

Winter 2013

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Recommended Citation

Christine Ramelb, *Public Health Care Funding: The Battle Over Planned Parenthood*, 47 Val. U. L. Rev. 100 (2013).

Available at: <https://scholar.valpo.edu/vulr/vol47/iss2/24>

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Notes

PUBLIC HEALTH CARE FUNDING: THE BATTLE OVER PLANNED PARENTHOOD

I. INTRODUCTION

Imagine you are a woman living in present day America during these stormy, volatile times of economic uncertainty. You received your high school diploma but have not been able to pursue further education.¹ You might have considered going to college, but you became pregnant before you finished high school.² Uncertain of your options, you decided to keep the baby, and nine months later you gave birth. The costs of raising a child made going to college an impractical choice, so you decided to enter the workforce instead.³

The closest health care center of any kind is the local Planned Parenthood clinic. You discovered this clinic after you started working at your first job. Even though you worked full-time, the only medical benefits and services you could access were those available through your Medicaid benefits.⁴ You married your high school sweetheart, and, although you started to receive health insurance through your husband's employer, you continued to seek care from the clinic. Planned Parenthood remains the only place you receive any medical care.

¹ In October 2011, roughly thirty-two percent of high school graduates did not attend college. Press Release, Bureau of Labor Statistics, Coll. Enrollment & Work Activity of 2011 High Sch. Graduates (Apr. 19, 2012), *available at* <http://www.bls.gov/news.release/hsgsec.nr0.htm>.

² Teenage pregnancy rates reached a high in 1990 of 116.9 pregnancies per 1000 women between the ages of fifteen and nineteen. GUTTMACHER INST., U.S. TEENAGE PREGNANCIES, BIRTHS AND ABORTIONS: NATIONAL AND STATE TRENDS AND TRENDS BY RACE AND ETHNICITY 2, 6 (2010), <http://www.guttmacher.org/pubs/USTPtrends.pdf>. Teenage pregnancy rates have generally been trending downwards, reaching a low of 69.5 in 2005. *Id.*

³ The total average cost of college—which includes tuition and fees, room and board, books and supplies, transportation, and a small amount for miscellaneous expenses—for 2010–2011 was \$36,993 for a four-year private college; \$16,140 for in-state students attending a four-year public college; and \$28,130 for out-of-state students attending a four-year public college. COLL. BD. ADVOCACY AND POLICY CTR., TRENDS IN COLLEGE PRICING 2011 3 (2011), http://advocacy.collegeboard.org/sites/default/files/2011_College_Pricing_11b-3631_Final_Web.pdf.

⁴ See generally 81 C.J.S. *Social Security and Public Welfare* § 247 (2004) (providing a general background on the Medicaid program).

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Sadly, with the economic downturn, your husband loses his job.⁵ Your husband cannot secure another job so you take on a second job. Everything seems to be improving until one day, while at the clinic, you learn that it will be shutting down. The state is also struggling with its budget and recently enacted a state law that mandates all public funding to the clinic be withheld.⁶ The clinic operates on public and private funds, but the private donations it receives are no longer sufficient to cover its expenses. The clinic cannot properly operate and makes plans to either move its staff or lay them off. This news is probably the most shocking and disappointing development you have yet to experience.

Unfortunately, stories like this have become commonplace as millions of people living in the United States either do not have health insurance or cannot obtain affordable medical care.⁷ This Note reviews the history of how our great nation has tried to put social policies and programs in place, attempting to avoid such a predicament.⁸ Next, this

⁵ The average unemployment rate for 2011 was 8.9% in the United States. Press Release, Bureau of Labor Statistics, Reg'l & State Unemployment, 2011 Annual Average Summary (Feb. 29, 2012), available at <http://www.bls.gov/news.release/srgune.nr0.htm>.

⁶ Medicaid is the "single largest budget problem." Teresa A. Coughlin, Colin Winterbottom, John Holahan & David Heslam, *State Responses to the Medicaid Spending Crisis: 1988 to 1992*, 19 J. HEALTH POL. POL'Y & L. 837, 838 (1994). States continue to cut their budgets to avoid bankruptcy. Tami Luhby, *Medicaid: States' \$24 Billion Black Hole*, CNN MONEY (June 8, 2010, 12:39 PM), http://money.cnn.com/2010/06/08/news/economy/states_medicaid/index.htm?iid=EAL; see also Tami Luhby, *Rising Medicaid Costs to Blow Hole in State Budgets*, CNN MONEY (Sept. 30, 2010, 9:42 AM), http://money.cnn.com/2010/09/30/news/economy/medicaid_state_budget/index.htm (discussing rising Medicaid costs due to rising enrollment). See generally *State Fiscal Conditions and Medicaid*, KAISER COMM'N ON MEDICAID FACTS (Kaiser Family Found., Wash., D.C.), Oct. 2010, available at <http://www.kff.org/medicaid/upload/7580-07.pdf> (examining generally the states' fiscal crisis and its impact on Medicaid).

⁷ Forty-six million people do not have health insurance and those with insurance have difficulty paying for their care, as almost three-quarters of people who experience medical bankruptcy had health insurance when they needed medical services. Robert Longley, *Is the US Really that Uninsured?*, ABOUT.COM, <http://usgovinfo.about.com/od/medicarehealthinsurance/a/insurancstats.htm> (last visited Dec. 28, 2012). The Affordable Health Care Choices Act of 2009 aims to have ninety-seven percent of the population covered by health insurance by 2015. *Id.*

⁸ See *infra* Part II (outlining the history of social insurance and social welfare programs in the United States). The very first effective socially-conscious legislation was an outgrowth from the Great Depression; however, none of the most well intentioned political leaders could have foreseen the changes that would evolve later in the 20th century and into the 21st century. See *infra* Part II.A. Medical care costs have risen dramatically as Medicaid spending alone reached \$373.9 billion in 2009. *National Health Expenditure Fact Sheet*, CTRS. FOR MEDICARE & MEDICAID SERVS., <http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NHE-Fact-Sheet.html> (last visited Dec. 28, 2012). Medicaid spending is expected to grow, on average, 7.9 percent per year from 2009-2019. *Id.* See generally CONG. BUDGET OFFICE, PUB. NO. 3216, THE LONG-TERM OUTLOOK FOR MEDICARE, MEDICAID, AND TOTAL HEALTH CARE SPENDING

Note elaborates on certain steps the states have taken to manage public funding and medical services that certain entities provide.⁹ Finally, this Note proposes an amendment to two state laws that have eliminated public funding for eligible entities, so that each state might better serve its citizens while also achieving its funding goals in a more socially acceptable environment.¹⁰

II. BACKGROUND

Medicaid has provided access to medical care for the poor since the 1960s.¹¹ Title X funds enable the poor to receive family planning services.¹² However, limits placed on these two programs do not allow for federal money to be spent on abortion procedures.¹³ Indiana and Kansas were among the first states to eliminate public funding for certain health care providers based upon the range of services they provide.¹⁴ The Planned Parenthood affiliates in these two states have challenged these newly enacted laws, and so a brief history of Planned Parenthood should be provided.¹⁵ But before discussing how the current laws impact Medicaid and Title X funding, the history and organization of these two programs must be understood.¹⁶

A. *A History of Social Programs and Related Legislation*

Before the Great Society, there was the New Deal.¹⁷ Enacted in response to the Great Depression, President Franklin D. Roosevelt's New Deal legislation provided economic support for the poor and unemployed.¹⁸ The New Deal legislation marked the beginning of a

21-35 (2009), available at <http://www.cbo.gov/ftpdocs/102xx/doc10297/chapter2.5.1.shtml> (providing a general overview of Medicaid and Medicare spending).

⁹ See *infra* Part III (analyzing the reasons in favor and against specific public funding laws).

¹⁰ See *infra* Part IV (proposing changes to state laws to resolve contested issues).

¹¹ See *infra* Part II.A.1 (examining the history and purpose of the Medicaid program).

¹² See *infra* Part II.A.2 (examining the history and purpose of Title X grants).

¹³ See *infra* Part II.A.3 (discussing the Hyde Amendment).

¹⁴ See *infra* Part II.B.1 (focusing on Indiana's controversy over its withholding of Medicaid funds to Planned Parenthood); *infra* Part II.B.2 (explaining Kansas's controversy over its restriction of providing Title X grants to Planned Parenthood).

¹⁵ See *infra* Part II.B (detailing the history of Planned Parenthood).

¹⁶ See *infra* Part II.A (discussing the legislative history of programs started by President Franklin D. Roosevelt to President Lyndon B. Johnson).

¹⁷ See ERIC RAUCHWAY, *THE GREAT DEPRESSION AND THE NEW DEAL: A VERY SHORT INTRODUCTION* 1 (2008) (examining President Franklin D. Roosevelt's desire for "a new deal for the American people") (quoting *Text of Governor Roosevelt's Speech at the Convention Accepting the Nomination*, N.Y. TIMES, Jan. 3, 1932, at 8).

¹⁸ *Id.*

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series of social welfare and social insurance programs in the United States.¹⁹ The start of these programs led to a shift in the American lifestyle.²⁰

Congressional and other political leaders disagreed with the basic concepts underlying the New Deal legislation, and several of these programs were challenged in the judicial system.²¹ Some of those challenges were successful, and the Supreme Court struck down those programs.²² President Harry Truman followed President Roosevelt's lead and attempted to enact health care legislation on the national level.²³ Dwight Eisenhower succeeded President Truman, and, despite being a Republican, he did not make any major changes to the New Deal legislation.²⁴ Lyndon B. Johnson became President in the 1960s and followed John F. Kennedy's ever hopeful "New Frontier" proposals and intended to create several new social programs with his "Great Society"

¹⁹ See *id.* ("[T]he 'new deal' included increasing public works, supporting agricultural prices, creating new mortgage markets, shortening the working day and week, regulating securities, restoring international trade, reforesting the countryside, and repealing Prohibition."). Eventually, new programs were added, including social insurance for the elderly, disabled, and poor. *Id.* See generally LARRY W. DEWITT, DANIEL BÉLAND & EDWARD D. BERKOWITZ, *SOCIAL SECURITY: A DOCUMENTARY HISTORY* (2008) (providing an in-depth look at the creation and evolution of the largest social welfare program in the United States, the Social Security program, through primary source documents).

²⁰ See RAUCHWAY, *supra* note 17, at 57 (discussing the impact of the New Deal on American life). Nobody could predict what the future for the country held as the New Deal itself was unpredictable. *Id.* at 2. The New Deal was created and altered as the three government branches exerted their powers against each other while dealing with the challenges of the effects of the Depression. *Id.*

²¹ See, e.g., *United States v. Butler*, 297 U.S. 1, 53 (1936) (challenging the Agricultural Adjustment Act); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 519, 521 (1935) (challenging an act promulgated under the National Industrial Recovery Act); DEWITT ET AL., *supra* note 19, at 5 (discussing the initial constitutional challenge to the Social Security Act of 1935 and the Supreme Court's decision in May 1937).

²² See, e.g., *Butler*, 297 U.S. at 68 (holding that the Agricultural Adjustment Act was unconstitutional); *A. L. A. Schechter Poultry Corp.*, 295 U.S. at 551 (holding that the Live Poultry Code promulgated under the National Recovery Act was unconstitutional); see also Daniel A. Farber, *Who Killed Lochner?*, 90 GEO. L.J. 985, 990-92 (2002) (reviewing G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000)) (evaluating New Deal legislation and various challenges heard by the Supreme Court). President Roosevelt tried to combat the successful challenges to the New Deal by implementing his "court-packing scheme." Georg W. Kofler & Ruth Mason, *Double Taxation: A European "Switch in Time?"*, 14 COLUM. J. EUR. L. 63, 97 n.178 (2007).

²³ See DENNIS W. JOHNSON, *THE LAWS THAT SHAPED AMERICA: FIFTEEN ACTS OF CONGRESS AND THEIR LASTING IMPACT* 334 (2009).

²⁴ See DEWITT ET AL., *supra* note 19, at 13 ("Congress, despite its Republican majority, acquiesced in the program expansion.").

plan.²⁵ One program in particular changed the social welfare landscape of the United States: Medicaid.²⁶

1. Medicaid

Perhaps the most well-known program originally conceived during President Johnson's term was Medicaid.²⁷ Medicaid is a social insurance program that allows underprivileged individuals to receive medical care.²⁸ Started in 1965, Medicaid ensures that all individuals receive, at a minimum, basic medical services.²⁹ Ultimately, it provides federal

²⁵ See THE GREAT SOCIETY AND ITS LEGACY: TWENTY YEARS OF U.S. SOCIAL POLICY 1 (Marshall Kaplan & Peggy L. Cuciti eds., 1986) [hereinafter THE GREAT SOCIETY] (writing that President Johnson's plan to create a Great Society sparked a "rich legislative legacy"). Many were a furthering of President Kennedy's proposals in his New Frontier plan. *Id.* Creating government-funded health insurance was possible with Johnson's election in 1964. John J. DiIulio Jr. & Richard P. Nathan, *Introduction, in MEDICAID AND DEVOLUTION: A VIEW FROM THE STATES* 4 (Frank J. Thompson & John DiIulio Jr. eds., 1998). Democrats held a large majority over the Republicans, which enabled President Johnson to finally pass the idea of Medicaid and the related Medicare program. *Id.* President Johnson's ultimate plan was to eliminate poverty and to put a stop to race-based injustice. THE GREAT SOCIETY, *supra*, at 2. While it was necessary for the federal government to take the lead, a variety of partnerships were also developed to further Johnson's vision. *Id.*

²⁶ See *infra* Part II.A.1 (providing an overview of the history and operation of the Medicaid program).

²⁷ See John J. DiIulio Jr. & Richard P. Nathan, *supra* note 25, at 3 (noting that Medicaid "is the single most costly, complicated, and consequential of all intergovernmental programs"); see also Wilbur J. Cohen, *Random Reflections on the Great Society's Politics and Health Care Programs After Twenty Years*, in THE GREAT SOCIETY, *supra* note 25, at 115 (calling the establishment of the Medicaid program a "major accomplishment" by President Johnson); Kenneth R. Wing, *The Right to Health Care in the United States*, 2 ANNALS HEALTH L. 161, 190 (1993) (calling the Medicaid program "extraordinarily popular").

²⁸ See generally The Medicaid Act, 42 U.S.C. §§ 1396-1396w-5 (2006 & Supp. IV 2011) (outlining the entire Medicaid program in its statutory form); 42 C.F.R. § 430.0 (2011) (providing a general description of the Medicaid program). The Medicaid Act exists:

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance.

42 U.S.C. § 1396-1. The term "medical assistance" is defined to include the payment for the cost of the designated services a person receives. 42 U.S.C. § 1396d(a).

²⁹ See THE GREAT SOCIETY, *supra* note 25, at 8 (stating that the passage of Medicaid and Medicare provided greater accessibility for the poor and the elderly); see also Harris v. McRae, 448 U.S. 297, 301-02 (1980) (listing the five general areas of medical care that states must cover). Medicaid also covers preventive medical services for women and children. Sar A. Levitan & Clifford M. Johnson, *Did the Great Society and Subsequent Initiatives Work?*, in THE GREAT SOCIETY, *supra* note 25, at 76. However, the Medicaid Act does not require

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funding to each state so that each state can pay for the medical care its Medicaid-eligible residents receive.³⁰

Participation in Medicaid is entirely voluntary.³¹ States may choose not to receive the federal funding; however, to receive any funding, all states choosing to participate in the program must comply with the federal guidelines.³² In addition, states must submit a plan to the federal government detailing how the Medicaid funds will be spent.³³ After a state submits its plan, the Secretary of Health and Human Services reviews the plan and either approves or denies it.³⁴ The state's plan must be approved prior to receiving any federal funding.³⁵

states to fund nontherapeutic abortions. *Maier v. Roe*, 432 U.S. 464, 465–66 (1977). While women possess the right to have an abortion, “[t]he state may not justify its refusal to pay for one type of expense arising from pregnancy on the basis that it morally opposes such an expenditure of money.” *Id.* at 468 (quoting *Roe v. Norton*, 408 F. Supp. 660, 664 (1975)). Allowing a state to do so would be promoting discrimination against those exercising their constitutional rights on the basis that the state merely disagrees with their choice of lawful action. *Id.* But see Jessica D. Yoder, Note, *Pharmacists’ Right of Conscience: Strategies for Showing Respect for Pharmacists’ Beliefs While Maintaining Adequate Care for Patients*, 41 VAL. U. L. REV. 975, 1013 (2006) (asserting that individual pharmacists should have the right to refuse to provide patients with emergency contraception, because “a pharmacist’s decision that life begins with fertilization should be afforded the same respect as a patient who believes life begins at some later point”).

³⁰ See 42 U.S.C. § 1396b(a) (outlining the reimbursement rates for medical services). The funding the state receives is then used to reimburse health care providers for the “reasonable cost” of the care they provided to their Medicaid-eligible patients. *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 505 (1990).

³¹ See *Wilder*, 496 U.S. at 502 (outlining the basics of the Medicaid program); see also Bradley J. Sayles, *Preemption or Bust: A Review of the Recent Trends in Medicaid Preemption Actions*, 27 J. CONTEMP. HEALTH L. & POL’Y 120, 122–23 (2010) (declaring that while state participation is voluntary, since 1982, all states have decided to participate in the Medicaid program).

³² *Wilder*, 496 U.S. at 502; see Wing, *supra* note 27, at 164 (providing that “the nondiscrimination requirements of equal protection and the ‘fairness’ requirements of due process as imposed by the Fifth and Fourteenth Amendments” must also be met). See generally 42 U.S.C. § 1396a(a) (outlining the requirements states must meet before their plans for medical assistance may be approved).

³³ See *Wilder*, 496 U.S. at 502 (“To qualify for federal assistance, a State must submit to the Secretary and have approved a ‘plan for medical assistance’ that contains a comprehensive statement describing the nature and scope of the State’s Medicaid program.”) (citations omitted).

³⁴ See *Cnty. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 134 (2d Cir. 2002) (“The Secretary of the U.S. Department of Health and Human Services (‘HHS’) reviews each plan to assure that it complies with a long list of federal statutory and regulatory requirements.”) (citations omitted). If the Secretary receives the plan and determines one of two factors has caused the state’s plan to be inconsistent with federal law, the Secretary has discretion to withhold all or a portion of federal funds. 42 U.S.C. § 1396c. Title 42 of the U.S. Code, Section 1396c states:

If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the

Once the Secretary approves the plan, each state has the power to determine the eligibility standards for its citizens to receive Medicaid benefits.³⁶ States, generally, also have the power to choose what medical services will be covered under the Medicaid funds.³⁷ Since the time of its enactment, the program has faced many challenges.³⁸ Despite the fact that Medicaid covers many of the basic health services people need, Congress has continued to create programs that provide funding for more specific medical services, such as family planning services.³⁹

2. Title X

Following the enactment of many social welfare programs in the 1930s, many more socially-conscious laws appeared, such as the Public

administration of the State plan approved under this subchapter, finds—

(1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision;

the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

Id. See also 42 C.F.R. § 430.15 (2011) (detailing the authority to grant or deny a state plan).

³⁵ 42 U.S.C. § 1396c; see 42 C.F.R. § 430.30 (2011) (outlining the factors that determine the amount of funding a state receives).

³⁶ See James R. Tallon Jr. & Lawrence D. Brown, *Who Gets What?: Devolution of Eligibility and Benefits in Medicaid*, in *MEDICAID AND DEVOLUTION: A VIEW FROM THE STATES*, *supra* note 25, at 235 (discussing the frustrations of many who are potentially left out under state supervision).

³⁷ Armen H. Merjian, *A Choice Between Food and Medicine: Denning v. Barbour and the Struggle for Prescription Drug Coverage Under the Medicaid Act*, 13 *SCHOLAR* 201, 204–05 (2010). While states generally have deference in determining eligibility guidelines and the services covered, Congress has continued to step in and set minimum federal standards to expand who and what is covered by Medicaid. See ANDY SCHNEIDER, *KAISER COMM'N ON MEDICAID AND THE UNINSURED*, *THE MEDICAID RESOURCE BOOK* App. 1, 175–77, available at <http://www.kff.org/medicaid/2236-index.cfm> (outlining major changes to the Medicaid Act since its enactment in 1965).

³⁸ See, e.g., *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 433–34 (2004) (challenging the state's Medicaid plan on the grounds that it did not follow federal requirements); *Wilder*, 496 U.S. at 501–02 (challenging the Boren Amendment to the Medicaid program); *Doe v. Beal*, 523 F.2d 611, 614 (3d Cir. 1975) (challenging the Medicaid program on equal protection grounds).

³⁹ See *infra* Part II.A.2 (discussing the Title X Family Planning Program).

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Health Service Act, enacted in 1944.⁴⁰ In 1970, Congress amended the Public Health Service Act to include the Title X Family Planning Program (“Title X”).⁴¹ Title X provides that federal money must be used exclusively for family planning-related medical services.⁴² Title X grants, however, do not cover abortion-related services.⁴³

The purpose of Title X was to ensure that women would not be without family planning and other related preventive health care services.⁴⁴ Among those eligible to receive care under the Title X grants are women and families who do not have insurance or are not covered by Medicaid.⁴⁵ One condition on entities receiving Title X funding is that they be a public or non-profit entity.⁴⁶ Grant amounts for entities are

⁴⁰ See Public Health Service Act, 42 U.S.C. §§ 201, 300mm-61 (2006 & Supp. IV 2011) (establishing federal laws and programs that eventually became the basis for improving national health). The Public Health Service is an agency of the Department of Health, Education, and Welfare that is responsible for the management of health research, programs of state and local aid, health services, and executive staff resources. Message of the President on Reorganization Plan No. 3 of 1966, 31 Fed. Reg. 8855 (June 25, 1966). See also Lynne Page Snyder, *Passage and Significance of the 1944 Public Health Service Act*, 109 PUB. HEALTH REP. 721 (1994) (examining the impact of the Public Health Service Act).

⁴¹ *Rust v. Sullivan*, 500 U.S. 173, 178 (1991); see Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504 (1970) (stating that the purpose of the Act is “[t]o promote public health and welfare by expanding, improving, and better coordinating the family planning services and population research activities of the Federal Government, and for other purposes”).

⁴² *Rust*, 500 U.S. at 178. The Title X funds cover “preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities.” *Id.* at 178-79 (quoting H.R. Rep. No. 91-1667, at 8 (1970)). See 42 U.S.C. § 300a(a) (2006) (stating that grants will be given “to State health authorities to assist in planning, establishing, maintaining, coordinating, and evaluating family planning services”); ANNE HENDERSHOTT, *THE POLITICS OF ABORTION* 45 (2006) (explaining that Congress enacted Title X “to give millions of poor and low-income women access to reproductive-health services that they otherwise could not afford”).

⁴³ See 42 U.S.C. § 300a-6 (establishing a prohibition against using Title X funds in programs using abortion as a family planning method); *Rust*, 500 U.S. at 178 (describing the abortion restriction) (citing 42 U.S.C. § 300a-6). Three conditions must be met before Title X-related federal funds can be granted: (1) the health care provider may not discuss abortion or make a referral to an abortion provider as a method of family planning; (2) any recipient of Title X funds must keep Title X-related activities “physically and financially separate” from abortion-related activities; and (3) the health care provider may not “encourage, promote, or advocate” for abortion. Public Health Service, 53 Fed. Reg. 2922, 2945-46 (Feb. 2, 1988) (to be codified at 42 C.F.R. pt. 59).

⁴⁴ See *Rust*, 500 U.S. at 179; Public Health Service, 42 C.F.R. § 59.1 (2011) (clarifying Congress’s intent for the use of Title X funds). The purpose of the funds is “to assist in the establishment and operation of voluntary family planning projects.” *Id.* These projects include “educational, comprehensive medical, and social services necessary to aid individuals to determine freely the number and spacing of their children.” *Id.*

⁴⁵ *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1220-21 (D. Kan. 2011).

⁴⁶ 42 U.S.C. § 300(a). In the section titled “Authority of Secretary,” the statute provides:

determined based on how many patients the entity sees and its ability to efficiently provide services.⁴⁷ However, there are no requirements that the entity must be a certain type of provider or provide only a certain range of services.⁴⁸ Nonetheless, the abortion restriction continues to be the main restraint on what Title X funds may be used for, and the federal government extended that restriction to ensure no federal funds are used to fund abortions.⁴⁹

3. The Hyde Amendment

One of the most highly controversial health care-related issues is abortion.⁵⁰ Since *Roe v. Wade* legalized abortion, judicial action has been taken regarding many aspects of this issue.⁵¹ Funding of abortions is

The Secretary is authorized 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). To the extent practical, entities which receive grants or contracts under this subsection shall encourage family participation in projects assisted under this subsection.

Id. (footnote omitted).

⁴⁷ 42 U.S.C. § 300(b). In the section titled “Factors determining awards; establishment and preservation of rights of local and regional entities,” the statute provides:

In making grants and contracts under this section the Secretary shall take into account the number of patients to be served, the extent to which family planning services are needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance. Local and regional entities shall be assured the right to apply for direct grants and contracts under this section, and the Secretary shall by regulation fully provide for and protect such right.

Id.

⁴⁸ *Brownback*, 799 F. Supp. 2d at 1221. A state cannot constitutionally ban an entity that provides family planning services from providing abortion-related services by withholding all funding from the entity. 1 AM. JUR. 2D *Abortion and Birth Control* § 49 (2005).

⁴⁹ See *infra* Part II.A.3 (discussing the federal restriction on money going towards abortion).

⁵⁰ See HENDERSHOTT, *supra* note 42, at 4 (calling the debate over abortion a bitter “culture war”); Caitlin E. Borgmann, *The Meaning of “Life”: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 553 (2009) (“The abortion controversy is commonly called a war.”) (footnote omitted). See generally Jacob J. Zehnder, Note, *Constitutional Comparativism: The Emerging Risk of Comparative Law as a Constitutional Tiebreaker*, 41 VAL. U. L. REV. 1739 (2007).

⁵¹ 410 U.S. 113 (1973). The Court in *Roe* held that women have the fundamental right to choose to have an abortion prior to the viability stage. *Id.* at 164–66. See generally *Gonzales v. Carhart*, 550 U.S. 124 (2007) (challenging a federal law regarding partial-birth abortions); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (challenging a state law ban on partial-birth abortions); *Hill v. Colorado*, 530 U.S. 703 (2000) (challenging a state law regulating speech

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especially controversial, as many taxpayers do not want their money to go to activities that they do not support.⁵²

In response to the controversy surrounding legalized abortions, Congress enacted the Hyde Amendment in 1976.⁵³ The Hyde Amendment is a legislative provision that prevents certain federal funds from going towards abortion services.⁵⁴ Its purpose is to ensure that federal funds, like Medicaid and Title X, do not go towards abortion-related activities.⁵⁵

outside of abortion clinics); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997) (enjoining protestors from blocking entry into abortion clinics and participating in harassment-like activities); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (affirming *Roe v. Wade* and creating the undue burden test); *Rust v. Sullivan*, 500 U.S. 173 (1991) (challenging a federal law limiting Title X funding); *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1990) (challenging a state law on parental notification); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (challenging a state law prohibiting the use of public funds, employees, and facilities to perform non-medically necessary abortions); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (challenging a state law on reporting, counseling, and other provisional requirements); *Simopoulos v. Virginia*, 462 U.S. 506 (1983) (challenging a state law on second-trimester abortions); *Planned Parenthood Ass'n of Kan. City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983) (challenging a state law on requirements regarding location, consent, pathology reports, and the number of physicians); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (challenging a state law on second-trimester abortions, parental consent, informed written consent, 24-hour waiting periods, and disposal of fetal remains); *Harris v. McRae*, 448 U.S. 297 (1980) (challenging a federal funding restriction—the Hyde Amendment); *Colautti v. Franklin*, 439 U.S. 379 (1979) (challenging a state law defining viability); *Maher v. Roe*, 432 U.S. 464 (1977) (challenging a state law prohibiting public funding for non-medically necessary abortions); *Bellotti v. Baird*, 428 U.S. 132 (1976) (challenging a state law requiring parental consent); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (challenging a state law requiring spousal and parental consent, reporting requirements, defining viability, and setting a professional standard of care); *Connecticut v. Menillo*, 423 U.S. 9 (1975) (challenging a state law regulating abortions by non-physicians); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (challenging the advertising of abortion services); *Doe v. Bolton*, 410 U.S. 179 (1973) (challenging a state law regulating the location of abortions, setting requirements on abortions, and limiting who can have abortions).

⁵² See generally H.R. REP. NO. 112-3, at 1–8 (2011) (outlining the “No Taxpayer Funding for Abortion Act”). This federal bill was introduced in the House of Representatives with the stated purpose “[t]o prohibit taxpayer funded abortions and to provide for conscience protections, and for other purposes.” *Id.* at 1.

⁵³ *Harris*, 448 U.S. at 302; see H.R. 2055, 112th Cong. § 506(a) (2012) (“None of the funds appropriated in this Act . . . shall be expended for any abortion.”). The prohibition does not apply if the life of the mother is endangered or if rape or incest caused the pregnancy. H.R. 2055, 112th Cong. § 507(a)(1) (2012).

⁵⁴ *Harris*, 448 U.S. at 302. In 2011, a bill was introduced in the Senate “[t]o prohibit the expenditure of Federal funds for abortions, and for other purposes.” S. 1488, 112th Cong. (2011). If enacted, it would codify the Hyde Amendment into federal law. *Id.*

⁵⁵ Exec. Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 24, 2010). President Barack Obama ensured that, even with the passage of the Patient Protection and Affordable Care Act, the Hyde Amendment would continue to be a restriction on federal funds. *Id.*

There has been one major challenge against the validity of this Amendment.⁵⁶ But the challenge failed, and every year Congress either includes the Hyde Amendment in the annual appropriations bill for the Department of Health and Human Services or prohibits the use of federal funds to reimburse the cost of abortions by a joint resolution.⁵⁷ The Hyde Amendment and the other restraints on Medicaid and Title X funding remain law, but not without controversy.⁵⁸

B. *The Controversy over Public Funding*

Public funding issues and the topic of abortion are always controversial.⁵⁹ Federal legislation prevents the federal government from funding abortion; however, states are divided on whether state funds may be used for abortions.⁶⁰ As the largest medical provider of abortions, Planned Parenthood has been involved in numerous legal challenges to such statutes and regulations regarding its medical services and public funding.⁶¹

⁵⁶ See *Harris*, 448 U.S. at 326 (holding that the Hyde Amendment was not an unconstitutional violation of either the Fifth Amendment or the Establishment Clause of the First Amendment).

⁵⁷ *Id.* at 302. The Hyde Amendment is an annual “Medicaid rider that end[s] most federal involvement in subsidizing abortion services and instead relegate[s] that role to the states.” HENDERSHOTT, *supra* note 42, at 46. See Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 485–88 (1987) (discussing the Hyde Amendment as a limitation rider on abortion funding).

⁵⁸ See *infra* Part II.B (discussing the various challenges to public funding laws).

⁵⁹ See *supra* Part II.A.3 (detailing the Hyde amendment). There are three seminal cases in which public funding for abortion was challenged. See *Rust v. Sullivan*, 500 U.S. 173, 177–78 (1991); *Harris*, 448 U.S. at 300–01; *Maher v. Roe*, 432 U.S. 464, 466 (1977).

⁶⁰ See GUTTMACHER INST., STATE FUNDING OF ABORTION UNDER MEDICAID (Aug. 1, 2011), http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf (breaking down the state funding of abortions). Thirty-two states and the District of Columbia mirror the Hyde Amendment and fund abortions where carrying the pregnancy to term endangers life or where the pregnancy results from acts of rape or incest. *Id.* Seventeen states provide funds for all or most medically necessary abortions. *Id.* One state appears to be in violation of federal law and provides abortions only in cases of life endangerment. *Id.*

⁶¹ See generally *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006) (challenging New Hampshire’s Parental Notification Prior to Abortion Act); *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309 (1994) (challenging amendments to Pennsylvania’s abortion statute); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (challenging Missouri’s abortion statute); *Planned Parenthood of Minn. v. Rounds*, 653 F.3d 662 (8th Cir. 2011) (challenging a South Dakota law that requires doctors to inform women of certain abortion-related speech); *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324 (5th Cir. 2005) (challenging a Texas statute that withheld federal family planning funds from abortion providers); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004) (challenging Idaho’s parental consent statute); *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783 (9th Cir. 2002) (challenging Arizona’s parental consent statute); *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v.*

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Planned Parenthood is a private, non-profit provider of medical services related to family planning, men and women's sexual health, and abortions.⁶² Over 865 health centers affiliated with Planned Parenthood operated in the United States from 2008–2009.⁶³ Covering all fifty states and the District of Columbia, Planned Parenthood clinics tend to be located in rural neighborhoods and areas with many low-income

Dempsey, 167 F.3d 458 (8th Cir. 1999) (challenging a Missouri statute that prevented state family planning funds from reaching abortion providers); *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463 (7th Cir. 1998) (challenging a Wisconsin statute that called for life imprisonment for anyone who performed a partial-birth abortion); *Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 718 F.2d 938 (9th Cir. 1983) (challenging an Arizona appropriation bill that prohibited state social welfare funds from reaching private abortion providers); *Planned Parenthood Ass'n of Chi. Area v. Kempiners*, 700 F.2d 1115 (7th Cir. 1983) (challenging an Illinois statute denying state funds dedicated to dealing with problem pregnancies to abortion counseling services); *Planned Parenthood Ass'n of Utah v. Schweiker*, 700 F.2d 710 (D.C. Cir. 1983) (challenging the allocation of Title X funds solely to the Utah Department of Health); *Planned Parenthood of Minn. v. Minnesota*, 612 F.2d 359 (8th Cir. 1980) (challenging a provision in a Minnesota statute that denied grants for pregnancy planning services to certain non-profit corporations); *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482 (M.D.N.C. 2011) (challenging a North Carolina statute that prohibited public funds from reaching Planned Parenthood); *Planned Parenthood of Cent. N.J. v. Verniero*, 41 F. Supp. 2d 478 (D.N.J. 1998) (challenging New Jersey's statute banning partial-birth abortions); *Planned Parenthood of Kan., Inc. v. City of Wichita*, 729 F. Supp. 1282 (D. Kan. 1990) (challenging a resolution that banned a county's board of health from contracting with Planned Parenthood for family planning services); *Planned Parenthood of Billings, Inc. v. Montana*, 648 F. Supp. 47 (D. Mont. 1986) (challenging a Montana statute that conditioned receipt of federal family planning funds); *Planned Parenthood Ass'n of Utah v. Dandoy*, 635 F. Supp. 184 (D. Utah 1986) (challenging a Utah statute that prohibited public funds from being used to provide contraceptive services to unmarried minors without prior parental consent).

⁶² PLANNED PARENTHOOD FED'N OF AM., PLANNED PARENTHOOD FEDERATION OF AMERICAN ANNUAL REPORT 2006–2007 1, 15 (2007) [hereinafter ANNUAL REPORT 2006–2007], http://www.plannedparenthood.org/files/AR_2007_vFinal.pdf (providing that eighty percent of the organization's revenue came from private donors). For the year 2010, providing contraception accounted for about thirty-four percent of Planned Parenthood's total services. PLANNED PARENTHOOD FED'N OF AM., SERVICES 2 (2011), http://www.plannedparenthood.org/files/PPFA/PPFA_Services.pdf. Thirty-eight percent went towards testing and treatment for sexually transmitted infections and diseases. *Id.* About fifteen percent went towards cancer screening and prevention. *Id.* Other women's health services accounted for slightly over ten percent of services, while abortion services constituted three percent. *Id.* The final one percent went toward other services. *Id.*

⁶³ PLANNED PARENTHOOD FED'N OF AM., PLANNED PARENTHOOD FEDERATION OF AMERICA ANNUAL REPORT 2008–2009 1 (2009) [hereinafter ANNUAL REPORT 2008–2009], http://www.plannedparenthood.org/files/PPFA/PPFA_Annual_Report_08-09-FINAL-12-10-10.pdf. As of January 2011, there were more than 820 operating health centers affiliated with Planned Parenthood. PLANNED PARENTHOOD FED'N OF AM., PLANNED PARENTHOOD BY THE NUMBERS (2011) [hereinafter PLANNED PARENTHOOD BY THE NUMBERS], http://www.plannedparenthood.org/files/PPFA/fact_PPNumbers_2011-01-05.pdf.

individuals and families.⁶⁴ For the people in these areas, Planned Parenthood often acts as their primary health care provider.⁶⁵ In 2011 alone, Planned Parenthood served three million men and women at health centers throughout the United States.⁶⁶

To operate under the restraints of Medicaid, Title X, and the Hyde Amendment, Planned Parenthood relies on private donations.⁶⁷ These private funds go toward the abortion procedures Planned Parenthood performs.⁶⁸ Planned Parenthood operates in such a way to ensure none of the public funds it receives are used for abortions.⁶⁹ However, even with these federal measures in place, states took it upon themselves to further ensure no state funds directly or indirectly finance abortions.⁷⁰

1. Indiana Leads the Way

Prior to May 2011, no state law singled out Planned Parenthood from receiving public funds for the basic, non-abortion-related health care services Planned Parenthood provides.⁷¹ While regulations are in place

⁶⁴ See PLANNED PARENTHOOD FED’N OF AM., TITLE X: AMERICA’S FAMILY PLANNING PROGRAM 2 (2008), http://www.plannedparenthood.org/files/PPFA/Title_X.pdf (“Patients served at Title X health centers are predominantly low-income, uninsured young women.”). About two-thirds of the clients served have incomes at or below the federal poverty level. *Id.*

⁶⁵ Deborah Kotz, *Lost Your Health Insurance? Consider Planned Parenthood Clinics*, U.S. NEWS & WORLD REPORT (Feb. 24, 2009), <http://health.usnews.com/health-news/blogs/on-women/2009/02/24/lost-your-health-insurance-consider-planned-parenthood-clinics>.

⁶⁶ PLANNED PARENTHOOD BY THE NUMBERS, *supra* note 63. Another 1.2 million people benefitted from Planned Parenthood educational programs. *Id.*

⁶⁷ ANNUAL REPORT 2008–2009, *supra* note 63, at 15 (detailing how eighty percent of the organization’s revenue came from private donors).

⁶⁸ Travis Waldron, *Defending Riders, Sen. Kyl Falsely Claims 90 Percent of Planned Parenthood’s Services Are for Abortion*, THINK PROGRESS (April 8, 2011, 12:55 PM), <http://thinkprogress.org/politics/2011/04/08/157196/jon-kyl-90-percent-planned-parenthood-abortion/?mobile=nc>.

⁶⁹ See, e.g., *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1230, 1235 (D. Kan. 2011) (citing to the Kansas Department of Health and Environment’s (“KDHE”) commendation of Planned Parenthood in providing services to the poor and mentioning that Planned Parenthood “has never been the subject of any previous complaint or criticism by the State”); *Planned Parenthood of Ind., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 794 F. Supp. 2d 892, 898 (S.D. Ind. 2011) (stating that no independent audits have found an “inappropriate comingling” of funds). Even though it provides abortions, it is eligible and allowed to receive public funds for the other care it provides. *Rust v. Sullivan*, 500 U.S. 173, 196 (1991). None of the legal action that has been taken accuses Planned Parenthood of acting in conflict with this provision. *Comm’r of the Ind. State Dep’t of Health*, 794 F. Supp. 2d at 898.

⁷⁰ See *infra* Part II.B.1 (discussing how Indiana was the first state to take public funds from eligible entities).

⁷¹ See Laura Bassett, *Indiana Set to Defund Planned Parenthood*, HUFFINGTON POST (April 27, 2011, 1:24 PM), <http://www.huffingtonpost.com/2011/04/27/planned-parenthood->

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to direct federal funds from abortion-related activities, no regulations had been enacted on the state level to ensure that public funds did not reach abortion providers.⁷² Indiana became the first state to withhold any type of public funds from Planned Parenthood clinics within the state.⁷³ Legislators in Indiana passed House Enrolled Act 1210 ("HEA 1210") to prevent Medicaid funds from reaching private abortion providers.⁷⁴

At the time it was passed, HEA 1210 was highly controversial.⁷⁵ Ultimately, it created two new provisions: (1) a defunding provision and (2) an informed consent provision.⁷⁶ The defunding provision prevented

indiana-defund_n_854337.html (explaining that with the signing of House Bill 1210, Indiana would become the first state to stop Medicaid funding for non-abortion-related health services provided by Planned Parenthood clinics).

⁷² See *supra* Part II.A.3 (discussing the Hyde Amendment).

⁷³ Arlette Saenz, *Indiana Gov. Mitch Daniels Will Sign Bill to Defund Planned Parenthood*, ABC NEWS (April 29, 2011), <http://abcnews.go.com/Politics/ind-gov-mitch-daniels-sign-bill-defund-planned/story?id=13494351>.

⁷⁴ *U.S. District Court Hearing Held in Planned Parenthood of Indiana Injunction Case, Ruling Expected by July 1*, PLANNED PARENTHOOD OF IND. (last visited Sept. 22, 2012), http://www.ppin.org/news/news_InjunctionHearing.html. See generally Dawn Johnsen, "TRAP"ing Roe in Indiana and a Common-Ground Alternative, 118 YALE L.J. 1356, 1362-73 (2009) (providing a brief history of abortion-related legislation in Indiana).

⁷⁵ See Rob Quinn, *Feds Block Indiana Planned Parenthood Law*, NEWSER (June 2, 2011, 1:39 AM), <http://www.newser.com/story/119962/feds-block-indiana-planned-parenthood-law.html> (writing that the Federal government responded to the enactment of HEA 1210 by denouncing the law). Federal Medicaid officials threatened to withhold all Medicaid funding for the entire state of Indiana if Indiana did not eliminate the defunding provision. *Id.* By stopping all of Indiana's Medicaid funds from reaching the state, HEA 1210 could not only shut down Planned Parenthood clinics throughout Indiana, but also adversely impact all health care providers and patients who receive health care because of Medicaid. *Id.* See generally Laura Bassett, *Planned Parenthood vs. The States: The Legal Battles Rage*, HUFFINGTON POST (Aug. 24, 2011, 12:31 PM), http://www.huffingtonpost.com/2011/08/24/planned-parenthood-defunding_n_935134.html (discussing legislation and legal challenges arising in a number of states).

⁷⁶ *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 897-98 (S.D. Ind. 2011). The defunding provision, as enacted, states:

- (b) An agency of the state may not:
 - (1) enter into a contract with; or
 - (2) make a grant 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.
- (c) Any appropriations by the state:
 - (1) in a budget bill;
 - (2) under IC § 5-19-1-3.5; or
 - (3) in any law of the state;
 to pay for a contract with or grant made to any entity that performs abortions or maintains or operates a facility where abortions are performed is canceled, and the money appropriated is not available for

all state funds from going to abortion providers, regardless of whether the provider performed other non-abortion-related services eligible for public funding.⁷⁷

Following the enactment of HEA 1210, Planned Parenthood of Indiana, Inc. (“PPIN”) filed a lawsuit against the Commissioner of the Indiana State Department of Health.⁷⁸ PPIN argued that a state plan must provide the individual eligible for Medicaid coverage the ability to seek medical care from any appropriately qualified person or entity.⁷⁹ PPIN made four different arguments against the enforcement of the defunding provision.⁸⁰ The Commissioner of the Indiana State Department of Health (“Indiana”) countered that the State had the

payment of any contract with or grant made to the entity that performs abortions or maintains or operates a facility where abortions are performed.

(d) For any contract with or grant made to an entity that performs abortions or maintains or operates a facility where abortions are performed covered under subsection (b), the budget agency shall make a determination that funds are not available, and the contract or the grant shall be terminated under section 5 of this chapter.

IND. CODE § 5-22-17-5.5 (2011). This provision does not apply to hospitals or ambulatory surgical centers licensed under Indiana Code section 16-21-2. IND. CODE § 5-22-17-5.5(a). This Note focuses on this provision only and not the informed consent provision codified as Indiana Code section 6-34-2-1.1(a)(1)(E) and (G), which amended existing Indiana state law on informed consent requirements.

⁷⁷ *Planned Parenthood of Ind., Inc. v. Comm’r of the Ind. State Dep’t of Health*, No. 1:11-cv-630-TWP-TAB, 2011 U.S. Dist. LEXIS 50882, at *2 (S.D. Ind. May 11, 2011).

⁷⁸ *Comm’r of the Ind. State Dep’t of Health*, 794 F. Supp. 2d at 897. Also included as plaintiffs were Michael King, M.D., Carla Cleary, C.N.M., Letitia Clemons, and Dejjiona Jackson. *Id.*

⁷⁹ *See id.* at 900–01 (referring to this provision of the Medicaid Act as the “‘freedom of choice’ provision”); *see also* 42 U.S.C. § 1396a(a)(23) (2006) (“[A]ny individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services . . .”). Medicaid recipients may not be denied freedom of choice of qualified providers of family planning services. *Free Choice of Providers*, 42 C.F.R. § 431.51(a)(2) (2011).

⁸⁰ *Comm’r of the Ind. State Dep’t of Health*, 794 F. Supp. 2d at 899. First, PPIN argued that HEA 1210 violated the “freedom of choice” provision of the Medicaid Act. *Id.* Second, PPIN argued that federal law preempted HEA 1210. *Id.* Third, HEA 1210 violated the Contracts Clause of the United States Constitution. *Id.* The Contracts Clause states that “[n]o State shall enter into any . . . [l]aw impairing the Obligation of Contracts.” U.S. CONST. art. I, § 10, cl. 1. Finally, PPIN challenged that HEA 1210 imposed an “unconstitutional condition” on the ability of Planned Parenthood of Indiana, Inc. to receive state and federal funds. *Comm’r of the Ind. State Dep’t of Health*, 794 F. Supp. 2d at 899. The unconstitutional condition doctrine states that, while “a person has no ‘right’ to a valuable governmental benefit . . . there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . .” *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

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authority to exclude PPIN from the Medicaid program.⁸¹ Indiana further argued that it had the authority to choose the Medicaid providers operating within the state.⁸²

Initially, the U.S. District Court for the Southern District of Indiana rejected PPIN's plea to issue a temporary restraining order.⁸³ However, the court later granted a preliminary injunction against the continual enactment of the defunding provision.⁸⁴ Before the court ruled on HEA 1210, the court analyzed whether PPIN had standing to bring the lawsuit.⁸⁵ Next, the court analyzed the freedom of choice provision using the three pronged test of *Blessing v. Freestone*.⁸⁶ Finally, the court

⁸¹ *Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d at 903. Indiana supported its position by citing to the Medicaid Act and to a case from the First Circuit Court of Appeals. *Id.*

⁸² *Id.* at 904.

⁸³ *See id.* at 897 (holding that Planned Parenthood of Indiana did not meet the standards necessary for a court to grant a temporary restraining order). However, the court did set a hearing date for Planned Parenthood of Indiana's motion for a preliminary injunction. *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, No. 1:11-cv-630-TWP-TAB, 2011 U.S. Dist. LEXIS 50882, at *2 (S.D. Ind. May 11, 2011).

⁸⁴ *Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d at 921. Using the standard set out by the Seventh Circuit in *Reid L. v. Ill. State Bd. of Educ.*, the court found that PPIN established that it would likely prevail on the merits of the case. *Id.* at 899, 904 (citing *Reid L. v. Ill. State Bd. of Educ.*, 289 F.3d 1009, 1021 (7th Cir. 2002)). The court listed three reasons to support its determination: (1) the federal government rejected Indiana's amended Medicaid plan; (2) the language of the Medicaid Act itself; and (3) case law. *Id.* at 904.

⁸⁵ *See id.* at 901-03 (analyzing whether a right to sue under 42 U.S.C. § 1983 existed, as a party must assert the violation of a federal right not just a violation of federal law). "[O]ne cannot go into court and claim a 'violation of § 1983' – for § 1983 by itself does not protect anyone against anything." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) (quoting *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 617 (1979)). Title 42 of the United States Code § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2006). In 2006, the Sixth Circuit ruled that Medicaid's Freedom of Choice Provision created private rights that recipients could enforce under § 1983. *Harris v. Olszewski*, 442 F.3d 456, 459 (6th Cir. 2006).

⁸⁶ 520 U.S. 329 (1997). The Court presented three factors to consider when determining whether a statutory provision creates a federal right. *Id.* at 340. First, the court must determine whether Congress intended the provision in question to benefit the party

ruled in favor of PPIN on the grounds of the “freedom of choice” provision.⁸⁷ The State filed an appeal with the Seventh Circuit Court of Appeals, which affirmed in part.⁸⁸ Similar to the way Indiana enacted HEA 1210, Kansas enacted a defunding provision of its own.⁸⁹

2. Kansas Follows

Kansas became the second state to deny public funds to private abortion providers.⁹⁰ Unlike Indiana, Kansas prevented private abortion providers, specifically Planned Parenthood clinics, from successfully applying for the Title X funds for which they were eligible.⁹¹ Kansas enacted House Bill 2014 (“HB 2014”) to deny Planned Parenthood clinics from receiving any public funds and to cause a shutdown of those clinics in the state.⁹²

challenging it. *Id.* Second, the challenging party must show that the asserted right protected by the statute is “not so ‘vague and amorphous’ that its enforcement would strain judicial competence.” *Id.* at 340–41. Third, the statute must be clear in requiring states to act in conformance with it. *Id.* at 341.

⁸⁷ *Comm’r of the Ind. State Dep’t of Health*, 794 F. Supp. 2d at 909.

⁸⁸ *See Planned Parenthood of Ind., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 699 F.3d 962, 974 (7th Cir. 2012) (affirming that the freedom of choice provision conferred a private right of action enforceable under § 1983). The Seventh Circuit also affirmed that Indiana’s defunding likely violated § 1396a(a)(23). *Id.* at 980. However, the court reversed the case in part with regards to Indiana’s Disease Intervention Services block-grant funding. *Id.* at 985. The court remanded the case to modify the injunction. *Id.* at 988.

⁸⁹ *See infra* Part II.B.2 (discussing how Kansas became the next state to withhold public funds from eligible entities).

⁹⁰ *See* Dave Bohon, *Federal Judge Suspends Kansas Law Defunding Planned Parenthood*, THE NEW AM. (Aug. 4, 2011, 11:55 AM), <http://www.thenewamerican.com/usnews/politics/8458-federal-judge-suspends-kansas-law-defunding-planned-parenthood>; Roxana Hegeman, *In Lawsuit, Planned Parenthood Officials Say Kansas Defunding Efforts Part of National Campaign*, LAWRENCE JOURNAL-WORLD (July 28, 2011) http://www2.ljworld.com/news/2011/jul/28/lawsuit-planned-parenthood-officials-say-kansas-de/?kansas_legislature (“Republican Gov. Sam Brownback spoke to the state GOP caucus before the vote saying Kansas would become only the second state in the nation to ‘zero out funding of Planned Parenthood.’”).

⁹¹ *See Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1234 (D. Kan. 2011) (discussing the purpose and effect of the enacted statute).

⁹² *Id.* at 1224–25. Section 107(l) of HB 2014 is the specific provision at issue. *Id.* at 1220. Section 107(l) of H.B. 2014, 84th Leg. (Kan. 2011) states:

During the fiscal year ending June 30, 2012, subject to any applicable requirements of federal statutes, rules, regulations or guidelines, any expenditures or grants of money by the department of health and environment—division of health for family planning services financed in whole or in part from federal title X moneys shall be made subject to the following two priorities: First priority to public entities (state, county, local health departments and health clinics) and, if any moneys remain, then, Second priority to non-public entities which are hospitals or federally qualified health centers that provide

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As happened in Indiana, Planned Parenthood of Kansas and Mid-Missouri (“Planned Parenthood KS”) filed a lawsuit challenging the validity of the enacted statute.⁹³ The statute prioritizes Title X funding to public entities first and hospitals or federally-qualified health centers (“FQHC”) second.⁹⁴ Neither priority applies to Planned Parenthood KS, so the law essentially guarantees that Planned Parenthood KS cannot successfully apply to receive Title X funds.⁹⁵

Planned Parenthood KS made three arguments against the validity of HB 2014.⁹⁶ First, they argued that HB 2014 violated the Supremacy Clause.⁹⁷ Second, they argued that HB 2014 violated the First Amendment.⁹⁸ Finally, they argued that Section 107(l) of HB 2014 violated the Fourteenth Amendment.⁹⁹ Kansas countered that the Eleventh Amendment barred Planned Parenthood KS’s claims.¹⁰⁰

comprehensive primary and preventative care in addition to family planning services: *Provided*, That, as used in this subsection “hospitals” shall have the same meaning as defined in K.S.A. 65-425, and amendments thereto, and “federally qualified health center” shall have the same meaning as defined in K.S.A. 65-1669, and amendments thereto.

H.B. 2014, 84th Leg. § 107(l) (Kan. 2011).

⁹³ *Brownback*, 799 F. Supp. 2d at 1220.

⁹⁴ *Id.*

⁹⁵ *See id.* at 1230–31 (emphasizing that the law does not simply prioritize medical providers but rather acts to exclude certain ones). In Kansas, the KDHE acts as the grantee for the state. *Id.* at 1221. KDHE contracts with fifty-six entities to provide family planning services. *Id.* at 1222. Fifty-three are local public health departments. *Id.* Two are Planned Parenthood clinics that, combined, receive the second-largest amount of Title X funds allocated by KDHE. *Id.* at 1222–23.

⁹⁶ *See id.* at 1228–34 (analyzing Planned Parenthood KS’s arguments that Section 107(l) was unconstitutional under the Supremacy Clause, the First Amendment, and the Fourteenth Amendment).

⁹⁷ *Id.* at 1228–32. Then, the court criticized the state’s alleged purpose for creating Section 107(l). *Id.* at 1229–30. Kansas failed to demonstrate that the basis for this section was the fact that other recipients of Title X funding serve a higher percentage of poor clients than Planned Parenthood KS. *Id.* at 1230. Creating a priority among the recipients had “no direct or logical connection with such a hypothetical policy of ensuring greater service to the poor.” *Id.* *See also* *ACLU of Kan. & W. Mo. v. Praeger*, 815 F. Supp. 2d 1204, 1212 (D. Kan. 2011) (providing that evidence supporting Planned Parenthood of KS included the showing that HB 2014 “directly contradicted federal law governing use of the [Title X] funds”).

⁹⁸ *Brownback*, 799 F. Supp. 2d at 1232–34. The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

⁹⁹ *Brownback*, 799 F. Supp. 2d at 1232–34. The Fourteenth Amendment states that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

The District Court of Kansas agreed with Planned Parenthood KS and granted a preliminary injunction preventing the state from enforcing Section 107(l) of HB 2014.¹⁰¹ The Kansas Department of Health and Environment (“KDHE”) refused to comply with the court’s decision, and almost one month later the District Court of Kansas ordered the KDHE to reinstate the family planning funds that the Planned Parenthood clinics in Kansas were entitled to receive.¹⁰² The state appealed the court’s decision in hopes the appellate court would reverse the district court’s order.¹⁰³ The following section discusses the law as it applies to Kansas and Indiana’s position.¹⁰⁴

C. *The Limits of State Power over Public Funding*

Generally, a state is free to operate as it wishes as long as federal laws do not preempt its choice of activities.¹⁰⁵ Powers not covered by the

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. To claim protection under the Equal Protection Clause, the plaintiffs seeking relief must be members of a suspect class. *Maier v. Roe*, 432 U.S. 464, 470 (1977); see 16B AM. JUR. 2D *Constitutional Law* § 868 (2009) (providing a list of classes that are not suspect). Economic status is not grounds for strict scrutiny analysis under the Equal Protection Clause. *Id.* § 904. Classifications based on economic status must pass rational basis analysis to be constitutional. *Id.*

¹⁰⁰ *Brownback*, 799 F. Supp. 2d at 1227–28. The Eleventh Amendment states that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

¹⁰¹ *Brownback*, 799 F. Supp. 2d at 1236.

¹⁰² See *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, No. 11 2357 JTM, 2011 WL 3860024, at *1 (D. Kan. Aug. 30, 2011) (ordering Kansas to comply with the court’s grant for a preliminary injunction in favor of Planned Parenthood of Kansas and Mid-Missouri and to enjoin the continual enforcement of Kansas’s law preventing Planned Parenthood from receiving Title X funds).

¹⁰³ *Kansas Will Fund Planned Parenthood While It Appeals Court Ruling*, LAWRENCE JOURNAL-WORLD (Aug. 31, 2011), <http://www2.ljworld.com/news/2011/aug/31/kansas-will-fund-planned-parenthood-while-it-appea/>.

¹⁰⁴ See *infra* Part II.C (discussing the limitations of Indiana’s and Kansas’s state laws in context of federal laws).

¹⁰⁵ *Planned Parenthood of Ind., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 794 F. Supp. 2d 892, 910 (S.D. Ind. 2011) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000)). See U.S. CONST. art. VI, cl. 2 (establishing the Constitution as the supreme law of the United States). The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby,

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U.S. Constitution are left to the states.¹⁰⁶ There are several instances where state laws create preemption issues.¹⁰⁷ States cannot overstep the power of the federal government.¹⁰⁸ But as long as a state avoids violating federal laws, does that leave the state completely free to do as it wishes?¹⁰⁹ Indiana was the first of several states to enact a law that creates adverse effects on private, non-profit abortion providers.¹¹⁰ Lost within the debate between the states' powers and the rights of entities such as Planned Parenthood is the ultimate question of whether states can choose who should be the Medicaid and Title X providers in their state.¹¹¹

any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

¹⁰⁶ See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

¹⁰⁷ See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 738-40 (2008) (detailing the various ways federal law can preempt state laws). Express preemption occurs when Congress includes a preemption clause, a savings clause, or both within the text of a law to state that federal law will displace related, conflicting state laws. *Id.* at 738. There are multiple categories of implied preemption. *Id.* at 739. One example of implied preemption occurs when federal law thoroughly covers a field of law. *Id.* Known as "field preemption," Congress leaves no room for states to make their own laws on the matter. *Id.* Two other categories exist: conflict and frustration. *Id.* These both go towards congressional intent, as Congress would not want its laws to be so easily undermined by state laws. *Id.* at 740.

¹⁰⁸ See *supra* note 105 (discussing the Supremacy Clause).

¹⁰⁹ See, e.g., U.S. CONST. art I, § 8, cl. 3 (creating the Commerce Clause, which states Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); see also *supra* note 99 (outlining the Equal Protection Clause as part of the Fourteenth Amendment). See generally James L. Buchwalter, *Construction and Application of Dormant Commerce Clause*, U.S. CONST. ART. 1, § 8, CL. 3 – *Supreme Court Cases*, 41 A.L.R. FED. 2d 1 (2009); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417 (2008) (discussing the Dormant Commerce Clause).

¹¹⁰ See, e.g., *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 484 (M.D.N.C. 2011) (granting a preliminary injunction to enjoin North Carolina from enforcing a law that prohibited state and federal funds from reaching Planned Parenthood, Inc. and its affiliates). Even Congress tried to pass a law that specifically targeted Planned Parenthood. David Nather & Kate Nocera, *House Votes to Defund Planned Parenthood*, POLITICO (Feb. 18, 2011, 2:35 PM), <http://www.politico.com/news/stories/0211/49830.html>. The House of Representatives, led by Representative Mike Pence of Indiana, passed the bill but the Senate did not. *Id.*

¹¹¹ *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 903 (S.D. Ind. 2011). See generally Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991) (analyzing abortion in relation to the government's rights over public funding).

III. ANALYSIS

Indiana and Kansas each answered positively that they may choose who receives Medicaid and Title X funds.¹¹² Each argued that states could choose the eligibility guidelines for recipients, as well as medical providers.¹¹³ The following is an analysis of the laws of each state that are used to prevent private medical providers who render abortion services from receiving state and federal public funds. Part III.A examines the federal laws that support and oppose Indiana's and Kansas's actions.¹¹⁴ Part III.B follows an assessment of Indiana's and Kansas's arguments for and against their laws.¹¹⁵ Finally, Part III.C provides an in-depth review of the overall effectiveness of these defunding laws.¹¹⁶

A. *Federal Laws and Rights*

When a state legislature passes a law that appears to violate an individual's rights, a private right of action is not automatically created.¹¹⁷ On occasion, the judicial system is incapable of solving the perceived problem.¹¹⁸ Conversely, when a law is enacted for an improper, discriminatory purpose, the statute should be abrogated as invalid.¹¹⁹ But first the courts must analyze whether the challenged laws have created a private cause of action for individuals to challenge.¹²⁰

¹¹² *Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d at 903.

¹¹³ See *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1230 (D. Kan. 2011) (discussing Kansas's contention that it was allowed to prioritize among who received funding); *Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d at 904 (stating that Indiana contends it has "virtually unfettered discretion to disqualify otherwise competent Medicaid providers").

¹¹⁴ See *infra* Part III.A (outlining the constitutional arguments against the laws and whether the Constitution creates a private right of action).

¹¹⁵ See *infra* Part III.B (evaluating the impact of the budget crisis, the ability of states to choose to fund one activity over another, and the ability for private medical clinics to remain open without public funding).

¹¹⁶ See *infra* Part III.C (analyzing how the laws impact Planned Parenthood, how the laws have an impact beyond Planned Parenthood and its clients, and other alternatives states can implement in advancing their goals).

¹¹⁷ See *Maher v. Roe*, 432 U.S. 464, 479 (1977) ("[T]he Constitution does not provide judicial remedies for every social and economic ill" (quoting *Lindsey v. Normet*, 405 U.S. 56, 74 (1972))).

¹¹⁸ See *id.* (stating that the courts generally give states deference when states allocate their limited public funds). Only when laws and regulations related to the allocation of welfare-related funding fail to have a rational basis will the court consider a challenge to the law or regulation. *Id.*

¹¹⁹ *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1234 (D. Kan. 2011); see *Johnsen*, *supra* note 74, at 1368-69 (discussing how recently proposed laws that target abortion providers are "not based in medical fact and would not give women

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1. A Private Cause of Action Pursuant to § 1983

In order for a lawsuit to be valid under 42 U.S.C. § 1983, a violation of a federal statutory or constitutional right must be asserted.¹²¹ Indiana argued PPIN failed to meet its burden, but, using the *Blessing* analysis, the district court disagreed with the State's reasoning.¹²² First, the plain language of the freedom of choice provision manifested a clear intent to benefit the plaintiffs by providing for a choice in Medicaid providers.¹²³ Second, the right to have the freedom of choosing one's Medicaid provider is not so "'vague and amorphous' that it would strain judicial competence."¹²⁴ Third, the language of the provision is clear in requiring states to act in accordance with the law.¹²⁵ Consequently, the freedom of

true risk and benefit information; rather, . . . [they are] politically motivated attempt[s] to use misinformation to dissuade women from having abortions"). Johnsen notes that "[a]bortion restrictions can impose burdens not apparent on their face, especially on the most vulnerable women—those who, because of their life circumstances, are most unable to bear increased costs, travel additional distances, or otherwise overcome government-imposed barriers to abortion." *Id.* at 1362.

¹²⁰ See *infra* Part III.A.1 (evaluating whether the challengers have standing under 42 U.S.C. § 1983).

¹²¹ *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 901 (S.D. Ind. 2011). A violation of federal law is not enough. *Id.*

¹²² See *Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d at 901-03 (applying the *Blessing* test to PPIN's case); *supra* note 86 (discussing the three prongs of the *Blessing* test). For a plaintiff to have a right to sue under § 1983, PPIN and Planned Parenthood KS must demonstrate that the statute at issue intended to create an enforceable right. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002). However, PPIN and Planned Parenthood KS do not have the burden of showing that the statute at issue intended to create a private remedy. *Id.* at 284.

¹²³ See *Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d at 902 (emphasizing certain words in the freedom of choice provision to evoke the clear intent to benefit individuals).

A state plan for medical assistance *must . . . provide* that (A) *any individual eligible* for medical assistance (including drugs) may obtain such assistance from *any institution, agency, community pharmacy, or person, qualified to perform the service or services required* (including an organization which provides such services, or arranges for their availability, on a prepayment basis), *who undertakes to provide him such services . . .*

Id. (quoting 42 U.S.C. § 1396a(a)(23)).

¹²⁴ *Id.* There may be issues regarding the kind of medical care the provision will or will not cover, but the provision itself does not contain the vagueness that would strain judicial limits. *Harris v. Olszewski*, 442 F.3d 456, 462 (6th Cir. 2006).

¹²⁵ *Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d at 902. Language of the provision, such as "must . . . provide," mandates, rather than advises, states to act in conformance. *Id.* (quoting *Harris*, 442 F.3d at 462).

choice provision of the Medicaid Act grants PPIN a right to sue under § 1983, and Indiana cannot argue against PPIN's right to do so.¹²⁶

Planned Parenthood KS also made § 1983 arguments in its case against Kansas, but the issue was not whether the federal statutes provided for a right to sue, but rather whether the federal statutes in question applied to HB 2014.¹²⁷ The court held in favor of Planned Parenthood KS that Kansas's action barring Planned Parenthood KS from applying for Title X funds, either as a grantee or contractee, directly conflicted with federal law.¹²⁸ Ultimately, the federal statutes in question—the freedom of choice provision of the Medicaid Act, the Supremacy Clause, and the First and Fourteenth Amendments—allow PPIN and Planned Parenthood KS the right to challenge Indiana and Kansas, respectively, but that right does not automatically equate to a positive outcome for the organizations.¹²⁹

2. Planned Parenthood Not Entitled to Equal Protection

An argument in support of the laws enacted in Indiana and Kansas is that the defunding laws against Planned Parenthood do not entitle Planned Parenthood or its clientele to protection under the Fourteenth Amendment.¹³⁰ Fundamental rights protection would be invoked if

¹²⁶ *Id.* at 903. The court also noted that certain circumstances allow an argument of federal preemption against state regulations, without an independent cause of action being present. *Id.* at 911.

¹²⁷ *See supra* Part II.B.2 (listing Planned Parenthood KS's arguments against HB 2014: the Supremacy Clause, the First Amendment, and the Fourteenth Amendment).

¹²⁸ *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1231 (D. Kan. 2011). Kansas provided no valid reasons for the court to allow the narrowing of the eligibility requirements for receiving Title X funds. *Id.* at 1232. Section 107(l) created an additional condition and effectively excluded a qualified class of entities. *Id.* Addressing Planned Parenthood KS's First Amendment argument, the court stated that Kansas acted in a manner to "bar an entity associated with abortion from the benefit of federal funding for which it would be otherwise eligible." *Id.* at 1234. Kansas's refusal to grant family planning funds to Planned Parenthood KS due to Planned Parenthood KS's "protected association with abortion related services, renders the statute unconstitutional." *Id.* The court also agreed that Kansas, in violation of the Fourteenth Amendment, included section 107(l) with the purpose to "single out, punish, and exclude Planned Parenthood, the only historical Kansas subgrantee which provides or associates with a provider of abortion services, from receiving any further Title X subgrants." *Id.*

¹²⁹ *See infra* Part III.A.2 (discussing federal law-based arguments in favor of Indiana and Kansas).

¹³⁰ *See supra* note 99 (explaining the text and application of the 14th Amendment).

[W]hether [state legislation] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate,

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Indiana and Kansas chose to deny individuals the right to choose or seek abortion services.¹³¹ Also, there are many other health care providers that provide family planning services to individuals receiving Medicaid benefits.¹³² Judicial precedent allows governments the choice of funding one activity over another.¹³³

In both cases, Planned Parenthood argued that the impact of the defunding provisions would have an adverse impact on its clinics and clients; therefore, the laws should be repealed because they discriminate against the men and women who utilize Planned Parenthood's varying medical services.¹³⁴ However, neither case involved discrimination against a suspect class.¹³⁵ Even where intentional discrimination exists, the Supreme Court has rejected economic status as a basis for strict scrutiny.¹³⁶ Furthermore, despite the fact that states need to work within

articulated state purpose and therefore does not constitute an invidious discrimination. . . .

Maier v. Roe, 432 U.S. 464, 470 (1977) (quoting *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)).

¹³¹ See *Planned Parenthood of Minn. v. Minnesota*, 612 F.2d 359, 360 (8th Cir. 1980) (stating that the court would review state legislation under the strict scrutiny test only when fundamental rights, such as the right to choose to have an abortion, are violated). The state does not have to fund an individual's interest in exercising that right, nor does the "failure to fund pre-pregnancy family planning services sponsored by Planned Parenthood" violate one's right to privacy. *Id.*

¹³² See *Wing*, *supra* note 27, at 169 (stating that the Court has acknowledged that denying funding would lead to the inability of at least some of the people receiving Medicaid to not be able to find alternative medical providers).

¹³³ See *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."). "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Id.* (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1917)). The Government has "merely chosen to fund one activity to the exclusion of the other." *Id.* But see *McConnell*, *supra* note 111, at 1046 ("[A] government program may be unconstitutional if it funds a substitute for a constitutionally protected choice without also funding the individual's preferred choice."); *supra* Part III.A.1 (analyzing how the violation of the federal statutes gives PPIN and Planned Parenthood of KS a private right of action).

¹³⁴ See, e.g., *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1234 (D. Kan. 2011) (stating that the evidence in the case demonstrated the law had a discriminatory purpose).

¹³⁵ See *Maier*, 432 U.S. at 471 ("[E]very denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.") (citations omitted).

¹³⁶ *Wing*, *supra* note 27, at 173-74.

the framework of the U.S. Constitution, states hold the power to create laws more specifically tailored to their own goals.¹³⁷

B. *State Goals*

State legislators took action in 2011 and passed laws that placed restrictions on public funding for private abortion providers.¹³⁸ Many advanced these laws as necessary to reduce the impact of the economic crisis plaguing much of the United States.¹³⁹ States retain the power to set their own budgets, and defunding private abortion providers was seen by some legislators as the best means for reducing Medicaid and Title X costs.¹⁴⁰ Private abortion entities like Planned Parenthood provide many medical services that are also available at hospitals, public health clinics, and other private entities which do not perform abortion services.¹⁴¹ Combine that fact with a growing budget crisis and state lawmakers had to decide where public money would and would not be allocated.¹⁴²

1. Cutting Costs and Eliminating Public Funding

Public health care costs constitute a large portion of state budgets every year.¹⁴³ To deal with these rising costs, Indiana and Kansas took

¹³⁷ See *infra* Part III.B (discussing how Indiana and Kansas chose to balance their need to decrease medical care costs with the federal laws that may cause their actions to be unsuccessful).

¹³⁸ See, e.g., *supra* note 75 (detailing the controversy surrounding Indiana's passing of its law to withhold Medicaid funds from Planned Parenthood clinics around the state). Kansas also passed a law that stopped public funds from reaching certain private abortion providers. See *supra* Part II.B (providing additional background information on the laws Indiana and Kansas passed to prevent public funds from reaching private abortion providers).

¹³⁹ See *supra* note 6 (discussing the budget crisis throughout the United States and its impact on Medicaid).

¹⁴⁰ See *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1223–24 (D. Kan. 2011) (explaining that HB 2014 and the addition of section 107(l) effectively prohibit Planned Parenthood from receiving Title X funds); *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 897 (S.D. Ind. 2011) (stating Indiana passed HEA 1210, which prevented certain entities from receiving Medicaid funds). Indiana argued that the “defunding provision promotes the public interest by preventing taxpayer dollars from indirectly funding abortions.” *Id.* at 913.

¹⁴¹ See, e.g., *Brownback*, 799 F. Supp. 2d at 1222–23 (rejecting the state's argument that the defunding of Planned Parenthood clinics in the state was a non-issue, as the clinics constitute only five percent of the recipients of Title X funds provided by the state).

¹⁴² See *McConnell*, *supra* note 111, at 989 (“The government cannot spend money on everything. It must be selective.”).

¹⁴³ See *supra* note 6 (stating that Medicaid is the largest problem plaguing state budgets, as medical costs only continue to grow each year). As federal laws expand the guidelines

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action by enacting defunding legislation to lower their expenditures on medical care.¹⁴⁴ The courts disagreed, but why should states not be able to decide who can provide medical care to its citizens?¹⁴⁵ In preventing private abortion providers from receiving public funds, Indiana and Kansas created laws that reasonably related not only to their goal to decrease their budget, but also to their preferred objective of promoting child birth over abortions.¹⁴⁶

In eliminating either all Medicaid or Title X funding from Planned Parenthood's budget, Indiana and Kansas have sent the message that they do not want their public funds to indirectly support abortion services.¹⁴⁷ The Planned Parenthood clinics in each state will have to

for eligible persons and services for Medicaid and Title X funds, states need to limit their spending where federal law allows. *See Harris v. McRae*, 448 U.S. 297, 316 (1980) ("The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."). As a cooperative program with the federal government, nothing in the legislative history of the Medicaid program requires a state to assume the full costs of medical care provided to its citizens. *Id.* at 308-09.

¹⁴⁴ *See supra* Part II.B (discussing Indiana's and Kansas's actions to withhold Medicaid and Title X funding, respectively, from qualified entities).

¹⁴⁵ The U.S. Constitution does not require any level of government to provide any type of health care service. *Wing, supra* note 27, at 162. In fact, the Constitution generally prevents government action rather than require the government to act. *Id.* States have the ability to determine which health and social services should be provided to its citizens. *Maher v. Roe*, 432 U.S. 464, 481 (1977) (Burger, C.J., concurring). But just because the state does not provide for one service does not mean the state is required to provide for another. *Id.* The U.S. Supreme Court has ruled that states can choose to fund one activity over another without providing an alternative. *Id. But see id.* at 468 (stating that the state's fiscal interest to not fund nontherapeutic abortions was "wholly chimerical" (quoting *Roe v. Norton*, 408 F. Supp. 660, 664 (1975))).

The state may not justify its refusal to pay for one type of expense arising from pregnancy on the basis that it morally opposes such an expenditure of money. To sanction such a justification would be to permit discrimination against those seeking to exercise a constitutional right on the basis that the state simply does not approve of the exercise of that right.

Id. (quoting *Norton*, 408 F. Supp. at 664). The Court has upheld a state's determination in what is and is not funded as long as a rational basis standard has been utilized. *Id.* at 470.

¹⁴⁶ *See Harris*, 448 U.S. at 326 (holding that when government "has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest"); *supra* Part III.A.2 (explaining that Indiana's and Kansas's defunding provisions did not invoke strict scrutiny analysis so each state's law only needs to meet rational basis analysis).

¹⁴⁷ *See, e.g., supra* note 90 (presenting evidence of Kansas lawmakers making statements that targeted Planned Parenthood entities). Planned Parenthood can still continue to operate using private funds. *See supra* notes 67-70 and accompanying text (examining how

operate within a decreased budget.¹⁴⁸ However, states do not directly eliminate Planned Parenthood clinics by restricting state or federal funds. Rather, it opens up an opportunity for citizens to be more directly involved in where their money is invested. States are free to make a value judgment to favor one type of program or activity over another.¹⁴⁹ Neither Indiana nor Kansas imposed an absolute prohibition on anyone wanting to receive the non-abortion services that Planned Parenthood provides. Indiana and Kansas have merely chosen to fund public medical providers rather than private medical providers. But there are two sides to the controversy and the law also shows its support for Planned Parenthood.¹⁵⁰

2. States Cannot Pick and Choose Where Medicaid and Title X Funds Go

The government cannot place unconstitutional conditions on the receipt of federal funds.¹⁵¹ Choosing not to fund non-abortion-related services creates a form of financial pressure on indigent individuals.¹⁵² When the government refuses to fund private abortion clinics because they provide abortions, in addition to other non-abortion-related services, the government unconstitutionally targets a specific viewpoint.¹⁵³

Indiana enacted a law that withholds Medicaid benefits from individuals because they decided to exercise their right to receive certain medical services from an organization that also happens to provide abortion services.¹⁵⁴ HEA 1210 prohibits PPIN from being reimbursed

much of a percentage of the organization's revenue comes from private donations and how Planned Parenthood uses private funding to remain in operation).

¹⁴⁸ See *supra* note 62 (describing how eighty percent of Planned Parenthood's services do not relate to performing abortions).

¹⁴⁹ *Maier*, 432 U.S. at 474. The state may demonstrate its preference when it allocates public funds. *Id.* The law only requires that a state not create an "absolute barrier" to an individual's choice relating to medical care. *Id.* at 481 (Burger, C.J., concurring).

¹⁵⁰ See *infra* Part III.B.2 (explaining how states cannot act merely on their own accord).

¹⁵¹ See *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (discussing how regulations that "condition the receipt of a benefit . . . on the relinquishment of a constitutional right" are prohibited). But see *Maier*, 432 U.S. at 475-76 (examining the difference between interference with a protected activity and encouragement of an alternative activity).

¹⁵² *Maier*, 432 U.S. at 483 (Brennan, J., dissenting).

¹⁵³ See *Rust*, 500 U.S. at 210 (Blackmun, J., dissenting) ("By refusing to fund those family-planning projects that advocate abortion because they advocate abortion, the Government plainly has targeted a particular viewpoint."). "[I]deological viewpoint is a . . . repugnant ground upon which to base funding decisions." *Id.* at 211.

¹⁵⁴ *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 897-900 (S.D. Ind. 2011); see *Wing, supra* note 27, at 175 (stating that the Supreme Court would consider a higher standard of scrutiny when governments impose a

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for Medicaid-eligible services, which would otherwise be reimbursable and so violates the freedom of choice provision of the Medicaid statute.¹⁵⁵ Indiana cannot unilaterally determine that an otherwise competent Medicaid provider should be labeled incompetent.¹⁵⁶ Meanwhile, Kansas has created an additional requirement that qualified medical providers must meet to receive Title X funds.¹⁵⁷ The Medicaid and Title X statutes do not allow for states to eliminate qualified medical providers from receiving public funds based on the scope of services the medical providers have available to their patients.¹⁵⁸

Ultimately, both states created laws that the challengers argue violate federal law.¹⁵⁹ Each state's law also places an unconstitutional condition on private medical providers that perform abortions, preventing them from receiving public funding solely because they have decided to exercise their right to provide abortions.¹⁶⁰ While states

condition on funds for entities participating in constitutionally-protected activities). This creates a "substantial constitutional question" that could lead to an exception of the rational basis standard in determining whether a law imposes a "penalty" on a "fundamental interest." *Id.* at 174-75. The Court makes a distinction between instances where a limit on government funding does not negatively affect a person's situation and instances where the purpose of limiting government funding is to hinder constitutionally protected activities or interests. *Id.* at 175-76.

¹⁵⁵ *Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d at 901. However, the provision does not give Medicaid recipients an "absolutely unfettered right to choose" as one cannot assert a right to receive services from an unqualified medical provider. *Id.* at 903.

¹⁵⁶ *Id.* at 909. If the courts followed the state's view and allowed Indiana to unilaterally determine whether a provider was qualified, it would render the freedom of choice provision meaningless. *Id.* at 908.

¹⁵⁷ *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1220-21 (D. Kan. 2011).

¹⁵⁸ *See Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d at 904 (disagreeing with Indiana's argument and clarifying that the Medicaid statute allows states to eliminate providers based on the quality of services provided and not the scope of services). *But see Harris v. McRae*, 448 U.S. 297, 309 (1980) (holding that the Medicaid program "does not obligate a participating State to pay for those medical services for which federal reimbursement is unavailable") (footnote omitted).

¹⁵⁹ *See, e.g., Brownback*, 799 F. Supp. 2d at 1221 ("Neither the Title X statute nor any federal regulation imposes any additional service requirements on entities that receive Title X funds, including mandating the type of provider that they must be, or the services that they provide outside of those offered as part of the Title X program."). An organization that receives Title X funds may choose to provide abortions and remain eligible to receive Title X funds, so long as the abortions are paid for with the organization's own funds. *Id.* at 1222.

¹⁶⁰ *Cf. McConnell*, *supra* note 111, at 1047 ("By the same token, the government [cannot] deny all Medicaid benefits to a woman who procures an abortion, even though it need not pay the cost of the abortion itself.").

Using essentially the same reasoning, the Supreme Court has indicated that it also will except the general rule of rationality where a recipient of government financing or services is prohibited from

would prefer to pick and choose the recipients of public funds, states need to weigh the needs of its citizens before taking action.¹⁶¹

C. Public Demands

Perhaps the most challenging factor to consider when states create new laws is the impact the laws will have on affected individuals or organizations. In making health care decisions, people should be free from governmental interference in their decision-making process.¹⁶² States do not have to provide any sort of government-related help to their citizens; but once they do, they need to operate within constitutional boundaries.¹⁶³ For when states wander from those restrictions, the impact may be costly.¹⁶⁴

1. The Impact on Planned Parenthood and Beyond

Indiana and Kansas enacted laws that allowed them to stop providing Medicaid and Title X funds for the majority of the non-abortion services Planned Parenthood provides, which are entitled to coverage by the public funds.¹⁶⁵ This denial of public funds to Planned Parenthood of Indiana and Planned Parenthood of Kansas and Mid-Missouri will have a noticeable impact on each organization's overall

engaging in a constitutionally-protected activity as a condition on the receipt of government services or funds for other activities.

Wing, *supra* note 27, at 175.

¹⁶¹ See *infra* Part III.C (providing an overview of defunding provisions on Planned Parenthood clinics and its clients and alternatives state may consider).

¹⁶² See *Rust v. Sullivan*, 500 U.S. 173, 214 (1991) (Blackmun, J., dissenting) (stating that people have the "liberty" to make the most personal medical decisions without government compulsion). *But see Harris*, 448 U.S. at 317-18 ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.").

¹⁶³ *Maier v. Roe*, 432 U.S. 464, 469-70 (1977). The Court stated that:

The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.

Id. (footnote omitted).

¹⁶⁴ See *infra* Part III.C.1 (analyzing the effects Indiana's and Kansas's laws have had on Planned Parenthood entities within each state and the surrounding communities).

¹⁶⁵ See *supra* note 62 (breaking down by percentage the different services Planned Parenthood provides and stating that only three percent of the services Planned Parenthood provides are abortion services).

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ability to render other health services to their patients.¹⁶⁶ Lost funding has forced, or will force, several of the health centers in both states to shut down.¹⁶⁷ The states may see this as a success in preventing abortions; however, according to PPIN, thousands of patients will be needlessly and negatively affected.¹⁶⁸

Closing Planned Parenthood clinics is not beneficial to states.¹⁶⁹ When states are in a financial crisis, they choose to sometimes privatize services and lessen the burden on government, but these laws seem to have the opposite effect: they shift the burden to public clinics to care for thousands of women and men receiving care from Planned Parenthood clinics.¹⁷⁰

In Indiana's situation, the federal government took a stance against the law to defund Planned Parenthood and threatened to withhold all Medicaid funding from the state.¹⁷¹ That would amount to over \$5 billion in lost federal support.¹⁷² By choosing to enact HEA 1210, Indiana made it more difficult for its Medicaid patients to receive any medical care, whether or not the care is related to any type of family planning service.¹⁷³ In Kansas's case, cutting Title X funds would defeat the purpose of the funds.¹⁷⁴ Ultimately, any measures taken by the states in advancing their goals must comply with all legal and constitutional

¹⁶⁶ See *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1235 (D. Kan. 2011) ("In the absence of Title X funding, Planned Parenthood will be required to either increase its charges to clients, fire employees, close one or more of its health centers, or engage in some combination of these responses."); *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 899 (S.D. Ind. 2011) ("HEA 1210 will exact a devastating financial toll on PPIN and hinder its ability to continue serving patients' general health needs.").

¹⁶⁷ *Brownback*, 799 F. Supp. 2d at 1235 ("In the absence of Title X funding, Planned Parenthood will be required to either increase its charges to clients, fire employees, close one or more of its health centers, or engage in some combination of these responses."); *Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d at 899 ("PPIN estimates that [HEA 120] will force it to close seven health centers and eliminate roughly 37 employees.").

¹⁶⁸ See *Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d at 899 (stating how the closure of Planned Parenthood health centers in Indiana will cause thousands of PPIN's patients to lose their chosen health care provider).

¹⁶⁹ See *Brownback*, 799 F. Supp. 2d at 1237 (noting that Kansas had failed to show that alternate family planning services providers had the ability to provide the same level of services Planned Parenthood health centers in the state provide).

¹⁷⁰ See *id.* at 1235, 1237 (explaining that the closure of Planned Parenthood clinics in the state would result in an inability for Planned Parenthood's patients to receive similar care, if any, at a local, public health clinic).

¹⁷¹ See *Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d at 913.

¹⁷² *Id.*

¹⁷³ *Id.* Losing all Medicaid funding would affect nearly one million citizens and residents of Indiana. *Id.*

¹⁷⁴ See *ACLU of Kan. & W. Mo. v. Praeger*, 815 F. Supp. 2d 1204, 1212 (D. Kan. 2011) ("[HB 2014] directly contradicted federal law governing use of the [Title X] funds . . .").

requirements, and states should consider the effects these measures might have on their citizens.¹⁷⁵

2. Similar Laws Struck Down and Alternative Measures

The creation of laws that have the secondary effect of eliminating a medical provider, like Planned Parenthood, as a viable option for medical services has caused Indiana and Kansas to inhibit their citizens from making a choice about their medical care provider free from state interference.¹⁷⁶ These types of laws often create a direct conflict between federal and state law.¹⁷⁷ When states arbitrarily reduce Medicaid reimbursement rates, medical providers may use the Supremacy Clause to argue against the state's actions.¹⁷⁸ Previous attempts to impose additional state-created eligibility requirements to receive public funds have been held to be unconstitutional.¹⁷⁹

If the goal is to ensure that no public funds are used to support abortion services, states could mandate that Planned Parenthood clinics create physically separate facilities for their patients who receive abortion services instead of family planning services.¹⁸⁰ However, if decreasing the number of abortions performed is a state's ultimate goal, it should look toward addressing public health policies rather than imposing fiscal regulations.¹⁸¹ States should try to reach a "common-

¹⁷⁵ See *infra* Part III.C.2 (integrating all elements of the federal laws, state goals, and public demands discussed in this Note).

¹⁷⁶ See Wing, *supra* note 27, at 164 (stating that when it comes to Medicaid or Title X funds, the government must especially comply with the Equal Protection Clause and the "fairness" requirements of the Due Process Clause found in the Fifth and Fourteenth Amendments).

¹⁷⁷ See *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1228 (D. Kan. 2011).

¹⁷⁸ Sayles, *supra* note 31, at 121.

¹⁷⁹ *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 336-37 (5th Cir. 2005) ("[A] state eligibility standard that altogether excludes entities that might otherwise be eligible for federal funds is invalid under the Supremacy Clause.") (footnote omitted); see *Planned Parenthood of Minn. v. Minnesota*, 612 F.2d 359, 363 (8th Cir. 1980) (using rational basis analysis); *Planned Parenthood of Billings, Inc. v. Montana*, 648 F. Supp. 47, 51 (D. Mont. 1986) (using the Supremacy Clause).

¹⁸⁰ Providing separate facilities could allow the clinics within the state to remain eligible for funds. *But see Planned Parenthood of Billings, Inc.*, 648 F. Supp. at 51 (striking down a state law that required separate facilities for abortion services and family planning services in order for an organization to receive Title X funds). A Montana appropriations bill unconstitutionally conditioned Title X funding for family planning services to be performed in a "physical plant that d[id] not contain an abortion clinic or facility that performs abortions." *Id.* at 49.

¹⁸¹ See Johnsen, *supra* note 74, at 1388-89 (arguing that state lawmakers should focus on preventing unintended pregnancies and encouraging adoption rather than criminalizing abortion); see also McConnell, *supra* note 111, at 1005 ("[I]t is not at all clear that the government saves money by denying funding.").

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ground” between public policy and constitutional values.¹⁸² In fact, regulations that are not uniformly enforced among similar health care providers, for example among all abortion providers, may have the opposite effect that states seek.¹⁸³ Most often, abortion providers are the main providers of the family planning services that seek to prevent pregnancy and provide other reproductive and sexual health-related care.¹⁸⁴ While the Court ruled that public funding-related laws that have a rational basis will be upheld, it is unlikely that a law will be overturned if it meets more than that standard.¹⁸⁵ District courts in Indiana and Kansas ruled in favor of Planned Parenthood when analyzing each state’s respective Medicaid or Title X defunding provision.¹⁸⁶ The contested statutes should be amended to bring each within a permissible balance between federal, state, and local interests.¹⁸⁷

IV. CONTRIBUTION

An analysis of Indiana’s defunding provision shows that Indiana cannot prevent abortion providers from receiving any Medicaid funds solely because these providers perform abortions, in addition to other family planning services.¹⁸⁸ The Medicaid statute allows recipients of Medicaid to benefit from the freedom to choose where, and from whom, they seek medical care.¹⁸⁹ Kansas’s attempt to eliminate funding to

¹⁸² Johnsen, *supra* note 74, at 1389.

In contrast with compromise abortion restrictions that diminish services, increase costs, and constrain choices, common-ground efforts to prevent unintended pregnancy and support post-conception options, including healthy childbearing and adoption, work to reduce the number of abortions by enhancing responsible reproductive decisionmaking and by empowering especially those most in need of support. Common-ground alternatives . . . [uphold] fundamental commitments to liberty and equality.

Id. at 1390.

¹⁸³ *Id.* at 1390. Medically unnecessary regulations may have the “indirect and perverse effect of increasing the number of abortions or delaying abortion.” *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See *supra* notes 99, 118 (explaining that courts will apply the rational basis standard when the suspect class at issue relates to poverty).

¹⁸⁶ See Planned Parenthood of Kan. & Mid-Mo. v. Brownback, 799 F. Supp. 2d 1218, 1236 (D. Kan. 2011) (granting a preliminary injunction to stop the enforcement of section 107(l) of HB 2014 and ordering all Title X funds to continue to be allocated as usual); Planned Parenthood of Ind., Inc. v. Comm’r of the Ind. State Dep’t of Health, 794 F. Supp. 2d 892, 921 (S.D. Ind. 2011) (granting a preliminary injunction to enjoin the defunding provision).

¹⁸⁷ See *infra* Part IV (creating separate amendments to Indiana’s and Kansas’ statutes at issue to resolve major arguments between the Planned Parenthood organizations of each state and each state’s government representative).

¹⁸⁸ See *supra* Part III.B.2 (discussing that Indiana cannot arbitrarily pick which entities receive public funds and which entities do not).

¹⁸⁹ See *supra* Part II.A.1 (outlining the framework of the Medicaid program).

private abortion providers, who also offer family planning services, conflicts with the purpose of the Title X program itself.¹⁹⁰ As discussed above, Indiana's and Kansas's statutes present issues when states selectively fund private abortion providers.¹⁹¹ Outlined below is a proposed amendment to each state's law, which establishes guidelines in determining what Medicaid or Title X funds, if any, will be allocated to private abortion providers.¹⁹²

A. *Indiana*

The defunding provision, codified in section 5-22-17-5.5 of the Indiana Code, reads as follows with the proposed change:

(b) An agency of the state may not:

(1) enter into a contract with; or

(2) make a grant 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.

(c) Any appropriation by the state:

(1) in a budget bill;

(2) under IC § 5-19-1-3.5; or

(3) in any other law of the state;

to pay for a contract with or grant made to any entity that performs abortions or maintains or operates a facility where abortions are performed is canceled, and the money appropriated is not available for payment of any contract with or grant made to the entity that performs abortions or maintains or operates a facility where abortions are performed.

(d) For any contract with or grant made to an entity that performs abortions or maintains or operates a facility where abortions are performed covered under subsection (b), the budget agency shall make a determination that funds are not available, and the contract or the grant shall be terminated under section 5 of this chapter.

(e) *Where an entity that performs abortions or maintains or operates a facility where abortions are performed also provides*

¹⁹⁰ See *supra* Part II.A.2 (explaining the purpose of Title X programs).

¹⁹¹ See *supra* Part III.A-B (analyzing reasons for and against each state's law).

¹⁹² See Part IV (proposing an amendment to both Indiana's and Kansas's enacted laws).

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*non-abortion-related medical services in addition to performing abortions, the above subsections (b), (c), and (d) do not apply, provided that the entity maintains and operates its abortion services separately from all non-abortion-related medical services.*¹⁹³

Commentary

As written, the current defunding provision prevents Medicaid recipients from obtaining any services from Planned Parenthood clinics in Indiana.¹⁹⁴ The amendment to the statute resolves certain issues that arose with the enactment of the original statute. First, the amendment will permit abortion providers that also provide non-abortion-related services to continue to receive Medicaid funding. By allowing entities like PPIN to continue to receive Medicaid funds for its non-abortion services, people would continue to have the freedom to choose PPIN for non-abortion care,¹⁹⁵ thus, resolving the Supremacy Clause issue.¹⁹⁶

Second, the amendment ensures a separation of abortion and non-abortion services. This will prevent public funds from being commingled with private funds and used for abortion-related procedures.¹⁹⁷ Requiring strict separation would thereafter be used to condition funding. This separation does not have to be a physical separation of facilities but rather a management requirement.¹⁹⁸ For example, keeping separate financial accounts and partitioning the facility to have a strict division between an abortion-only service area and a non-abortion service area. Adding a condition to the receipt of funding, rather than completely eliminating funding, is a constitutional prerequisite that would be utilized where government chooses to selectively fund entities.¹⁹⁹

¹⁹³ The proposed amendment is italicized and constitutes the contribution of the author.

¹⁹⁴ See *supra* Part II.B.1 (detailing the creation and consequence of the Indiana defunding provision).

¹⁹⁵ See *supra* note 79 and accompanying text (discussing that a provision of the Medicaid Act allows eligible individuals to seek medical care from a qualified provider of his or her choice).

¹⁹⁶ See *supra* note 105 (including the text of the Supremacy Clause); see also *supra* note 96 (listing the Supremacy Clause as one of Planned Parenthood KS's arguments against section (l)).

¹⁹⁷ See *supra* note 69 and accompanying text (explaining that while commingling of funds is a concern, no evidence shows PPIN has acted in a manner that suggests an illegal mixing of funds).

¹⁹⁸ See *supra* note 180 (holding a Montana state law requiring a physical separation of services as illegal, as it would be too costly for those affected to comply with the law).

¹⁹⁹ See *supra* notes 80, 151, 160 and accompanying text (clarifying when conditioning funding is unconstitutional and situations where putting a condition on funding is legal).

Ultimately, the amendment clarifies where the state would appropriate Medicaid funding. PPIN would continue to receive Medicaid funds as long as compliance has been demonstrated within the statute's provisions. If PPIN does not adequately separate abortion and non-abortion services, it would not be eligible for any contract or grant from the state. Taxpayers who are concerned would be comforted knowing that PPIN would not receive any financing if any of the public funds were used for abortion services.

B. Kansas

During the fiscal year ending June 30, 2012, subject to any applicable requirements of federal statutes, rules, regulations or guidelines, any expenditures or grants of money by the department of health and environment—division of health for family planning services financed in whole or in part from federal title X moneys shall be ~~made subject~~ *appropriated according to the following two ~~priorities~~ criteria: First, money will be allocated according to the percentage of services related to family planning that the entity provides in comparison with all entities within the state applying for federal Title X moneys and, ~~priority to public entities (state, county, local health departments and health clinics) and, if any moneys remain,~~ then, Second, money will be allocated according to the percentage of clients who receive family planning services that the entity provides which qualify for state medical assistance. All federal Title X moneys may only be used for family planning services. No federal Title X moneys may be used to perform abortions or any abortion related services. ~~priority to non-public entities which are hospitals or federally qualified health centers that provide comprehensive primary and preventative care in addition to family planning services; Provided, That, as used in this subsection "hospitals" shall have the same meaning as defined in K.S.A. 65-425, and amendments thereto, and "federally qualified health center" shall have the same meaning as defined in K.S.A. 65-1669, and amendments thereto.~~*²⁰⁰

²⁰⁰ The proposed amendments are italicized and are the contribution of the author.

Commentary

The main issue with this section of HB 2014 is that it completely eliminates the possibility of any private entity, which is not a hospital or FQHC that provides abortions, from receiving any Title X funds for any family planning services the entity may provide.²⁰¹ Title X funds already include a federal provision that forbids any use of the funds for abortion procedures.²⁰² Further restricting or defunding entities like Planned Parenthood KS is unnecessary. The amendment to the statute resolves the courts' major objection to the Kansas law.

Rather than exclude entities like Planned Parenthood KS from receiving any Title X money, the amendment gives similar entities an equal opportunity to receive Title X funds. Kansas reasoned that enacting the law would assure that low-income citizens of the state could remain as the main beneficiaries of the Title X funds.²⁰³ The proposed amendment would now allocate the Title X funds to entities based on the number of clients they serve who qualify as low-income. It also resolves another concern regarding which funds are used and by whom. The law includes a provision that allows the money to be used for family planning services only and not abortions.

The amended law eliminates any eligibility requirement for the funds; rather, all entities remain eligible under the revisions. These amendments allow for the allocation of Title X money to any and all entities that would otherwise qualify. The new proposed criteria allocate funds based on the clients the entity serves and the services the entity provides to those people, and not based on the entity itself.

V. CONCLUSION

Now, imagine your life again as a mother struggling to make ends meet. Planned Parenthood clinics around the state closed due to lack of funding, and you must once again locate a new place to receive care.

²⁰¹ See *supra* notes 94-95 and accompanying text (describing how HB 2014 prioritizes funding in a manner that eliminates Planned Parenthood KS from receiving any Title X funds).

²⁰² See *supra* note 43 (reviewing the provision that prohibits Title X funds from financing any abortion or abortion-related activities); see also *supra* Part II.A.3 (explaining the Hyde Amendment which prevents the application of federal funds for abortions, unless an exception is met).

²⁰³ See *supra* note 97 (criticizing Kansas for providing a reason that it could not prove was the basis for HB 2014). It was Kansas's "suggestion that the statute was simply designed to prioritize funding to entities who have a higher percentage of poor clients which appears to be a *post-hoc*, 'litigation-spawned' attempt to find some alternative, benign rationale for Section 107(l)." *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1230 (D. Kan. 2011).

With the amended law in place, your Planned Parenthood clinic has been allowed to resume services. The clinic already keeps its abortion and non-abortion services operationally and physically separate. Accordingly, all you have to do is remain patient until the Planned Parenthood staff members are ready to provide medical services to you again. Under the amended law, Planned Parenthood may re-open with little difficulty. You no longer have to worry about finding a new primary care provider.

Since the advent of social welfare programs in the United States, the public funding of health care has remained a controversial topic. The Medicaid program accounts for a large portion of state budgets. Every year that portion continues to grow as medical costs seem to rise and the economy continues to struggle. States responded by creating laws to prohibit certain entities from receiving public funds for programs such as Medicaid or Title X.

Indiana and Kansas are learning that these new laws are difficult to enforce as each proposal has been met with controversy. Indiana was first to eliminate Medicaid funding for private abortion providers, and Kansas followed with a law of its own when it denied Title X funds to private abortion providers. The Planned Parenthood organization in each state immediately responded and secured the assistance of the courts to prevent the enforcement of these laws.

The proposed changes enable Indiana to place a condition on the receipt of Medicaid funding, while allowing PPIN's patients to maintain their freedom of choice. The modifications allow Kansas to prioritize its funding, while ensuring that Planned Parenthood KS remains eligible to receive Title X funds. Amending the language of each state's law has created a basis—which aligns federal laws, state goals, and public demands—for other states to follow when they decide to address Medicaid or Title X appropriations in their budgets.

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* J.D. Candidate, Valparaiso University Law School (2013); B.S., Health Administration and Policy, Creighton University (2010). Many people made this Note possible. I want to thank my parents, David and Susan, for their unconditional love and support and for making me do my homework. That seems to have been a wise parenting choice. I want to thank my siblings, Jameson and Shannon, for being awesome. Additionally, I want to thank my advisor, Dan Gioia, who provided invaluable feedback and helped me become a better writer. Finally, I want to thank my friends who reminded me to balance researching and writing this Note with a healthy dose of procrastination. All of you made this entire experience unforgettable.