112TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPT. 112–38
Part 1

NO TAXPAYER FUNDING FOR ABORTION ACT

MARCH 17, 2011.—Ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3) to prohibit taxpayer funded abortions and to provide for conscience protections, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

The Amendment

The amendment is as follows:

99–006

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "No Taxpayer Funding for Abortion Act".

SEC. 2. PROHIBITING TAXPAYER FUNDED ABORTIONS AND PROVIDING FOR CONSCIENCE PROTECTIONS.

Title 1, United States Code is amended by adding at the end the following new chapter:

"CHAPTER 4—PROHIBITING TAXPAYER FUNDED ABORTIONS AND PROVIDING FOR CONSCIENCE PROTECTIONS

"§ 301. Prohibition on funding for abortions

"No funds authorized or appropriated by Federal law, and none of the funds in any trust fund to which funds are authorized or appropriated by Federal law, shall be expended for any abortion.

"§ 302. Prohibition on funding for health benefits plans that cover abortion

"None of the funds authorized or appropriated by Federal law, and none of the funds in any trust fund to which funds are authorized or appropriated by Federal law, shall be expended for health benefits coverage that includes coverage of abortion.

"§ 303. Prohibition on tax benefits relating to abortion

"For taxable years beginning after the date of the enactment of this section—

"(1) no credit shall be allowed under the internal revenue laws with respect to amounts paid or incurred for an abortion or with respect to amounts paid or incurred for a health benefits plan (including premium assistance) that includes coverage of abortion,

"(2) for purposes of determining any deduction for expenses paid for medical care of the taxpayer or the taxpayer's spouse or dependents, amounts paid or incurred for an abortion shall not be taken into account, and

"(3) in the case of any tax-preferred trust or account the purpose of which is to pay medical expenses of the account beneficiary, any amount paid or distributed from such an account for an abortion shall be included in the gross income of such beneficiary.

"§ 304. Limitation on Federal facilities and employees

"No health care service furnished—

"(1) by or in a health care facility owned or operated by the Federal Government; or

"(2) by any physician or other individual employed by the Federal Government to provide health care services within the scope of the physician's or individual's employment,

may include abortion.

"§ 305. Construction relating to separate coverage

"Nothing in this chapter shall be construed as prohibiting any individual, entity, or State or locality from purchasing separate abortion coverage or health benefits coverage that includes abortion so long as such coverage is paid for entirely using only funds not authorized or appropriated by Federal law and such coverage shall not be purchased using matching funds required for a federally subsidized program, including a State's or locality's contribution of Medicaid matching funds.

"§ 306. Construction relating to the use of non-Federal funds for health coverage

"Nothing in this chapter shall be construed as restricting the ability of any non-Federal health benefits coverage provider from offering abortion coverage, or the ability of a State or locality to contract separately with such a provider for such coverage, so long as only funds not authorized or appropriated by Federal law are used

and such coverage shall not be purchased using matching funds required for a federally subsidized program, including a State's or locality's contribution of Medicaid matching funds.

"§ 307. Non-preemption of other Federal laws

"Nothing in this chapter shall repeal, amend, or have any effect on any other Federal law to the extent such law imposes any limitation on the use of funds for abortion or for health benefits coverage that includes coverage of abortion, beyond the limitations set forth in this chapter.

"§ 308. Construction relating to complications arising from abortion

"Nothing in this chapter shall be construed to apply to the treatment of any infection, injury, disease, or disorder that has been caused by or exacerbated by the performance of an abortion. This rule of construction shall be applicable without regard to whether the abortion was performed in accord with Federal or State law, and without regard to whether funding for the abortion is permissible under section 309 of this Act.

"§ 309. Treatment of abortions related to rape, incest, or preserving the life of the mother

"The limitations established in sections 301, 302, 303, and 304 shall not apply to an abortion—

"(1) if the pregnancy is the result of an act of rape or incest; or

"(2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness that would, as certified by a physician, place the woman in danger of death unless an abortion is performed, including a life-endangering physical condition caused by or arising from the pregnancy itself.

"§ 310. Application to District of Columbia

"In this chapter:

"(1) Any reference to funds appropriated by Federal law shall be treated as including any amounts within the budget of the District of Columbia that have been approved by Act of Congress pursuant to section 446 of the District of Columbia Home Rule Act (or any applicable successor Federal law).

"(2) The term 'Federal Government' includes the government of the District of Columbia.

"§ 311. No government discrimination against certain health care entities

"(a) NONDISCRIMINATION.—A Federal agency or program, and any State or local government that receives Federal financial assistance (either directly or indirectly), may not subject any individual or institutional health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

"(b) HEALTH CARE ENTITY DEFINED.—For purposes of this section, the term 'health care entity' includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

"(c) REMEDIES.—

"(1) IN GENERAL.—The courts of the United States shall have jurisdiction to prevent and redress actual or threatened violations of this section by issuing any form of legal or equitable relief, including—

"(A) injunctions prohibiting conduct that violates this section; and

"(B) orders preventing the disbursement of all or a portion of Federal financial assistance to a State or local government, or to a specific offending agency or program of a State or local government, until such time as the conduct prohibited by this section has ceased.

"(2) COMMENCEMENT OF ACTION.—An action under this subsection may be instituted by—

"(A) any health care entity that has standing to complain of an actual or threatened violation of this section; or

"(B) the Attorney General of the United States.

"(d) ADMINISTRATION.—The Secretary of Health and Human Services shall designate the Director of the Office for Civil Rights of the Department of Health and Human Services—

"(1) to receive complaints alleging a violation of this section;

"(2) subject to paragraph (3), to pursue the investigation of such complaints in coordination with the Attorney General; and

"(3) in the case of a complaint related to a Federal agency (other than with respect to the Department of Health and Human Services) or program adminis-

tered through such other agency or any State or local government receiving Federal financial assistance through such other agency, to refer the complaint to the appropriate office of such other agency.".

SEC. 3. AMENDMENT TO TABLE OF CHAPTERS.

The table of chapters for title 1, United States Code, is amended by adding at the end the following new item:

"4. Prohibiting taxpayer funded abortions and providing for conscience protections ..... 301".

Purpose and Summary

For more than 30 years, a patchwork of policies has regulated Federal funding for abortion. Amendments have been added to various appropriations bills that prohibit the Federal funding of abortions through the programs funded by those appropriations bills. The time has come for Congress to pass one piece of legislation to prohibit Federal funding of elective abortion, no matter the source in the Federal system of funding. H.R. 3, with the exception of a few narrow categories that have been accepted for many years, provides that the Federal Government shall not make taxpayers pay for, subsidize, encourage, or facilitate abortions or insurance coverage that includes abortion.

Background and Need for the Legislation

H.R. 3 was introduced by Reps. Chris Smith (R–NJ) and Daniel Lipinski (D–IL) on January 20, 2011.

THE AMERICAN PEOPLE OPPOSE FEDERAL PAYMENTS AND FEDERAL ENCOURAGEMENT OF ABORTION

The American people overwhelmingly oppose Federal funding of abortions.

A 2010 Zogby/O'Leary poll found that 77% of Americans believe that Federal funds should never pay for abortion or should pay only to save the life of the mother.[1]

A September 2009 International Communications Research poll asked, "If the choice were up to you, would you want your *own insurance* policy to include abortion?" Among respondents, 68% answered no and only 24% answered yes.[2]

HUNDREDS OF THOUSANDS OF ABORTIONS WOULD BE PAID FOR EACH YEAR BY FEDERAL TAXPAYERS WITHOUT THE POLICIES THAT H.R. 3 MAKES PERMANENT

In 1993 the Congressional Budget Office estimated that the Federal Government would pay for as many as 675,000 abortions each year without the Hyde Amendment and other measures in place at the time to prevent taxpayer funding of abortion in Federal programs.[3] By contrast, in 2008 there were 425 abortions funded by the Federal Government (through Medicaid) and in 2009 there

[1] Zogby/O'Leary, January 19–21, 2010, *The O'Leary Report,* August/September 2010, Volume 5, Issue 4, http://www.olearyreport.com/media/pdf/OLR__Vol5Issue4__AugustSeptember2010Final.pdf

[2] International Communications Research, September 16–20, 2009, 1043 adults (margin of error: ±3.0%).

[3] Robert D. Reischauer, Director, Congressional Budget Office, Letter to the Congressman Vic Fazio (D–Ca) (July 19, 1993).

were 220 Medicaid-financed abortions.[4] It is axiomatic that when government subsidizes conduct, it encourages it. Our tax code is replete with pertinent examples. The Supreme Court in *Maher v. Roe* acknowledged the truth of this proposition in the context of abortion when it equated government funding of an activity with government encouragement of that activity.[5]

According to recent studies, when government funding for abortion is not available under Medicaid or the state equivalent program, conservative estimates are that at least one-fourth of the Medicaid-eligible women who would otherwise procure federally funded abortions, carry their babies to term. One abortion advocacy group, the National Abortion and Reproductive Rights Action League (NARAL), has claimed that the effect of a denial of public funding on abortion reductions is even greater, around 50 percent. For example, a 2010 NARAL factsheet contains this statement:

> A study by the Guttmacher Institute shows that Medicaid-eligible women in states that exclude abortion coverage have abortion rates of about half of those of women in states that fund abortion care.[6]

Using a conservative 25 percent abortion-reduction figure, well over one million Americans are alive today because of the Hyde Amendment.[7]

H.R. 3 IS WORKABLE

H.R. 3 will ensure that American taxpayers are not forced to be involved in funding what many consider to be the destruction of innocent human life through abortion on demand. The "No Taxpayer Funding for Abortion Act" will establish a government-wide statutory prohibition on funding abortion or insurance coverage that includes abortion. This comprehensive approach will reduce the need for the numerous separate abortion-funding policies and ensure that no program or agency is exempt from this important safeguard.

This comprehensive approach is administratively workable, despite critics' claims. Insurers have been operating under the limits of the Hyde Amendment and the Hyde-companion policy that applies to the Federal Employee Health Benefits Program for decades. As *CQ* recently reported, "Most people with employer-sponsored insurance also must pay for abortions out of their own pocket. 'Most insurers offer plans that include this coverage, but most employers choose not to offer it as part of their benefits package,'

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[4] FY 2011 Moyer Report, submitted by the Office of the Assistant Secretary for Financial Resources, U.S. Department of Health and Human Services, February 2010, at 106.

[5] *Maher v. Roe,* 432 U.S. 464, 475 (1977).

[6] "Discriminatory Restrictions on Abortion Funding Threaten Women's Health," NARAL Pro-Choice America Foundation factsheet (January 1, 2010) (citing Rachel K. Jones et al., *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000–2001, Persp. on. Sexual & Reprod. Health* 34 (2002)).

[7] *See* "Whose Choice? How the Hyde Amendment Harms Poor Women," Center for Reproductive Rights, 2010, at 4, available at http://reproductiverights.org/en/feature/whose-choice-download-report (stating that "[b]ecause of the Hyde Amendment, more than a million women" have not had abortions they may have had otherwise). *See also The Heart of the Matter: Public Funding Of Abortion for Poor Women in the United States,* by Heather D. Boonstra, *Guttmacher Policy Review,* Volume 10, Number 1 (Winter 2007) ("Studies published over the course of two decades looking at a number of states concluded that 18–35% of women who would have had an abortion continued their pregnancies after Medicaid funding was cut off.").

said Robert Zirkelbach, a spokesman for America's Health Insurance Plans, the insurance industry's trade association."[8]

H.R. 3 CONTINUES LONG-STANDING FEDERAL POLICIES

H.R. 3 will make permanent the policies that have previously been enacted on a case-by-case basis. Provisions that currently rely on regular re-approval include:

1) the Hyde amendment, which prohibits funding for elective abortion coverage through any program funded through the annual Labor, Health and Human Services Appropriations Act;
2) the Smith FEHBP amendment, which prohibits funding for health plans that include elective abortion coverage for Federal employees;
3) the Dornan amendment, which prohibits use of congressionally appropriated funds for abortion in the District of Columbia; and
4) other policies such as the restrictions on elective abortion funding through the Peace Corps and Federal prisons.

H.R. 3 also codifies the Hyde-Weldon conscience clause that has been part of the Hyde Amendment since 2004. The conscience clause ensures that governmental recipients of Federal funding do not discriminate against health-care providers, including doctors, nurses and hospitals, because the providers do not provide, pay for, provide coverage for, or refer for abortions.

THE PATIENT PROTECTION AND AFFORDABLE CARE ACT FAILS TO CONTAIN ANY PROHIBITIONS ON THE USE OF TAXPAYER MONEY TO FUND ABORTIONS

During the debate last Congress on the Patient Protection and Affordable Care Act (PPACA), Rep. Joe Pitts (R–PA) and former Rep. Bart Stupak (D–MI) offered an amendment that would have prohibited government funding of abortion had it been included in the version of the health-care reform that became law. The House-proposed health-care legislation, H.R. 3200, America's Affordable Health Choices Act, radically departed from the current Federal policy of not paying for elective abortion or subsidizing plans that cover abortion. However, at the last minute, the Democratic leadership permitted a vote on the Stupak/Pitts amendment, which passed by a vote of 240–194. The Senate then took up another bill (H.R. 3590) which did not include the Stupak/Pitts amendment. Instead it contained provisions designed to cloak the funding for abortion coverage. The Senate bill was signed into law as P.L. 111–148. The law is a drastic break from longstanding Federal policy. The Hyde Amendment has, for more than 30 years, prevented programs funded by the annual Health and Human Services Appropriations bill from financing abortion.

The PPACA passed the House only after a handful of Democrats, led by former Rep. Stupak, who claimed to oppose the Senate bill's Federal funding of abortion, agreed to a deal in which the text of the Senate bill would not change, but the President would sign an

[8] *CQ Today* (July 15, 2009).

executive order that would allegedly negate the text of the Senate bill. It is black-letter constitutional law, however, that executive order cannot trump the text of legislation enacted by Congress.

In a recent interview with the *Chicago Tribune* editorial board, the President's former chief of staff, Rahm Emanuel, was asked questions about his commitment to the pro-abortion cause. Mr. Emanuel emphasized that Executive Order 13535, the Executive Order on abortion signed by President Obama in March 2010, ostensibly to eliminate the need for the pro-life Stupak Amendment to be attached to PPACA, does not carry the force of law, and as such, was approved by former House Speaker Nancy Pelosi and others who oppose a ban on taxpayer funding of abortion. Mr. Emanuel said "I came up with an idea for an executive order to allow the Stupak amendment *not to exist in law.*"[9] Clearly, then, the substance of the Stupak amendment does not now exist in law, according to the person who served as the chief of staff to President Obama at the time. Therefore Congress needs to pass H.R. 3 to restore the long-standing ban on taxpayer funding of abortions in law.

FEDERAL FUNDING FOR ABORTION IN PPACA

The PPACA subsidizes abortion in private health plans and can pay directly for abortion in new health programs.[10] The funds under that law are directly appropriated, not subject to further appropriation through the HHS Appropriations bill, and are therefore not subject to the Hyde Amendment's abortion funding restriction.

Here are some examples:

- PPACA appropriates $5 billion for high-risk pool programs without a restriction on funding abortion.[11] The Pennsylvania, Maryland, and New Mexico's high-risk pool plans approved by the Federal Government did, in fact, contain coverage of elective abortion. Only after the news of government-financed abortions was reported in the press did the White House tell these states to remove abortion from the list of covered services.[12]
- PPACA also authorized funding for community health centers,[13] and the enactment of the Health Care and Education Reconciliation Act[14] a week later increased the amount of funding for these community health centers to over $9 billion. The money appropriated for community health centers can be used to pay for elective abortions directly, as these

[9] Chicago Tribune mayoral debate video (January 14, 2011), available at http://www.wgntv.com/news/elections/mayor/editorial/(Pt. 10).

[10] For a chart of details of the various abortion funding provisions in PPACA, *see* http://downloads.frcaction.org/EF/EF10C08.pdf.

[11] Patient Protection and Affordable Health Care Act ("PPACA"), H.R. 3590, became P.L. 111–148, Section 1101.

[12] On July 14, 2010, HHS Spokesperson Jenny Backus issued a statement saying that abortion would not be covered in the high risk pool program in Pennsylvania. Then after other states approved abortion funding, Nancy-Ann DeParle on July 29, 2010 blogged that abortion would not be covered by the high risk pool program http://www.whitehouse.gov/blog/2010/07/29/insurance-americans-with-pre-existing-conditions

[13] PPACA Section 10503.

[14] The Health Care and Education Reconciliation Act, 2010, H.R. 4872, became P.L. 111–152 on March 30, 2010 ("Reconciliation Act").

funds are not appropriated under the HHS Appropriations bill and therefore is not subject to the Hyde Amendment.[15]

- PPACA appropriates $6 billion for loans and grants for the creation of non-profit health co-ops.[16] Because the funds would not be appropriated by the HHS Appropriations bill, they are not covered by the Hyde Amendment and can be used to pay for elective abortions.
- PPACA provides tax credits for qualified health plans in each of the state exchanges.[17] Section 1303, as amended, permits qualified health plans to include coverage for elective abortions even if they receive tax credits or cost-sharing credits.[18] This provision directly conflicts with the principle of the Hyde Amendment and the restriction on subsidizing health benefits plans that include abortion through the Federal Employee Health Benefits Program (FEHBP).[19]
- Section 1303, as amended, also permits private insurance plans that receive Federal subsidies to cover elective abortions. If the issuer of the plan chooses to cover elective abortions and receive Federal subsidies, then every individual who is part of that plan is required to pay an abortion surcharge and the insurance company will take that surcharge payment and hold it in a special account. This gimmick does nothing to cure the problem: it still allows Federal dollars to be used to subsidize abortion coverage, and the Federal Government still requires Americans enrolling in these federally subsidized health plans to pay for other people's abortions.
- Secretary of Health and Human Services Kathleen Sebelius said on December 22, 2009 said that "everyone in the exchange would pay" a "portion of their premium" for "abortion coverage."[20] (This would not be the case for plans purchased without abortion coverage.) The abortion surcharge is, arguably, an even more egregious violation of the Hyde Amendment principle.
- The PPACA also created a new government-controlled, multi-state plan to be run by the Director of the Office of Personnel Management that can include insurance plans with abortion coverage.[21] This multi-state plan is similar to the FEHBP for Federal employees and will be operated by the Federal Government, but without the FEHBP restriction on coverage of elective abortion.

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[15] Reconciliation Act, Section 2303.
[16] PPACA, Section 1322.
[17] PPACA, Section 1401 provides refundable tax credits and Section 1402 provides cost-sharing credits to purchase health plans.
[18] PPACA, Section 1303 as amended by Section 10104(c).
[19] Section 613, Division C of the Consolidated Appropriations Act, 2010 (P.L. 111–117).
[20] *See* "Sebelius Praises Abortion Accounting Trick in Senate Bill," Real Clear Politics Video (last modified December 22,2009) in which Secretary Sebelius states: "That would be an accounting procedure, but everybody in the exchange would do the same thing, whether you're male or female, whether you're 75 or 25, you would all set aside a portion of your premium that would go into a fund, and it would not be earmarked for anything, it would be a separate account that everyone in the exchange would pay. . . . [I]t's really an accounting that would apply across the board and not just to women, and certainly not just to women who want to choose abortion coverage." http://www.realclearpolitics.com/video/2009/12/22/sebelius__praises__abortion__accounting__trick__in__senate__bill.html
[21] PPACA, Section 1334 as amended by Section 10104(q).

THE PPACA PROVIDES FOR ACTUAL "FEDERAL FUNDING" OF ABORTIONS

The PPACA provides for actual "federal funding" of abortions. Under the PPACA, tens of millions of Americans will be eligible for Federal subsidies for private health plans, at a projected total cost of $435 billion over 7 years (from 2014 through 2020). Without the enactment of H.R. 3, these Federal subsidies will be used to pay for plans that cover abortion on demand, in direct contradiction to the second principle of the Hyde Amendment, which prohibits the use of funds to pay for plans that cover elective abortion.

Although this Federal assistance is called a "credit," it is actually provided regardless of one's tax liability, so it is akin to an entitlement program. An August 2010 chart by the Congressional Budget Office evidences that 73% of the total cost for the premium-assistance credits will be through direct spending in excess of tax liability. In a separate publication, CBO explains: "PPACA, as amended, establishes new exchanges for the purchase of health insurance and authorizes government subsidies for such purchases for individuals and families who meet income and other eligibility criteria. The subsidies for health insurance premiums are structured as refundable tax credits; the portions of such credits that exceed taxpayers' liabilities are classified as outlays, while the portions that reduce tax payments appear in the budget as reductions in revenues." [22]

CBO projects that in year 2020, there will be $72.2 billion in direct spending in premium-credit outlays, and $27.2 in premium-credit revenue reductions. This means that 73% of the total premium-assistance dollars will be in excess of taxpayers' liabilities (72.2/99.4=73%).[23]

Moreover, these subsidies are advancable, meaning that Federal monies will be sent by the Secretary of the Treasury on a monthly basis directly to the health insurer to pay for the subsidized plan, including plans that cover abortion on demand.

The PPACA integrates the U.S. Government into the process of paying for health plans that cover abortion on demand. Opponents are fighting so hard against H.R. 3 because they have long opposed the Hyde Amendment's prohibition on Federal funding of abortion, as well as funding of plans that cover elective abortion. Now, opponents of H.R. 3 see the chance to get billions of taxpayer dollars to start flowing to health plans that cover abortion on demand. H.R. 3 will prevent that from happening.

Hearings

The Judiciary Committee's Subcommittee on the Constitution held 1 day of hearings on H.R. 3, the "No Taxpayer Funding for Abortion Act," on February 8, 2011. Testimony was received from: Richard M. Doerflinger, Associate Director of the Secretariat of Pro-Life Activities, United States Conference of Catholic Bishops; Sara Rosenbaum, Harold and Jane Hirsh Professor of Health Law and Policy and Chair of the Department of Health Policy, The

[22] CBO, "The Budget and Economic Outlook: Fiscal Years 2011 to 2021, pp. 62–63 (January 2011).

[23] (When the projected $18.9 billion in direct spending on cost-sharing subsidies (which are not a credit) is added to the $72.2 billion in direct spending for premium credit outlays, the resulting $91.1 billion in direct spending equals 77% of the total dollars for Exchange subsidies (91.1/118.3 = 77%).

George Washington University School of Public Health and Health Services; and Cathy Ruse, Senior Fellow for Legal Studies, the Family Research Council.

Committee Consideration

On March 3, 2011, the Judiciary Committee met in open session and ordered the bill H.R. 3 favorably reported, with an amendment, by a rollcall vote of 23 to 14, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 3:

1. An amendment offered by Mr. Conyers to treat the District of Columbia as a state for the purposes of the provisions of the bill. Defeated 13 to 18.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes			
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Reed		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez			
Ms. Wasserman Schultz	X		
Total	13	18	

2. An amendment offered by Mr. Nadler to strike Section 303 of the bill. Defeated 14 to 20.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot		X	
Mr. Issa			
Mr. Pence		X	
Mr. Forbes			
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Reed		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle			
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi		X	
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez			
Ms. Wasserman Schultz	X		
Total	14	20	

3. An en bloc vote on (a) an amendment offered by Ms. Jackson Lee to provide a new Section 312 that states the bill shall not take effect unless the Attorney General certifies to Congress that it will not violate constitutionally guaranteed rights, and (b) an amendment offered by Ms. Jackson Lee to amend Section 309 to provide that the limitations in the bill will not apply where continuing the pregnancy could result in severe and long-lasting damage to a woman's health. Defeated 15 to 19.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot		X	
Mr. Issa			
Mr. Pence		X	
Mr. Forbes			
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Reed		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez			
Ms. Wasserman Schultz	X		
Total	15	19	

4. An amendment offered by Mr. Nadler to condition the effect of Section 303 on the President or his designee's decision as to whether any individual, small business, or employer taxes would be more than it would have been for such taxable years had Section 303 not been in effect. Defeated 14 to 19.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble			
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot		X	
Mr. Issa			
Mr. Pence		X	
Mr. Forbes			
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe		X	

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Chaffetz		X	
Mr. Reed		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi		X	
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez			
Ms. Wasserman Schultz	X		
Total	14	19	

5. An amendment offered by Mr. Nadler to provide that Section 303 does not apply with respect to any health benefit plan provided by or through an employer. Defeated 13 to 22.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Reed		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi		X	
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez	X		
Ms. Wasserman Schultz	X		
Total	13	22	

6. An amendment offered by Mr. Nadler to provide that Section 303 does not apply with respect to a taxpayer who is self-employed. Defeated 13 to 22.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Reed		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi		X	
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez			
Ms. Wasserman Schultz	X		
Total	13	22	

7. An amendment offered by Mr. Nadler to amend Section 311 to provide protections for entities who provide, pay for, provide coverage of, or refer for abortions. Defeated 13 to 19.

ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Smith, Chairman			
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Reed		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy			
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi		X	
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez			
Ms. Wasserman Schultz	X		
Total	13	19	

8. An amendment offered by Mr. Johnson to amend Section 311 to provide the bill shall not take effect unless the Attorney General submits a report to Congress setting forth the effect of the bill on women's access to abortion and health benefits coverage that includes coverage of abortion. Defeated 11 to 18.

ROLLCALL NO. 8

	Ayes	Nays	Present
Mr. Smith, Chairman			
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot			

ROLLCALL NO. 8—Continued

	Ayes	Nays	Present
Mr. Issa			
Mr. Pence		X	
Mr. Forbes		X	
Mr. King			
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Reed		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi		X	
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez			
Ms. Wasserman Schultz	X		
Total	11	18	

9. An amendment offered by Mr. Johnson to amend Section 303 to provide it does not apply in the case of a taxpayer who is an individual, except to the extent that such amount is paid or incurred in carrying on a trade or business. Defeated 14 to 19.

ROLLCALL NO. 9

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa			
Mr. Pence		X	
Mr. Forbes		X	
Mr. King			
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Reed		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	

ROLLCALL NO. 9—Continued

	Ayes	Nays	Present
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi		X	
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez			
Ms. Wasserman Schultz	X		
Total	14	19	

10. An amendment offered by Mr. Quigley to amend Section 303 to apply only if the President or his designee submits to Congress written certification that this section will not affect the availability of abortion coverage offered by private health insurance issuers or group health plans for individuals who are not eligible for tax credits under title I of the Patient Protection and Affordable Care Act of 2010. Defeated 12 to 21.

ROLLCALL NO. 10

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King			
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Reed		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		

ROLLCALL NO. 10—Continued

	Ayes	Nays	Present
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi		X	
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez			
Ms. Wasserman Schultz	X		
Total	12	21	

11. An amendment offered by Ms. Chu to add new Section 312 that provides that nothing in the bill shall be construed to relieve any health care provider from providing emergency health care services as required by State or Federal law. Defeated 14 to 21.

ROLLCALL NO. 11

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Reed		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez			
Ms. Wasserman Schultz	X		
Total	14	21	

12. An amendment offered by Ms. Wasserman Schultz to amend Section 303 to provide that subsection (a) does not apply with respect to a taxpayer who is a small business. Defeated 14 to 22.

ROLLCALL NO. 12

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Reed		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi		X	
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez			
Ms. Wasserman Schultz	X		
Total	14	22	

13. An amendment offered by Ms. Wasserman Schultz to amend Section 309 to exclude abortions in the case of a woman with cancer who needs a life saving treatment incompatible with continuing the pregnancy. Defeated 15 to 21.

ROLLCALL NO. 13

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa		X	

ROLLCALL NO. 13—Continued

	Ayes	Nays	Present
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Reed		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez			
Ms. Wasserman Schultz	X		
Total	15	21	

14. To report H.R. 3 favorably. Passed 23 to 14.

ROLLCALL NO. 14

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Chabot	X		
Mr. Issa	X		
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan			
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Reed	X		
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy	X		
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle	X		
Mr. Conyers, Jr., Ranking Member		X	

ROLLCALL NO. 14—Continued

	Ayes	Nays	Present
Mr. Berman		X	
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Cohen		X	
Mr. Johnson		X	
Mr. Pierluisi	X		
Mr. Quigley		X	
Ms. Chu		X	
Mr. Deutch		X	
Ms. Sánchez			
Ms. Wasserman Schultz		X	
Total	23	14	

An amendment offered by Ms. Chu to add new Section 312 to provide that the bill shall not restrict the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions or violate the principles of informed consent and the ethical standards of health care professionals was defeated by voice vote.

A manager's amendment was adopted by voice vote.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 15, 2011.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3, the "No Taxpayer Funding for Abortion Act."

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 3—No Taxpayer Funding for Abortion Act.

H.R. 3 would amend Title 1 of the United States Code to prohibit the use of Federal funds provided under Federal law to pay for abortion services or for any health plan that provides abortion services, except in cases of rape or incest, or when the life of the pregnant woman is in danger. The bill would prohibit any tax credit that results from amounts paid for abortion services or, under certain circumstances, the costs of a health benefits plan that includes coverage of abortion services. Further, it would not allow the costs of abortion services, other than under the excepted circumstances mentioned above, to count as a deductible medical expense in determining income tax liability. In addition, the bill would expand nondiscrimination rules for health care providers that decline to engage in abortion-related activities.

Enacting H.R. 3 could affect direct spending or revenues; therefore, pay-as-you-go procedures apply. According to the staff of the Joint Committee on Taxation, the bill would have negligible effects on tax revenues. Similarly, CBO estimates that any effects on direct spending would be negligible for each year and over the 2011–2021 period.

H.R. 3 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on State, local, or tribal governments.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3 prevents Federal taxpayer funds and other incentives from supporting abortion.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following describes each section in H.R. 3. A manager's amendment (an amendment in the nature of a substitute) was offered by Rep. Trent Franks and adopted by the committee, which makes several clarifying amendments to H.R. 3 which are also described below.

Section 1. Provides the short title of the bill.

Section 2. Contains the following provisions prohibiting taxpayer-funded abortions and providing conscience protections:

SECTION 301

Section 301. Prohibits Federal funding for abortion.

SECTION 302

Section 302. Prohibits funding for health benefits coverage that includes coverage of abortion.

SECTION 303

Section 303. Clarifies, in Section 303(1), that the prohibition on abortion and abortion coverage subsidies applies to tax credits (a sum deducted from the total amount a taxpayer owes) and, in Sections 303(2) and 303(3), ensures that abortion is not incentivized through tax breaks in the form of itemized deductions or pre-tax health accounts, such as health savings accounts (HSAs), medical savings accounts (MSAs) or cafeteria plans (company benefit programs that allow employees to use pretax dollars to pay certain out-of-pocket expenses). Elective abortions are not health care, and they should not be treated as such by any Federal Government entity, including the I.R.S. Federal tax policy should not incentivize abortion.

SECTION 303(1)

Section 303(1) provides that "no credit shall be allowed under the internal revenue laws with respect to amounts paid or incurred for an abortion or with respect to amounts paid or incurred for a health benefits plan (including premium assistance) that includes coverage of abortion."

The Patient Protection and Affordable Health Care Act ("PPACA"), H.R. 3590, became P.L. 111–148. It is a radical expansion of government involvement in health care, and as such subsidies in the form of *tax credits* were included in the law to help individuals and small businesses purchase health insurance. These tax credits are a much more powerful incentive because they are far more valuable than a tax deduction. Whereas a tax deduction is a way to reduce your gross income before determiningthe tax you owe, a tax credit is applied to the actual amount of tax you owe. Had the Stupak-Pitts amendment been included in the law, those tax credits would have been prohibited from subsidizing insurance coverage that included elective abortions. But the Stupak-Pitts amendment was not enacted and instead PPACA contains provisions that result in the largest deviation from the principles of the Hyde Amendment in the 35 years since it was first enacted. Section 303 prohibits abortion coverage subsidies in the form of tax credits and would also capture any other pre-existing tax credits

for health insurance that have gone previously unnoticed and which are not covered by the Hyde Amendment. If there is any doubt that these tax credits are actually subsidies consider this. The CBO has indicated that by 2020 the Federal Government will spend $72.2 billion in direct premium credit outlays and $18.9 billion in direct spending for cost-sharing subsidies.[24]

Section 303(1) prevents tax credits for both abortion and abortion coverage, because tax credits like those in PPACA, are a dollar-for-dollar reduction in tax liability and are therefore a form of subsidy. Individual premium assistance is even paid when the individual has no tax liability at all. In fact, according to the CBO by 2020, 73% of premium assistance dollars made available under PPACA will be in the form of direct spending, meaning that 73% of the dollars made available as "tax credits" under PPACA law will actually be subsidies over and above tax liability.[25] This is the case because the tax credits in PPACA are refundable, advancable tax credits that are paid directly to the insurance company.

Section 303(1) prohibits small business owners from obtaining tax credits under PPACA for the cost of health care plans which cover abortion.[26] Under H.R. 3, individuals and small businesses will be able to obtain tax credits on the purchase of health plans that do not include abortion coverage.

SECTION 303(2)

Section 303(2) provides that "for purposes of determining any deduction for expenses paid for medical care of the taxpayer or the taxpayer's spouse or dependents, amounts paid or incurred for an abortion or for a health benefits plan that includes coverage of abortion shall not be taken into account." Tax *deductions* are amounts deducted from a person's taxable income. Individuals who spend more than 7.5% of their income on health costs are permitted to deduct those costs on their individual tax return. The threshold for this deductibility will soon increase to 10% under PPACA. Section 303(2) applies to tax deductions for abortion. The Internal Revenue Code does not specify which expenses are eligible for deduction, yet the IRS has, without congressional authorization, listed "abortion" as a deductible medical expense in its official publication on medical expenses.[27] Section 303(2) would correct this abortion subsidy and prevent deductions from an individual's tax return for abortions.

The manager's amendment struck the reference, in Section 303(2), to "or for a health benefits plan that includes coverage of abortion." The reason for that change is as follows. Section 303(2) deals with tax deductions which reduce a taxpayer's taxable in-

[24] Congressional Budget Office, CBO's August 2010 Baseline: Health Insurance Exchanges (August 25, 2010), available at http://www.cbo.gov/budget/factsheets/2010d/ExchangesAugust 2010FactSheet.pdf

[25] Congressional Budget Office, CBO's August 2010 Baseline: Health Insurance Exchanges (August 25, 2010), available at http://www.cbo.gov/budget/factsheets/2010d/ExchangesAugust 2010FactSheet.pdf

[26] Patient Protection and Affordable Health Care Act ("PPACA"), H.R. 3590, became P.L. 111–148. PPACA, Section 1421, as amended by Section 10105(e), provides a small business tax credit for certain employers to cover up to 35% of the cost health care plans from 2010 through 2013, and up to 50% of the cost of health plans after 2014 for two consecutive years.

[27] Section 213(d) of the I.R.S. code allows individuals who itemize to deduct medical expenses over 7.5% of their income, but does not specify what services can be deducted. IRS Publication 502 for 2010 "Medical and Dental Expenses" lists services which can be deducted and includes "abortion." *See* page 5 (http://www.irs.gov/pub/irs-pdf/p502.pdf).

come. The tax credits addressed in Section 303(1) are a much more powerful incentive because they are far more valuable than a tax deduction. Whereas a tax deduction is a way to reduce your gross income before figuring the tax you owe, a tax credit is applied to the actual amount of tax you owe. This change will ensure that tax deductions are not available for abortion, but will allow deductions for employer-sponsored plans that cover abortion.[28]

SECTION 303(3)

Section 303(3) provides that "in the case of any tax-preferred trust or account the purpose of which is to pay medical expenses of the account beneficiary, any amount paid or distributed from such an account for an abortion shall be included in the gross income of such beneficiary." This section involves the various tax-preferred savings accounts for medical expenses. An individual's contributions to a tax-preferred savings account sometimes are not included in adjusted gross income, are not always deducted on a tax return, and are often excluded from income by the employer. These tax-preferred trusts or accounts include Health Savings Accounts (HSAs), Medical Savings Accounts (MSAs) and Flexible Spending Arrangements (FSAs) and other tax-favored health plans.[29] Currently, I.R.S. Publication 969 specifies that qualified medical expenses for these accounts include any deductable medical expense listed in Publication 502, which lists abortion, and so abortions are currently tax-preferred medical expenses. If elective abortion is not health care, the I.R.S. should not be giving tax-preferred status to the procedure and Section 303(3) appropriately excludes abortion as a qualified medical expense.

In sum, H.R. 3 prohibits the use of tax credits for abortion or abortion coverage. It also prohibits individuals from deducting the costs of abortion on their individual tax returns. Finally, it prohibits the use of tax-preferred trusts like flexible spending accounts (systems in which certain types of expenses are not included in payroll or other taxes) and health savings accounts (in which funds contributed to an account are not subject to Federal income tax) to get a tax-free abortion.

H.R. 3 does not affect the tax treatment of employer-sponsored health insurance coverage as is permitted through the general employer deduction and the employee exclusion. Employee contributions to their premiums are taken out of their paycheck as a pretax exclusion called the employer exclusion. Exclusions for premiums are not addressed in H.R. 3. Employer-sponsored plans consist of insurance provided by an employer in one of two ways. One way allows the individual to exclude the cost of premiums (either paid by themselves or by their employer) from their gross income.[30] This is a pre-tax benefit excluded from income called the "employee exclusion." H.R. 3 does not affect exclusions for the cost of premiums.

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[28] Because tax deductions are a much less powerful incentive than tax credits, and because determining tax deduction eligibility is much more complicated than determining tax credit eligibility, the manager's amendment only covers tax credit eligibility as regards overall health benefits plans that include abortion.

[29] *See* IRS Publication 969 for 2010 "Health Savings Accounts and Other Tax-Favored Health Plans," at 8 (http://www.irs.gov/pub/irs-pdf/p969.pdf).

[30] The "employer tax deduction" found in IRS Code 162(a) allows employers to write off the cost of their contribution to their employees' health plans as well as other business expenses. The "employee tax exclusion" found in IRS Code 106(a) allows employees to exclude from taxable income the amount their employer contributes to their health care premiums.

The second way comes through the employer's general deduction which includes deducting any costs associated with compensating employees. Such deductions allow employers to deduct the cost of their contributions to an employee's health insurance plan as a business expense. Since Section 303(2) only ever applied to deductions for expenses of taxpayers and their dependants, it never captured employer deductions because those would not be deductions for expenses of the taxpayer. However, with the removal of the phrase "health benefits plan that includes coverage of abortion," Section 303(2) no longer addresses any kind of deduction for the cost of health plans that include abortion.

Taken together, Sections 301, 302, and 303 of H.R. 3 will stop government funding of abortions under PPACA, will prevent tax credits for premiums paid to health plans that cover abortions, and will prevent abortion from being given tax preferred status. Direct payments for abortions under the high risk pool program [31] and in the community health centers will be prohibited, and tax credits will not be given to subsidize health plans with abortion coverage whether in private plans in the state exchanges, in plans created under the co-op program, or in the multi-state plan run by the government. These Sections will also make permanent policies currently in place, such as the Hyde amendment.

SECTION 304

Section 304. Prohibits abortion in Federal health facilities (such as Department of Defense, Indian Health, and Veterans Affairs hospitals) and ensures abortion is not included in the services provided by individuals as a part of their employment by the Federal Government. Under current law these facilities do not provided abortions except in the cases of rape, incest or to save the life of the mother. Section 304 codifies that policy.

SECTION 305

Section 305. Clarifies that the bill does not prohibit individuals, entities, States or localities from purchasing separate privately funded coverage that includes abortion.[32] However, such coverage must be purchased using non-federal funds and may not be purchased using matching funds required for a federally subsidized program. For example, States may provide abortion coverage to Medicaid participants, but may not do so using Federal funds or

[31] Section 1101 of PPACA provides for the establishment of a temporary high-risk insurance pool program for specified individuals with preexisting conditions between the date on which the program is established and January 1, 2014.

[32] Much of the mechanics of how health insurance will work under PPACA will be worked out by Federal regulations and each state's unique arrangements, but what follows is a typical example of how this provision would work. A subsidy eligible individual goes to a health exchange and chooses a plan that costs $300 a month for the premium. If the plan does not include abortion they can use their subsidy of $200 (paid to the insurance company directly by the government), but they are only covered if they also pay their share of the premium. In this hypothetical, that's $100 a month. If they say "no, I want the version of the plan with abortion coverage," then they don't get the subsidy (that is, the insurance company won't be able to get the $200 a month from the government) and have to pay the full $300 themselves. Or, they can take the subsidy for a non-abortion plan and only pay the $100, with the government paying $200 a month, and then separately buy another policy to cover abortion from the same company or from another company. This option would be buying an abortion rider much like buying dental or vision insurance separate from your health insurance. If someone buys the abortion rider, they then pay the additional cost of the rider separately. Individual subsidies may also vary based on income level. If someone takes any subsidy, they have to go with a non-abortion plan and none of their premium share can be used for abortion.

State Medicaid matching funds, as is the case under the Hyde Amendment today.

SECTION 306

Section 306. Clarifies that non-federal health insurance providers may sell abortion coverage consistent with the policies described in Section 305. Section 306 provides that "Nothing in this chapter shall be construed as restricting the ability of any non-Federal health benefits coverage provider from offering abortion coverage, or the ability of a State or locality to contract separately with such a provider for such coverage, so long as only funds not authorized or appropriated by Federal law are used and such coverage shall not be purchased using matching funds required for a federally subsidized program, including a State's or locality's contribution of Medicaid matching funds." Section 306 makes clear that the insurance industry may continue to provide abortion coverage to those who purchase such coverage using their own private money.

SECTION 307

Section 307. Clarifies that the bill preserves any stronger abortion funding restrictions in existing law.

SECTION 308

Section 308. Clarifies that neither the bill nor any other Federal law shall be used as a basis to require any State or local government to provide or pay for abortion or abortion coverage.

The manager's amendment strikes this section and replaces it with another (described below). The manager's amendment strikes this language because this provision is not included in the current Hyde Amendment, and is seen as unnecessary in that amendment. Like H.R. 3, the Hyde Amendment's effect on Federal funding of abortion is to prohibit such funding; if it allows (that is, fails to prohibit) funding of abortion in certain rare cases, the issue of whether a state government or other entity may have to provide funds for such an abortion is determined by other laws.

The manager's amendment replaces section 308 with a new section that states:

> SEC. 308. CONSTRUCTION RELATING TO COMPLICATIONS ARISING FROM ABORTION. Nothing in this chapter shall be construed to apply to the treatment of any infection, injury, disease, or disorder that has been caused by or exacerbated by the performance of an abortion. This rule of construction shall be applicable without regard to whether the abortion was performed in accord with Federal or state law, and without regard to whether funding for the abortion is permissible under section 309 of this Act.

The manager's amendment adds a Section 308 to explain that H.R. 3's restrictions on the use of Federal funds and tax incentives for abortion do not apply to the treatment of complications from abortion, regardless of whether the abortion itself was illegal or ineligible for Federal funds. This section is added because opponents of H.R. 3 have tried to argue that the provisions in H.R. 3 would allow insurance companies to refuse to provide treatment for post-abortion complications. The Hyde Amendment and other Federal

laws regarding abortion funding have never prevented funding for complications from an abortion. The performance of abortions is clearly separate from the treatment of injuries resulting from the performance of an abortion. The Hyde Amendment and other longstanding restrictions on Federal funding of abortion have not included this explicit rule of construction in the past, because no case has been raised to indicate any problem of lack of clarity in applying these laws. However, the distinction has sometimes been explicit in foreign assistance applications.[33]

Moreover, while the Hyde Amendment has been in place, nothing has prevented Medicaid from covering services for complications following an abortion. The "State Medicaid Manual," which is the official guidance provided to states by HHS, addresses this point explicitly. The manual, in Chapter 4, says explicitly that Federal financial reimbursement is also "available for the costs of certain specific services associated with a non-Federally funded abortion," including "charges for all services, tests and procedures performed post-abortion for complications of a non-Federally funded therapeutic abortion."[34]

SECTION 309

Section 309. Establishes an exception to the prohibitions on abortion funding for cases of rape and incest, and when necessary to save the life of the mother.[35]

The manager's amendment will revert this section to the language used in the Hyde Amendment, namely through references to pregnancies that are "the result of an act of rape or incest." The references to "pregnant female" in Section 309(2) are also changed to "woman," consistent with the terminology used in the current Hyde Amendment.

Reverting to the original Hyde Amendment language should not change longstanding policy. H.R. 3, with the Hyde Amendment language, will still appropriately *not* allow the Federal Government to subsidize abortions in cases of statutory rape. The Hyde Amendment has not been construed to permit Federal funding of abortion based solely on the youth of the mother, nor has the Federal funding of abortions in such cases ever been the practice.

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[33] For example, President Bush's 2001 memorandum reinstating the "Mexico City Policy" (a policy against disbursing population assistance funds to non-governmental organizations that perform or promote abortion in foreign countries) explicitly excluded from the definition of abortion "the treatment of injuries or illnesses caused by legal or illegal abortions, for example, post-abortion care" (Presidential Memorandum of March 28, 2001, "Restoration of the Mexico City Policy," 66 *Fed. Reg.* 17301–13 (March 29, 2001) at 17306 and 17311). The additional clarification in the manager's amendment's Section 308 requires no change from the current understanding of abortion limitations in domestic or foreign policy.

[34] From 4432 Federal Funding of Abortion Related Services, within Chapter 4 of the State Medicaid Manual, which can be found at this link: http://www.cms.gov/Manuals/PBM/itemdetail.asp?filterType=none&filterByDID=-99&sortByDID=1&sortOrder=ascending&itemID=CMS021927&intNumPerPage=10

[35] The Hyde Amendment does not contain a broader exception for the "health" of the mother. Such an exception would be easily abused on the grounds that a federally-funded abortion is deemed necessary to prevent the mother's "emotional distress." A general "health" exception would consequently be bad policy, and the Supreme Court has not required such an exception. The Supreme Court upheld the Hyde Amendment of Fiscal Year 1977, which allowed Federal abortion funding only in cases of danger to the life of the mother. *See Harris v. McRae,* 448 U.S. 297 (1980). Consequently, there is no constitutional requirement that the Federal Government extend exceptions beyond the life of the mother.

SECTION 310

Section 310. Clarifies that the term "funds appropriated by Federal law" includes funds appropriated by Congress for the District of Columbia, and that standards set for the Federal Government include the government of the District of Columbia. Because H.R. 3 codifies the Hyde Amendment principle as a matter of Federal law, it will affect funding in the District of Columbia. Article 1 of the Constitution grants Congress control over all District legislation, including funding. Last year the Omnibus Appropriations Act[36] which allocates funds to the District removed the provision restricting the funding of elective abortions, a provision which had been renewed each year since 1996. Section 814 of Division C changed this provision to prevent only "Federal" funds from being used for abortion, which is a bogus distinction since all funds received and spent by the District are appropriated by Congress. H.R. 3 would restore the prohibition on taxpayer funding for elective abortion in Washington, D.C.

SECTION 311

Section 311. Ensures that the Federal Government, and any State or local government that receives Federal funds, may not discriminate against any individual or institutional health care entity on the basis that the entity does not provide, pay for, provide coverage of, or refer for abortions.

H.R. 3 makes permanent the conscience protection language found in the Hyde-Weldon Amendment renewed each year in the Labor-HHS appropriations bill, and applies this nondiscrimination policy to other departments and agencies of the Federal Government, as well as state and local governments that receive Federal funds from these departments and agencies.

Since PPACA appropriates funds directly, bypassing the Labor-HHS bill, these funds are not bound by the Hyde-Weldon conscience protections. Moreover, PPACA included a weaker nondiscrimination provision which only prevents health "plans" in the exchanges from discriminating against "providers" or "facilities" unwilling to participate in abortion. It does not prevent the Federal Government, or state or local governments, from committing such discrimination. H.R. 3 would codify the Hyde-Weldon provision, restoring conscience protections for health care workers to the status quo.

Section 311 forbids government from discriminating against any health care entity based on its declining to provide, pay for, provide coverage of, or refer for abortions. Thus the government may not penalize, deny a benefit or status to, or deny participation in public benefits programs to health care entities on this basis, whether the law or policy asserted by the government as a justification specifically targets such entities or is a law of general applicability.

In three respects Section 311 clarifies or improves the language of the Hyde-Weldon amendment.

[36] Section 814 of Division C of The Consolidated Appropriations Act, 2010 (P.L. 111–117).

First, it clarifies that this policy governs a state or local government that receives Federal financial assistance "either directly or indirectly." Thus, for example, a local governmental entity that has received Federal funds to help implement health care reform legislation is covered by the policy, even if those funds were channeled to the local government through a state agency. Likewise, if a state government receives Federal financial assistance, an agency of that state government is covered by the policy regardless of whether that particular agency is itself a direct recipient of Federal funds.

Second, Section 311 provides for a private right of action so that health care entities may directly file suit in Federal court if their rights under this Section have been or are threatened to be violated. This right of action belongs to any health care entity that has standing under the general rules of standing under Article III of the Constitution. This would certainly include the entity whose rights are threatened, and can also include an association of health care entities when one or more of its members are threatened by a violation of the law.[37] This right of private action, and the process discussed below for filing complaints with HHS for actual or threatened violations of Section 311, are set forth as concurrent and independent avenues for enforcement. Section 311 does not require, and should not be construed to require, that an administrative complaint must be filed, or that an investigation must be either initiated or concluded, before suit may be filed in Federal court.

Third, Section 311 designates the Office for Civil Rights of the Department of Health and Human Services (HHS) to receive complaints under this section. This designation parallels the regulation recently issued by HHS regarding enforcement of Federal conscience laws, including the Hyde-Weldon Amendment.[38] Because Section 311 applies to Federal agencies and programs in addition to HHS, it instructs the HHS Office for Civil Rights to investigate complaints or refer them to the other agency or program, as appropriate.

In an April 2009 survey by The Polling Company, Inc., 87% of American adults believed it is important (and 65% saw it as very important) to "make sure that healthcare professionals in America are not forced to participate in procedures and practices to which they have moral objections."[39]

SECTION 312

Section 312. Defines the term health benefits coverage.

The manager's amendment strikes this definition, as it could prove overly restrictive and exclude from coverage other forms of health benefits coverage that may be created under PPACA and other Federal legislation.

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[37] *See United Food & Commercial Workers Union v. Brown Group,* 517 U.S. 544, 555–56 (1996).

[38] *See* Department of Health and Human Services, "Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws," 76 *Fed. Reg.* 9968–77 (February 23, 2011).

[39] On the April 2009 survey, *see* www.freedom2care.org/docLib/200905011__Pollingsummary handout.pdf.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

TITLE 1, UNITED STATES CODE

TITLE 1—GENERAL PROVISIONS

CHAPTER 4—PROHIBITING TAXPAYER FUNDED ABORTIONS AND PROVIDING FOR CONSCIENCE PROTECTIONS

§ 301. Prohibition on funding for abortions

No funds authorized or appropriated by Federal law, and none of the funds in any trust fund to which funds are authorized or appropriated by Federal law, shall be expended for any abortion.

§ 302. Prohibition on funding for health benefits plans that cover abortion

None of the funds authorized or appropriated by Federal law, and none of the funds in any trust fund to which funds are authorized or appropriated by Federal law, shall be expended for health benefits coverage that includes coverage of abortion.

§ 303. Prohibition on tax benefits relating to abortion

For taxable years beginning after the date of the enactment of this section—

(1) no credit shall be allowed under the internal revenue laws with respect to amounts paid or incurred for an abortion or with respect to amounts paid or incurred for a health benefits plan (including premium assistance) that includes coverage of abortion,

(2) for purposes of determining any deduction for expenses paid for medical care of the taxpayer or the taxpayer's spouse or dependents, amounts paid or incurred for an abortion shall not be taken into account, and

(3) in the case of any tax-preferred trust or account the purpose of which is to pay medical expenses of the account beneficiary, any amount paid or distributed from such an account for an abortion shall be included in the gross income of such beneficiary.

§ 304. Limitation on Federal facilities and employees

No health care service furnished—

(1) by or in a health care facility owned or operated by the Federal Government; or

(2) by any physician or other individual employed by the Federal Government to provide health care services within the scope of the physician's or individual's employment,

may include abortion.

§ 305. Construction relating to separate coverage

Nothing in this chapter shall be construed as prohibiting any individual, entity, or State or locality from purchasing separate abortion coverage or health benefits coverage that includes abortion so long as such coverage is paid for entirely using only funds not authorized or appropriated by Federal law and such coverage shall not be purchased using matching funds required for a federally subsidized program, including a State's or locality's contribution of Medicaid matching funds.

§ 306. Construction relating to the use of non-Federal funds for health coverage

Nothing in this chapter shall be construed as restricting the ability of any non-Federal health benefits coverage provider from offering abortion coverage, or the ability of a State or locality to contract separately with such a provider for such coverage, so long as only funds not authorized or appropriated by Federal law are used and such coverage shall not be purchased using matching funds required for a federally subsidized program, including a State's or locality's contribution of Medicaid matching funds.

§ 307. Non-preemption of other Federal laws

Nothing in this chapter shall repeal, amend, or have any effect on any other Federal law to the extent such law imposes any limitation on the use of funds for abortion or for health benefits coverage that includes coverage of abortion, beyond the limitations set forth in this chapter.

§ 308. Construction relating to complications arising from abortion

Nothing in this chapter shall be construed to apply to the treatment of any infection, injury, disease, or disorder that has been caused by or exacerbated by the performance of an abortion. This rule of construction shall be applicable without regard to whether the abortion was performed in accord with Federal or State law,

and without regard to whether funding for the abortion is permissible under section 309 of this Act.

§ 309. Treatment of abortions related to rape, incest, or preserving the life of the mother

The limitations established in sections 301, 302, 303, and 304 shall not apply to an abortion—

(1) if the pregnancy is the result of an act of rape or incest; or

(2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness that would, as certified by a physician, place the woman in danger of death unless an abortion is performed, including a life-endangering physical condition caused by or arising from the pregnancy itself.

§ 310. Application to District of Columbia

In this chapter:

(1) Any reference to funds appropriated by Federal law shall be treated as including any amounts within the budget of the District of Columbia that have been approved by Act of Congress pursuant to section 446 of the District of Columbia Home Rule Act (or any applicable successor Federal law).

(2) The term "Federal Government" includes the government of the District of Columbia.

§ 311. No government discrimination against certain health care entities

(a) NONDISCRIMINATION.—A Federal agency or program, and any State or local government that receives Federal financial assistance (either directly or indirectly), may not subject any individual or institutional health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

(b) HEALTH CARE ENTITY DEFINED.—For purposes of this section, the term "health care entity" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

(c) REMEDIES.—

(1) IN GENERAL.—The courts of the United States shall have jurisdiction to prevent and redress actual or threatened violations of this section by issuing any form of legal or equitable relief, including—

(A) injunctions prohibiting conduct that violates this section; and

(B) orders preventing the disbursement of all or a portion of Federal financial assistance to a State or local government, or to a specific offending agency or program of a State or local government, until such time as the conduct prohibited by this section has ceased.

(2) COMMENCEMENT OF ACTION.—An action under this subsection may be instituted by—

(A) any health care entity that has standing to complain of an actual or threatened violation of this section; or

(B) the Attorney General of the United States.

(d) ADMINISTRATION.—The Secretary of Health and Human Services shall designate the Director of the Office for Civil Rights of the Department of Health and Human Services—

(1) to receive complaints alleging a violation of this section;

(2) subject to paragraph (3), to pursue the investigation of such complaints in coordination with the Attorney General; and

(3) in the case of a complaint related to a Federal agency (other than with respect to the Department of Health and Human Services) or program administered through such other agency or any State or local government receiving Federal financial assistance through such other agency, to refer the complaint to the appropriate office of such other agency.

Dissenting Views

Congress has prohibited the use of Federal funds for abortion for more than three decades, and H.R. 3 is not needed to achieve what has already been accomplished. Contrary to the claims of its sponsors, H.R. 3 is not a "just and widely supported common sense approach" to Federal funding [1] but an aggressive assault on women's health and the constitutionally protected right to decide whether to carry a pregnancy to term. If enacted, H.R. 3 would burden that right in a variety of ways that have nothing to do with Federal funds. H.R. 3 is not just, it is not common sense, and we adamantly oppose it.

H.R. 3 is far more ambitious than a mere codification of existing law. As originally introduced, it would have narrowed already inadequate exceptions that allow funding for abortion in cases of rape or incest by further limiting these hard-fought protections to cases of "forcible rape" and incest only when the victim is a minor. These cutbacks to existing law were not an oversight. As explained by a witness invited to testify by the Majority at the hearing on H.R. 3 held in the Constitution Subcommittee, these changes were intended to target and narrow protection for teenage girls.[2] In response to public outcry and anger, and perhaps realizing that this particular overreach might cost passage of the bill, Representative Trent Franks removed these limitations through a manager's amendment offered at the Committee markup. H.R. 3's sponsors may have retreated on this particular issue for now, but they remain steadfast in their overarching goal.

The goal of H.R. 3 is to make abortion completely unavailable even when paid for with purely private, non-Federal funds. H.R. 3 does this by, among other things, imposing an unprecedented tax penalty on individuals and businesses who use their own money to pay for abortion or to purchase insurance that would cover abortion. To the extent that individuals and businesses seek to avoid H.R. 3's penalty on insurance by purchasing insurance that excludes abortion coverage, any resulting costs for abortion-related medical care will be borne entirely by women and their families out-of-pocket. This is not codification of existing law, nor is it just another attempt to enact the approach taken in the Stupak/Pitts Amendment to the House-passed Affordable Health Care for America Act.[3] H.R. 3 is a radical departure from current tax treatment of medical expenses and insurance coverage; and it is not justifiable nor necessary to prevent Federal funding of abortion.

H.R. 3 changes existing law in other ways that will further harm women's health and place their lives at risk. For example, as interpreted by its key sponsors, section 311 of the bill would elevate a broad right to refuse to provide abortion-related care above the fundamental obligation to provide life-saving care. Current law is clear: no one has the right to refuse to provide emergency care, even if that requires performance of abortion. Rather than adhere

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[1] No Taxpayer Funding for Abortion Act: Markup of H.R. 3 Before the H. Comm. on Judiciary, 112th Cong. 12 (2011) [hereinafter "Markup Transcript"] (opening statement of Rep. Trent Franks), available at http://judiciary.house.gov/hearings/mark__03022011.html.

[2] No Taxpayer Funding for Abortion Act: Hearing Before the Subcomm. on Constitution of the H. Comm. on the Judiciary, 112th Cong. (2011) [hereinafter "Constitution Subcomm. Hearing"] (oral testimony of Richard M. Doerflinger, unofficial transcript).

[3] H.R. 3962, 111th Cong., § 265 (as passed by House, Nov. 7, 2009).

to well-established law in this regard, H.R. 3 seeks to upset it, while simultaneously creating new and special rights for those who refuse to provide abortion-related care.

H.R. 3 also seeks to extend funding restrictions that are limited in time and scope and apply them to all Federal laws, without any effort to determine how such a sweeping and permanent expansion would impact American women and their families.

I. OVERVIEW OF H.R. 3, THE "NO TAXPAYER FUNDING FOR ABORTION ACT"

H.R. 3 seeks to amend Title I of the U.S. Code to add new sections to Federal law, some of which have no corollary in existing law. Section 303 of the bill, for example, seeks to impose an unprecedented tax penalty on the use of purely private funds for abortion. Other sections are similar—but not identical to—restrictions that have been placed on Federal funding through various amendments to annual appropriations bills. The impact of these modified provisions on women and their families is unclear, yet H.R. 3 nonetheless seeks to make these restrictions permanent, and applicable to all Federal laws, as outlined below.

Sections 301 and 302 would impose a permanent, blanket restriction on funding. Sections 301 and 302 are modeled on the Hyde Amendment. First enacted in 1976, the Hyde Amendment prohibits the use of funds appropriated in particular laws (e.g., annual appropriations for the Department of Health and Human Services) from being used for abortion.[4] But unlike the Hyde Amendment, sections 301 and 302 would never expire and would apply to all Federal funds, not just funds specifically appropriated for a particular agency or purpose.

Section 303 would impose an unprecedented tax penalty on private funding for abortion and for insurance coverage that includes abortion. As described more fully below, section 303 imposes a tax on the use of private funds to pay for abortion or for the purchase of insurance that covers abortion in many circumstances. Section 303 has no corollary in existing law and represents a novel, untested use of the Internal Revenue Code to penalize a lawful and constitutionally protected health care choice. To the extent individuals and businesses seek to avoid section's 303's insurance penalty by purchasing insurance that excludes abortion, women and their families will bear the costs of any abortion-related medical care out-of-pocket.

Section 304 would ban abortion services in Federal health care facilities or by any Federal employee. Section 304 imposes a sweeping prohibition on the inclusion of abortion as part of any health care service furnished in a health care facility "owned or operated" by the Federal government or by any Federal employee. Congress previously has prohibited abortion services in prisons (though requiring transportation from prison when necessary)[5] and in Department of Defense facilities,[6] but H.R. 3 now seeks to impose this

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[4] See, e.g., P.L. 111–117, div. D, tit. II, § 507(a), 123 Stat. 3034, 3280 (2009) ("None of the Federal funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion.").

[5] See, e.g., P.L. 111–117, div. B, tit. II, §§ 203–04, 123 Stat. 3034, 3139 (2009).

[6] See, e.g., 18 U.S.C. § 1093(b) (prohibiting the performance of abortions in Department of Defense facilities).

ban on all Federal facilities and all Federal employees. The ban would not apply in cases of rape, incest, or where the woman's life is in danger (by virtue of Section 309).

Section 305 would narrow the Hyde Amendment's broad right to use non-Federal funds. The Hyde Amendment recognizes and preserves a broad right to use private funds, without specifying or limiting items that may be purchased with those funds.[7] Rather than mirroring this language exactly, section 305 protects only the purchase of "separate abortion coverage or health benefits coverage that includes abortion" with non-Federal funds. The impact of limiting a broad, unspecified right is unclear but notably places the use of funds for abortion (as compared to funds used to pay for insurance coverage) at risk, particularly when coupled with section 303's unprecedented tax penalties on private payments for abortion. As described more fully below, those penalties may make the right allegedly protected by section 305 purely symbolic for many women and their families.

Section 306 would alter Hyde Amendment protections for providers who offer abortion coverage. The Hyde Amendment broadly preserves the right for "any" managed care provider to offer abortion coverage,[8] while section 306 protects only the right of a "non-Federal" health benefits plan provider to offer coverage that includes abortion. It is not clear who might fall in or outside this category, and whether any insurer who participates in an exchange established under the Affordable Care Act might be considered a Federal provider for purposes of H.R. 3.

Section 307 would preserve only those Federal laws that impose greater restrictions on access to abortion. Section 307 makes clear that H.R. 3 would supersede any law that does not impose equal or greater restrictions on access to abortion. Section 307 leaves Congress no discretion or flexibility to, for example, provide greater protections for a woman's health in a particular setting or circumstance.

Section 308 would allow funding for treatments of complications that might arise from abortion. This section was added by the manager's amendment offered at Committee markup and appears intended to protect women against wrongful denials of coverage by clarifying that funding restrictions do not apply to treatment for complications that might arise from an abortion. It is unclear whether section 308 will be sufficient to overcome the chilling effect of section 303 on insurers' coverage decisions.

Section 309 would adopt the Hyde Amendment exceptions for cases of rape, incest, or where a woman's life is endangered. As originally introduced, H.R. 3 sought to narrow Hyde Amendment exceptions by allowing funding only in cases of "forcible rape" and incest only with a minor. In response to justifiable outrage, these further limits were removed at markup, leaving in place the Hyde Amendment restrictions that provide only limited safeguards for a woman's health.

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[7] See, e.g., P.L. 111–117, div. D, tit. II, § 508(b), 123 Stat. 3034, 3280 (2009) ("Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State's or locality's contribution of Medicaid matching funds).").

[8] See, e.g., P.L. 111–117, div. D, tit. II, § 508(c), 123 Stat. 3034, 3280.

Section 310 would reinstate and make permanent restrictions on funding for the District of Columbia. While some Congresses have restricted the District's use of its own funds, other Congresses have afforded it the same right as the states to use local, non-Federal funds for abortion-related services. Section 310 would impose a permanent ban on the District's use of local funds for abortion-related services.

Section 311 would provide unprecedented protection for anyone who refuses to provide abortion-related care and would elevate the right to refuse care over the obligation to provide life-saving care. Section 311 broadly protects any health care entity from government discrimination for refusing to provide abortion-related services, and creates a new private cause for enforcing this right. Unlike existing conscience protections, Section 311 protects anyone who faces even a threat of discrimination, regardless of whether actual discrimination ever occurs. Because section 311 does not define "discrimination," it is unclear what types of state actions might leave states at risk of a lawsuit and loss of Federal funding. Section 311, as interpreted by its key sponsors, also seeks to upset well-established law that requires the provision of life-saving care, even when that care requires the performance of an abortion.

A number of organizations oppose H.R. 3, including: Abortion Care Network, Advocates for Youth, Alliance for Justice, American Nurses Association (ANA), American Civil Liberties Union, American Congress of Obstetricians and Gynecologists, American Humanist Association, American Medical Student Association (AMSA), American Medical Women's Association, American Public Health Association, Asian & Pacific Islander American Health Forum, Association of American Women (AAUW), Association of Reproductive Health Professionals (ARHP), Black Women's Health Imperative, Catholics for Choice, Center for American Progress Action Fund, Center for Health and Gender Equity (CHANGE), Center for Reproductive Rights, Center for Women Policy Studies, EngenderHealth, EQUAL Health Network, Feminist Majority Foundation, Guttmacher Institute, Human Rights Campaign, International Planned Parenthood Federation—Western Hemisphere Region, Ipas, Law Students for Reproductive Justice, Medical Students for Choice, NARAL Pro-Choice America, National Abortion Federation, National Asian Pacific American Women's Forum (NAPAWF), National Association of Nurse Practitioners in Women's Health (NPWH), National Association of Social Workers (NASW), National Council of Jewish Women, National Family Planning and Reproductive Health Association, National Health Law Program, National Institute for Reproductive Health, National Latina Institute for Reproductive Health, National Network of Abortion Funds, National Organization for Women, National Partnership for Women & Families, National Women's Conference Committee, National Women's Health Network, National Women's Law Center, People For the American Way, Physicians for Reproductive Choice and Health, Planned Parenthood Federation of America, Population Connection, Raising Women's Voices for the Health Care We Need, Religious Coalition for Reproductive Choice, Religious Institute, Reproductive Health Technologies Project, Sexuality Information and Education Council of the U.S. (SIECUS), Third Way, Union for Reform Judaism,United Church of Christ,

Justice and Witness Ministries, United Methodist Church, General Board of Church & Society, Women of Reform Judaism, YWCA USA.

II. H.R. 3 IMPOSES UNPRECEDENTED TAX PENALTIES ON PRIVATE FUNDS AND WILL INCREASE TAXES AND IMPERIL EXISTING INSURANCE COVERAGE FOR AMERICAN WOMEN, FAMILIES, AND BUSINESSES.

Section 303 of the bill will impose an unprecedented penalty—in the form of a tax increase—on the use of private money to pay for abortion or insurance that would cover abortion. Section 303 is not about Federal money. It is about the Federal Government penalizing individuals, families, and businesses when they make a particular, constitutionally protected, health care choice that some Members of Congress oppose.

Section 303 of H.R. 3 has absolutely no corollary in existing law. It is a completely novel and untested use of the Internal Revenue Code, and the claim that section 303 is needed to prevent Federal funding for abortion represents a radical view that is at-odds with our longstanding treatment of private contributions in countless other circumstances. The politically convenient fiction that the money in an individual's own pocket is converted into Federal funds any time the government elects not to tax that money should be rejected.

A. Section 303 Increases Taxes, Endangers Existing Insurance Coverage, and Creates Uncertainty.

Exactly how far section 303 sweeps, and what expenses it may penalize, is unclear. How much it will increase taxes, and exactly whose taxes will increase, is also unclear. Its impact on current comprehensive insurance coverage that American families now have, and rely upon to safeguard their physical and financial health, is similarly unknown.

Indeed, while a Constitution Subcommittee hearing and the markup of H.R. 3 provide a general sense of the minimum reach of section 303's novel tax penalty provision, no one has been able to explain its maximum impact and when, if ever, insurance coverage that includes abortion is beyond its scope. This uncertainty will necessarily cause individuals, businesses and insurers to drop anything that might be construed as abortion coverage, if only to avoid the catastrophic financial consequences of an adverse tax ruling in the future. To the extent that individuals, businesses, and insurers do so, medical expenses incurred as a result of the loss of coverage for abortion-related care will be shifted to women and their families. These increased costs, which will not be reflected in estimates regarding H.R. 3's impact on Federal tax revenues, place women and families at considerable financial risk.

1. Even if limited to its minimum potential applications, section 303 will increase taxes of millions of small businesses, workers, and their families.

At a minimum, section 303 will reach any private funds paid out-of-pocket for abortion services and private funds used to purchase insurance that includes coverage for abortion in many circumstances, including in the following ways.

(a) Section 303(1) of H.R. 3 bars any "credit" under the Internal Revenue Code for any amounts paid for abortion or for health benefit plans that include coverage for abortion. This provision is intended to and likely would reach: (1) any small business that helps pay for insurance for its employees; and (2) any individual who qualifies for a credit under the Affordable Care Act or any other law, if the insurance purchased through private funds that make these businesses and individuals eligible for the relevant credit covers abortion.[9]

The Council of Economic Advisors estimates that 4 million small businesses are eligible for a tax credit under the Affordable Care Act if they provide health care to their workers, and that "millions of workers at small firms and their families would be eligible for their own tax credits to purchase coverage through the Exchange if their firms did not offer coverage."[10] All of these businesses, individuals, and families would lose their tax credits under section 303(1) if their insurance covers abortion, thus raising taxes on potentially millions of small businesses and their workers.

While the bill's sponsors claim that sections 305 and 306 of the bill will preserve the right to use one's own funds to contract for and purchase insurance that covers abortion, section 303(1) would make it impossible for many women, families, and businesses to do so.

For example, a single mother with two children who earns $24,000 a year becomes eligible in 2014 to purchase insurance through an exchange under the Affordable Care Act. If the family's health insurance plan includes coverage for abortion, section 303(1) requires them to forfeit the premium assistance credit that makes it possible to purchase this insurance. This effectively forces them to purchase insurance that excludes abortion coverage, making the right allegedly protected by sections 305 and 306 purely symbolic for this mother and her family.

(b) Section 303(2) of H.R. 3 taxes any private funds paid out-of-pocket for abortion services by making these medical expenses ineligible for tax deduction. This will increase taxes on women and families who use their own money to pay for abortion services or where privately-purchased health insurance requires an out-of-pocket co-payment.

As introduced, section 303(2) would also have disallowed tax deductions for any amounts paid for health benefit plans that include coverage of abortion. During the Constitution Subcommittee hearing, witnesses took decidedly different positions on whether section 303(2) would reach employer-provided health insurance plans.[11]

In an apparent effort to clarify that section 303(2) should not be interpreted to apply to employer-provided plans, Representative Trent Franks offered a manager's amendment to H.R. 3 that struck the portion of section 303(2) referencing funds used to purchase

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[9] Constitution Subcomm. Hearing, supra note 2 (written testimony of Cathy Cleaver Ruse, at 8; written testimony of Sara Rosenbaum, at 3).

[10] Christina Romer & Mark Duggan, Council of Econ. Advisors, Health Insurance Reform Will Help Small Businesses (Feb. 26, 2010), www.whitehouse.gov/blog/2010/02/26/health-insurance-reform-will-help-small-businesses. Appointed by the President with the advice and consent of the Senate, the Council of Economic Advisors offers the President objective economic advice on foreign and domestic economic policy.

[11] Constitution Subcomm. Hearing, supra note 2 (written testimony of Cathy Cleaver Ruse, at 8; written testimony of Sara Rosenbaum, at 3).

health benefit plans that cover abortion.[12] Though Representative Franks expressed his belief that section 303, as amended, should not be interpreted to reach employer-provided plans, he nonetheless objected to an amendment offered by Representative Jerrold Nadler that would have ensured that employer-provided plans are exempt from section 303.[13] That amendment was not agreed to.

(c) Section 303(3) of H.R. 3 would penalize individuals with tax-preferred savings accounts any time they use their funds to pay for abortion services. Section 303(3) applies to individuals who set up health savings accounts or similar trusts through an employer or on their own, and requires that any personal funds paid for abortion be counted as taxable income.[14]

An estimated 30 million Americans currently use flexible spending accounts to set aside pre-tax money to pay for medical expenses,[15] and approximately 10 million are enrolled in health savings accounts.[16] Section 303 would increase taxes for these individuals and families if they use the money that they have set aside to cover medical expenses to pay for abortion.

2. Section 303's maximum reach is uncertain, with key sponsors seeking to penalize any insurance with a "federal nexus," possibly including all plans purchased through an exchange.

Minority Committee Members were unable to clarify section 303's scope during the Committee's markup of H.R. 3 despite several efforts to do so. Indeed, several Members questioned Representative Franks about how his manager's amendment would work. Representative Franks' explanations only led to further confusion.

For example, Representative Nadler sought to clarify the impact of the bill on an individual's use of her own funds to purchase insurance from a private company through the following colloquy:

> Mr. NADLER. If the only activity of the government, Federal Government or State government, in the given situation is that they have set up the exchange, that the administrative costs of the exchange are being borne by either the State or the Federal government, and an individual goes to this exchange and, getting no tax credit, buys an insurance policy from some private company but does so

[12] H.R. 3's sponsors may also have made this change to blunt the justifiable concern and criticism that, if interpreted to reach employer-provided plans, section 303 would immediately alter insurance coverage for the vast majority of American workers who receive coverage through their employers. However, as explained in Sec. I.(A)(3), even if section 303 does not itself reach employer-provided plans, there will be a spillover effect (as companies redesign insurance products for use in multiple markets) that will impact coverage under employer-provided plans regardless. For a further explanation of the industry-wide impact, and how insurance product design responds to broad regulatory intervention aimed at reshaping product content, see also Sara Rosenbaum et al., George Washington Univ. Med. Ctr., An Analysis of the Implications of the Stupak/Pitts Amendment for Coverage of Medically-Indicated Abortions (Nov. 16, 2009), http://www.gwumc.edu/sphhs/departments/healthpolicy/dhp__publications/pub__uploads/dhpPublication__FED314C4–5056–9D20–3DBE77EF6ABF0FED.pdf.

[13] Markup Transcript, supra note 1, at 106–07.

[14] Constitution Subcomm. Hearing, supra note 2 (prepared statement of Cathy Cleaver Ruse, at 8; prepared statement of Sara Rosenbaum, at 3).

[15] Jordan Rau, Kaiser Health News, Defending the Flex Spending Accounts (Feb. 2, 2011), http://www.politico.com/news/stories/0211/48627.html.

[16] America's Health Insurance Plans, January 2010 Census Shows 10 Million People Covered by HSA Qualified High-Deductible Health Plans (2010), http://www.ahipresearch.com/hsacensus.html.

> on an exchange that is maintained by the government, does [this bill] affect that?
>
> Mr. FRANKS. Well, once again, it depends on whether there is any Federal nexus of financing and whether the plan offers abortion or it does not. If it does not offer abortion, of course, it is unaffected. If it does, if there is any Federal nexus, whether it is this tax credit again that makes the furniture float in the room –
>
> Mr. NADLER. I thank the gentleman and I remain almost as confused as I was before.[17]

The question of whether section 303 reaches any plan offered through an exchange is a significant one. The Congressional Budget Office estimates that within six years of implementation, 30 million people will get their health insurance through an exchange, including 3 million who will receive no Federal subsidy for doing so and another 9 million who will receive exchange-based insurance through an employer.[18] Taxes will be increased, and coverage for millions of Americans placed at risk if, as its key sponsors have indicated it might, section 303 reaches any plan purchased through an exchange.

During Committee markup, several Minority Members tried to limit section 303's scope and mitigate resulting tax increases by offering a series of amendments to the tax penalty provision. Representative Nadler offered an initial amendment to strike section 303 in its entirety, arguing that the provision reaches and penalizes private, not Federal, funds. He explained:

> My colleagues insist that this bill merely codifies existing law and is needed to ensure that no Federal funds are spent for abortion. But section 303 is not a mere codification of existing law. It is completely new. This provision would penalize the use of private funds and impose a tax increase on anyone who used their own money for abortion or abortion coverage. The American people should not be fooled into thinking that this is what happens now.
>
> Section 303 is not needed to prevent spending Federal funds on abortion. Current law already prevents that. And the funds reached in section 303 are not Federal funds. And as the discussion of this committee in the last 20 minutes has shown, the sponsors cannot even tell us what this section covers and what this section does not cover.[19]

When that amendment failed, Representative Nadler offered an amendment that would have stayed enforcement of the law pending a determination that section 303 will not increase taxes. As he explained: "Unless it is the sponsor's intent to use tax penalties to impose a massive tax increase on Americans who choose to exercise their own private choices about their own health care and health care coverage, using their own money, every member should be able to support this amendment."[20] The amendment was not

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[17] Markup Transcript, supra note 1, at 32.

[18] Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Hon. John D. Dingell, U.S. House of Representatives (Nov. 6, 2009), http://www.cbo.gov/ftpdocs/107xx/doc10710/hr3962Dingell_mgr_Amendment_update.pdf.

[19] Markup Transcript, supra note 1, at 51.

[20] Id. at 90.

agreed to, nor were additional amendments offered by Representative Nadler to exempt employers and the self-employed from section 303's tax penalty provision.

Also seeking to mitigate the harm caused by section 303, Representative Henry "Hank" Johnson, Jr. offered an amendment to exempt individuals from its tax penalties. As he explained, section 303 would place at risk American workers who lose their jobs and women at all income levels:

> Under current law, certain workers who lose their jobs as a result of outsourcing to foreign countries may be eligible for a health coverage tax credit. The health coverage tax credit pays 80 percent of the cost of a qualified health plan premium for eligible workers.
> H.R. 3 makes any insurance plan that includes coverage of abortion ineligible for the health coverage tax credit, thereby raising taxes on potentially thousands of displaced workers. H.R. 3 would also increase taxes on women who use their tax-preferred savings accounts, such as flexible spending or health savings accounts, their own money, to pay for abortion care. . . .
> . . . Further, this bill would penalize low-and-middle income people [who would lose eligibility for a tax credit to purchase insurance under the Affordable Care Act].
> . . . [I]n every way, this bill tells the American taxpayer if you buy legal constitutionally protected medical services that some members, mostly males, of Congress don't like, then we're going to raise your taxes. That's wrong. We have absolutely no business doing that.[21]

Representative Johnson's amendment was not agreed to, nor was an amendment offered by Representative Debbie Wasserman Schultz that would have protected small businesses from section 303's tax penalties. As Representative Wasserman Schultz explained, application of section 303 to small businesses would—for an average small business with twelve employees, whose healthcare costs totaled approximately $90,000—raise the taxes of that small business by nearly $15,000.[22]

Without the benefit of any of the clarifying and narrowing amendments offered by Minority Members, the potential reach of H.R. 3's tax penalty provision remains unclear and, even limited to its minimal applications, section 303 will raise the taxes of millions of American women, workers, businesses, and families.

3. Section 303 also endangers insurance coverage that millions of American women and their families currently rely upon to secure their physical and financial health.

Regardless of its exact scope, the goal of section 303 is to drive insurance companies that provide coverage that includes abortion out of the private insurance market.

Testifying before the Constitution Subcommittee, Professor Sara Rosenbaum explained that, if enacted, section 303 would cause " a complete exodus of health plans from the market of abortion cov-

[21] Id. at 149–50.
[22] Id. at 184.

erage."[23] In order to avoid the loss of favorable tax treatment, insurance companies will alter product design to exclude abortion coverage and deny coverage for any medical procedures that might possibly qualify as abortion-related coverage. As Professor Rosenbaum observed:

> Because products that violate the [abortion] exclusion would no longer qualify for favorable tax treatment, the industry can be expected to scramble quickly to come into compliance. Where the exclusion is as complex and fact-driven as that laid out in H.R. 3, compliance poses great difficulties. . . .
>
> . . . [A] far easier and completely legal strategy for private insurers and plan administrators could be simply to exclude coverage of all abortions from their coverage products, whatever the clinical or factual evidence, rather than risk a violation of the Federal exclusion that in turn would result in the loss of tax-favored treatment for the entire product.[24]

As Professor Rosenbaum's testimony makes clear, section 303 will have a chilling effect on insurance coverage for medical expenses incurred by millions of American women.[25]

A Majority witness at the hearing, Richard Doerflinger, frankly acknowledged the likelihood that the bill will alter existing insurance coverage:

> [T]he new legislation when combined with existing laws may produce a 'tipping point' where coverage without abortion becomes the usual norm for health insurance; coverage that includes abortion will be permitted but rare.[26]

Mr. Doerflinger expressed no concern for the millions of American women and families whose current insurance coverage would be changed: "My response to this is that I hope it is correct."[27]

Congress should not embrace such cavalier disregard for the well-being of millions of American women and their families who currently have insurance that covers abortion services.[28] Indeed, to the extent the H.R. 3 achieves this goal of making insurance that includes abortion coverage unavailable, medical expenses incurred as a result of that loss of coverage will be shifted entirely to women and their families. These increased costs, which will not be re-

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[23] Constitution Subcomm. Hearing, supra note 2 (oral testimony of Sara Rosenbaum, unofficial transcript).

[24] Id. (written testimony of Sara Rosenbaum, at 4).

[25] Inclusion of a new section 308 in Representative Franks' managers amendment, which allows coverage for medical care needed to treat possible complications "caused by or exacerbated by the performance of an abortion" does not mitigate this chilling effect. A decision to provide coverage will remain subject to review and, as Professor Rosenbaum testified, the safest and easiest route for insurers will still be denial of all coverage requests. Since another provision of H.R. 3 (section 311) provides insurers with a broad right to refuse coverage, any claim that section 308 sufficiently safeguards women's health is, at best, mistaken.

[26] Constitution Subcomm. Hearing, supra note 2 (written testimony of Richard M. Doerflinger, at 9).

[27] Id.

[28] A federally supported study conducted by the Guttmacher Institute found that 87% of typical employer-based insurance plans covered abortion, and a 2003 survey by the Kaiser Family Foundation found that 46% of insured workers had coverage for abortion. See Guttmacher Institute, Memo on Insurance Coverage of Abortion (updated Sept. 18, 2009), http://www.guttmacher.org/media/inthenews/2009/07/22/index.html.

flected in estimates regarding H.R. 3's impact on Federal tax revenues, place women and families at considerable financial risk.

Seeking to mitigate the resulting risk to women and their families, Minority Members of the Committee fought hard to safeguard current insurance coverage through an amendment offered by Representative Mike Quigley.

Representative Quigley's amendment would have protected current coverage by requiring certification that H.R. 3's untested tax penalty provision would not impair coverage in plans that millions of American women and families rely upon for comprehensive medical care. As he explained:

> I also want to be clear on what this attempt to eliminate insurance coverage of abortion would actually mean for millions of families across the country. . . . if the intent of this bill succeeds, women who never thought they would need an abortion will be endangered when they are without coverage for an abortion and even when an abortion is necessary to preserve a woman's health.
>
> [T]he true ramifications of this bill will likely eliminate private insurance coverage of abortions, stripping away the comprehensive coverage that millions of women currently have, need, and deserve.[29]

Representative Quigley's amendment to safeguard existing coverage was not agreed to, placing at risk current coverage that American women and their families pay for with their own funds and that ensures comprehensive coverage for unforeseen medical needs.

B. Accepting the Fiction that Section 303 Targets Federal Funding is At-Odds with Congress's Longstanding Tax Treatment of Private Funds in Other Circumstances.

There is no precedent for the position that the tax treatment of private funds—whether through exemption, deduction, credit or any other favorable treatment—converts money that the government has decided not to collect from individual taxpayers or businesses into Federal funds. That position, adopted to justify H.R. 3's tax penalty on the purely private funding of abortion, directly conflicts with Congress's and the courts' longstanding view of the tax treatment of private funds.

Under this theory, for example, favorable tax treatment for religious organizations or for individual contributions to religious organizations would qualify as Federal funding of religion, raising First Amendment Establishment Clause concerns. Of course, the Supreme Court has never considered the favorable tax treatment of private funds to constitute Federal funding in that context:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the pub-

[29] Markup Transcript, supra note 1, at 162.

> lic payroll." There is no genuine nexus between tax exemption and establishment of religion.[30]

Just as favorable tax treatment does not convert private funds paid to religious organizations into Federal funding of religion, allowing private funds paid for abortion-related services to be treated as permissible medical expenses under the Internal Revenue Code does not convert those private funds into Federal funding of abortion. Section 303 does not target Federal funds but, instead, targets and penalizes the use of private funds. H.R. 3 is a radical departure from current tax treatment of medical expenses and insurance coverage; and it is not justifiable nor necessary to prevent Federal funding of abortion.

III. H.R. 3 SEEKS TO ELEVATE THE RIGHT TO REFUSE CARE ABOVE THE OBLIGATION TO PROVIDE LIFE-SAVING CARE AND GRANTS UNPRECEDENTED SPECIAL RIGHTS TO THOSE WHO REFUSE TO PROVIDE ABORTION-RELATED CARE.

As originally enacted, conscience-clause provisions protected a provider's right *to refuse or to provide* abortion-related care, and linked the right to refuse to provide care to religious beliefs or moral convictions.[31] Starting in 2005, however, the right to refuse to provide care has been greatly expanded in certain appropriations bills, granting anyone who qualifies as a "health care entity" the right to refuse to provide abortion-related services for any reason whatsoever.[32] Thus, while H.R. 3's sponsors claim that section 311 is needed to protect rights of conscience, citing a desire to protect religiously affiliated hospitals and individual health care workers, the broad right they seek to enshrine in Federal law lacks any connection to conscience-based reasons for refusing care and is not limited to individuals or faith-based providers.

Representative Nadler explained the breadth and impact of section 311's refusal right during the markup of H.R. 3:

> Under section 311, for example, a state that requires an insurance company to provide coverage for an abortion, made necessary because a woman needs to start immediate cancer treatment, could not be enforced against any insurance company that chose not to provide that coverage, regardless of the reason for doing so. So we are not talking, necessarily, about a right of conscience. If the insurance company came out and said, we don't want to obey the State law that requires us to pay for an abortion made necessary by a woman's cancer, because we don't want to spend the money, we have no ethical or moral or conscience objection, we just don't want to spend the money, section 311 would trump the State law that was enacted to protect the woman's health in that case.[33]

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[30] Walz v. Tax Commission of City of New York, 397 U.S. 664, 675 (1970) (upholding property tax exemptions for religious organizations).

[31] See, e.g., P.L. 93–45, § 401, codified at 42 U.S.C. § 300a-7 (the "Church Amendment," named for its principal sponsor, Senator Frank Church, and first enacted in 1973).

[32] See section 311 of H.R. 3; see also P.L. 111–117, div. D, tit. II, § 508(d)(2) ("health care entity" includes "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health are facility, organization, or plan.").

[33] Markup Transcript, supra note 1, at 122.

Seeking to at least ensure equal protection for those who provide medical care, Representative Nadler offered an amendment that would provide this reciprocal right, including the new private right of action created by section 311. That amendment was not agreed to, with Representative Franks expressing concern that the amendment would undermine government efforts to restrict women's access to abortion services.[34] Majority Committee Members expressed no equivalent concern for women in need of care, also rejecting several other amendments offered to safeguard women's health.[35]

Representative Franks opposed these amendments as unwarranted departures from current law[36] while characterizing H.R. 3 as codifying existing refusal rights.[37] But section 311 departs from current law in at least two critically important respects.

First, as interpreted by its key sponsors, section 311 does not respect well-established law requiring life-saving care. Current law on this point is clear: no one has the right to refuse to provide emergency life-saving care, even if that requires performance of an abortion. Indeed, Representative David Weldon, the original author of the refusal language included in H.R. 3, made clear that his nondiscrimination language "simply prohibits coercion in nonlife-threatening situations."[38]

Seeking to clarify that current law on this point will be respected, Representative Judy Chu offered an amendment to confirm that the right to life-saving care would survive H.R. 3's enactment. As Representative Chu explained:

> I hope that no one here would suggest that this bill allows women coming into a hospital for life or death care would be provided with anything less than the best and fullest care. In fact, I fully expect my colleagues on the other side to tell me that this amendment isn't needed because the bill doesn't affect EMTALA [Emergency Medical Treatment and Active Labor Act] provisions, but I am very, very concerned that the language in the Manager's Amendment regarding refusal is broad enough and vague enough that some providers may not understand that what we here in this room all agree, which is that EMTALA supersedes refusal provisions.[39]

However, rather than confirm an intent to respect current law, Representative Franks objected to the amendment, arguing that it "would gut the conscience provision," and Majority Members of the

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[34] Id. at 124.

[35] Majority members of the Committee would not agree to several amendments that would have provided funding or coverage where an abortion is necessary to preserve a woman's health, including a specific amendment offered by Representative Wasserman Schultz to protect the health of women with cancer. Majority members also would not agree to an amendment offered by Representative Sheila Jackson Lee that would restore language previously include in the Hyde Amendment that allows funding where continuing a pregnancy could cause "severe and long-lasting" damage to a woman's health.

[36] See, e.g., Markup Transcript, supra note 1, at 72 (Representative Franks opposed Representative Jackson Lee's amendment to allow abortion where continuing a pregnancy could cause "severe and long-lasting damage to a woman's health" on the ground that "[t]he Hyde Amendment does not contain a broader exception for health, and there is no reason to add one here. Such language has never been part of the Hyde Amendment. . . ."). As Representative Nadler pointed out, however,"[t]he health exception was in the Hyde Amendment for many years. . . ." Id. at 73.

[37] Id. at 13 ("Both the funding policies and the conscience protections of this bill have been Federal law for decades. . . .").

[38] 151 Cong. Rec. H177 (daily ed. Jan 25, 2005) (statement of Rep. David Weldon).

[39] Markup Transcript, supra note 1, at 172–73.

Committee voted it down.[40] This departure from existing law finds no support from its original author, Representative Weldon, who described the provision as applying to "non-life threatening situations" and took the unequivocal position that "in situations where a mother's life is in danger a health care provider must act to protect the mother's life."[41] It is also at-odds with the position of the Catholic Health Association (CHA), the national leadership organization of more than 2,000 Catholic health care entities. While CHA supports the Weldon nondiscrimination language, it does not seek to elevate the right of refusal over the obligation to provide life-saving care: **"CHA member hospitals have been providing compassionate, quality care under both EMTALA and the 'Weldon Amendment,' without conflict since the enactment of these provisions. Accordingly, CHA does not believe that there is a need for the provider nondiscrimination section to apply to EMTALA."**[42]

Section 311 also departs from existing law by creating an unprecedented private cause of action any time there is "an actual *or threatened* violation" of its non-discrimination requirement. Thus, for example, a health care entity might sue a state under section 311 for requiring emergency care as a condition of state licensing, regardless of whether actual discrimination ever occurs. In fact, the mere existence of a state law requiring an insurance company to provide coverage for abortion in cases where a woman has cancer and needs to start treatment immediately, or in other cases where a woman's health is in serious danger, might entitle the entire universe of "health care entities" to sue the state for money damages.

This unprecedented special right to receive compensation absent actual discrimination does not exist in other contexts. It is remarkable that, under the guise of preventing taxpayer funding of abortion, H.R. 3 seeks an entitlement to damages for an unlimited universe of individuals and organizations who have suffered no actual harm.

IV. H.R. 3 SINGLES OUT WOMEN AND FAMILIES IN THE DISTRICT OF COLUMBIA FOR PARTICULAR HARM, UNJUSTIFIABLY RESTRICTING THE DISTRICT'S USE OF LOCAL FUNDS.

Section 310 of H.R. 3 singles out the District of Columbia and places additional limits on the District's use of its own, non-Federal funds for abortion-related care or coverage. Because of H.R.3's unprecedented impact on her district, Representative Eleanor Holmes Norton asked to testify before the Constitution Subcommittee. Breaking with the Committee's past practice of granting other Members with a particular interest in a bill or issue the opportunity to testify, the Majority refused our colleagues' request.

Having been denied the opportunity to appear, Representative Norton submitted a prepared statement, explaining among other

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[40] Id. at 175. An amendment offered by Representative Chu to ensure that nothing in H.R. 3 deprives women of the right to get full and accurate information about their medical condition and care also was not agreed to.

[41] 151 Cong. Rec. H177 (daily ed. Jan 25, 2005) (statement of Rep. David Weldon).

[42] Letter from Sr. Carol Keehan, President and CEO, Catholic Health Association of the United States, to Joseph R. Pitts, Chairman, House Energy and Commerce Subcommittee on Health, U.S. House of Representatives (Feb. 9, 2011) (emphasis in original) (submitted for the record of the Constitution Subcomm. Hearing, supra note 2).

things, how H.R. 3 represents a radical departure from Congress's historic consideration of the District:

> H.R. 3, however, not only seeks to re-impose the ban on the District's use of its local funds for abortion, but also to make it permanent. This bill presents a new and expanded way to deny the residents of the District of Columbia their democratic rights. Unlike the prior prohibitions on the District's use of its local funds, section 310 states that the "term 'Federal Government' includes the government of the District of Columbia." Declaring that the District is a part of the Federal Government for the purpose of abortion is an unprecedented violation of the District's right to self-government.[43]

As Representative Norton's testimony makes clear, some Congresses have restricted the District's use of its own funds, but others have accorded the District the same respect afforded to the states with regard to decisions about the use of local funds. If H.R. 3 should become law, the District's discretion to make the funding decisions that best serve the needs of its residents will be permanently restricted.

During Committee markup of H.R. 3, Ranking Member John Conyers, Jr. offered an amendment to prevent imposition of this permanent restriction. Echoing his prior disappointment that the Committee had not honored Representative Norton's request to testify, Ranking Member Conyers sought to ensure that, as with constituents in other Members' districts, the women and families who reside in the District of Columbia should have the same assurance that their elected representatives can spend local funds to serve their best interests, not those of certain Members of Congress:

> Given the unique impact the bill has on the District of Columbia, I offer this amendment that would ensure that, like citizens elsewhere in the country, the citizens of the District would be able to use their own money, not Federal funds, but money from the District's own general revenue fund that comes from District residents.[44]

Committee Chairman Lamar Smith responded that, by virtue of Congress's unique relationship with the District, whereby Congress approves all District funding and technically appropriates those funds, the funds in the District's general revenue are converted to Federal funds. Despite Ranking Member Conyers' efforts "to make sure that you heard this part of my comment, that there are monies that come into the treasury of the District of Columbia that are not Federal monies,"[45] Majority Members of the Committee would not agree to the amendment.

As with the fiction created to justify section 303 of the bill, this politically convenient funding fiction, used here to justify restrictions on the District's use of its own local funds, should be rejected. Women and families who live in the District should not be subject to additional harm simply because of where they live. They deserve

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[43] Constitution Subcomm. Hearing, supra note 2 (written testimony of Hon. Eleanor Holmes Norton, at 2).
[44] Markup Transcript, supra note 1, at 34.
[45] Id. at 36.

the same guarantee afforded to constituents elsewhere: the fundamental assurance that their local elected representatives will act in their best interests or answer to the democratic process. We would never tolerate Congress treating our own constituents this way; we should show the same regard for the Americans who live in the Nation's Capitol.

CONCLUSION

H.R. 3 is not a modest effort to codify existing restrictions on Federal funding of abortion but part of an aggressive campaign to roll back women's rights, without regard for the impact on women's health, lives, or families. H.R. 3's aggressive tax provision has no corollary in existing law. It is an untested and unjustifiable penalty on privately funded health care choices that some Members of Congress oppose.

Through Federal funding restrictions that have been in place for more than three decades, Congress has used economic coercion in an effort to limit women's access to abortion. Until now, that coercion has been directed against the poor and women dependent on the Federal Government for health care. Now, all women and their families have been targeted.

Women in America have the fundamental right—guaranteed by the Constitution that we take an oath to support and defend—to make the profound and deeply personal decision of whether to carry a pregnancy to term. H.R. 3 burdens that right in a variety of ways that have nothing to do with Federal funding of abortion. Accordingly, we adamantly oppose this bill.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
JERROLD NADLER.
ROBERT C. "BOBBY" SCOTT.
MELVIN L. WATT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
MAXINE WATERS.
STEVE COHEN.
HENRY C. "HANK" JOHNSON, JR.
MIKE QUIGLEY.
JUDY CHU.
TED DEUTCH.
LINDA T. SÁNCHEZ.
DEBBIE WASSERMAN SCHULTZ.

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