**Case No. 11-2464**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

***Planned Parenthood of Indiana, Inc. et al.*,**
**Plaintiffs-Appellees,**

**v.**

***Commissioner of the Indiana State Department of Health et al.*,**
**Defendants-Appellants.**

On Appeal from the U.S. District Court for the Southern District of Indiana,
No. 1:11-cv-00630-TWP-DKL, Hon. Tanya Walton Pratt

# *Amici Curiae* Brief of the American Center for Law and Justice, United States Representatives Michele Bachmann, Larry Bucshon, Dan Burton, Francisco "Quico" Canseco, Michael Conaway, John Fleming, Bill Flores, Randy Forbes, Virginia Foxx, Trent Franks, Scott Garrett, Vicky Hartzler, Jeb Hensarling, Tim Huelskamp, Randy Hultgren, Lynn Jenkins, Bill Johnson, Walter Jones, Jim Jordan, Mike Kelly, Steve King, John Kline, Doug Lamborn, Jeff Landry, James Lankford, Robert Latta, Kenny Marchant, Thaddeus McCotter, Cathy McMorris Rodgers, Jeff Miller, Alan Nunnelee, Ron Paul, Mike Pence, Joe Pitts, Mike Pompeo, Todd Rokita, Chris Smith, Lamar Smith, Marlin Stutzman, Glenn Thompson, and Todd Young, and the Committee to Defund Planned Parenthood's Abortions at the State Level, Supporting Defendants-Appellants and Reversal


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Dated: August 8, 2011

## CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 11-2464

Short Caption: Planned Parenthood of Indiana, Inc. *et al.* v. Commissioner of the Indiana State Department of Health *et al.*

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Committee to Defund Planned Parenthood's Abortions at the State Level

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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The American Center for Law and Justice has no parent corporations.

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Attorney Signature: /s/ Jay Alan Sekulow Date: August 8, 2011
Attorney's Printed Name: Jay Alan Sekulow

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## INTEREST OF *AMICI*[1]

*Amicus*, American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law and the sanctity of human life. ACLJ attorneys have argued before the Supreme Court of the United States and participated as *amicus curiae* in a number of significant cases involving abortion and the freedoms of speech and religion. *See, e.g.*, *Pleasant Grove v. Summum*, 129 S. Ct. 1125 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

*Amici*, United States Representatives Michele Bachmann, Larry Bucshon, Dan Burton, Francisco "Quico" Canseco, Michael Conaway, John Fleming, Bill Flores, Randy Forbes, Virginia Foxx, Trent Franks, Scott Garrett, Vicky Hartzler, Jeb Hensarling, Tim Huelskamp, Randy Hultgren, Lynn Jenkins, Bill Johnson, Walter Jones, Jim Jordan, Mike Kelly, Steve King, John Kline, Doug Lamborn, Jeff Landry, James Lankford, Robert Latta, Kenny Marchant, Thaddeus McCotter, Cathy McMorris Rodgers, Jeff Miller, Alan Nunnelee, Ron Paul, Mike Pence, Joe Pitts, Mike Pompeo, Todd Rokita, Chris Smith, Lamar Smith, Marlin Stutzman,

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[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund preparation or submission of the brief. No person, other than *amici curiae*, their members, and their counsel, contributed money that was intended to fund the preparation or submission of the brief.

Glenn Thompson, and Todd Young, are Members of the 112th United States Congress.

*Amicus*, the Committee to Defund Planned Parenthood's Abortions at the State Level, consists of more than 25,000 Americans who support the authority of federal, state, and local governments to prevent the direct or indirect subsidizing of abortion through public funds.

The *Amici* seek to ensure that federal Medicaid statutes and regulations are properly interpreted to preserve the States' broad authority to define the contours of their Medicaid programs, including through laws that set qualifications for Medicaid service providers such as Indiana House Enrolled Act 1210 ("HEA 1210"). In addition, the *Amici* are concerned by Plaintiffs' novel claim that abortion providers have a constitutional right to perform abortions and receive public funds; if accepted, this argument would unduly restrict the policy discretion that Congress and state and local governments have to decide how to spend public funds. The outcome of this case is of great interest to the *Amici*, as it will significantly impact the ability of legislatures at all levels of government to enact reasonable laws, such as HEA 1210, that prevent the direct or indirect public subsidization of abortions.

## SUMMARY OF ARGUMENT

Federal Medicaid statutes and regulations give States broad discretion to craft the rules applicable to their Medicaid programs. Congress left intact the States' authority to determine what makes an entity qualified to provide Medicaid services, 42 U.S.C. § 1396a(p)(1), while ensuring that Medicaid recipients may utilize any practitioner deemed to be qualified under State law, 42 U.S.C. § 1396a(a)(23). Since HEA 1210 does not limit a beneficiary's ability to choose among providers that are deemed to be qualified, it is consistent with federal Medicaid law.

In addition, the novel argument that abortion providers have a constitutional right to perform abortions and receive public funds finds no support in the law. HEA 1210's public funding provisions are consistent with the standards set forth in cases illustrating that a government's decision to not directly or indirectly subsidize abortion is constitutionally sound. As such, HEA 1210 does not violate doctors' rights because it does not violate patients' rights.[2]

[2] This brief does not address whether Plaintiffs have a cause of action to enforce the relevant Medicaid statutory provisions. In addition, although this brief does not address HEA 1210's provisions requiring abortion providers to inform women that human physical life begins at fertilization, and that scientific evidence shows that a fetus can feel pain at or before twenty weeks, those provisions are constitutionally sound; the Indiana General Assembly's determinations concerning matters of medical or scientific fact are entitled to great deference.

## ARGUMENT

### I. HEA 1210 is not preempted by federal Medicaid law.

The discretion that federal Medicaid law affords a State in crafting many aspects of its Medicaid plan is substantial and wide. *Alexander v. Choate*, 469 U.S. 287, 303 (1985) ("The federal Medicaid Act . . . gives the States substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage."); *Smith v. Miller*, 665 F.2d 172, 178 (7th Cir. 1981) (noting that States have "wide" and "substantial" discretion in administering their Medicaid programs); *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 172 (2d Cir. 1991) ("Congress has delegated the authority to administer the Medicaid program to the states. As such, the states are responsible for licensing health-care providers and qualifying them for participation in the program."). HEA 1210 is a permissible regulation of the qualifications of Medicaid service providers. States retain the authority to decide what makes a health care provider "qualified" to provide Medicaid services; that a service provider had been qualified under State law in the past, but is now disqualified under new State standards, is irrelevant. In addition, HEA 1210 is consistent with the Hyde Amendment, as Medicaid recipients seeking an abortion in the limited circumstances permitted under the Hyde Amendment (when the mother's life would be endangered or the pregnancy resulted from rape or incest) can do so at hospitals or ambulatory surgical centers.

42 U.S.C. § 1396a(a)(23), known as the Medicaid freedom of choice provision, states that a State plan must (with exceptions not relevant here) "provide that . . . any individual eligible for medical assistance . . . 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." This provision dictates that a State cannot entirely eliminate choice among service providers by mandating that beneficiaries use one particular qualified provider.[3]

Importantly, as Plaintiffs admitted in their reply brief filed with the District Court, "the term 'qualified'—as utilized in § 1396(a)(23)—*is not defined in federal Medicaid law*." Pl. Reply Br. at 11, n.9, Doc. 48 (June 2, 2011) (emphasis added). The lack of a federal definition of "qualified" in this context was intentional. Congress left intact the States' authority to determine what makes an entity "qualified" to provide Medicaid services while ensuring that Medicaid recipients could utilize any practitioner deemed to be qualified under State law. Among the stated purposes of the freedom of choice provision and other 1967 additions were

[3] The District Court erred in rejecting Defendants' argument that *Chisholm v. Hood*, 110 F. Supp. 2d 499, 506 (E.D. La. 2000), and *Bay Ridge Diagnostic Lab., Inc. v. Dumpson*, 400 F. Supp. 1104, 1108 (E.D.N.Y. 1975), are distinguishable because they involved provisions mandating the use of one particular qualified provider (although other qualified providers existed), whereas HEA 1210 merely regulates provider qualifications. Appellants' Required Short Appendix ("Short App.") 22-23, n.7.

to "establish[] certain limits on Federal participation in the program and to add flexibility in administration." Social Security Amendments of 1967, S. Rep. No. 90-744, 90th Cong., 1st Sess. (1967), reprinted in 1967 U.S. Code Cong. & Admin. News 2838, 3021. Congress contemplated that, "[i]nasmuch as *States may* . . . set certain standards for the provision of care . . . it is possible that some providers of service may still not be . . . *considered qualified* to provide the services included in the State plan." *Id.* (emphasis added). HEA 1210 is an example of a permissible state regulation of the qualifications of Medicaid service providers.

In 1980, the Supreme Court emphasized that the freedom of choice provision applies with respect to qualified providers and does not prevent the government from determining that a provider is not qualified. In *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), the Court held that nursing home residents did not have "a constitutional right to a hearing before a state or federal agency may revoke the home's authority to provide them with nursing care at government expense." *Id.* at 775. The Court explained:

> [T]he Medicaid provisions relied upon by the Court of Appeals do not confer a right to continued residence in the home of one's choice. Title 42 U. S. C. § 1396a(a)(23) . . . gives recipients the right to choose among a range of *qualified* providers, without government interference. By implication, it also confers an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified. But it clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to

> continue to receive benefits for care in a home that has been decertified. . . .
>
> [W]hile a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified.

*Id.* at 785-86; *see also* Short App. 12 (noting that *O'Bannon* recognized that the right to choose among providers "is not limitless").

A 1987 amendment to the Medicaid statutes emphasized that States retain the authority to determine what makes an entity "qualified" to be a Medicaid provider. Subsection (p)(1) of § 1396a, the statute that includes the freedom of choice provision, states that, "[i]n addition to any other authority, a State may exclude any individual or entity for purposes of participating under the State plan . . . for any reason for which the Secretary could exclude the individual or entity from participation in a program" under various statutory provisions. 42 U.S.C. § 1396a(p)(1). Thus, a State's authority to "exclude any individual or entity for purposes of participating under the State plan" *is not limited to* "any reason for which the Secretary could exclude the individual or entity," but, "[i]n addition," includes any reason for exclusion found in "any other authority." *See id.* A State's exclusion of service providers pursuant to a State statute—such as HEA 1210—is expressly authorized by subsection (p)(1).

The District Court's conclusion that "PPIN—an otherwise competent Medicaid provider—cannot be rendered 'unqualified' solely because Indiana unilaterally says so," Short App. 23, is deeply flawed and fails to recognize the broad authority that § 1396a(p) expressly provides to the States to set provider qualifications. The statutory language referring to "any reason for which the Secretary could exclude the individual or entity from participation in a program" is not rendered "entirely superfluous" by this reading, *id.* at 24, but is merely *illustrative* of *some* of the reasons a State might choose to include within its qualification standards.

The First Circuit's decision in *First Medical Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46 (1st Cir. 2007), persuasively supports Defendants' reading of subsection (p)(1). Puerto Rico excluded health care providers (such as First Medical) that owned facilities that provided certain Medicare services from participating in a dual Medicare/Medicaid program designed to provide full prescription drug coverage. *Id.* at 49. The court first determined that Puerto Rico was "acting to protect the integrity of the Puerto Rico Medicaid system," not impermissibly regulating Medicare Advantage plans. *Id.* at 52. The court then rejected First Medical's argument that federal Medicaid law prevented Puerto Rico from excluding it from the plan. *Id.* at 52-53.

> First Medical interprets [42 U.S.C. § 1396a(p)] to limit ASES's authority to exclude entities from participating in its Medicaid

> program to those reasons for which the Secretary could prohibit an entity from participating in Medicare. . . .
>
> First Medical incorrectly interprets the Medicaid exclusion statute. The statute expressly grants states the authority to exclude entities from their Medicaid programs for reasons that the Secretary could use to exclude entities from participating in Medicare. But it also preserves the state's ability to exclude entities from participating in Medicaid under "any other authority."

*Id.* at 53.

As the court also noted,

> [t]he legislative history clarifies that this "any other authority" language was intended to permit a state to exclude an entity from its Medicaid program for *any* reason established by state law. The Senate Report states:
>
> > The Committee bill clarifies current Medicaid Law by expressly granting States the authority to exclude individuals or entities from participation in their Medicaid programs for any reason that constitutes a basis for an exclusion from Medicare . . . . *This provision is not intended to preclude a State from establishing, under State law, any other bases for excluding individuals or entities from its Medicaid program*.
>
> S. Rep. 100-109 at 20, reprinted in 1987 U.S.C.C.A.N. at 700 (emphasis supplied).

*Id.*; *see also* Short App. 13 (characterizing § 1396a(p) and *Vega-Ramos* as "some notable authority" backing Defendants' position).

The First Circuit's reading of § 1396a(p)(1) is consistent with the provision's unambiguous text. The express statutory authorization for States to exclude willing service providers based upon "any other authority" directly

supports Indiana's authority to enact HEA 1210. The District Court's suggestion that "any other authority" must be interpreted narrowly to only authorize State regulations addressing fraud, abuse, or incompetence (*i.e.*, to limit State regulation of qualifications to grounds that the Secretary could utilize) reads that language out of the statute. *Id.* at 14-15. The District Court erred by using its view of § 1396a(p)'s "overarching purpose" to override its plain language. *See, e.g.*, *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1266 (2011) ("We will not . . . allow[] ambiguous legislative history to muddy clear statutory language."); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quotation marks omitted) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").[4] Rather than allowing States to only retain the limited power of setting qualifications for the same reasons as the Secretary, Congress intentionally used the "any other authority" language to afford States with broad discretion to craft the contours of their programs. The statute says "any other authority," not "any analogous authority" or "any authority relating to fraud, abuse, or incompetence." If Congress had desired to limit State exclusion

[4] Although this brief does not address *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), the Department of Health and Human Services' reading of § 1396(p)(1) relies on the same flawed reasoning and is inherently unreasonable.

of providers to the grounds stated with respect to the Secretary, it would have expressly said so.

Federal regulations further confirm State authority to define what qualifies a service provider for Medicaid eligibility. 42 C.F.R. § 1002.2 (federal regulations should not be "construed to limit a State's own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law."); 42 C.F.R. § 431.51(c) (Medicaid statutes and regulations do not prohibit State agencies from "[s]etting reasonable standards relating to the qualifications of providers."); *see also Briarcliff Haven, Inc. v. Dep't of Human Res.*, 403 F. Supp. 1355, 1362 (N.D. Ga. 1975) (noting that then-existing 45 C.F.R. § 249.20 provided, "A State plan for medical assistance under title XIX of the Social Security Act . . . does not prohibit the State agency . . . from setting reasonable standards relating to the qualifications of providers of such care.").

HEA 1210 is not rendered unreasonable or inconsistent with federal Medicaid law simply because it bolsters Indiana's strong interests in encouraging childbirth and ensuring that abortions are not directly or indirectly subsidized by public funds. In upholding a State Medicaid regulation prohibiting Medicaid funding of abortions that were not "medically necessary," as that term was defined by state law, the Supreme Court observed:

> [T]he State has a valid and important interest in encouraging childbirth. . . . Respondents point to nothing in either the language or

> the legislative history of Title XIX that suggests that it is unreasonable for a participating State to further this unquestionably strong and legitimate interest in encouraging normal childbirth. Absent such a showing, we will not presume that Congress intended to condition a State's participation in the Medicaid program on its willingness to undercut this important interest by subsidizing the costs of nontherapeutic abortions.

*Beal v. Doe*, 432 U.S. 438, 445-46 (1977); *see also Pharm. Researchers & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666 (2003) (plurality opinion) ("The Medicaid Act contains no categorical prohibition against reliance on state interests unrelated to the Medicaid program itself when a State is fashioning the particular contours of its own program. It retains the 'considerable latitude' that characterizes optional participation in a jointly financed benefit program."). HEA 1210 is more narrow in scope than the ban on the funding of specific services upheld in *Beal*, as HEA 1210 in no way limits the type of medical services that are covered under Indiana's Medicaid plan. Indiana may reasonably conclude that sending large sums of public funds to abortion providers that also provide non-abortion services within the same organization serves to indirectly subsidize abortion activities.[5]

It is important to note the critical difference between a state limitation on *beneficiary* eligibility and a state regulation of the qualifications of *providers*. *Rx Pharmacies Plus, Inc. v. Weil*, 883 F. Supp. 549, 552, 554 (D. Colo. 1995) ("The

[5] Indiana could also reasonably conclude that there is an inherent conflict of interest when an organization that purports to help prevent pregnancy profits immensely from unplanned pregnancies by providing abortions.

Medicaid statutes were intended to benefit Medicaid recipients. . . . [P]roviders may not be qualified to extend services to recipients."). As such, cases involving laws that effectively limited beneficiary access to specific services are largely irrelevant to this case.[6]

In addition, cases involving State laws regulating beneficiary or provider eligibility under Title X,[7] AFDC,[8] or other federal funding programs bear little relevance to the issue of whether the Medicaid statutes and regulations preempt State laws such as HEA 1210. *Amici* are not suggesting that the Title X cases were correctly decided but, regardless of their validity, Plaintiffs' reliance on them in

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[6] *See, e.g.*, *Planned Parenthood Ass'n of Utah v. Dandoy*, 810 F.2d 984, 988 (10th Cir. 1987) (state limit on Medicaid reimbursements for providing contraceptives to minors without parental consent conflicted with federal Medicaid law); *Planned Parenthood Ass'n of Utah v. Matheson*, 582 F. Supp. 1001, 1004-06 (D. Utah 1983) (state law prohibiting the distribution of contraceptives to minors without first notifying their parents conflicted with Titles X and XIX); *Doe v. Pickett*, 480 F. Supp. 1218, 1220-22 (D. W. Va. 1979) (state practice of denying family planning services to an otherwise eligible recipient because he or she is a minor who lacks parental consent was preempted by Titles X and XIX).

[7] *See, e.g.*, *Planned Parenthood v. Heckler*, 712 F.2d 650, 651, 661-63 (D.C. Cir. 1983) (Title X preempted HHS regulations requiring Title X funding recipients to comply with state parental notice laws concerning family planning services for minors); *Valley Family Planning v. North Dakota*, 661 F.2d 99, 101-02 (8th Cir. 1981) (Title X preempted a state law prohibiting funds from going to an entity that performs or refers for abortions); *Planned Parenthood of Billings, Inc. v. Montana*, 648 F. Supp. 47, 50 (D. Mont. 1986) (Title X preempted a state law prohibiting Title X funds from going to an entity located on the same premises as a facility that performs abortions).

[8] *Blum v. Bacon*, 457 U.S. 132, 145-46 (1982) (state limit on AFDC eligibility was preempted); *Carleson v. Remillard*, 406 U.S. 598, 600, 604 (1972) (same); *Townsend v. Swank*, 404 U.S. 282, 286-88 (1971) (same); *King v. Smith*, 392 U.S. 309 (1968) (same).

support of their Medicaid preemption argument is flawed because, as noted previously, the Medicaid statutes and regulations expressly recognize State authority to set qualifications for Medicaid providers.[9]

For example, *Planned Parenthood of Central Texas v. Sanchez*, 403 F.3d 324 (5th Cir. 2005), has no bearing upon the Medicaid issues because it dealt with Title X, and the court expressly declined to address any Medicaid arguments. In *Sanchez*, the United States Court of Appeals for the Fifth Circuit upheld an appropriations rider that prohibited state funding of entities that perform elective abortions or contract with other entities for the performance of elective abortions. The court concluded that the rider was valid because it allowed for the creation of independent affiliates that could continue to receive public funds. 403 F.3d at 327. Although the rider involved funding under Titles X, XIX, and XX, the Court "express[ed] no opinion beyond Title X" in stating that, absent the possibility of independent affiliates, the rider would likely be preempted by Title X. *Id.* at 338 & n.68. As such, the court did not analyze, or even mention, § 1396a(p)(1), its legislative history, or federal regulations that expressly authorize State exclusions of providers from Medicaid through the setting of qualification standards. The court stated *in the context of Title X only* that "a state eligibility standard that

[9] Similarly, the District Court's reliance on Title X cases in its analysis of 42 U.S.C. § 247c is flawed. Short App. 28.

altogether excludes entities that might otherwise be eligible for federal funds is invalid under the Supremacy Clause." *Id.* at 337.

In addition, HEA 1210 does not violate the Hyde Amendment. Numerous Medicaid-eligible qualified providers, *i.e.*, hospitals or ambulatory surgical centers, remain available to provide abortions in the limited circumstances in which the Hyde Amendment comes into play. The Hyde Amendment does not prohibit States from determining the qualifications of Medicaid providers.

## II. HEA 1210 does not impose an unconstitutional condition on the receipt of government funds.

HEA 1210's public funding provisions are consistent with the standards set forth in cases prohibiting the government from imposing an undue burden on a woman's ability to obtain an abortion. In addition, a doctor does not have an independent constitutional right to perform abortions but may, in some cases, assert legal arguments on behalf of patients. HEA 1210 does not violate doctors' rights because it does not violate patients' rights.[10]

"[E]ven though a person has no 'right' to a valuable governmental benefit . . . [the government] 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) (reinstating a professor's claim that a public college refused to

[10] Although the District Court declined to address the unconstitutional conditions argument due to its holding that HEA 1210 was preempted, Plaintiffs will likely rely upon that argument before this Court as an alternative ground for affirmance.

rehire him due to his criticism of the college administration). Although government funding restrictions can transgress constitutional bounds in rare instances, the appropriateness of the lines drawn in a funding program are primarily matters of policy for legislatures to decide. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 326 (1980) ("In making an independent appraisal of the competing interests involved here, the District Court went beyond the judicial function. Such decisions are entrusted under the Constitution to Congress, not the courts."); *Maher v. Roe*, 432 U.S. 464, 479 (1977) ("[W]hen an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature."); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (city policy of not providing nontherapeutic abortions at public hospitals "is subject to public debate and approval or disapproval at the polls.").

Numerous cases have recognized that the government has broad discretion to create limitations for its funding programs. "Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *United States v. Am. Library Ass'n*, 539 U.S. 194, 203 (2003) (plurality opinion) ("Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy

objectives."); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998) ("So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities."); *Maher*, 432 U.S. at 476 ("Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.").

### A. HEA 1210 does not impose an undue burden on a woman's ability to obtain an abortion.

HEA 1210's funding provisions do not implicate abortion rights as defined by relevant cases, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992), as HEA 1210 deals with public funding for *non-abortion* services.[11] The law does not restrict the ability of women to obtain a *privately-funded* abortion in any way. In addition, women remain able to obtain Medicaid-financed abortions under the Hyde Amendment in limited circumstances at hospitals and ambulatory surgical centers; public funding of abortions in the narrow circumstances authorized by the Hyde Amendment is a matter of legislative policy, not constitutional right. Where, as here, a funding condition's impact on the exercise of a constitutional right is tangential at best, the condition is

[11] The *Amici*'s discussion of cases that refer to a constitutional right to obtain an abortion (such as *Casey*) should *not* be construed as an endorsement of those decisions by *Amici*, but they are discussed to illustrate that they do not support Plaintiffs' unconstitutional conditions claim.

constitutionally sound. *See, e.g.*, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* , 547 U.S. 47 (2006) (hol ding that a requirement that universiti es receiving federal funds give m ilitary recru iters the same access to students tha t they give to ot her em ployers did not vi olate the First Am endment); *Am. Library Ass'n*, 539 U.S. 194 (pluralit y opini on) (holdi ng that a law requiring libraries receiving federal funds to install Internet filters to block obscene i mages did not violate the First Amendment).

Numerous cases illustrate that a govern ment's decision to not directly or indirectly subsidize abortion is cons titutionally sound. For exam ple, in *Maher v. Roe*, the Court held that a state regulation lim iting Medicaid fundi ng of first trimester abortions to those that are "medi cally necessary," as defined by state law, was rational under the Equal Protecti on Clause. The Court explai ned that i ts abortion c ases "im pl[y] no li mitation on the authority of a State to mak e a valu e judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." 432 U.S. at 474. Any difficult ies that an indi gent woman may encounter in obt aining an abor tion are attribut able to her financial situation, not the State's decis ion to decline to subsidize abortion. *Id.* "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legi slative pol icy." *Id.* at 475. The Court emphasized that "[t] he State unquestionably has a 'strong and

legitimate interest in encouraging normal childbirth,' . . . an interest honored over the centuries. . . . The subsidizing of costs incident to childbirth is a rational means of encouraging childbirth." *Id.* at 478-79; *see also Beal*, 432 U.S. at 445-46 (holding that the exclusion of most abortions from Medicaid coverage is reasonable in light of the state's interest in encouraging childbirth, which is "valid and important," "legitimate," "significant," and "unquestionably strong"). The Court declined to apply strict scrutiny to the funding restriction, stating that "a State is not required to show a compelling interest for its policy choice to favor normal childbirth any more than a State must so justify its election to fund public but not private education." *Maher*, 432 U.S. at 474, n.8, 477; *see also Am. Library Ass'n*, 539 U.S. at 207 (declining to apply strict scrutiny).[12]

Similarly, in *Harris v. McRae*, the Court held that the Hyde Amendment's exclusion of government funding for abortions except in limited circumstances did not violate abortion rights or various constitutional provisions. Relying on *Maher*, the Court observed that "[t]he Hyde Amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services,

[12] The Court observed in a footnote that strict scrutiny might be appropriate "[i]f Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits." 432 U.S. at 474, n. 8. This hypothetical is irrelevant to HEA 1210, however, as the law does not affect a woman's eligibility for Medicaid.

encourages alternative activity deemed in the public interest." 448 U.S. at 315. The Court rejected the claim that the Hyde Amendment impermissibly penalized the exercise of a woman's choice to have an abortion, noting that "[a] substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion." *Id.* at 317, n.19. The Court added:

> [T]he Hyde Amendment, by encouraging childbirth except in the most urgent circumstances, is rationally related to the legitimate governmental objective of protecting potential life. By subsidizing the medical expenses of indigent women who carry their pregnancies to term while not subsidizing the comparable expenses of women who undergo abortions (except those whose lives are threatened), Congress has established incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid.

*Id.* at 325.

Under these cases, HEA 1210 clearly does not impose an undue burden on a woman's right to obtain an abortion as defined in *Casey*.

### B. HEA 1210 does not violate doctors' rights, which are derivative of their patients' rights.

In cases in which doctors have been permitted to challenge laws that were alleged to violate their patients' constitutional rights, the Supreme Court acknowledged that doctors can serve as effective advocates for their patients. Those cases do *not* support the claim, upon which Plaintiffs rely, that doctors have

a distinct "right to perform abortions" that extends beyond the rights of their patients. To the contrary, since HEA 1210 does not violate patients' rights, it also does not violate the rights of doctors.

In *Singleton v. Wulff*, 428 U.S. 106 (1976), the Court held that doctors had standing to challenge a Missouri law excluding most abortions from the State's Medicaid plan because they would receive payments from the State for their services if they prevailed. *Id.* at 112-13. A plurality of Justices also stated, "[t]he Court of Appeals adverted to what it perceived to be the doctor's own 'constitutional rights to practice medicine.' . . . We have no occasion to decide whether such rights exist." *Id.* at 114 (plurality opinion).

The following year, in *Whalen v. Roe*, 429 U.S. 589 (1977), the Court unanimously held that a law requiring doctors to forward the names and addresses of patients who obtain certain prescription drugs to the state health department did not violate patients' privacy rights. *Id.* at 603-04. Particularly relevant to Plaintiffs' arguments here, the Court stated:

> The appellee doctors argue separately that the statute impairs their right to practice medicine free of unwarranted state interference. . . .
>
> The doctors rely on two references to a physician's right to administer medical care in the opinion in *Doe v. Bolton*, [410 U.S. 179, 197-99 (1973)]. *Nothing in that case suggests that a doctor's right to administer medical care has any greater strength than his patient's right to receive such care*.

*Id.* at 604 & n.33 (emphasis added).

Also, in *Harris v. McRae*, the Court explained:

> Since the constitutional entitlement of a physician who administers medical care to an indigent woman *is no broader than that of his patient*, *see Whalen v. Roe*, 429 U.S. 589, 604, and n. 33, we also reject the appellees' claim that the funding restrictions of the Hyde Amendment violate the due process rights of the physician who advises a Medicaid recipient to obtain a medically necessary abortion.

448 U.S. at 318, n.21 (emphasis added).

Similarly, in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the Court held that a law prohibiting the use of public facilities to perform abortions not necessary to save the mother's life was constitutional. *Id.* at 507. The Court rejected the claim that "private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions." *Id.* at 509. The *Webster* Court also stated in a footnote, "[t]his case might . . . be different if the State barred doctors who performed abortions in private facilities from the use of public facilities for any purpose. *See Harris v. McRae*, 448 U.S. 297, 317, n.19 (1980)." *Id.* at 510, n.8. Given that the *Harris* footnote dealt with a hypothetical claim that *a woman's rights* would be violated by the denial of all Medicaid benefits for obtaining an abortion outside of the program, and that the Court has repeatedly emphasized that doctors merely assert their patients' rights in the abortion context, the *Webster* footnote does *not* imply that doctors have a constitutional right to perform abortions. *See also Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) ("The law need not give abortion doctors

unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community."); *Casey*, 505 U.S. at 884 ("Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position.").

Two court of appeals decisions upon which Plaintiffs will likely rely are inconsistent with the foregoing Supreme Court cases. In *Planned Parenthood of Central & Northern Arizona v. Arizona*, 718 F.2d 938 (9th Cir. 1983), the court concluded that an Arizona law prohibiting abortion providers from receiving state social welfare funds did not violate women's rights under *Maher*. *Id.* at 943-44. In addition, the court asked "whether the State unduly interfered with Planned Parenthood's exercise of its right to perform abortion and abortion-related services" and concluded that "the State of Arizona may not unreasonably interfere with the right of Planned Parenthood to engage in abortion or abortion-related speech activities." *Id.* at 944. The court did not explain the origin or scope of the constitutional right or rights it was referring to, or explain why doctors would have greater rights than their patients in the case at hand. Contrary to the Supreme Court's approach as noted above, the court applied strict scrutiny to the funding restriction, remanding to the district court for a determination of whether the law "was drawn as narrowly as possible to permit the State to control use of its funds while infringing minimally on exercise of constitutional rights." *Id.* at 945.

*Planned Parenthood of Mid-Missouri v. Dempsey*, 167 F.3d 458 (8th Cir. 1999), is also inconsistent with the Supreme Court's cases. In *Dempsey*, the court vacated an injunction against the enforcement of a state provision prohibiting organizations that provide or promote abortions from receiving family-planning funds. The court interpreted *Rust* as holding that "[l]egislation that simply dictates the proper scope of government-funded programs is constitutional, while legislation that restricts protected grantee activities outside government programs is unconstitutional." *Id.* at 462. The court concluded that the provision "allow[ed] a grantee to maintain an affiliation with an abortion service provider, so long as that affiliation does not include direct referrals for abortion." *Id.* The court stated, "[n]o [direct or indirect] subsidy will exist if the affiliate that provides abortion services is separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family-planning funds." *Id.* at 463. "By requiring abortion services to be provided through independent affiliates, Tier I ensures that abortion service providers will not receive benefits in the form of marketing, fixed expenses, or State family-planning funds from section 10.715 grantees." *Id.* at 464.

The court concluded that if the provision prohibited grantees from having an affiliation with independent organizations that provided abortions, it would impose an unconstitutional condition by restricting activities outside the program. *Id.* at

462. The court stated that the provision "respects Planned Parenthood's constitutional rights by allowing it to establish an independent affiliate to provide abortion services outside the government program," *id.* at 464, although the court did not explain the origin or scope of the specific constitutional right(s) it was referring to. The court later rejected the claim that "physicians and clinics have a fundamental constitutional right to provide abortion services," stating that

> [a]ny constitutional right of clinics to provide abortion services . . . is derived directly from women's constitutional right to choose abortion. . . . Legislation affecting physicians and clinics that perform abortions, like all legislation affecting abortion access, will be found unconstitutional if it imposes an "undue burden" on women seeking abortions.

*Id.* The court concluded that the provision did not violate women's abortion rights. *Id.* at 465.

The *Planned Parenthood of Central & Northern Arizona* and *Dempsey* decisions cannot be reconciled with the Supreme Court's cases. Although both decisions correctly concluded that the laws at issue did not impose an undue burden upon women's rights, they exceeded the bounds of existing Supreme Court jurisprudence by effectively recognizing a right of doctors to perform abortions that has a broader scope than women's rights. The Supreme Court has repeatedly emphasized, however, that doctors' claims in abortion-related cases derive from their patients' right to obtain an abortion and go no further. As such, this Court

should decline to follow the reasoning set forth in *Planned Parenthood of Central & Northern Arizona* and *Dempsey*.

Even if a constitutional right to provide abortions hypothetically existed, HEA 1210 would not violate such a right because it allows for the creation of independent affiliates through which abortion and non-abortion services would be completely separated. Laws such as HEA 1210 that require a complete separation between entities or programs that engage in a publicly-subsidized activity and entities or programs that engage in an activity that the government does not want to subsidize are constitutionally sound. *See, e.g.*, *Rust*, 500 U.S. at 201-03 (holding that regulations requiring Title X projects to be organized "so that they are 'physically and financially separate'" from abortion or abortion-counseling services did not impose an unconstitutional condition on the receipt of Title X funding); *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984) (holding that a provision prohibiting educational stations that receive federal grants from editorializing violated the First Amendment, but the provision would be constitutional if it were revised to allow editorializing in a separate affiliate); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (holding that IRC § 501(c)(3)'s extension of tax exemption to organizations that do not engage in a substantial amount of lobbying activities did not violate the First Amendment or the Equal Protection Clause, and noting that organizations that engage in

substantial lobbying activities could ma intain tax-exem ption by creating an independent affiliate under IRC § 501(c)(4)).

## CONCLUSION

For t he foregoing reasons and those set forth i n Defendants-Appell ants' opening brief, the District Court's order granting Plaintiffs' Motion for Preliminary Injunction should be reversed with respect to the funding provisions.

Respectfully submitted this 8th day of August, 2011.

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Dated: August 8, 2011

## CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing *Amici Curiae* Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) in that, relying on the word count feature of the word-processing system used to prepare the brief, Microsoft Word 2007, the brief contains 6,575 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned counsel also certifies that the foregoing *Amici Curiae* Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) in that the brief has been prepared in a proportionally spaced 14-point Times New Roman typeface.

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## CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2011, I caused the foregoing Amici Curiae Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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