consolidated Appropriations Act, 2017, Pub. L. No. 115–31, 131 Stat. 135 (2017); Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, 129 Stat. 2242 (2016).

30. *See* Mary Ziegler, *Sexing* Harris*: The Law and Politics of the Movement to Defund Planned Parenthood*, 60 BUFF. L. REV. 701, 704 (2012) ("The defunding movement works to expand . . . the fungibility principle: the idea that money offered to any abortion provider for any service offsets other expenses, frees up funds for abortion, and thus constitutes money for abortion."); *see also* Cohen, *supra* note 28, at 1.

31. Ziegler, *supra* note 30, at 702. However, "open hostility to contraception" is not extinct; modern anti-contraception zealots assert that contraceptives are abortifacients and harmful to women's health. *Id.* at 702, 714, 719. For example, Katy French Talento, a member of the White House's Domestic Policy Council, claims that "chemical birth control" is "causing miscarriages of already-conceived children" and "breaking your uterus for good." Katy French Talento, *Miscarriage of Justice: Is Big Pharma Breaking Your Uterus?*, FEDERALIST (Jan. 22, 2015), http://thefederalist.com/2015/01/22/miscarriage-of-justice-is-big-pharma-breaking-your-uterus.

32. *See* Ziegler, *supra* note 30, at 716.

33. Cohen, *supra* note 28, at 1.

34. Brief for the United States as Amicus Curiae Supporting Appellees at 10–19, Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Health Dep't, 699 F.3d 967 (7th Cir. 2012) (No. 11-2464).

35. 42 C.F.R. § 431.51(b)(1) (2017); *accord* 42 U.S.C. § 1396a(a)(23) (2012).

standards relating to the qualifications of providers."[36] This has emboldened the pro-life movement to dispute Planned Parenthood's qualifications, calling Planned Parenthood an "abortion business"[37] and asserting that women's health would be better served at "community health centers that provide comprehensive health care for women."[38]

Despite the Medicaid Act's "free choice of providers"[39] requirement, seventeen state legislatures have adopted or proposed legislation that excludes Planned Parenthood from participation in federally funded family planning programs, hoping these laws will be upheld as mere funding restrictions.[40] But interpreting *Harris* to allow medically qualified providers to be exempted from receiving funding for family planning services simply because they also provide abortion care would surely be an expansion of government's right to favor live birth over abortion.[41]

However, the pro-life movement has made the funding issue about gender equality as well, asserting that women, especially poor women of color, need to be protected from increasing social pressures to choose abortion over childbirth.[42] "[T]he defunding movement draws on longstanding feminist anxieties about the power dynamics of heterosexual sexual relationships. . . .[and holds] that Planned Parenthood aids and abets men who use women for sex by removing pregnancy as a consequence of wrongdoing."[43]

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36. 42 C.F.R. § 431.51(c)(2).

37. *See, e.g.*, Press Release, Majorie Dannenfelser, President, Susan B. Anthony List, SBA List Celebrates House Passage of Health Care Bill with Two Critical Pro-life Provisions (May 4, 2017), https://www.sba-list.org/newsroom/press-releases/sba-list-celebrates-house-passage-health-care-bill-two-critical-pro-life-provisions.

38. *E.g.*, Letter from Donald J. Trump, *supra* note 4.

39. 42 U.S.C. § 1396a(a)(23) (2012).

40. *Medicaid Family Planning Eligibility Expansions*, GUTTMACHER INST. (Nov. 1, 2018) https://www.guttmacher.org/print/state-policy/explore/medicaid-family-planning-eligibility-expansions. For example, Indiana enacted a statute prohibiting state agencies from contracting with or making grants to "any entity that performs abortions or maintains or operates a facility where abortions are performed that involves the expenditure of state funds or federal funds administered by the state." IND. CODE § 5-22-17-5.5(b)(2) (2018). Immediately after this statute was enacted, Planned Parenthood filed a lawsuit seeking to block its implementation claiming that the statute violated the Medicaid Act's "free choice of provider" provision; injunctive relief was granted. Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Health Dep't, 699 F.3d 962, 967–68 (7th Cir. 2012). However, the House Committee on the Budget recently proposed a budget that "supports the long-standing policy to ban federal taxpayer dollars from funding elective abortions and calls for a 10-year cessation of federal funding for Planned Parenthood." H.R. REP. NO. 115–816, at 72 (2018). It, similarly, preached that "[t]he federal government should not force states to provide funding to clinics such as Planned Parenthood that perform elective abortions. . . . [and] should not force taxpayers to fund those clinics." *Id.* It seems likely that a Supreme Court ruling on this issue would be unfavorable to Planned Parenthood. *See* Dylan Scott, *John Roberts Is the Supreme Court's New Swing Vote. Is He Going to Overturn* Roe v. Wade*?*, VOX (July 9, 2018, 9:00 AM), https://www.vox.com/policy-and-politics/2018/7/9/17541954/roe-v-wade-supreme-court-john-roberts.

41. *See* Ziegler, *supra* note 30, at 703 ("[T]he movement represents [] an effort to redefine and expand the limits on the abortion right set forth in . . . *Harris v. McRae*, the case that upheld the Hyde Amendment, a ban on the use of federal Medicaid funds for abortion services.").

42. *Id.* at 704.

43. *Id.* at 705–06.

Moreover, husbands and other would-be fathers, pimps, parents of teenage girls who become pregnant, and even physicians and counselors at abortion clinics ostensibly coerce and threaten pregnant girls and women into having abortions. "Her 'choice' can include loss of home, income and family, or violence and even murder," abortion opponents say.[44] Thus, the pro-life movement asserts that the availability of abortion services doesn't allow for an option to choose abortion; it creates an obligation to have an abortion.[45]

Given this spin on the provision of abortion services, the pro-life movement alleges that funding Planned Parenthood does not advance reproductive freedom. Rather, it contravenes that freedom and is harmful to women's health. But notions that women are *generally* relegated to submissive roles within heterosexual relationships and/or are susceptible to coercion *merely* because they are of the so-called weaker sex are antiquated.[46]

Moreover, laws that defund abortion clinics as a means of protecting subjugated women who may be particularly vulnerable to forced or coerced abortions are both overbroad and under-inclusive. They are overbroad because they impede abortion access for all women, including those who reach the decision to have an abortion without any undue influence. At the same time, the laws are seriously under-inclusive, because they do not protect women who have the means to pay for abortion (or whose coercer is willing and able to pay for the abortion) from being subjected to forced or coerced abortions. Indeed, laws that require abortion providers to identify and provide special counseling or other services to patients who may have been unduly influenced to schedule an abortion appointment would better address the issue of forced or coerced abortions. Moreover, such laws would better serve women's health by identifying women in abusive relationships and connecting them with agencies that can provide appropriate social services.

2. Demands to Prohibit the Subsidization of Abortion Care

While Planned Parenthood has been fighting defunding threats for decades, the 2010 implementation of state and federal marketplaces has provided a new

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44. *Forced Abortion in America: Coercion Can Escalate to Violence, Even Murder*, ELLIOTT INST., http://www.theunchoice.com/pdf/FactSheets/ForcedAbortion FactSheet.pdf (last visited Nov. 21, 2018).

45. *See id.*

46. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting) (opining that the notion that women need statutory protection to prevent them from making a decision they will come to forget "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited"); United States v. Virginia, 518 U.S. 515, 533, 542 n.12 (1996) (opining that a government interest must not rely on "overbroad generalizations about the talents, capacities, or preferences" of women as "[s]uch judgments have attended, and impeded, women's progress toward full citizenship stature throughout our Nation's history"); Califano v. Goldfarb, 430 U.S. 199, 207 (1977) (plurality opinion) (opinion of Brennan, J.) (rejecting a gender-based Social Security classification because it rested on "'archaic and overbroad' generalizations 'such as assumptions as to [women's] dependency' [on their husbands] that are more consistent with 'the role-typing society has long imposed,' than with contemporary reality" (first quoting Schlesinger v. Ballard, 419 U.S. 498, 507 (1975); then quoting Stanton v. Stanton, 421 U.S. 7, 14-15 (1975); and then quoting Weinberger v. Weisenfeld, 420 U.S. 636, 645 (1975))).

avenue for attempts to expand the funding restrictions upheld in *Harris.* Marketplaces provide a convenient forum where individuals who have too much income to qualify for Medicaid can purchase insurance plans that are subsidized by the federal government.[47] While people with incomes below one hundred and thirty-eight percent of the federal poverty level (FPL) qualify for no-cost insurance through the Medicaid expansion, those with incomes up to four hundred percent of the FPL[48] *only* receive refundable premium tax credits when they purchase health insurance plans through the federal or state marketplaces.[49]

Yet another advantage of purchasing insurance through a marketplace is that the federal government makes advance payments of the premium tax credit directly to eligible individuals' insurance companies, thereby lowering out-of-pocket costs for health care premiums.[50] Many people would not be able to purchase health insurance in the absence of such an arrangement.[51]

But, under current law, states are allowed to prohibit all health plans in their marketplaces from offering abortion coverage as a standard feature.[52] States may also ban such coverage in all state-regulated *private* plans.[53] This unfortunate arrangement was the result of a concession made by former President Barack Obama, which was necessary to get the Patient Protection and Affordable Care Act of 2010 (ACA) enacted.[54] As of September 21, 2017, twenty-five states have laws that limit or ban abortion coverage in their marketplaces, and eleven of those states also ban abortion coverage in the *private* insurance markets.[55]

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47. *A Quick Guide to the Health Insurance Marketplace: 5 Tips About the Health Insurance Marketplace*, HEALTHCARE.GOV, https://www.healthcare.gov/quick-guide/one-page-guide-to-the-marketplace (last visited Nov. 21, 2018).

48. *2018 Federal Poverty Level*, OBAMACARE.NET, https://obamacare.net/2018-federal-poverty-level (last visited Nov. 21, 2018). Below is an excerpt of the 2018 Federal Poverty Level Income Bracket Chart:

Family Size	100% of FPL	400% of FPL
1	$12,060	$48,240
2	$16,240	$64,960
3	$20,420	$81,680
4	$24,600	$98,400

Id.

49. Cynthia Cox et al., *How Affordable Care Act Repeal and Replace Plans Might Shift Health Insurance Tax Credits*, HENRY J. KAISER FAM. FOUND. (Mar. 10, 2017), https://www.kff.org/health-reform/issue-brief/how-affordable-care-act-repeal-and-replace-plans-might-shift-health-insurance-tax-credits.

50. Internal Revenue Serv., Dep't of the Treasury, Pub. No. 974, Premium Tax Credit (PTC) (2018), https://www.irs.gov/pub/irs-pdf/p974.pdf.

51. *See* Cox et al., *supra* note 49.

52. *See* Exec. Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 29, 2010) ("The [ACA] maintains current Hyde Amendment restrictions governing abortion policy and extends those restrictions to the newly created health insurance exchanges.").

53. *Id.*

54. *See* Rebecca Adams, *The Question of Abortion Coverage in Health Exchanges*, ROLL CALL (July 22, 2013, 10:05 AM), http://www.rollcall.com/news/the_question_of_abortion_coverage_in_health_exchanges-226547-1.html.

55. *Interactive: How State Policies Shape Access to Abortion Coverage*, HENRY J. KAISER FAM. FOUND. (Sept. 21, 2017), https://www.kff.org/interactive/abortion-coverage.

Texas recently passed a bill that bans non-emergent abortion coverage in both its marketplace and its private insurance market.[56] The law makes no exceptions for the termination of pregnancies arising out of rape or incest or instances of fetal abnormalities.[57] Instead, it requires women to purchase an abortion "rider"—an optional policy add-on—if they want "elective abortion" coverage.[58] The lively floor debates had over the bill in Texas's House of Representatives demonstrate the controversial nature of such laws and are helpful in understanding fungibility principle-based arguments for and against demands to prohibit the subsidization of abortion services.

Chris Turner, a Texas Democratic Representative, has dubbed the additional insurance premium required for the coverage of non-emergent abortions "rape insurance" and denounces the Texas law, stating:

> Women don't plan to be raped. Parents don't plan for their children to be victims of incest, . . . Asking a woman or a parent to foresee something like that and buy supplemental insurance to cover that horrific possibility is not only ridiculous, it is cruel.[59]

The emotional appeal of Representative Turner's statement is palpable, but, in all fairness, all insurance policies are taken out in anticipation of the worst. And Turner hasn't done the abortion rights movement any favors—his statement disparages *only* the resolve not to include an exception for pregnancies arising out of rape or incest, arguably undermining the legitimacy of other reasons for choosing to terminate a pregnancy.

And just as the poor are more heavily burdened by the Hyde Amendment, poor Texans will suffer the consequences of the Texas law in greater numbers, many of them having to carry unwanted pregnancies to term. Of course, there are exceptions to every rule—desperate women may resort to objectionable means of raising the funds necessary to obtain lawful abortions. In *Women's Health Services, Inc. v. Maher*, the court noted that some particularly assiduous women were able to finance abortions by:

> [N]ot paying rent or utility bills, pawning household goods, diverting food and clothing money, or journeying to another state to obtain lower rates or fraudulently use a relative's insurance policy. In a few cases, patients were [even] driven to theft.[60]

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56. H.B. 214, 85th Gen. Assemb., 1st Called Sess. (Tex. 2017) (enacted).

57. *Id.*

58. *Id.* at § 169.001(b); *see also* Caroline Rosenzweig et al., *Abortion Riders: Women Living in States with Insurance Restrictions Lack Abortion Coverage Options*, HENRY J. KAISER FAM. FOUND., at 3 (2018), http://files.kff.org/attachment/Data-Note-Abortion-Riders-Women-Living-in-States-with-Insurance-Restrictions-Lack-Abortion-Coverage-Options ("A health insurance rider is a limited scope supplemental benefit policy that covers certain services, such as dental and vision benefits, which are not included in a standard health insurance plan.").

59. Shannon Najmabadi, *Abbott Signs Bill Restricting Insurance Coverage of Abortion*, TEX. TRIB. (Aug. 15, 2017, 12:00 PM), https://www.texastribune.org/2017/08/15/abbott-signs-bill-restricting-insurance-coverage-abortion (quoting Texas Representative Chris Turner).

60. Women's Health Servs., Inc. v. Maher, 482 F. Supp. 725, 731 n.9 (D. Conn. 1980), *vacated*, 636 F.2d 23 (2d Cir. 1980).

But proponents of the Texas law contend that "[t]his isn't about who can get an abortion. It is about who is forced to pay for an abortion."[61] This sentiment was echoed by Texas Governor Greg Abbott, who signed the bill stating:

> As a firm believer in Texas values, I am proud to sign legislation that ensures no Texan is ever required to pay for a procedure that ends the life of an unborn child . . . This bill prohibits insurance providers from forcing Texas policy holders to subsidize elective abortions. I am grateful to the Texas legislature for getting this bill to my desk, and working to protect innocent life this special session.[62]

Thus, the fungibility principle is the underlying justification for the Texas law and, in theory, abortion seekers in Texas can still purchase abortion riders. However, it is unclear whether insurance providers will even offer abortion riders in Texas. After all, abortion riders have not been readily available in the ten other states that have banned the sale of policies that include abortion coverage as a standard feature from their private insurance markets.[63]

The lack of available abortion riders creates a *de facto* prohibition on abortion coverage. After all, if abortion riders are not actually available to those who would seek to maintain abortion coverage, then there is no meaningful distinction between allowing the purchase of abortion riders and prohibiting individuals who purchase insurance plans through the Marketplace from purchasing separate coverage for abortions. For those who must purchase health insurance through the Marketplace in order to remain in compliance with the law, a *de facto* prohibition of abortion coverage results from banning plans that cover abortions from the subsidized markets.

Taken to its logical extreme, the fungibility principle begins to crumble in the context of the abortion war. *Even if abortion riders were available to those who would seek to maintain abortion coverage,* a thorough application of the fungibility principle would necessitate prohibiting individuals who purchase insurance plans through the Marketplace from purchasing separate coverage for abortions in order to protect taxpayers from having to subsidize abortions. After all, subsidizing the costs of maintaining health insurance frees up money that can then be used to purchase abortion riders.

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61. Najmabadi, *supra* note 59 (quoting Republican Texas Representative John Smithee). But how much does abortion coverage cost taxpayers?

> For insurers, the additional cost to provide abortion coverage as a benefit in a standard health policy is minimal. The actual cost of an abortion benefit for plans operating on the ACA Exchanges (where payments for abortion coverage are required to be segregated from the other services) was estimated to add between 11 and 33 cents per member per month (PMPM) in 2012, significantly less than the minimal additional premium charge for abortion coverage that is required by law, $1 PMPM. Insurers that include abortion coverage pay for abortion services for their policy holders, but the additional cost is minimal because it is spread over all enrollees.

ROSENZWEIG ET AL., *supra* note 58, at 4 (footnote omitted).

62. Press Release, Greg Abbott, Governor of Tex., Off. of the Tex. Governor, Governor Abbott Signs Pro-Life Insurance Reform (Aug. 15, 2017), https://gov.texas.gov/news/post/governor-abbott-signs-pro-life-insurance-reform.

63. *See* ROSENZWEIG ET AL., *supra* note 58, at 1 ("In states that ban abortion coverage, riders are practically nonexistent, and [individual] policy holders have no option to obtain abortion coverage.").

C. TARGETED REGULATION OF ABORTION PROVIDERS AND THE CONCEPTION[64] OF THE "UNDUE BURDEN" STANDARD

Funding restrictions have not been the exclusive means of undercutting reproductive freedom. State governments have also enacted a plethora of anti-abortion laws that, while not absolute bans on abortion, place unnecessary mandates or restrictions on abortion providers and facilities where abortions are provided.[65] These laws, which have been dubbed "targeted regulations of abortion providers" or "TRAP laws," are usually passed under the guise of promoting maternal health, but are actually intended to undermine the abortion right by shutting down abortion providers.[66] TRAP laws are not unconstitutional *per se* but are scrutinized under the "undue burden" standard set out by the Supreme Court in a seminal 1992 case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

Casey held that any law that places an "undue burden" on women's right to terminate a pregnancy violates the Due Process Clause of the Fifth Amendment in the case of a federal law and of the Fourteenth Amendment in the case of a state law.[67] A law places an undue burden on abortions right when it "has the purpose or effect of placing a *substantial* obstacle in the path of a woman seeking an abortion of a nonviable fetus."[68] However, a law that was "not designed to strike at the [abortion] right" yet still has an "incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure," should not be invalidated.[69]

But *Casey* failed to explain exactly when a burden crosses the line from merely "incidental" to "undue." And, because the Supreme Court upheld four of the five anti-abortion provisions examined in *Casey*, states came to believe that they were free to pass essentially any anti-abortion law that was not an outright prohibition of abortion and exercised little restraint in continuing to enact an abundance of new, post-*Casey* TRAP laws.[70] This trend went largely unchecked until 2016 when the Supreme Court deemed two provisions of Texas's House Bill 2 to constitute unnecessary and *substantial* obstacles to abortion access in *Whole Woman's Health v. Hellerstedt*.[71]

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64. Pun intended.

65. *See* Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, 17 GUTTMACHER POL'Y REV. 9, 10 (2014).

66. *See id.* (TRAP laws generally "dictate that abortions be performed at sites . . . [like] ambulatory surgical centers, or even hospitals, . . . [or] require clinicians at abortion facilities to have admitting privileges at a local hospital . . . effectively giving hospitals veto power over whether an abortion clinic can exist") (citation omitted)).

67. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion) (opinion of O'Connor, Kennedy, and Souter, JJ.).

68. *Id.* (emphasis added).

69. *Id*. at 874.

70. *See* Boonstra & Nash, *supra* note 65, at 10 ("[A] startling number of states have passed harsh new restrictions. In 2011–2013, legislatures in 30 states enacted 205 abortion restrictions—more than the total number enacted in the entire previous decade." (citation omitted)).

71. 136 S. Ct. 2292, 2298 (2016).

Whole Woman's Health contributed the following to the undue burden analysis: If a law's enactment will not serve a legitimate government interest or if there is no evidence that the law will actually serve the government's proffered interest, then any burden the law imposes on abortion access cannot be deemed merely "incidental" because the law is assumed to have been enacted solely to impede abortion access.[72] Thus, *Whole Woman's Health* provides a meaningful measure by which TRAP laws can be challenged—it requires governments to demonstrate a cognizable benefit derived from the enactment of any abortion regulation which advances a legitimate government interest.

II. ARGUMENTS

A. THE NO FUNDING PROVISIONS UNDULY BURDEN ABORTION ACCESS

All laws that infringe on abortion rights are subject to the "undue burden" standard. The undue burden analysis, laid out and applied in *Casey* and developed in *Whole Woman's Health*, is a balancing test that weighs the government's interest in enacting a law against the burden the law places on abortion access. The standard demands that any law that burdens abortion access must meet the following requirements: (1) the law must have a valid purpose, meaning that it was enacted to address a legitimate government interest and not just to impede abortion access, and (2) the law must not place "a substantial obstacle in the path of a woman's choice" to have an abortion.[73]

1. Application of the "Undue Burden" Standard to the Provision that Defunds Planned Parenthood

PRONG 1—LEGITIMATE INTEREST

Congress' proffered interests in defunding Planned Parenthood are 1) to promote women's health by reallocating funds to "community health centers that provide comprehensive health care for women," and 2) to "protect [pro-life] taxpayers from having to pay for abortions."[74] The following Parts address the legitimacy of these interests, but it is worth noting that, even if the proffered interests are not legitimate, Congress can always fall back on the classic

72. *Hellerstedt*, 136 S. Ct. at 2313.

73. *Casey*, 505 U.S. at 877. The Hyde Amendment and analogous state statutes have not been invalidated by *Casey* and *Whole Woman's Health*. I surmise that these statutes would likely pass the "undue burden" test. After all, the *Harris* decision (1) explicitly recognized a government interest in encouraging childbirth over abortion as a legitimate purpose for prohibiting government funds from being used to fund abortions directly, and (2) found that these statutes place "no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest." Harris v. McRae, 448 U.S. 297, 315 (1980). It is almost as if the *Harris* decision was written with the undue burden standard in mind.

74. *See, e.g.*, Letter from Donald J. Trump, *supra* note 4.

"important and legitimate interest in protecting the potentiality of human life."[75] However, even this interest cannot justify the placement of an undue burden on women's constitutional liberty interest, as exemplified in *Whole Woman's Health*.

A proffered interest cannot be deemed legitimate when there is no evidence that the law will serve that interest.[76] In *Whole Women's Health*, the Court considered two provisions of Texas's House Bill 2.[77] The first provision, an "admitting privileges requirement," obligated all physicians providing abortion services to have admitting privileges at a hospital located within thirty miles from the place where the abortion was done.[78] The second provision, the "surgical-center requirement," required all abortion facilities to comply with a cumbersome list of specifications regarding the layout of those facilities and sterile procedures to be followed before, during, and after abortion procedures.[79] In justifying these provisions, the State claimed an interest in promoting maternal health.[80] However, there was no evidence that these provisions would actually serve to promote maternal health, giving rise to a presumption that the provisions had been enacted for the sole purpose of undercutting the abortion right and were, therefore, unconstitutional.[81]

Just as the healthcare regulations in *Whole Woman's Health* did not advance the government's proffered interest in protecting maternal health, neither would barring Planned Parenthood from receiving Medicaid and Title X grants and reimbursements *for the provision of family planning services* advance any of the government's proffered interests in doing so. With respect to the interest in promoting women's health, it seems that if community health centers really provide better, more comprehensive care than Planned Parenthood provides, then women would seek care from community health centers, and Medicaid and Title X reimbursements would follow without the need for government interference. However, women are *choosing* Planned Parenthood for their *family planning and other preventative care* services—this is the only reason why Planned Parenthood receives any government funding—and a provision that defunds Planned Parenthood would take that choice away, not provide new and better options.

There is no evidence that Planned Parenthood provides substandard care or that women's health would be promoted by the exclusion of Planned Parenthood from receiving government funds for the provision of family planning and other preventative care services.[82] Thus, this proffered interest should be deemed

75. Roe v. Wade, 410 U.S. 113, 162 (1973).

76. *See Whole Woman's Health*, 136 S. Ct. at 2313.

77. *Id.* at 2296.

78. *Id.*

79. *Id.*

80. *Id.* at 2310.

81. *Id.*

82. The argument that defunding Planned Parenthood would promote women's health is based on notions that the abortion experience is psychologically damaging to women; however, this notion has been discredited

illegitimate.

Additionally, defunding Planned Parenthood would not serve Congress' interest in protecting pro-life taxpayers from being forced to subsidize abortions. It would only keep taxpayers from having to subsidize *family planning* services, which help to prevent the need for abortion services. Similarly, excluding Planned Parenthood from receiving Title X grants and reimbursements for the provision of family planning services would not advance the government's contingency interest in "protecting the potentiality of human life"[83] because Title X funds are not used to pay for abortions. Thus, one would have to accept wholesale the fungibility argument to believe that defunding Planned Parenthood would actually serve the interests in protecting pro-life taxpayers from being forced to subsidize abortions or protecting the potentiality of human life.

But critics of the fungibility principle as a justification for any policy based funding or defunding campaigns are quick to point out that *all money is fungible,* so any money given to an organization or to a citizen by the government could be said to subsidize any stigmatized or illegal activities that the organization or citizen chooses to engage in. Senator Patrick Leahy (D-VT) illustrated this point in a Senate floor debate on the Foreign Affairs Reform Act, stating:

> Does that mean that because abortion is legal in Israel, . . . we should shut off U.S. aid to Israel because other Israeli government funds are used for abortion? . . .
>
> Should we stop funding nuclear safety programs in Russia because abortion is legal there and . . . provided at government hospitals? . . . Maybe we should cut off aid to any state in the United States because abortion is legal [there].[84]

Senator Leahy's comment illustrates the slippery slope that the fungibility argument presents. And yet, any arguments that defunding Planned Parenthood would protect taxpayers or potential lives are completely dependent on the fungibility principle because Planned Parenthood is already prohibited from using government funds to pay for abortions. Thus, the No Funding provisions aimed at defunding Planned Parenthood are merely duplicative of the Hyde Amendment and analogous state statutes and, therefore, can be presumed to have been created solely for the purpose of impeding abortion rights.

PRONG 2—SUBSTANTIAL OBSTACLE

by numerous studies. *See, e.g.*, BRENDA MAJOR ET AL., AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 92 (2008), http://www.apa.org/pi/wpo/mental-health-abortion-report.pdf (reviewing numerous studies on this topic and concluding that "the most methodologically sound research indicates that among women who have a single, legal, first-trimester abortion of an unplanned pregnancy for nontherapeutic reasons, the relative risks of mental health problems are no greater than the risks among women who deliver an unplanned pregnancy").

83. Roe v. Wade, 410 U.S. 113, 162 (1973).

84. 144 CONG. REC. 6,732 (statement of Sen. Leahy).

Although Congress probably does not have a legitimate interest in provisions that bar funding to Planned Parenthood, there is no guarantee that the Supreme Court would reach that conclusion given the chance to review a federal or state No Funding provision. After all, the Supreme Court is shifting rightward.[85] Moreover, there is a genuine concern that the Court will seek to

85. *See, e.g.*, Robert Barnes, *Justice Kennedy, the Pivotal Swing Vote on the Supreme Court, Announces His Retirement*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/politics/courts_law/justice-kennedy-the-pivotal-swing-vote-on-the-supreme-court-announces-retirement/2018/06/27/a40a8c64-5932-11e7-a204-ad706461fa4f_story.html?utm_term=.c8e8c3c3ce6e ("An already right-leaning Supreme Court is poised to become the most conservative institution in the entire history of America's government." (quoting Thomas Goldstein, a Washington lawyer and the founder of SCOTUSblog.com)). In fact, with the recent addition of President Trump's Supreme Court appointee, Justice Neil Gorsuch, the Court's conservative majority has been prevailing in recent ideologically charged cases. *See, e.g.*, Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (with Chief Justice Roberts and Justices Alito, Kennedy, Gorsuch, and Thomas forming the majority), *overruling* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (holding that the First Amendment prohibits states from requiring non-union members to pay union dues that support the collective bargaining activities of the union); Trump v. Hawaii, 138 S. Ct. 2392 (2018) (same majority) (holding that, with respect to immigration policy, the President's actions are subject only to rational basis review). With respect to abortion rights, the Court's conservative majority deemed California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) a likely burden on free speech in Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (same majority). The FACT Act requires unlicensed facilities that provide family planning services, often called "crisis pregnancy centers," to: (1) notify patients that they are "not licensed as a medical facility by the State of California and ha[ve] no licensed medical provider who provides or directly supervises the provision of services," and (2) post a sign stating that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office." CAL. HEALTH & SAFETY CODE § 123472 (West 2018). These disclosures are imperative: "crisis pregnancy centers" (which are both pro-life and pro-lie) often provide misinformation intended to discourage abortions and "look just like doctor's offices with ultrasound rooms and staff in scrubs . . . [but] [u]nlike other mental-health providers, center counselors are generally not bound by professional standards or malpractice laws." Meaghan Winter, *What Some Pregnancy Centers Are Really Saying to Women with Unplanned Pregnancies*, COSMOPOLITAN (July 14, 2015), https://www.cosmopolitan.com/politics/news/a43101/pregnancy-centers-august-2015. Moreover, it is not uncommon for medical providers to be required to make certain disclosures to patients; indeed, full disclosure is the basis of informed consent. As the Court said in *Casey*: "If the information the State requires to be made available to the woman is truthful and not misleading, the requirement *may* be permissible." 505 U.S. at 882 (opinion of O'Connor, Kennedy, Souter, JJ.) (emphasis added) (upholding a Pennsylvania statute that required abortion providers to give patients "information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion," *id.* at 881). Yet, the *Becerra* Court held that "the FACT Act unduly burdens protected speech" by imposing "a government-scripted, speaker-based disclosure requirement that [was] wholly disconnected from [California's] informational interest." 138 S. Ct. at 2377. To be clear, California's informational interest was to prevent women from being tricked by religious anti-abortion centers masquerading as secular medical clinics by requiring those clinics to disclose their unlicensed status and inform women that they can access licensed healthcare providers and a range of family planning services. The FACT Act's "government-scripted, speaker-based disclosure requirement" seems to be very clearly directed at this goal. Thus, *Casey* and *Becerra* are as irreconcilable as *Harris* and *Whole Woman's Health* in the context of No Funding provisions. As Justice Breyer noted in his dissent in *Becerra*, "[i]f a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?" *Id.* at 2385 (Breyer, J., dissenting).

constrain abortion rights or even overturn *Roe* in the upcoming term.[86] Thus, the fungibility argument provides a plausible justification for recanting abortion rights. However, even if preventing the indirect subsidization of abortions is viewed as a legitimate government interest in defunding Planned Parenthood, such action would still be unduly burdensome if it placed "a *substantial* obstacle in the path of a woman seeking an abortion of a nonviable fetus."[87]

In considering the magnitude of the obstacle that defunding Planned Parenthood places in the path of women seeking abortions, it is important to note that Planned Parenthood is a keystone provider of family planning and abortion services, especially for the poor. "Despite comprising only 6% of the safety-net clinics that provided subsidized family planning services in 2015, Planned Parenthood clinics served 32% of women (nearly 2 million women) seeking contraceptive care at these centers."[88] Moreover, Planned Parenthood performs over one-third of all abortions in the United States[89] (and fifty-one percent of women seeking abortion care live below the federal poverty level).[90] But Planned Parenthood is dependent on federal grants and reimbursements, which make up thirty-seven percent of Planned Parenthood's revenues.[91] Thus, barring Planned Parenthood from receiving federal funds will directly burden both abortion and contraceptive access.

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86. Trump's newest Supreme Court appointee, Justice Brett Kavanagh, has been widely endorsed by the pro-life movement, which hopes he will be instrumental in overturning *Roe*. Ed Kilgore, *Anti-Abortion Activists Have No Doubts About Kavanaugh*, N.Y. MAG: INTELLIGENCER (July 20, 2018), http://nymag.com/daily/intelligencer/2018/07/anti-abortion-activists-are-sure-about-kavanaugh-to-scotus.html. ("[A]nti-abortion activists in Indiana hope that one of their laws, which gave a fetus nondiscrimination protections but was struck down in federal appeals court earlier this year, may be the one to challenge Roe v. Wade [sic]—if their attorney general appeals to the Supreme Court in the months ahead. But there are dozens of other cases working their way through the courts nationwide, including one involving an Iowa law banning almost all abortions after a fetal heartbeat is detected, and a Mississippi law banning abortion after 15 weeks." (citation omitted) (alteration in original)). Even if the Court does not expressly overrule *Roe*, the abortion right is likely to be undermined in many states over the upcoming terms as the Court upholds state restrictions on abortion.

87. *See Casey*, 505 U.S. at 877 (emphasis added).

88. USHA RANJI ET AL., TEN WAYS THAT THE HOUSE AMERICAN HEALTH CARE ACT COULD AFFECT WOMEN 5 (2017), http://files.kff.org/attachment/Issue-Brief-Ten-Ways-That-the-House-American-Health-Care-Act-Could-Affect-Women.

89. *Compare* Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2014*, 49 PERSP. ON SEXUAL & REPROD. HEALTH 17, 17 (2017) ("In 2014, an estimated 926,200 abortions were performed in the United States . . . ."), *with* PLANNED PARENTHOOD FED'N OF AM., 2014–2015 ANNUAL REPORT 30 (2015), https://www.plannedparenthood.org/files/2114/5089/0863/2014-2015_PPFA_Annual_Report_.pdf [hereinafter PLANNED PARENTHOOD 2014–2015 ANNUAL REPORT] (reporting that Planned Parenthood and its affiliates performed 323,999 of those abortions in 2014).

90. Foster et al., *supra* note 2, at 409.

91. *See* PLANNED PARENTHOOD FED'N OF AM., 2016–2017 ANNUAL REPORT 33 (2017), https://www.plannedparenthood.org/uploads/filer_public/d4/50/d450c016-a6a9-4455-bf7f-711067db5ff7/20171229_ar16-17_p01_lowres.pdf [hereinafter PLANNED PARENTHOOD 2016–2017 ANNUAL REPORT]. This number is down from the previous year's figure of forty-one percent. *See* PLANNED PARENTHOOD FED'N OF AM., 2015–2016 ANNUAL REPORT 27 (2016), https://www.plannedparenthood.org/uploads/filer_public/18/40/1840b04b-55d3-4c00-959d11817023ffc8/20170526_annualreport_p02_singles.pdf [hereinafter PLANNED PARENTHOOD 2015–2016 ANNUAL REPORT].

In fact, the Congressional Budget Office (CBO), which provides Congress with nonpartisan analysis of proposed legislation, estimates that defunding Planned Parenthood will negatively "affect services that help women avert pregnancies."[92] "By CBO's estimates, in the one-year period in which federal funds for Planned Parenthood would be prohibited under the legislation, the number of births in the Medicaid program would increase by several thousand" as a result of the burden on contraceptive access.[93] This report faintly acknowledges the important role that Planned Parenthood plays in preventing unintended pregnancies.

Moreover, the CBO alluded to the fact that Planned Parenthood is a keystone healthcare provider in rural communities and for low-income women, stating "[t]he people most likely to experience reduced access to [contraceptive] care would probably reside in areas without other health care clinics or medical practitioners who serve low-income populations" and even estimated that "about 15 percent of those people would lose access to care" entirely.[94]

But barring Planned Parenthood from receiving government funds will burden abortion access as well. The threat to take away Planned Parenthood's primary source of income will coerce Planned Parenthood to either stop performing abortions or else scramble to find another way to maintain eligibility for federal grants and reimbursements. Any solution that Planned Parenthood could come up with would burden abortion access, albeit to differing extents. The following sections detail Planned Parenthood's apparent options (excluding legal remedies) for responding to the enactment of a No Funding provision.

OPTION 1: STOP PERFORMING ABORTIONS

If Planned Parenthood were to simply stop providing abortion services, the organization would no longer fall within the definition of a "prohibited entity" as defined in the No Funding provisions intended to defund Planned Parenthood.[95] Thus, ceasing to perform abortions would allow Planned Parenthood to remain eligible to receive Medicaid and Title X reimbursements for its family planning services. But Planned Parenthood's choice to take this action would undoubtedly impede abortion access, *substantially* affecting abortion rights. To that point, Planned Parenthood's affiliated clinics currently provide just over one-third of all abortion services offered in the United States.[96] Furthermore, research indicates that other abortion providers would not be able

92. H.R. REP. NO. 115–52, at 59–60 (2017).

93. *Id.* at 60.

94. *Id.* at 59.

95. *See, e.g.*, American Health Care Act of 2017, H.R. 1628, 115th Cong. § 103(b)(1) (2017) (defining a "prohibited entity" as one that, among other things, provides for abortions other than those allowed by the Hyde Amendment).

96. *Compare* Jones & Jerman, *supra* note 89, at 17 ("In 2014, an estimated 926,200 abortions were performed in the United States."), *with* PLANNED PARENTHOOD 2014–2015 ANNUAL REPORT, *supra* note 89, at 30 (2015) (reporting that Planned Parenthood and its affiliates performed 323,999 abortions in 2014).

to meet the demand for abortion services if Planned Parenthood stopped providing abortion care.[97]

Whole Woman's Health provides a great reference point for analyzing whether the provision that threatens to defund Planned Parenthood would be unduly burdensome in the event that Planned Parenthood decides to stop performing abortions in order to remain eligible for Medicaid and Title X reimbursements for the provision of family planning services. In that case, the record indicated that the number of licensed abortion facilities declined from "more than 40" to "almost half [that amount] leading up to and in the wake of enforcement of the admitting-privileges requirement" and that "[i]f the surgical-center provision were allowed to take effect, the number of abortion facilities . . . would be reduced further, so that 'only seven facilities and a potential eighth [would have] exist[ed] in Texas.'"[98]

If Planned Parenthood were to respond to the No Funding provision by no longer providing abortion services, the burdens on abortion access would not be consistent across the country. Abortion access would be more severely burdened in states that have a greater number of Planned Parenthood clinics or where a greater proportion of the state's abortion clinics are Planned Parenthood affiliates.

For example, about seventy-six percent of California's abortion service providers are Planned Parenthood clinics.[99] Thus, if Planned Parenthood responds to the defunding threat by ceasing to provide abortions, California will experience an abortion clinic shut down rate of seventy-six percent. That shut-down rate would far exceed the abortion clinic shut-down rate caused by Texas's admitting-privileges requirement. Thus, the No Funding provision that defunds Planned Parenthood would unduly burden abortion access in California if Planned Parenthood responds to it by ceasing to perform abortions.

In contrast, only twenty-five percent of Florida's abortion clinics are Planned Parenthood clinics (22 out of 88).[100] While the closure of one-quarter of Florida's abortion clinics would arguably be *substantial*, it is unclear whether this would be deemed to impose an undue burden on Floridians because the Court, in *Whole Woman's Health*, did not specify what constitutes an unacceptable percentage of clinic closure. We only know that a law that causes fifty percent or more abortion clinics to close is unduly burdensome.

Moreover, the Court in *Whole Women's Health* acknowledged and

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97. Sara Rosenbaum, *Planned Parenthood, Community Health Centers, and Women's Health: Getting the Facts Right*, HEALTH AFF. BLOG (Sept. 2, 2015), https://www.healthaffairs.org/do/10.1377/hblog20150902.050150/full.

98. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2301 (2016) (quoting the findings of the lower court).

99. *See infra* text accompanying notes 104–105.

100. *Compare Health Centers in Florida*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/health-center/fl (last visited Nov. 21, 2018) (showing that there are twenty-two Planned Parenthood clinics in Florida), *with* Jones & Jerman, *supra* note 89, at 23 (showing that there are eighty-eight abortion clinics in Florida).

included in their analysis the fact that the Texas law would have denied women abortion access because the remaining abortion providers would have been incapable of meeting the demand for abortion services.[101] Here, too, the fact that remaining abortion providers will not be able to meet the demand for abortion services if Planned Parenthood stops performing abortions is significant.[102]

OPTION 2: SEGREGATE ABORTION CARE FROM ITS OTHER SERVICES

Instead of choosing not to provide *any* abortion care, Planned Parenthood could segregate its family planning and abortion services. Under this scheme, the clinics that provide only family planning services would not be "prohibited entities" as defined in the No Funding provision that would defund Planned Parenthood.[103] Thus, those clinics would remain eligible to receive Medicaid and Title X reimbursements for their family planning services. Only the clinics that continue to provide abortion care would be exempted from receiving Medicaid and Title X reimbursements.

Because this scenario would allow Planned Parenthood to provide *some* abortion services, the provision that defunds Planned Parenthood would burden abortion access to a lesser extent if Planned Parenthood segregated abortion care from its other services than it would if Planned Parenthood stopped providing abortions altogether. However, abortion access would still be burdened because the separation would necessarily result in fewer clinics offering abortion care. Further, the segregation would also impact *contraceptive* access due to the inability to offer family planning services at the clinics that perform abortions. In turn, the burden on contraceptive access would likely trigger a greater demand for abortion services, which abortion providers might not be able to meet given the already burdened structure.

The burden imposed by a No Funding provision that defunds Planned Parenthood under a segregation scheme would also include increased driving distances for those seeking both abortion and contraceptive services and a disruption in the continuity of care. For example, consider the following hypothetical: A patient seeking abortion care could call her local Planned Parenthood clinic, where she had been receiving cancer screening and contraceptive services for years, only to find out that the clinic no longer offers abortion care due to the segregation of abortion and family planning services.

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101. *See Whole Woman's Health*, 136 S. Ct. at 2302.

102. But how would the analysis in *Whole Woman's Health* apply to a state that has so few abortion clinics that causing just one to shut down would amount to a fifty or one hundred percent shut down rate? There are currently six states that rely on a sole abortion provider: Kentucky, Mississippi, South Dakota, North Dakota, West Virginia, and Wyoming. Linley Sanders, *Inside the States with One Abortion Clinic: Kentucky Fights for Its Last Provider in 2018*, NEWSWEEK (Jan. 8, 2018, 8:00 AM), https://www.newsweek.com/state-without-abortion-clinic-kentucky-772692.

103. *See* American Health Care Act of 2017, H.R. 1628, 115th Cong. § 103 (2017) (defining a "prohibited entity" as one that, among other things, provides for abortions other than those allowed by the Hyde Amendment).

She is informed that the nearest Planned Parenthood clinic offering abortions is twenty-five miles away in another town.

The burden of not being able to receive abortion care in her hometown may be enough to prevent the patient from getting an abortion. After all, she may not have reliable transportation to get to an appointment in another town or may not be able to take the extra time off work needed to keep an appointment at a faraway clinic (considering the increased travel time). She might also feel less comfortable seeking abortion care from providers who are strangers to her than she would if she was able to get that same care in the clinic she has been visiting for years. And, even *if* the patient is successful in procuring abortion care from the faraway clinic, the provider who performed the abortion would not be able to prescribe contraceptives to prevent her from experiencing another unintended pregnancy. Instead, the patient would have to make yet another appointment with her local clinic.

Women in states that have a greater number of Planned Parenthood clinics or where a greater proportion of the state's abortion clinics were Planned Parenthood affiliates would be disparately affected by a provision that defunds Planned Parenthood under this scheme as well. On balance, if Planned Parenthood were to segregate its family planning and abortion services in California, a state that relies heavily on Planned Parenthood's services, the state would experience an extreme reduction in the number of abortion service providers. There are one hundred and fifty-two abortion clinics in the State of California.[104] One hundred and fifteen of these are Planned Parenthood clinics.[105] In September 2017 a confidential informant told me that California's Planned Parenthood affiliates considered the segregation option to be the best response to the proposed defunding provisions and had preliminarily anticipated that they would only be able to maintain thirty-three abortion-providing clinics if Planned Parenthood has to segregate its abortion and family planning services in California. Thus, the number of abortion service providers in the state of California was projected to decrease by fifty-six percent, from one-hundred and fifty-two abortion service providers to only seventy if Planned Parenthood is defunded, as of that time.

The Court in *Whole Woman's Health* found that Texas's admitting-privileges requirement placed an undue burden on abortion access because it caused the closure of "almost half" of Texas's abortion clinics.[106] Thus, where the 56% decrease in the number of abortion providers in California is greater than the abortion clinic shut-down rate caused by Texas's admitting-privileges requirement, the provision that defunds Planned Parenthood would unduly burden abortion access in California if Planned Parenthood has to segregate its

104. Jones & Jerman, *supra* note 89, at 23.

105. *Planned Parenthood Affiliates of California Applauds Court's Decision on Birth Control Mandate*, PLANNED PARENTHOOD (Dec. 21, 2017), http://www.ppactionca.org/news/ppac-applauds-court-decision-on-birth-control-mandate-2.html.

106. *Whole Woman's Health*, 136 S. Ct. at 2301.

abortion and family planning services in response to the No Funding provision.

Additionally, my confidential informant reported that, under the segregation scheme, Planned Parenthood anticipates that most of its facilities that will provide abortion services in the state of California will be concentrated in urban areas, meaning that abortion seekers living in rural areas will likely have to travel significant distances to obtain abortion care. For example, the source disclosed that the organization anticipates that segregating its abortion and family planning services will leave the entire Central Valley without a single abortion clinic.

To draw parallels from *Whole Woman's Health*, the Court noted that if the Texas regulations were enacted, abortion facilities would "remain only in Houston, Austin, San Antonio, and the Dallas/Fort Worth metropolitan region" and that almost five million women would have lived more than fifty miles from an abortion provider (with many of these women living much farther away).[107] And, while the Court asserted that "[i]ncreased driving distances do not always constitute an 'undue burden,'" they are "one additional burden, which, . . . lead us to conclude that the record adequately supports the District Court's 'undue burden' conclusion."[108]

OPTION 3: TRY TO MAKE DO WITHOUT GOVERNMENT FUNDING

Planned Parenthood could always choose to forego government funds. However, the loss of thirty-seven percent of its budget would be detrimental to Planned Parenthood, presumably resulting in a thirty-seven percent decrease in the quantity of services Planned Parenthood is able to provide.[109] But *which*

107. *Id.* (quoting lower court's findings).

108. *Id.* at 2313.

109. I concede that, there may not necessarily be a 1:1 correspondence between amount of funds cut and the amount of services provided. Indeed, Planned Parenthood may improve efficiency in the face of defunding, and many non-profits have received an influx in private donations since the November 2016 election. *See, e.g.*, Rich Bellis, *LGBTQ Nonprofits Got a Trump Bump Last Year*, FAST CO. (Dec. 20, 2017), https://www.fastcompany.com/40510682/lgbtq-nonprofits-got-a-trump-bump-last-year ("[T]he combined revenues of 39 major U.S. LGBTQ nonprofits jumped 11% in fiscal 2016 . . . ."); Mike Scutari, *It's Official: Donald Trump Is the Best Thing That's Ever Happened to Nonprofit Journalism*, INSIDE PHILANTHROPY (Mar. 30, 2017), https://www.insidephilanthropy.com/home/2017/3/30/trump-bump-an-vocal-opponents-foundations-give-nonprofit-journalism-a-boost ("[T]he Center for Investigative Reporting, the Center for Public Integrity, and ProPublica received [huge donations] thanks to $12 million in new grants from First Look Media and Democracy Fund. . . . [which] came at a time when some wealthy donors felt deeply alarmed by a Republican president who had a contentious relationship with the truth."); Alexandra Spychalsky, *7 Silver Linings for Non-Profits Since Donald Trump Was Elected*, BUSTLE (Feb. 6, 2017), https://www.bustle.com/p/7-silver-linings-for-non-profits-since-donald-trump-was-elected-35896 (reporting, *inter alia*, that the ACLU received $24 million in donations—six times their annual budget—within two days of filing a lawsuit to halt Trump's executive order restricting immigration from seven-majority Muslim nations and that *Planned Parenthood received 80,000 donations "in just the first week after" the election* (emphasis added)); PLANNED PARENTHOOD 2016–2017 ANNUAL REPORT, *supra* note 91, at 2 ("Since November 2016, we have grown to more than 10 million supporters. More than 700,000 new donors have stepped up to support Planned Parenthood."). Thus, it's entirely possible that a financial attack on Planned Parenthood would be met with an even stronger show of support from private donors.

services would be reduced as a result of Planned Parenthood's decision to forego funds? Because Planned Parenthood cannot receive funding for abortions, but only for family planning and other medical services, the decision to forego government funding would seem to mostly impact its provision of services that are unrelated to abortions.

However, the loss of thirty-seven percent of Planned Parenthood's funding would ultimately impede *abortion* access because the substantial loss of income would likely prompt many clinic closures, reducing the number of abortion service providers. Additionally, the reduction in family planning services would also likely result in an increase in unintended pregnancies, which would provoke a greater demand for abortion services and impact Planned Parenthood's ability to meet the increased demand. The inverse relationship between contraceptive access and abortion rates is not just conjectural. Abortion rates dropped 13% between 2008 and 2011.[110] One study found that the reason for the drop in abortion incidence was a decline in the number of unintended pregnancies (from fifty-one percent to forty-five percent).[111] It further indicated that a rise in contraceptive use was partially responsible for the decline in unintended pregnancies during that time.[112]

Another study examined the adverse effects of "the implementation of the 2013 exclusion of Planned Parenthood affiliates from a Medicaid waiver program in Texas," and concluded that it "was associated with adverse changes in the rates of provision and continuation of contraception and with increases in the rate of childbirth covered by Medicaid."[113] Unfortunately, the methodologies used in that study made it impossible to establish a link between the adverse changes in the rates of provision and continuation of contraception and the abortion rate. The information used in the study was derived from Medicaid billing records. Because Texas prohibits state funds from being used to pay for abortions, Medicaid billing records would not have revealed the abortion rate amongst Medicaid patients. However, the aforementioned study still supports the suggestion that the increase in unplanned pregnancies in Texas was likely accompanied by an increase in demand for abortions.

Planned Parenthood has no good option in the face of defunding. Abortion access will be impeded no matter how Planned Parenthood responds to the threat *and the impediment will be substantial* because Planned Parenthood's clinics perform roughly one-third of all abortions performed in the United States. Thus, the No Funding provision that would exclude Planned Parenthood from receiving Title X funding would unduly burden abortion access, albeit to varying degrees in different parts of the country.

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110. Jones & Jerman, *supra* note 89, at 23.

111. Lawrence B. Finer et al., *Changes in Use of Long-Acting Contraceptive Methods in the United States, 2007–2009*, 98 FERTILITY & STERILITY 893, 893–97 (2012).

112. *Id.* at 895.

113. Amanda J. Stevenson et al., *Effect of Removal of Planned Parenthood from the Texas Women's Health Program*, 374 NEW ENG. J. MED. 853, 860 (2016).

2. *Application of the "Undue Burden" Standard to the Provisions that Prohibit the Subsidization of Abortion Care*

If enacted, the tax-related No Funding provisions contained within three of the four above-mentioned healthcare reform bills would ban abortion coverage from every state's Marketplace as well as the federal Marketplace and prohibit the use of federal tax credits to offset the costs of maintaining any outside-the-Marketplace plans that offer abortion coverage beyond the limitations of the Hyde Amendment.[114] The provisions would also limit employer coverage of abortion by disqualifying small employers from receiving tax credits if their plans cover abortion beyond Hyde limitations.[115] Under this scheme, there would be absolutely no government subsidization of *any* insurance plan that offered abortion coverage as a standard feature. Instead, women across the nation would have to purchase unsubsidized abortion riders to maintain abortion coverage and, again, abortion riders may not be readily available.

Even *if* abortion riders are made available, they are an impractical option. Purchasing an abortion rider would, essentially, be pre-paying for an abortion that might never be needed:[116]

> The financial viability of an insurance product counts on the fact that a large pool of consumers will pay into the policy, spreading the risk, but that not everyone will use the services. Therefore, a separate policy offered in the individual market that covers one specific . . . procedure would typically be purchased by those [who] anticipate needing that coverage. As a result, the insurers would likely charge very high premiums for these supplemental policies in order to cover the costs associated with the lack of a diverse risk pool.[117]

Further, women who purchase abortion riders would still end up paying most or all of their abortion costs due to deductibles, which, on average, exceed the costs of a typical abortion:[118]

> The cost of an abortion depends on many factors including gestation, anesthesia, procedure, and type of provider (clinic versus hospital or office-based). A clinic-based abortion at 10 weeks' gestation is estimated to cost between $400 and $550, whereas an abortion at 20 to 21 weeks' gestation is estimated to cost $1,100

114. *Compare* Graham-Cassidy-Heller-Johnson Amendment, H.R. 1628, 115th Cong. (2017), *and* Better Care Reconciliation Act of 2017, S. 270, 115th Cong. (2017), *and* Obamacare Repeal Reconciliation Act of 2017, 115th Cong. (2017), *with* Health Care Freedom Act of 2017, 115th Cong. (2017).

115. RANJI ET AL., *supra* note 88, at 9.

116. Indeed, only one in four women has an abortion. *See* Laurie Sobel et al., *The Myth of the Abortion Insurance Rider*, HEALTH AFF. BLOG (July 12, 2018), https://www.healthaffairs.org/do/10.1377/hblog20180703.31506/full. Thus, it would make more sense for reproductive-aged women to set aside emergency funds than to purchase abortion riders. This would allow women who experience unintended and unwelcome pregnancies to cash pay for abortion procedures and, in the event that no unintended pregnancy ever arises, to keep those funds (which otherwise would have been paid to an insurance provider and never seen again). I realize that healthy individuals who oppose the ACA's individual mandate could make the same argument about insurance generally. However, an unanticipated trip to the emergency room could result in tens of thousands of dollars in medical bills whereas the cost of an abortion is much more manageable.

117. Rosenzweig et al., *supra* note 58, at 3.

118. *See* Sobel et al., *supra* note 116.

to $1,650 or more.[119]

While abortion costs do not justify maintaining policies solely for abortion coverage, these costs are all too often daunting for low-income women trying to gather the funds needed to pay for abortions out-of-pocket. Proponents of the No Funding provisions are banking on the real possibility that many women will not be able to secure the necessary funds and will have to forego abortion care as a result. It is worth repeating that lack of funding is the number one barrier to abortion access, forcing one in four low-income women who would elect to have an abortion but for financial barriers to carry an unwanted pregnancy to term.[120] While pro-choice advocates contend that the tax-related No Funding provisions were contrived solely to undermine abortion rights, proponents of these provisions assert other government interests as justification for the enactment of the provisions.

PRONG 1—LEGITIMATE INTEREST

Congress' interests in enacting provisions that culminate in the exclusion of plans that cover abortions from all marketplaces are the same as those previously discussed with respect to the provision that defunds Planned Parenthood namely, (1) promoting women's health, which is ostensibly impaired by the abortion experience; (2) protecting pro-life taxpayers from being forced to subsidize abortions; and (3) protecting the potentiality of human life. Again, the legitimacy of these interests as justifications for the enactment of the No Funding provisions that exclude plans that cover abortions from the subsidized market is wholly dependent on the validity of the fungibility argument.

But the fungibility principle begins to collapse on itself with respect to a system under which individuals who purchase subsidized insurance plans are also allowed to purchase optional "unsubsidized" abortion "riders" because *all* money is fungible. Subsidizing the costs of maintaining health insurance "frees up" money that individuals can then use to purchase abortion riders. Applying the fungibility principle to its fullest extent, governments would need to either stop giving *any* money to *anyone* (which they cannot do as a practical matter) or else outlaw abortion (which they cannot do constitutionally) to prevent the subsidization of abortions. Thus, the fungibility principle just cannot be appropriately applied in this context.

Additionally, the method of preventing governmental subsidization of Planned Parenthood's operations by preventing Medicaid and Title X funds from going to Planned Parenthood by amending the Internal Revenue Service's definition of "Qualified provider" so that Planned Parenthood no longer fits within that definition does not wholly prevent governmental subsidization of

119. *Id.*

120. *Restricting Medicaid Funding for Abortion Forces One in Four Poor Women to Carry Unwanted Pregnancies to Term*, supra note 21.

Planned Parenthood's operations. For example, the No Funding provisions do not revoke Planned Parenthood's status as a 501(c)(3) charitable organization.[121] "Planned Parenthood . . . is a tax-exempt corporation under Internal Revenue Code section 501(c)(3) and . . . [c]ontributions are tax deductible to the fullest extent available under the law. Planned Parenthood affiliates have same tax status."[122] Therefore, even if the No Funding provisions are passed, taxpayers will still receive charitable deductions for donations made to Planned Parenthood, and Planned Parenthood can use those donations to provide abortions. Thus, by foregoing the tax revenue that would otherwise be collected on these transfers, the federal government can be viewed as subsidizing Planned Parenthood's operations in the same way that making Medicaid and Title X distributions to Planned Parenthood theoretically does.

Planned Parenthood receives thirty-six percent of its revenue from private donors via charitable gifts and bequests.[123] Thus, the federal government foregoes substantial revenue by allowing charitable deductions for gifts to Planned Parenthood. This is a major loophole in the scheme to prevent governmental subsidization of Planned Parenthood. In fact, charitable deductions account for "the largest tax expenditure program in the federal transfer tax regime."[124] If the purpose of the No Funding provisions is to protect taxpayers from having to subsidize abortions, it seems odd that Planned Parenthood's status as a "Qualified provider" is being targeted rather than its status as a non-profit organization.[125]

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121. Section 501(c)(3) is the portion of the U.S. Internal Revenue Code that allows for federal tax exemption of nonprofit organizations, specifically those that are considered public charities, private foundations or private operating foundations. Transfers to 501(c)(3) corporations are also exempted from estate taxes and gift taxes.

122. PLANNED PARENTHOOD 2016–2017 ANNUAL REPORT, *supra* note 91, at 34.

123. *Id.* at 33.

124. BRANT HELLWIG & ROBERT T. DANFORTH, ESTATE AND GIFT TAXATION 313 (2d ed. 2013).

125. *Exemption Requirements—501(c)(3) Organizations*, IRS, https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-section-501c3-organizations (last visited Nov. 21, 2018) ("To be tax-exempt under section 501(c)(3) of the Internal Revenue Code, an organization must be organized and operated exclusively for exempt purposes set forth in section 501(c)(3), and none of its earnings may inure to any private shareholder or individual. In addition, it may not be an *action organization*, *i.e.*, it may not attempt to influence legislation as a substantial part of its activities and it may not participate in any campaign activity for or against political candidates."). Some argue that Planned Parenthood's lobbying, campaigning and other political activities should preclude it from enjoying the benefits of tax-exempt status. To be clear, Planned Parenthood is not a single entity. Planned Parenthood Federation of America, Inc. (Tax ID # 13-1644147) (PPFA), the 501(c)(3) organization, provides educational and health care services relating to family planning, the prevention of sexually transmitted diseases, cancer screening, and more. Contributions to *that* entity are tax-exempt. PLANNED PARENTHOOD 2016–2017 ANNUAL REPORT, *supra* note 91, at 34. In contrast, Planned Parenthood's politically active arm is a 501(c)(4) organization called Planned Parenthood Action Fund (PPAF); contributions to that entity are *not* tax-exempt. *Id.* This separation allows Planned Parenthood to engage in political activities while also retaining tax-exempt status for its non-political arm; however, some claim that Planned Parenthood's tax returns indicate that the two Planned Parenthood entities commingle employees and funds. *See, e.g.*, Memorandum from Chairman Jason Chaffetz to Republican Members of the House Committee on Oversight and Government Reform 4–5 (Sept. 29, 2015), https://oversight.house.gov/wp-content/uploads/2015/09/Committee-Findings-Planned-Parenthood-Investigation.pdf ("Planned Parenthood has given the Planned Parenthood Action Fund $21,576,629 in grants. . . . [and] tax returns also indicate that both Planned Parenthood and its affiliates share employees, facilities, equipment, mailing lists, and other assets with

PRONG 2—SUBSTANTIAL OBSTACLE

Even if a court finds that Congress does have a legitimate interest in enacting the No Funding provisions that mandate the exclusion of plans that cover abortions from all subsidized markets and deny tax credits to consumers who purchase such plans, those provisions may still unduly burden abortion access if they *substantially* burden abortion access.[126] Although *Harris* stands for the proposition that funding restrictions do not *substantially* impede abortion access because they do not impede abortion access, the tax-related No Funding provisions go beyond simply denying government funds for abortions. They actually *would* impede abortion access by coercing *private* insurers into dropping abortion coverage as a standard feature from their plans in order to avoid exclusion from the subsidized insurance market, and coercing taxpayers—both individuals and small group employers—into foregoing abortion coverage or unwittingly neglecting to purchase separate abortion coverage.[127]

With respect to the coercion of *private* insurers, it is important to recognize the massive sales platform that the subsidized insurance market provides to insurers. Millions of Americans purchase health plans through the federal Marketplace each year.[128] No insurer would want to be disqualified from the prospect of reaching such a large customer base. Thus, by mandating the exclusion of *private* plans that offer abortion coverage as a standard plan feature from the subsidized markets, the No Funding provisions compel *private* insurers to eliminate abortion coverage from their plans. Of course, the natural consequence of this would be a decline in the *availability* of abortion coverage, which would make abortion coverage harder to find—not just for those purchasing insurance through subsidized marketplaces, but for everyone.

With respect to the coercion of taxpayers, mandating the exclusion of plans that offer abortion coverage as a standard feature from subsidized markets also

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[the lobbying arm]." (emphasis omitted) (footnote omitted)). If the comingling allegations are true, then an argument could be made that PPFA serves as a conduit for PPAF and should be stripped of its 501(c)(3) status according to the "conduit doctrine." The conduit doctrine argument is similar to the fungibility argument but it seems, at least to me, factually provable and, therefore, better grounded than the fungibility argument. Moreover, revoking Planned Parenthood's status as a non-profit organization would actually make it ineligible to receive Title X funds in the first place. *See* 42 C.F.R. § 59.3 (2017). Thus, revoking PPFA's 501(c)(3) status would more comprehensively prevent the subsidization of abortions. However, the question as to whether PPFA is properly classified as a 501(c)(3) is outside the scope of this Note.

126. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

127. It is "rare" for individuals and small group employers to request abortion riders and "it is unclear how customers who purchase group insurance . . . learn about the abortion coverage option." Peter Slevin, *Insurers Report on Use of Abortion Riders*, WASH. POST (Mar. 14, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/13/AR2010031302139.html.

128. Eight million Americans purchased health plans through the Marketplace in 2014, 11.7 million in 2015, and 12.7 million in 2016. *New Analysis Suggests ACA Marketplace Enrollment Could Grow Modestly Over Next Few Years, up to 16.3 Million Sign-Ups, 14.7 Million Enrollees After Attrition*, HENRY J. KAISER FAM. FOUND. (Mar. 4, 2016), https://www.kff.org/health-reform/press-release/new-analysis-suggests-aca-marketplace-enrollment-could-grow-modestly-over-next-few-years-up-to-16-3-million-sign-ups-14-7-million-enrollees-after-attrition.

forces taxpayers into foregoing abortion coverage because many taxpayers can only afford to purchase health plans through the subsidized market *and are required* to maintain insurance in compliance with the individual mandate as long as the mandate remains in effect.[129]

In concluding on the undue burden analysis, I resolve not only that Congress has not proffered a legitimate interest in enacting the No Funding provisions, but that the provisions would place a substantial obstacle in the paths of women seeking abortions. The pro-life movement cannot claim that the No Funding provisions only incidentally burden abortion access; they are TRAP laws because the purpose and the effect of No Funding provisions is to shut down the nation's largest abortion provider and to make abortion coverage essentially nonexistent. *Harris* and *Whole Woman's Health* become irreconcilable when the fungibility principle is applied in the context of abortion and the undue burden standard must be applied.

B. EVEN IF THE NO FUNDING PROVISIONS ARE NOT UNDULY BURDENSOME, THEY VIOLATE THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

Even if the undue burden standard is not applied in this context, the No Funding provisions violate the unconstitutional conditions doctrine. This doctrine holds that even where "a person has no 'right' to a valuable governmental benefit and even though the government may deny the benefit for any number of reasons, there are some reasons upon which the government may not rely. [A government] may not deny a benefit to a person on a basis that infringes constitutionally protected interests" because such a denial would "penalize[] and inhibit[]" the exercise of the constitutional right.[130]

For example, a non-tenured public professor who worked for a state college "under a series of one-year contracts" challenged a decision not to renew his employment contract, alleging that the decision was inappropriately based on his criticism of the regents and the college president and was, therefore, a violation of his right to free speech.[131] The Supreme Court held that a public employee's "lack of a contractual or tenure right to re-employment, taken alone, [did not] defeat[] his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments."[132] Similarly, the fact that women are not entitled to government funds that may be needed to procure abortion services, taken alone, cannot defeat a claim that the denial of healthcare subsidies is inappropriately based on maintenance of insurance coverage for services that women have a constitutional right to access and, therefore, violates women's liberty interest.

Additionally, service providers like Planned Parenthood are not

129. Although the individual shared responsibility payment, 26 U.S.C. § 5000A (2012), is a thing of the past, the individual mandate, technically, is still in effect.

130. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

131. *Id.* at 594.

132. *Id.* at 596.

circumscribed from invoking the unconstitutional conditions doctrine.[133] "[T]he Supreme Court has expressly recognized constitutional protections for entities seeking federal contracts or funding so that they may provide various services to others."[134] Thus, Planned Parenthood could invoke the unconstitutional conditions doctrine as an avenue of invalidating provisions that condition government funding for its family planning services on its abandonment of the provision of abortion services because such provisions penalize and inhibit the provision of services that women have a constitutional right to access.

In fact, the United States Court of Appeals for the Sixth Circuit recently reviewed an Ohio statute that was analogous to the AHCA's No Funding provisions and held that the statute violated the unconstitutional conditions doctrine.[135] The Ohio statute required the Ohio Department of Health (ODH) to ensure that all funds received through six non-abortion-related federal health programs were not used to contract with any entity that performs or promotes nontherapeutic abortions or was affiliated of with such an entity.[136] Of course, Planned Parenthood stepped in to challenge this statute before it went into effect, filing an action for declaratory and injunctive relief under 42 U.S.C. § 1983.[137]

Planned Parenthood alleged that the Ohio statute violated its First Amendment rights by denying it state and federal funds "because of—and in retaliation for—their constitutionally protected advocacy for abortion rights and affiliation with other organizations that also advocate for abortion rights and/or

133. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 118 (1976) ("[I]t generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision . . . ."); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 62 (1976) (physicians who supervised abortions at Planned Parenthood had standing to challenge constitutionality of Missouri statute); Planned Parenthood of Greater Ohio v. Himes, 888 F.3d 224, 230–31 (6th Cir. 2018) ("[A]bortion providers have standing to enforce their patients' abortion rights."), v*acated by and reh'g*, *en banc*, *granted by* 892 F.3d 1283 (6th Cir. 2018); Planned Parenthood Ass'n of Utah v. Herbert, 828 F.3d 1245, 1260 (10th Cir. 2016) ("'[B]ecause abortion is a medical procedure . . . the full vindication of the woman's fundamental right necessarily requires that her' medical provider be allowed the right to 'make his best medical judgment,' including 'implementing [her decision] should she choose to have an abortion.'") (quoting City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 427 (1983), *overruled in part on other grounds by Casey*, 505 U.S. at 870); Planned Parenthood of Wis. v. Doyle, 162 F.3d 463, 465 (7th Cir. 1998) ("[S]tanding of the physician plaintiffs, and of Planned Parenthood as the owner of abortion clinics in Wisconsin, to maintain this suit is not open to question."); Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati, 822 F.2d 1390, 1396 (6th Cir. 1987) (holding that Planned Parenthood and its Medical Director had standing to assert third-party rights of women as well as their own rights).

134. Planned Parenthood of Cent. N.C. v. Cansler, 877 F. Supp. 2d 310, 321 (M.D.N.C. 2012); *see also* O'Hare Truck Serv. v. City of Northlake, 518 U.S. 713, 725–26 (1996) (recognizing First Amendment protections for a private towing service seeking to maintain government contracts to provide towing services to the community); Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 686 (1996) (recognizing First Amendment protections for an independent contractor who provided trash hauling services and was seeking to maintain his government contracts to continue providing those services); Rust v. Sullivan, 500 U.S. 173, 177 (1991) (addressing First Amendment challenges by a group of plaintiffs that included providers of family planning services seeking to continue providing such services).

135. *Himes*, 888 F.3d at 248.

136. OHIO REV. CODE ANN. § 3701.034 (LexisNexis 2016).

137. *Himes,* 888 F.3d at 227.

provide abortion services."[138] Planned Parenthood also alleged that the statute violated the Due Process Clause by denying state and federal funds to women because of—and in retaliation for—their own constitutionally protected right to choose to have abortion.[139] The court seemed to agree, stating that the Ohio statute was "unnecessary to accomplish Ohio's choices to favor childbirth and refrain from subsidizing abortions,"[140] and that "if the government cannot directly prohibit [Planned Parenthood] from providing and advocating for abortion on their own time and dime, it may not do so by excluding them from government programs for which they otherwise qualify and which have nothing to do with the government's choice to disfavor abortion."[141]

While this decision supports the notion that the AHCA's No Funding provisions would similarly violate the unconstitutional conditions doctrine, the Sixth Circuit subsequently granted a rehearing *en banc*, which effectively vacated the decision and stayed the mandate pending appeal.[142] Moreover, we do not know how the increasingly right-leaning Supreme Court would decide on the issue. Thus, the saga continues.

CONCLUSION

There will likely be continued efforts to restrict abortion coverage. If enacted, the proposed No Funding provisions would threaten women's social and economic progress comprehensively assaulting reproductive freedom; after all, they would impede access to both *contraceptives* and abortions. The No Funding provisions would impede *contraceptive* access by defunding Planned Parenthood, a major provider of family planning services and often *the only* provider of family planning services available to low-income women in rural areas. The obvious result will be an increase in unintended pregnancies and, consequently, demand for abortion services. Of course, this will only compound the abortion access problems that the No Funding provisions will instigate.

With respect to the impediment of abortion access, the attack comes in two forms. First, the No Funding provisions would force clinic closures by defunding the nation's preeminent abortion provider. And, second, they would prevent all women, not just poor women receiving insurance subsidies, from securing abortion coverage by coercing *private* insurers to eliminate abortion coverage as a standard feature of their insurance plans. While proponents of the No Funding provisions assert that women can still purchase optional unsubsidized abortion coverage, the reality is that abortion "riders" are an impractical option and aren't likely to be available anyway.

138. *Id.*

139. *Id.*

140. *Id.* at 233.

141. *Id.* at 239.

142. Planned Parenthood of Greater Ohio v. Himes, 892 F.3d 1283 (6th Cir. 2018). Under Sixth Circuit Rule 35(b), "[a] decision to grant rehearing en banc vacates the previous opinion and judgment of the court, stays the mandate, and restores the case on the docket as a pending appeal." 6TH CIR. R. 35(b).

The undue burden standard must be applied to impose *some* limit on the extent of funding restrictions. After all, the freedom to choose has little meaning when women cannot obtain abortion care due to abortion clinic closures, attacks on entities that help low-income individuals pay for abortions (given the lack of government funding for abortions), and a lack of available insurance coverage of abortion care. The No Funding provisions do not leave much room for choice, only a lack of options. In the alternative, the unconstitutional conditions doctrine, which safeguards individuals and organizations from governmental attempts to penalize and obstruct the exercise of constitutional rights, could be applied to protect reproductive rights in any review of the No Funding provisions.

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