

THE WAR ON WOMEN: FEDERAL REMEDIES TO FIGHT BACK AGAINST STATES THAT DE-FUND PLANNED PARENTHOOD

INTRODUCTION

Medicaid and Title X provide critical reproductive health care and family planning services to low-income women and families throughout America. Medicaid is the largest single public funding source for family planning services.¹ It provides health insurance for 37% of all women who are of reproductive age and live below the poverty line.² These women “are extremely poor; they can barely cover basic necessities such as housing and food, let alone medical care.”³ Title X is equally important because it provides family planning services to low-income individuals who do not qualify for family planning services under Medicaid.⁴ Two-thirds of all family planning clinics receive Title X funding, enabling those clinics to serve millions of women, regardless of age, marital status, income, or insurance coverage.⁵ Both programs provide women with important health care services, including gynecological care, birth control counseling, STD and HIV testing, contraception, pap tests, and pelvic examinations.⁶

The private and public benefit of these services cannot be underestimated. First, Medicaid and Title X expand access to health care services that would otherwise be unavailable to low-income women.⁷ Second, these programs achieve significant cost savings because “unintended childbearing—especially among teenagers—[can] have serious social and economic consequences, including increased poverty and reliance on public assistance.”⁸ One study showed that for every dollar the federal government spends on Title X programs, it saves three dollars in

1. Jennifer J. Frost, Lawrence B. Finer, & Athena Tapales, *The Impact of Publicly-Funded Family Planning Clinic Services on Unintended Pregnancies and Government Cost Savings*, 19 JOURNAL FOR THE CARE OF THE POOR AND UNDESERVED 778, 779 (2008), available at www.guttmacher.org/pubs/09_HPU19.3Frost.pdf (“Medicaid constituted 61% of all public dollars spent on family planning care, some \$770 million.”).

2. THE KAISER FOUND. & THE GUTTMACHER INST., ISSUE BRIEF: MEDICAID’S ROLE IN FAMILY PLANNING 1 (2007), available at http://www.guttmacher.org/pubs/IB_medicaidFP.pdf.

3. Nicole Huberfeld, *Conditional Spending and Compulsory Maternity*, 2010 U. ILL. L. REV. 751, 770 (2010).

4. Rachel Benson Gold, *Title X: Three Decades of Accomplishment*, in 4 THE ALAN GUTTMACHER INSTITUTE, GUTTMACHER REPORT ON PUBLIC POLICY 5, 6 (2001), available at <http://www.guttmacher.org/pubs/tgr/04/1/gr040105.html>.

5. *Id.*

6. *Id.* at 7.

7. *Id.* at 5; KAISER FOUND. & GUTTMACHER INST., *supra* note 2, at 9.

8. KAISER FOUND. & GUTTMACHER INST., *supra* note 2, at 2.

avoided Medicaid and new-born care costs.⁹ Case studies from several states have also shown that increased access to family planning can save states and the federal government anywhere from \$6 million (in New Mexico) to \$76 million (in California) per year.¹⁰ Finally, federal family planning funding has actually reduced abortion rates. From 1980 to 2000, Title X-supported clinics helped women avoid nearly 20 million unintended pregnancies, nine million of which would have ended in abortion.¹¹

Despite the benefits that federally funded family planning clinics provide to both indigent women and society as a whole, they have recently become the target of Republican-controlled state legislatures. In 2011, as part of a wave of anti-abortion legislation,¹² these legislatures passed so-called “de-funding” laws, which strip abortion providers of family planning funding to which they would otherwise be entitled under Medicaid and Title X.¹³ Planned Parenthood has been the popular target of these laws because it provides—or associates with affiliates that provide—abortion services,¹⁴ even though federal law already forbids entities such as Planned Parenthood from spending federal funds on abortion.¹⁵ Nonetheless, the enacting legislatures perceive that every additional dollar of government money frees up a private dollar that Planned Parenthood can spend on abortions.¹⁶ Thus, reducing government funding for family planning will reduce Planned Parenthood’s capacity to provide abortions.

Although the Supreme Court held in a series of cases that the government has no affirmative obligation—constitutional or otherwise—to

9. Gold, *supra* note 4, at 8.

10. KAISER FOUND. & GUTTMACHER INST., *supra* note 2, at 9.

11. Gold, *supra* note 4, at 7.

12. See *Laws Affecting Reproductive Health and Rights: 2011 State Policy Review*, GUTTMACHER INSTITUTE, <http://www.guttmacher.org/statecenter/updates/2011/statetrends42011.html> (last visited Mar. 3, 2012) [hereinafter Guttmacher State Policy Review].

13. See, e.g., IND. CODE ANN. § 5–22–17–5.5 (West 2012); H.B. 200 § 10.19, 2011 Gen. Assemb., 1st Sess., 2011 N.C. Sess. Laws 365; H.B. 2014 § 107(1), 2011 Leg., Reg. Sess. (Kan. 2011); H.B. 228-FN, 162nd Gen. Court, Reg. Sess. (N.H. 2011) (proposed legislation); Governor and Executive Council Minutes: June 22, 2011, N.H. Executive Council (June 22, 2011), <http://www.sos.nh.gov/G&C/G&C%20Minutes%206-22-11.htm>; TEX. GOV’T CODE ANN. § 531.0025 (West 2011); H.B. 2800, 50th Leg., 2d Reg. Sess. (Ariz. 2012); WIS. STAT. §§ 253.07(5), 20.927(2) (West 2012).

14. Nick Baumann, *House GOP Declares War on Planned Parenthood*, MOTHER JONES (Feb. 9, 2011), <http://motherjones.com/mojo/2011/02/house-gop-slashes-planned-parenthood-family-planning-funding-zero>.

15. See *Harris v. McRae*, 448 U.S. 297, 302–03 (1980) (noting that since the 1976 Hyde Amendment, Congress prohibits use of federal funds to reimburse costs of abortions under the Medicaid program); Consolidated Appropriations Act of 2008, Pub. L. No. 110–161, § 615 (2008).

16. Sarah Seltzer, *The GOP Unleashes a Horrifying Attack on Women*, ALTERNET (Feb. 8, 2011), http://www.alternet.org/story/149846/the_gop_unleashes_a_horrifying_attack_on_women.

fund abortions,¹⁷ these new de-funding laws present a novel and important legal issue. This is because the funds that states are denying abortion providers are not for abortion-related services. Rather, states are barring organizations like Planned Parenthood from receiving general family planning funds under Medicaid and Title X; this funding supports services such as birth control counseling and prescriptions, STD testing and treatment, HIV testing, pregnancy testing, and other related services. Thus, these new de-funding laws present the question of whether a state may restrict non-abortion related family planning funding to an organization merely because that organization privately funds abortion services. And given the importance of federal family planning programs for both low-income women and broader public welfare, this is a legal and political issue that deserves serious attention. Regardless of one's normative political views about abortion, the public health benefits of family planning are evident. But by de-funding critical organizations like Planned Parenthood, states do not only craft bad public policy; they also pass legislation contrary to both federal law and the Constitution.

There are a variety of legal theories on which abortion providers could challenge these de-funding provisions. Given the deferential standard for abortion legislation that the Supreme Court established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁸ it would be difficult to successfully argue that these laws constitute an "undue burden" on a woman's right to choose. However, plaintiffs could assert claims under 42 U.S.C. § 1983, the Supremacy Clause, and the Supreme Court's

17. See *Rust v. Sullivan*, 500 U.S. 173, 186–98 (1991) (upholding the DHHS' "gag rule," which (among other things) forbade Title X grantees from providing counseling for or referrals to abortion providers, because the government has the power to refuse to fund abortion-related activities "out of the public fisc"); *Harris v. McRae*, 448 U.S. 297, 316–27 (1980) (upholding the Hyde Amendment, and recognizing that "[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."); *Beal v. Doe*, 432 U.S. 438, 447 (1977) (upholding a Pennsylvania law that limited medical assistance for abortions under state Medicaid plan to those abortions that are certified by a physician as medically necessary because nothing under Medicaid requires state Medicaid participants to fund the cost of nontherapeutic abortions); *Maher v. Roe*, 432 U.S. 464, 479–80 (1977) (upholding against an Equal Protection challenge a Connecticut statute that limited state Medicaid benefits to therapeutic first-trimester abortions, but that otherwise funded costs incident to pregnancy and childbirth).

18. See *Casey*, 505 U.S. 833, 874, 877 (1992) ("The fact that a [state] law . . . has the incidental effect of making it more difficult or expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on [a woman's right to an abortion will it be held unconstitutional]. . . . A finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."). See also *supra* note 17.

“unconstitutional conditions” precedent. Under the § 1983 framework, plaintiffs could argue that these de-funding laws impermissibly restrict the right of Medicaid beneficiaries to choose their provider.¹⁹ Organizations such as Planned Parenthood could also assert preemption claims against state laws that prohibit them from receiving family planning funds under Title X,²⁰ arguing these laws impose additional restrictions on abortion providers that would otherwise be qualified to receive family planning funding under federal law.²¹ Finally, abortion providers could argue that state de-funding laws impose unconstitutional conditions on a provider’s receipt of government benefits.²² Specifically, abortion providers could argue that these de-funding laws preclude them from receiving family planning funding based on their “participation in unrelated ‘legal and constitutionally-protected conduct’”—namely, promoting abortion or providing abortion services to women.²³

This Note argues that neither § 1983 nor the Supremacy Clause provide firm ground on which pro-choice litigants can challenge these de-funding laws. Rather, pro-choice litigants will likely be more successful bringing claims against these de-funding laws on the grounds that they impose “unconstitutional conditions” on an abortion provider’s access to federal family planning funding. This is because in *Gonzaga v. Doe*, the Supreme Court severely limited the extent to which courts can imply a cause of action under § 1983 against state officials who violate an individual’s federal statutory rights.²⁴ Scholars and courts were in broad agreement that plaintiffs could circumvent *Gonzaga*’s strict requirements by asserting challenges under the Supremacy Clause instead.²⁵ However, the Supreme Court’s recent ruling in *Douglas v. Independent Living Center of Southern California*²⁶ suggests that this theory may not be on as definite footing as once thought.²⁷ Thus, given the Supreme Court’s decisions in *Gonzaga* and *Douglas*, it may be difficult for abortion providers to assert their rights under the federal family planning statutes through § 1983 or the Supremacy Clause. Rather, abortion providers such as Planned Parenthood would most likely be

19. See 42 U.S.C. § 1396a(a)(23) (2011); *Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health*, 794 F. Supp. 2d 892, 901–03 (S.D. Ind. 2011).

20. See, e.g., *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 487 (C.D.N.C. 2011); *Planned Parenthood of Kan. and Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1228 (D. Kan. 2011); *Ind. State Dep’t of Health*, 794 F. Supp. 2d at 910–12.

21. See, e.g., *Cansler*, 804 F. Supp. 2d at 487.

22. *Id.* at 493–94; *Brownback*, 799 F. Supp. 2d at 1232–34.

23. *Cansler*, 804 F. Supp. 2d at 494 (quoting *Brownback*, 799 F. Supp. 2d at 1234).

24. *Gonzaga v. Doe*, 536 U.S. 273, 286 (2002).

25. See *infra* note 131–33 and accompanying text.

26. *Douglas v. Ind. Living Ctr. of So. Cal.*, 132 S. Ct. 1204, 1207–08 (2012).

27. *Id.* at 1211–15 (Roberts, C.J., dissenting).

successful arguing that the de-funding laws impose unconstitutional conditions on their First Amendment and Equal Protection rights.

The first Part provides a brief background on Title X (Federal Family Planning) and Title XIX (Medicaid). This Part focuses on how the states and federal government administer those programs and the type of family planning services that states provide. It also briefly describes the types of de-funding laws that states have passed. The second Part analyzes the claims that abortion providers could assert against state de-funding laws. It argues that, given the Court's recent decisions in *Gonzaga* and *Douglas*, it may be difficult for abortion providers to assert § 1983 and preemption claims. Rather, this Part concludes by arguing that “unconstitutional conditions” claims have the highest chance of success.

I. BACKGROUND: TITLE X, TITLE XIX & FEDERAL FAMILY PLANNING SERVICES

Both Title X²⁸ and Title XIX²⁹ provide, among other things, family planning resources, services, and education to families and individuals of child-bearing age throughout the country. They are voluntary, cooperative programs between the state and federal government.³⁰ If the states participate, they must establish a plan to administer federal funds that meets certain minimum requirements established by each statute.³¹ The federal government will then reimburse the state for certain expenses that they incur under these plans.³²

A. Title XIX (Medicaid)

In an effort to provide medical assistance to low-income and medically needy individuals, Congress enacted Title XIX—commonly referred to as Medicaid—as part of the Social Security Act of 1965.³³ Medicaid is a

28. 42 U.S.C. § 300a (2006).

29. 42 U.S.C. § 1396 (2006).

30. Martina Brendel, *When a Door Closes, a Window Opens: Using Preemption to Challenge State Medicaid Cutbacks*, 86 CHI.-KENT L. REV. 925, 928–929 (2011).

31. Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to Separation of Powers*, 29 U.C. DAVIS L. REV. 283, 284 (1996).

32. *Id.* at 288–89.

33. Medicaid requires states to provide medical assistance to the “categorically needy,” or those who Congress “considered especially deserving of public assistance because of family circumstances, age, or disability.” *Schweiker v. Gray Panthers*, 453 U.S. 34, 37 (1981); 42 U.S.C. § 1396a(a)(10)(A)(i). States also have the option of extending assistance to the “medically needy,” or those who lack the ability “to pay for medical expenses, but with incomes too large to qualify for categorical assistance.” *Schweiker*, 453 U.S. at 37; 42 U.S.C. § 1396a(a)(10)(A)(ii).

“cooperative federal-state program” that is supervised by the Department of Health and Human Services (DHHS) and jointly funded by the states and federal government.³⁴ The federal government partially reimburses participating states for expenses incident to providing health care to low-income individuals; in turn, the state will use those funds to reimburse eligible health care organizations that actually provide medical services to needy individuals.³⁵ The states do not have to participate, but all 50 states do.³⁶

To be eligible for federal matching funds under Title XIX, the states must develop a Medicaid Assistance plan that conforms to certain minimum federal requirements and that details how the state plan will expend federal funds.³⁷ The state must submit its plan to the Center for Medicare and Medicaid Services (CMS), which will ensure that the plan complies with federal requirements.³⁸ Once approved by CMS, the state must adhere to its plan unless CMS authorizes it to amend the plan.³⁹ CMS will review the revised plan and ensure it comports with Medicaid’s statutory and regulatory requirements.⁴⁰ But while states are subject to CMS oversight, they nonetheless retain some discretion in spending federal Medicaid funds.⁴¹ States have “substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in the best interests of recipients.”⁴² States are also permitted to establish “reasonable standards relating to the qualification of providers,” and may further exclude providers who do not meet certain minimum federal standards.⁴³

While the scope of medical assistance that states must include in their Medicaid plan is very broad, there are two requirements that are relevant for the purposes of this Note. Title XIX requires that a state plan include

34. *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 502 (1990).

35. *Brendel*, *supra* note 30, at 928–29.

36. *Id.*

37. *See* 42 U.S.C. § 1396a(a) (2006); *Cnty. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 133–34 (2nd Cir. 2002).

38. *Wilson-Coker*, 311 F.3d at 134.

39. 42 C.F.R. § 430.12 (2011); *Brendel*, *supra* note 30, at 929–30.

40. *Douglas v. Ind. Living Ctr. of So. Cal.*, 132 U.S. 1204, 1208 (2012).

41. *Wilson-Coker*, 311 F.3d at 134.

42. *Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health*, 794 F. Supp. 2d 892, 900 (S.D. Ind. Jun. 24, 2011) (quoting *Alexander v. Choate*, 469 U.S. 287, 303 (1985)). *See also* 42 U.S.C. § 1396a(p)(1) (2006) (“In addition to any other authority, a State may exclude any individual or entity for purposes of participating under the State plan under this subchapter for any reason for which the Secretary could exclude the individual or entity.”).

43. *Ind. State Dep’t of Health*, 794 F. Supp. 2d at 900 (citing 42 C.F.R. § 431.51(c)(2) (2011)).

“family planning services and supplies . . . (directly or under arrangements with others) to individuals of child-bearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies”⁴⁴ However, since September 1976, the Hyde Amendment has prohibited using federal funds to reimburse abortion costs under Medicaid.⁴⁵ Thus, though states must provide family planning services to needy individuals under Medicaid, they are forbidden from using federal funds to reimburse abortions or abortion-related services.

B. Title X (Family Planning)

In the mid-1960s, low income families’ lacked access to affordable contraception and family planning resources. This was adversely affecting not only them, but society as a whole: “unintended childbearing . . . increased poverty and reliance on public assistance, and reduced women’s ability to participate in the workforce or complete an education.”⁴⁶ In response to these problems, Congress passed Title X as part of the Public Health Service Act of 1970,⁴⁷ which provides federal funding for preventative family planning services to “low-income or underinsured women and families, including those ineligible for Medicaid.”⁴⁸

Unlike Medicaid, which covers a very broad range of medical services including family planning, Title X is dedicated solely to funding family planning services.⁴⁹ Under Title X, the DHHS provides grants to public or nonprofit private entities, which establish and operate “family planning projects . . . offer[ing] a broad range of acceptable and effective family planning methods and services.”⁵⁰ The program does not furnish services related to childbirth.⁵¹ Any public or private non-profit entity is entitled to apply for a family planning grant.⁵² These entities use federal funding to establish voluntary family planning projects,⁵³ to train personnel working

44. 42 U.S.C. § 1396d(a)(4)(C) (2006).

45. See Consolidated Appropriations Act of 2008, Pub. L. No. 110–161, § 615 (2008).

46. Gold, *supra* note 4, at 5.

47. Public Health Services Act of 1970, 42 U.S.C. § 300a (2006).

48. *Planned Parenthood of Kan. and Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1221 (D. Kan. 2011).

49. Gold, *supra* note 4, at 5.

50. 42 U.S.C. § 300(a) (2006).

51. *Rust v. Sullivan*, 500 U.S. 173, 179 (1991).

52. 42 C.F.R. § 59.3 (2011).

53. 42 U.S.C. § 300 (2006).

within those projects,⁵⁴ to conduct research related to family planning and population,⁵⁵ and to develop informational and educational materials regarding family planning.⁵⁶ To administer Title X in the most “cost effective and efficient manner,” the DHHS will award grants to public and non-profit entities that can “foster projects most responsive to local needs.”⁵⁷ Furthermore, DHHS may directly fund the grantee, or it may disburse grants to an organization—such as a state agency—that will then disburse that funding among sub-grantees and contractors.⁵⁸

Family planning projects must provide “a broad range of acceptable and effective medically approved family planning methods,” including contraceptives, natural family planning methods, infertility services, and services for adolescents.⁵⁹ This means that Title X grantees provide birth control counseling and prescriptions, STD testing and treatment—including HIV testing—pregnancy testing, and other services.⁶⁰ Although Title X projects cannot use abortion as a method of family planning, a project must offer pregnant women counseling regarding prenatal care and delivery; infant care, foster care and adoption; and pregnancy termination.⁶¹

C. *The De-Funding Laws*

The state laws that are the focus of this Note are the so-called “de-funding provisions,” which strip grantees of family planning, typically under both Medicaid and Title X.⁶² As mentioned, Planned Parenthood has been the popular target of these laws because it provides—or associates with affiliates that provide—abortion services.⁶³ State legislatures may

54. *Id.* § 300a-1.

55. *Id.* § 300a-2.

56. *Id.* § 300a-3.

57. U.S. Dep’t of Health & Human Svcs., Program Guidelines for Project Grants for Family Planning Services 2 (2001) [hereinafter Title X Guidelines], available at <http://www.hhs.gov/opa/pdfs/title-x-program-guidelines.pdf>. See also 42 C.F.R. § 59.7 (2011) (listing factors the DHHS will take in to account when awarding family planning, including the number of low-income patients to be served, the local need for family planning services, and the availability of alternate, non-federal family planning resources.).

58. Title X Guidelines, *supra* note 57, at 6. The regulations say nothing about denying funds to organizations that use their own private resources to provide abortion services to clients.

59. 42 C.F.R. § 59.5(a)(1) (2011).

60. Gold, *supra* note 4, at 7.

61. 42 C.F.R. § 59.5(a)(5) (2011). See also *infra* notes 164–168 and accompanying text.

62. See *supra* note 13.

63. Nick Baumann, *House GOP Declares War on Planned Parenthood*, MOTHER JONES (Feb. 9, 2011), <http://motherjones.com/mojo/2011/02/house-gop-slashes-planned-parenthood-family-planning-funding-zero>.

include defunding provisions as part of large budget bills.⁶⁴ Wisconsin, for example, passed an omnibus budget bill mandating that the Wisconsin Department of Health distribute family planning funds only to “public entities.”⁶⁵ Moreover, those public entities could not distribute family planning funds to private entities that: (1) provide abortion services; (2) refer women to other clinics that provide abortion services; or (3) have affiliates that provide abortion services.⁶⁶ The law contains an exception for cases when (1) the abortion is necessary to save a woman’s life; (2) the pregnancy was the result of “sexual assault or incest;” or (3) “the abortion is directly and medically necessary to prevent grave, long-lasting physical health damage to the woman.”⁶⁷

Other states structured their de-funding provisions differently. Kansas created a priority system for disbursing family planning funds; the first distributes funds to “public entities,” and second to “non-public entities which are hospitals or federally qualified health centers that provide comprehensive primary and preventative care in addition to family planning services.”⁶⁸ This law effectively excluded Planned Parenthood from receiving family planning funds under Title X.⁶⁹ Other laws directly target Planned Parenthood, prohibiting the state agency in charge of disbursing federal family planning block grants from contracting with Planned Parenthood.⁷⁰

II. POTENTIAL CHALLENGES TO STATE DE-FUNDING LAWS: §1983, PREEMPTION & THE FIRST AMENDMENT

The recent state de-funding legislation raises an important question: whether the government may deny family planning funding to an otherwise eligible Title X or Medicaid grantee, merely because the grantee uses private funds to promote or provide abortions. Grantees such as Planned Parenthood can potentially enjoin these laws under three different legal theories: § 1983, the Supremacy Clause, and the Supreme Court’s

64. NARAL Pro-Choice America, *Who Decides? The Status of Women’s Reproductive Rights in the United States 5* (2012), available at <http://www.prochoiceamerica.org/assets/download-files/2011-who-decides.pdf>.

65. WIS. STAT. § 253.07(5)(a) (2012).

66. WIS. STAT. § 253.07(5)(b) (2012).

67. WIS. STAT. §§ 253.07(5)(c), 20.927(2)(b).

68. H.B. 2014 § 107(1), 2011 Leg., Reg. Sess. (Kan. 2011).

69. *Planned Parenthood of Kan. and Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1224 (D. Kan. 2011).

70. See, e.g., H.B. 200 § 10.19, 2011 Gen. Assemb., 1st Sess. (N.C. 2011).

“unconstitutional conditions” doctrine.⁷¹ Asserting a claim under § 1983 requires that a Medicaid beneficiary—that is, a person insured under Medicaid—be party to litigation against one of these de-funding laws. The beneficiary can then argue that the de-funding laws violate their statutory right to choose a preferred Medicaid provider, free of state interference.⁷² However, the grantee itself can assert a claim under the Supremacy Clause. The simple theory behind this claim is the that de-funding laws impose additional requirements on health care providers that are otherwise eligible to receive federal family planning funds, and therefore they are unconstitutional on preemption grounds.⁷³

In fact, grantees of grant-in-aid programs such as Medicaid and Title X have long asserted causes of action under both § 1983 and the Supremacy Clause to enforce these programs’ statutory requirements and invalidate noncompliant state laws.⁷⁴ As mentioned, states participating in these programs must design implementation plans that comply with certain minimum federal requirements, and DHHS must approve those plans.⁷⁵ Federal standards typically govern how the programs are operated, and a state’s noncompliance with those standards “can harm the program’s intended beneficiaries.”⁷⁶ However, the DHHS—like many other agencies—is reluctant to use its enforcement powers, largely because the primary “remedy” at its disposal is “the blunt and seldom-used club’ of withholding federal Medicaid funding, which is hardly a remedy for program beneficiaries.”⁷⁷ As a result, Medicaid beneficiaries and, more recently providers, have turned to § 1983 and the Supremacy Clause to ensure that states “live up to the commitments [they] made in accepting federal funds.”⁷⁸ When used in this context, § 1983 and preemption are implied causes of action, for neither Medicaid nor Title X provide plaintiffs

71. See, e.g., *Planned Parenthood of Ind. v. Comm’r of Ind. State Dep’t of Health*, 794 F. Supp. 2d 892, 899 (S.D. Ind. 2011).

72. See 42 U.S.C. § 1396a(a)(23) (2006); *Ind. State Dep’t of Health*, 794 F. Supp. 2d at 901.

73. *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 487 (C.D.N.C. 2011).

74. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 51 (1981) (White, J., dissenting) (“We have often found federal-court jurisdiction to enforce statutory safeguards in grant programs in suits brought by injured recipients.”).

75. See *supra* Part I(A)–(B).

76. Key, *supra* note 31, at 285.

77. Brian J. Dunne, *Enforcement of the Medicaid Act Under 42 U.S.C. § 1983 After Gonzaga University v. Doe: The “Dispassionate Lens” Examined*, 74 Chi. L. Rev. 991, 994 (2007) (quoting Sasha Samberg–Champion, *How to Read Gonzaga: Laying the Seeds of a Coherent 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1839 (2003)). See also *Pennhurst*, 451 U.S. at 52 (White, J., dissenting) (“[A] funds cutoff is a drastic remedy with injurious consequences to the supposed beneficiaries of the Act.”).

78. Samberg–Champion, *supra* note 77, at 1838.

with a private right of action by which they could “as a matter of law, appropriately invoke the power of the court” to enforce each statute.⁷⁹

Although there is still a chance that § 1983 or preemption claims against de-funding laws will prevail at the appellate level or in future litigation, the Supreme Court’s recent decisions in *Gonzaga v. Doe*⁸⁰ and *Douglas v. Independent Living Center of Southern California*⁸¹ (discussed below) casts doubt on the reliability of those theories. Thus, the Supreme Court’s “unconstitutional conditions” doctrine⁸² likely provides Medicaid and Title X grantees such as Planned Parenthood with their strongest claim. Such an approach does not present the procedural hurdles that accompany implying a cause of action under § 1983 or the Supremacy Clause. Rather, Planned Parenthood can assert that the de-funding laws place an unconstitutional condition on its receipt of a public benefit.⁸² That is, by refusing to disburse family planning funds to Planned Parenthood based on its association with abortion and abortion-related activities, the de-funding laws violate both the First Amendment and the Equal Protection Clause.

A. 42 U.S.C. § 1983

The 64th Congress enacted § 1983 as part of the Civil Rights Act of 1871. It provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.⁸³

Section 1983 had several purposes. As a key piece of federal Reconstruction Era legislation, Congress passed § 1983 with the general lawlessness in the post-Civil War South—often perpetuated by the Klu

79. *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979); Rochelle Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access for Safety Net Statutes*, 10 LOY. J. PUB. INT. L. 27, 35 (2008).

80. *Gonzaga v. Doe*, 536 U.S. 273, 283 (2002). *See also* Brendel, *supra* note 30, at 930–31 (noting the substantial limitation by the Supreme Court of § 1983 claims as a cause of action for plaintiffs asserting violations of federal statutes).

81. *Douglas v. Ind. Living Ctr. of So. Cal.*, 132 S. Ct. 1204 (2011).

82. *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1232–33 (D. Kan. 2011).

83. 42 U.S.C. § 1983 (2006).

Klux Klan—“particularly in mind.”⁸⁴ It recognized that in the face of innumerable abuses and acts of violence against black citizens, the administrations of most southern states “made no successful effort to bring the guilty to punishment or to afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.”⁸⁵ At a broader level, § 1983 was designed to prohibit the states from passing “invidious legislation . . . against the rights or privileges of citizens of the United States.”⁸⁶ It represented “a major realignment in the relationship between the federal and state governments that gradually led the federal courts to play a more direct role in protecting individual rights” against the abuse of state actors.⁸⁷ Thus, though § 1983 was designed to remedy the specific problems arising in the post-Civil War South, it also served the broader purpose of providing individuals with a federal cause of action against state actors who, acting under the color of state law, violate their federal rights.

As originally enacted, § 1983 made no “reference to deprivations of rights secured by federal laws.”⁸⁸ However, in 1874, Congress passed an amendment adding the phrase “and laws” to the statute.⁸⁹ There was a great deal of debate as to what Congress intended when it added the aforementioned language.⁹⁰ In *Maine v. Thiboutot*, the Supreme Court settled this debate and held that under § 1983, private citizens may sue state officials who deprive those citizens of rights secured by any federal law.⁹¹ The Court concluded that the phrase “and laws” clearly extends to “violations of federal statutory as well as constitutional law.”⁹² The Court thus authorized private citizens to pursue a § 1983 cause of action against state officials who, acting under the color of state law, deprive said citizen of rights secured to her by federal law.

Thus, *Thiboutot* may, in some circumstances, give pro-choice litigants such as Planned Parenthood the capacity to bring suit under § 1983 against state laws that de-fund them of their Medicaid monies. However, the

84. *Monroe v. Pape*, 365 U.S. 167, 174 (1961) (citations omitted). Indeed, the Civil Rights Act was commonly known then as the “Klu Klux Klan Act.” James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 410 (2003).

85. *Pape*, 365 U.S. at 175 (quoting *Cong. Globe*, 42d Cong., 1st Sess., 428 (1871))(internal quotation marks omitted).

86. *Pape*, 365 U.S. at 173–74 (quoting *Cong. Globe*, 42d Cong., 1st Sess., 268 (1871))(internal quotation marks omitted).

87. Park, *supra* note 84, at 409–10.

88. Key, *supra* note 31, at 304–05.

89. *Maine v. Thiboutot*, 448 U.S. 1, 15 (1980) (Powell, J., dissenting).

90. Key, *supra* note 31, at 306.

91. *Thiboutot*, 448 U.S. at 4.

92. *Id.*

abortion providers themselves cannot bring suit under § 1983. Rather, only the Medicaid beneficiaries that those clinics serve can invoke § 1983 because the Medicaid statute arguably gives them, as individuals—not the clinics, as organizations—an enforceable right on which to sue. These plaintiffs can allege that the state de-funding laws violate their statutory “right” to choose among a range of qualified healthcare providers, free of state interference.⁹³ This represents an innovative strategy by which pro-choice litigants can attack decidedly anti-choice legislation on statutory—as opposed to constitutional—grounds.

However, the Supreme Court has since limited the scope of *Thiboutot*, which could create problems for litigants asserting challenges under § 1983 against these de-funding laws. Almost immediately following the *Thiboutot* ruling, the Court began “carving out exceptions to what initially was a declaration that § 1983 covered all federal statutes.”⁹⁴ The Court’s more conservative justices interpreted § 1983 and *Thiboutot* in a restrictive manner, constraining grantees’ and beneficiaries’ ability to bring § 1983 claims against Spending Clause statutes such as Medicaid. These Justices argued that Spending Clause statutes only establish procedural requirements for state plans—minimum standards that the state must meet in administering the federal program to receive federal funding⁹⁵—and therefore, these statutes cannot “confer any substantive rights” on Medicaid service providers or beneficiaries.⁹⁶ Rather, Congress must unambiguously

93. 42 U.S.C. § 1396a(a)(23) (2006); 42 C.F.R. § 430.51 (2011).

94. *Samberg–Champion*, *supra* note 77, at 1846. *See also*, *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 20 (1981) (holding that plaintiff has no cause of action under § 1983 against defendants because Congress indicated that intended to preclude such a suit by providing plaintiffs with comprehensive remedial devices under the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18–22 (1981) (holding that plaintiffs have no private right of action to sue to enforce the Developmentally Disabled Assistance and Bill of Rights Act because Congress did not intend to create “substantive rights in favor of the disabled,” for the Act is a “mere federal-state funding statute” designed to “encourage, rather than mandate” the provision of services to the developmentally disabled).

95. *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 527 (1990) (Rehnquist, C.J., dissenting).

96. *Id.*; *Suter v. Artist M.*, 503 U.S. 347 (1992). The Adoption Assistance and Child Welfare Act is a federal Spending Clause statute under which the federal government reimburses state governments for certain expenses the states incur incident to administering foster care and adoption services. *Suter*, 503 U.S. at 350–51. The Act requires that state plans to administer the Act include a provision that the state will take “reasonable efforts” to prevent the removal of children from their homes and to reunify those families where removal occurred. *Id.* at 351–52. In *Suter*, child beneficiaries of the Act brought suit against the Director of the Illinois Department of Children and Family Services for violating this provision. *Id.* The Court held that private individuals may not enforce provisions of a federal statute where Congress has not unambiguously conferred on those individuals such a right. *Id.* at 355. Here, the Act only mandated that states submit a plan meeting the “reasonable efforts” requirement, and therefore did not confer “an enforceable right upon the Act’s beneficiaries.” *Id.* at 361–63. The Court thus held that because the provision at issue was contained in a section of the Act that merely

confer a statutory right if it is to be enforced through § 1983.⁹⁷ Absent such explicit congressional authorization, the typical remedy for state noncompliance with a federal Spending Clause statute, such as Medicaid, is for the federal government to cut off money to the state until the state revises its plan to come back into compliance.⁹⁸

The Court's retreat from *Thiboutot* became especially pronounced in *Blessing v. Freestone*,⁹⁹ when it made clear that "to seek redress through § 1983 . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*."¹⁰⁰ The Court then set out the three part test for determining whether a federal statute creates a particular right:

First, Congress must have intended that the provision in question benefit the plaintiff Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence Third, the statute must unambiguously impose a binding obligation on the States.¹⁰¹

The Court emphasized that even if the plaintiff could satisfy these three criteria, there was only a rebuttable presumption of a statutory right. This presumption could be defeated if Congress expressly foreclosed § 1983 relief under the statute, or if it impliedly foreclosed redress to § 1983, such as "by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."¹⁰²

Five years later in *Gonzaga v. Doe*, the Court followed the trend it set in *Blessing* and drastically limited the availability of § 1983 to remedy

imposed requirements on state plans, it could not confer rights on the Act's beneficiaries. This decision "'had potentially far-reaching ramifications' to preclude suits under § 1983 for safety net statutes [such as Medicaid and Title X], because many rights in the Social Security Act are phrased in terms of requirements for state plans." Bobroff, *supra* note 79, at 52–53. However, Congress responded swiftly to this decision, passing the so-called "Suter Fix" which provided that actions brought to enforce provisions of the Social Security Act should not be precluded merely because the provision to be enforced is included in a section "requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. §§ 1320a-2, 1320a-10 (2006). *See also* Samberg–Champion, *supra* note 77, at 1849 ("In a vigorous dissent [to *Wilder v. Virginia Hospital Association*], Chief Justice Rehnquist argued that any right conferred by the Medicaid Act was merely procedural—the right to have a state file a plan, not the right to have the state conform to it or to have the plan meet certain requirements.").

97. *Suter*, 503 U.S. at 61–63.

98. *Pennhurst*, 451 U.S. 1, 28 (1981).

99. *Blessing v. Freestone*, 520 U.S. 329, 337 (1997).

100. *Id.* at 340.

101. *Id.* at 340–41 (internal citations omitted).

102. *Id.* at 341.

violations of federal statutory rights.¹⁰³ The Court emphasized that “recent decisions . . . have rejected attempts to infer enforceable rights from Spending Clause statutes.”¹⁰⁴ It further rejected the notion that a federal statute could confer rights on an individual merely if the putative plaintiff “falls within the general zone of interest that the statute is intended to protect.”¹⁰⁵ Ultimately, the Court concluded that nothing “short of an unambiguously conferred [federal statutory] right” would support a cause of action under § 1983.¹⁰⁶ The Court emphasized that the central inquiry is “whether Congress *intended to create a federal right*” and stated that to do so, a statute must contain “individually focused”, “rights-creating” language.¹⁰⁷

It is against this backdrop that plaintiffs must assert § 1983 claims against the current de-funding laws. In *Planned Parenthood of Indiana v. Commissioner of Indiana State Department of Health*,¹⁰⁸ the Federal District Court for the Southern District of Indiana concluded that Medicaid beneficiaries could pursue a cause of action under § 1983 to enforce the rights granted to them by the Medicaid statute.¹⁰⁹ In that case, Indiana enacted House Enrolled Act 2010 (HEA 2010), an omnibus abortion bill that prohibited state agencies from entering into contracts with, or making grants to, any entity that performs abortions or maintains facilities where abortions are performed.¹¹⁰ The court concluded that this law violated Medicaid’s “freedom of choice” provision, which requires a state Medicaid

103. *Gonzaga v. Doe*, 536 U.S. 273 (2002). In that case, a former Gonzaga University student sued the university and one of its employees for violation of the Federal Educational Rights and Privacy Act (FERPA) of 1974, 20 U.S.C. § 1232g (2006). The Court held that FERPA did not create individual enforceable rights under § 1983. *Gonzaga*, 536 U.S. at 290–91.

104. *Id.* at 281.

105. *Id.* at 283.

106. *Id.*

107. *Id.* at 283, 287. The Court emphasized that in this respect, the analysis for determining whether a federal statute provides a federal right that can be enforced through § 1983 should not differ from the analysis in determining whether a federal statute contains an implied right of action. *Id.* at 285. Though the Court has recognized that the inquiry as to whether a federal right may be enforced through § 1983 is separate from the inquiry as to whether a federal statute contains an implied right of action, “the inquiries overlap in one meaningful respect—in either case we must first determine whether Congress *intended to create a federal right*.” *Id.* at 283. The only difference between these two inquiries is that, in the latter context, the plaintiff must show that the statute “manifests an intent to create not just a private *right* but also a private *remedy*.” *Id.* at 284 (quoting *Alexander v. Sandoval*, 523 US 275, 286 (2001)). Plaintiffs suing to enforce a federal right under § 1983, however, do not carry this additional burden, because “§ 1983 generally supplies a remedy for the vindication of rights secured by federal statutes.” *Id.*

108. *Planned Parenthood of Ind. v. Comm’r of Ind. State Dep’t of Health*, 794 F. Supp. 2d 892 (S.D. Ind. 2011).

109. *Id.* at 900–01.

110. Ind. Code § 5–22–17–5.5(a) (2011).

plan to provide that “any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person qualified to perform the service . . . who undertakes to provide him such services.”¹¹¹

Applying the Supreme Court’s framework from *Blessing*, the district court concluded that the plaintiffs satisfied all three requirements and that the plaintiffs could enforce the freedom of choice provision through § 1983. The court reasoned that the language in the freedom of choice provision includes the “‘individual-focused terminology’ that ‘unambiguously confer[s]’ an individual right under the law.”¹¹² The court also cited to decisions from several other districts recognizing that the freedom of choice provision creates a federal right enforceable under § 1983.¹¹³ Indeed, the Supreme Court itself has stated that the freedom of choice provision gives Medicaid beneficiaries an absolute right to “choose among a range of *qualified* [Medicaid] providers, without government interference.”¹¹⁴ It then stated, rather conclusively, that the Freedom of Choice provision does not create a “vague and amorphous” right that would strain judicial competence.¹¹⁵ Finally, with respect to the third prong, the provision couches its language in mandatory terms (“must . . . provide”), and there is nothing to suggest that Congress intended to foreclose a cause of action from arising under this provision.¹¹⁶ Thus, the court allowed the plaintiffs to proceed with their § 1983 claim.

Having allowed the plaintiffs to pursue their § 1983 claim, the court turned to the merits of the case and granted Planned Parenthood a preliminary injunction.¹¹⁷ It reasoned that Planned Parenthood demonstrated a strong likelihood of success in proving that Indiana’s defunding law impermissibly restricts a Medicaid recipients’ right to “choose among a range of qualified providers, without government interference.”¹¹⁸ Indiana argued it had the right to exclude abortion providers such as Planned Parenthood from the scope of its Medicaid Plan.¹¹⁹ The court

111. 42 U.S.C. § 1396a(a)(23) (2011).

112. *Ind. State Dep’t of Health*, 794 F. Supp. 2d at 902 (citing *Gonzaga*, 536 U.S. at 273, 283, 287).

113. *Id. See, e.g., Harris v. Olszewski*, 442 F.3d 456, 459 (6th Cir. 2006) (holding Medicaid’s freedom of choice provision enables a §1983 claim).

114. *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980).

115. *Ind. State Dep’t of Health*, 794 F. Supp. 2d at 902 (quoting *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)).

116. *Id.*

117. *Id.* at 913.

118. *Id.* at 901–09 (citing *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980)).

119. *See* 42 U.S.C. § 1396a(p)(1) (2011) (emphasis added) (“*In addition to any other authority*, a State may exclude any individual or entity for purposes of participating under the State plan

disagreed, reasoning that a state's exclusion of a Medicaid provider must be based on the provider's failure to provide competent or adequate medical care.¹²⁰ That is to say, exclusions must be based on the quality of the provider's services, not the scope of its medical practice (e.g., whether it provides abortion services or not).¹²¹ The court further pointed to: (1) DHHS's rejection of Indiana's de-funding law as an amendment to its Medicaid Plan; (2) the language of the Medicaid statute; and (3) case law as evidence that Indiana's arguments could not hold water.¹²²

This reasoning is persuasive, but nonetheless vulnerable to attack on appeal for several reasons. First, *Gonzaga* demonstrates that the Supreme Court has set a high threshold that plaintiffs must meet to invoke § 1983 to enforce federal statutory rights.¹²³ The Court also clearly indicated that it is reluctant to allow plaintiffs to use § 1983 to enforce provisions of Spending Clause legislation, such as the Freedom of Choice provision. Second, it is possible that the Court might resurrect Justice Rehnquist's reasoning from *Suter*¹²⁴ and from his dissent in *Wilder*, where he stated that federal Spending Clause statutes such as Medicaid can never create substantive rights because they do not speak in the sort of "rights-creating" language that *Gonzaga* demands.¹²⁵ Rather, as the state of Indiana suggested, the Court might reason that these laws merely impose obligations on states to administer their programs in a manner that complies with the terms of the Medicaid statute and therefore do not create enforceable rights under

under this subchapter for any reason for which the Secretary could exclude the individual or entity from participation in a program under subchapter XVIII [Medicare] of this chapter under section 1320a-7, 1320a-7a, or 1395cc(b)(2) of this title." See also *Ind. State Dep't of Health*, 794 F. Supp. 2d at 903-06 (citing *First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 53 (1st Cir. 2007) ("[T]his 'any other authority' language was intended to permit a state to exclude an entity from its Medicaid program for any reason established by state law.")).

120. *Ind. State Dep't of Health*, 794 F. Supp. 2d at 903-06 (citing S. Rep. 100-109, at 1-2 (1987)) ("The basic purpose of the Committee bill is to improve the ability of the Secretary . . . to protect . . . Medicaid . . . programs from *fraud and abuse*, and to protect the beneficiaries of those programs from *incompetent practitioners and from inappropriate or inadequate care*.")

121. *Id.*

122. *Id.* at 904-09. Notably, CMS refused to approve Indiana's amended Medicaid plan, which would have excluded organizations such as Planned Parenthood from receiving Medicaid funds. In a letter to the Indiana State Department of Health, CMS stated that, "Medicaid programs may not exclude qualified health care providers from providing services that are funded under the program because of a provider's scope of practice. Such a restriction would have a particular effect on beneficiaries' ability to access family planning providers, who are subject to additional protections under section 1902(a)(23)(B) of the Act Therefore, we cannot determine that the proposed amendment complies with section 1902(a) (23) of the Act." *Id.* at 905.

123. *Gonzaga v. Doe*, 536 U.S. 273, 283 (2002).

124. *Suter v. Artist M.*, 503 U.S. 347, 360-63 (1992).

125. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 527 (1990) (Rehnquist, C.J., dissenting).

§ 1983.¹²⁶ In other words, because Title XIX “only describe[s] the mechanics and criteria for federal reimbursement under Medicaid, they do not provide a source of substantive rights for Plaintiffs.”¹²⁷ Thus, the appropriate remedy in this case would not be to allow Planned Parenthood and individual Medicaid beneficiaries to enforce the statute through a private right of action, but for the federal government to terminate funding to the state altogether.¹²⁸

On the other hand, the Supreme Court has stated that the Freedom of Choice provision “gives recipients the right to choose among a range of *qualified* providers, without government interference.”¹²⁹ Though this decision was handed down long before *Gonzaga*, it gives substantial support to the plaintiffs in the Indiana case, as it would be difficult for the Supreme Court to distinguish this language. Furthermore, there are several post-*Gonzaga* decisions in which lower courts have recognized that the Freedom of Choice provision creates substantive rights that are enforceable under § 1983.¹³⁰ Finally, CMS—the organization responsible for overseeing state administration of Medicaid programs—noted that the Freedom of Choice provision gives beneficiaries the right to choose among a range of qualified providers.¹³¹ It denied Indiana’s proposed amendment, and as the

126. *Ind. State Dep’t of Health*, 794 F. Supp. 2d at 901–02.

127. *Id.*

128. *See, e.g.*, *Pharm. Research and Mfrs. of Am. v. Walsh*, 538 U.S. 644, 675 (2003) (Scalia, J., concurring); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981). This argument, of course, is especially troublesome in light of the Supreme Court’s recent decision upholding the Patient Protection and Affordable Care Act of 2010 (“ACA”). *See Nat’l Fed’n of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). In passing the ACA, the federal government “expand[ed] the scope of the Medicaid program and increase[d] the number of individuals the States must cover.” *Id.* at 2581. If states did not comply with this “Medicaid expansion,” then they could lose all of their federal Medicaid funds. *Id.* at 2582. This revocation of funds, of course, was rooted in the Secretary of Health and Human Service’s authority to withhold future payments to a state that does not comply with the terms of the federal Medicaid mandate. *See* 42 U.S.C. § 1396c. The Court upheld the Medicaid expansion, but held that the Secretary could not exercise her powers under § 1396c to “withdraw existing Medicaid funds” from those states who refuse to participate in the expansion. *Sebelius*, 132 S. Ct. at 2607–08. The Court asserted that the Secretary’s threat to withdraw *all* Medicaid funds from non-compliant states was too coercive. It put a “gun to the head” of states, as they would have to comply with the Medicaid expansion or risk losing *all* of their funding. *Id.* at 2604. In the wake of this ruling, one is left to wonder just how to remedy a state’s non-compliance with the substantive terms of federal grant-in-aid statutes. On the one hand, individuals cannot use § 1983 unless it unambiguously grants them a federal statutory right. On the other, the federal government’s authority to withhold funding—which is the “proper remedy” among many of the Court’s conservatives—may now be severely limited.

129. *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980).

130. *See, e.g.*, *Harris v. Olszewski*, 442 F.3d 456, 459 (6th Cir. 2006); *G. ex. rel. K v. Hawaii, Dep’t. of Human Servs.*, 2009 WL 1322354, at *12 (D. Hawaii May 11, 2009); *Women’s Hosp. Found. v. Townsend*, 2008 WL 2743284, at *8 (M.D.La. July 10, 2008); *Martin v. Taft*, 222 F. Supp. 2d 940, 979 (S.D. Ohio 2002).

131. *Ind. State Dep’t of Health*, 794 F. Supp. 2d 892, 905–06 (S.D. Ind. 2011).

district court in *Indiana State Dep't of Health* noted that lower “[c]ourts have routinely applied *Chevron* deference to HHS’ approval or *denial* of state Medicaid plans.”¹³²

Given these factors, the issue of whether the Freedom of Choice provision creates an enforceable right under § 1983 could be decided either way. However, the procedural issues surrounding § 1983 and these defunding measures must be understood in the context of the broader abortion debate. Though no one would deny that judges often use their interpretation of the law to achieve normative political goals or objectives, the danger is heightened with an issue as politically and emotionally charged as abortion. It is possible then, that conservative, pro-life jurists—especially those on the Supreme Court—would use the Court’s recent restrictive § 1983 jurisprudence as a means of foreclosing plaintiffs from challenging defunding laws under § 1983. These courts could use procedural roadblocks—the high threshold for § 1983 claims, as stated in *Gonzaga*—as a means of achieving normative political goals, further subverting abortion rights, and using the legal system as a proxy for pro-choice ideology. Though the plaintiffs from *Indiana State Dep't of Health* won at the district level, there is no guarantee of similar results at the circuit level. Even if the Seventh Circuit upholds the district court on appeal, there is no guarantee that other circuits will follow suit. Ultimately, there is no guarantee that § 1983 claims will be a viable means by which to attack these de-funding laws.

B. The Supremacy Clause

The Supremacy Clause provides, in relevant part, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.”¹³³ Though the Supremacy Clause “is not a source of any federal rights, it does ‘secure’ federal rights by according them priority whenever they come into conflict with state law. In that sense all federal rights, whether created by treaty, by statute, or by regulation, are ‘secured’ by the Supremacy Clause.”¹³⁴ Thus, state laws that “interfere with, or are contrary to” those rights or the laws that secure them are preempted.¹³⁵

132. *Id.* at 906 (internal quotations omitted) (internal emphasis omitted).

133. U.S. Const. art. VI, § 2, cl. 2.

134. *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 613 (1979).

135. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (quoting *Gibbons v. Ogden* 22 U.S. (9 Wheat.) 1, 211 (1824)).

The Supremacy Clause does not, on its face, provide for its own enforcement. Thus, like with § 1983, courts have grappled with whether a plaintiff may pursue an implied cause of action under the Supremacy Clause against state statutes that conflict with Spending Clause legislation.¹³⁶ In its preemption cases, the Court has never raised procedural barriers to implying a private right of action under the Supremacy Clause as it has in the § 1983 context.¹³⁷ Furthermore, lower courts have recognized that individual plaintiffs may pursue an implied cause of action under the Supremacy Clause against a state statute that conflicts with federal law without having to meet the standard set out in *Gonzaga*.¹³⁸ The Fifth Circuit concluded:

While there may be some lack of harmony in the case law, the rule that there is an implied right of action to enjoin state or local regulation that is preempted by a federal statutory or constitutional provision—and that such an action falls within the federal question jurisdiction—is well-established.¹³⁹

However, the Supreme Court's recent decision in *Douglas* casts doubt on whether citizens have an implied cause of action under the Supremacy Clause to enforce Spending Clause statutes such as Title X and Medicaid.¹⁴⁰ In that case, the California legislature passed an amendment to the state's Medicaid plan, reducing by 10% payments to pharmacies, clinics, and

136. See e.g., *Planned Parenthood of Se. Tex. v. Sanchez*, 403 F.3d 324, 329–35 (5th Cir. 2005) (analyzing jurisdiction and preemption by Spending Clause legislation).

137. See *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 662–68 (2003) (proceeding to the merits of the plaintiff's preemption claim without considering whether they had an implied right of action to sue under the Supremacy Clause); *Pharm. Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817, 819 n. 3 (D.C. Cir. 2004) (on remand from the latter decision, recognizing that the Court had assumed *sub-silentio* that plaintiffs may assert an implied cause of action under the Supremacy Clause). See also *Shaw v. Delta Air Lines*, 463 U.S. 85, 96–100 (1983) (proceeding to the merits of the plaintiff's claim that the federal Employee Retirement Income Security Act preempts New York's Human Rights Law and Disability Benefits Law without questioning the authority of the plaintiffs to bring suit under the Supremacy Clause); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157–58 (1978) (proceeding to the merits of plaintiff's claim that Washington Taker Law, regulating size and design of oil tankers in the Puget Sound, was preempted by the federal Port and Waterways Safety Act, without questioning plaintiff's authority to bring suit under the Supremacy Clause).

138. Bobroff, *supra* note 79, at 69. See also *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642 (2002); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1055–64 (9th Cir. 2008); *Lankford v. Sherman*, 451 F.3d 496, 509, 513 (8th Cir. 2006); *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 3335 (5th Cir. 2005); *Antrican v. Odom*, 290 F.3d 178, 188–90 (4th Cir. 2002).

139. *Sanchez*, 403 F.3d at 334 (5th Cir. 2005) (citations omitted).

140. *Douglas v. Ind. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1207–08 (2012).

physicians.¹⁴¹ The state submitted its amendment to CMS, but before the agency could finish its review, a group of Medicaid providers and beneficiaries filed suit, alleging that the new law violated the Medicaid statute.¹⁴² The Ninth Circuit held that the providers and beneficiaries could bring suit directly under the Medicaid statute, and the Court granted certiorari on this question.¹⁴³ However, a month after the Court heard oral argument on the issue, the federal agency approved California's amendments.¹⁴⁴

In a 5–4 decision, the Court recognized that “while the cases are not moot, they are now in a different posture.”¹⁴⁵ The providers and beneficiaries continued to allege that the California amendments did not comply with federal law, despite the fact that those amendments had been approved by CMS.¹⁴⁶ Thus, the Court concluded that the proper course of action would be for the plaintiffs to seek review of CMS's “final agency action” under the Administrative Procedure Act.¹⁴⁷ Though the question was still the same—whether the California amendments comply with federal law—the fact that CMS had approved of those amendments might change the answer to that question.¹⁴⁸ Essentially, the Court held that the agency made a final decision interpreting the Medicaid Act, and that decision is entitled to substantial deference.¹⁴⁹ Thus, the Court did not answer the question on which it granted certiorari.

The dissenting opinion—written by Chief Justice Roberts, with Justices Scalia, Thomas, and Alito concurring—disagreed with the Court's ruling, and would have reached the merits of the question on which the Court granted certiorari.¹⁵⁰ Chief Justice Roberts argued that nothing in the Medicaid Act gives providers or beneficiaries a private right of action, and that enforcement of the Medicaid statute was left to CMS.¹⁵¹ He argued that “if Congress does not intend for a statute to supply a cause of action for its enforcement, it makes no sense to claim that the Supremacy Clause itself must provide one.”¹⁵² Chief Justice Roberts keenly recognized that the Supremacy Clause provides a back door by which litigants can get around

141. *Id.* at 1208.

142. *Id.* at 1208–09. *See also* 42 U.S.C. § 1396a(a)(30)(A) (2011).

143. *Douglas*, 132 S. Ct. at 1207–08.

144. *Id.*

145. *Id.* at 1210.

146. *Id.* at 1209.

147. *Id.* at 1210.

148. *Id.*

149. *Id.* at 1210–11.

150. *Id.* at 1213–14 (Roberts, C.J., dissenting).

151. *Id.* at 1211–12.

152. *Id.* at 1212.

the stringent requirements courts impose when implying a cause of action under § 1983:

[T]o say that there is a federal statutory right enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end-run around this Court's implied right of action and 42 U. S. C. §1983 jurisprudence. We have emphasized that "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under §1983 or under an implied right of action." This body of law would serve no purpose if a plaintiff could overcome the absence of a statutory right of action simply by invoking a right of action under the Supremacy Clause to the exact same effect.¹⁵³

While the Court did not address the question on which it granted certiorari, the importance of the *Douglas* decision cannot be understated. *Douglas* shatters the former consensus that litigants have a private right of action under the Supremacy Clause to enforce Spending Clause legislation. We now know that at least four of the nine justices would foreclose such a right of action. It is unclear how the other five justices would respond. It is also unclear how the circuits will respond to this decision. Will they continue to imply a cause of action under the Supremacy Clause, or will this decision counsel them to take heed? The substantive question from *Douglas* will certainly be before the Court again. For now, the availability of a private right of action under the Supremacy Clause is seriously in doubt. The usefulness of this remedy for Planned Parenthood and similarly situated litigants is also in grave doubt.

However, prior to the Supreme Court's decision in *Douglas*, a district court allowed Planned Parenthood of Central North Carolina (PPNC) to assert a cause of action under the Supremacy Clause to enforce its rights under Title X (not Medicaid).¹⁵⁴ In *Planned Parenthood of Central North Carolina v. Cansler*, the Republican-controlled North Carolina General Assembly enacted Session Law 2011-145 over the veto of Governor Beverly Purdue.¹⁵⁵ It was a general budget bill but it contained a provision, Section 10.19, which explicitly prohibited Planned Parenthood and its affiliates from receiving any federal funding through the state

153. *Id.* at 1213 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002)).

154. *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 484 (C.D.N.C. 2011).

155. *Id.* at 484.

whatsoever.¹⁵⁶ PPNC argued that, given these standards, Title X preempted § 10.19 because the latter added additional eligibility criteria to Title X funds that PPNC would otherwise be allowed to receive.¹⁵⁷

Though the defendant alleged that Planned Parenthood had no right to assert a cause of action under the Supremacy Clause to enforce its rights under Title X, the district court held otherwise.¹⁵⁸ It noted that district and circuit courts have permitted plaintiffs to pursue a private right of action directly under the Supremacy Clause to enforce federal statutes against contradictory state laws.¹⁵⁹ Indeed, several of those decisions dealt with preemption claims against state laws that conflict with Title X, and those courts have recognized that such laws are invalid under the Supremacy Clause.¹⁶⁰ Thus, the district court reasoned that the plaintiff could assert a claim for declaratory and injunctive relief directly under the Supremacy Clause.¹⁶¹

Turning to the merits of the case, the district court in *Cansler* concluded that “the overwhelming weight of authority supports the conclusion that Section 10.19 would be preempted by Title X,”¹⁶² and this conclusion is indeed supported by case law. Other courts have recognized that though the state may impose “modest impediment[s]” to eligibility for federal funds, it may not exclude altogether otherwise eligible recipients, for “once a state has accepted federal funds, it is bound by the strings that accompany them.”¹⁶³ The federal requirements for administering Title X funds are fairly straightforward.¹⁶⁴ Though Title X funds may not be used in projects where abortion is a method of family planning, “any public or

156. *Id.* at 484–85.

157. *Id.* at 487.

158. *Id.* at 487–89.

159. *Id.* at 488. (citing *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 332–35 (5th Cir. 2005); *Antrican v. Odom*, 290 F.3d 178, 188–90 (4th Cir.2002)).

160. *See, e.g. Sanchez*, 403 F.3d at 332–35; *Planned Parenthood of Billings, Inc. v. Montana*, 648 F.Supp. 47, 49–50 (D.Mont.1986); *Planned Parenthood Fed. of Am. v. Heckler*, 712 F.2d 650, 663 (D.C.Cir.1983); *Valley Family Planning v. North Dakota*, 661 F.2d 99, 100–02 (8th Cir.1981); *Planned Parenthood of Kan. and Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1228–32 (D. Kan. 2011).

161. *Cansler*, 804 F. Supp. 2d at 488–89.

162. *Id.* at 491.

163. *Sanchez*, 403 F.3d at 336–337 (citing *Pharm. Research Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661–62 (2003); *Blum v. Bacon*, 457 U.S. 132, 145–46 (1982); *Carleson v. Remillard*, 406 U.S. 598, 604 (1972)). *See also* *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458 (8th Cir. 1999) (finding that a de-funding law was not unconstitutional under the Supremacy Clause, but only because that law allowed Planned Parenthood to contract with affiliates who provide abortion services and still receive Title X funding); *Heckler*, 712 F.2d at 663 (“Title X does not provide, or suggest, that states are permitted to determine eligibility criteria for participants in Title X programs.”); *Valley Family Planning*, 661 F.2d at 102 (same); *Planned Parenthood of Billings, Inc.*, 648 F.Supp. at 47 (striking down a state law that forbid Title X funds from being disbursed to abortion providers).

164. *See supra* Section I–(B).

nonprofit private entity” is entitled to apply for Title X funds.¹⁶⁵ Furthermore, though the provider’s proposal must meet certain requirements, those requirements do not forbid Title X providers from using non-Title X funds to provide abortion services.¹⁶⁶ Finally, the DHHS considers several factors when awarding Title X grants—none of which relate to the scope of the provider’s service, and all of which are relevant to determining whether the project will meet Title X’s goals.¹⁶⁷ By imposing additional requirements on otherwise eligible Title X participants, the state has “restrict[ed] the scope of a federal program” in violation of the Supremacy Clause.¹⁶⁸

Thus, most courts have allowed preemption challenges to proceed against de-funding laws under the Supremacy Clause, and they have concluded that states cannot add additional eligibility requirements to organizations that are otherwise qualified to receive Title X funding. After *Douglas*, however, it is unclear whether parties such as Planned Parenthood will continue to enjoy a private right of action under the Supremacy Clause. In fact, it would not be surprising if the Supreme Court granted certiorari in *Cansler* or *Brownback* to definitively address whether a private right of action exists under the Supremacy Clause to enforce Spending Clause legislation against contradictory state laws. Again, given the normative political views of many conservative justices regarding abortion, it is possible that the Supreme Court would simultaneously foreclose private rights of action under the Supremacy Clause and chip away—yet again—at women’s reproductive rights.

C. *Unconstitutional Conditions on the Receipt of a Government Benefit: Planned Parenthood of Kansas and Mid-Missouri v. Brownback*

The “unconstitutional conditions” theory offers plaintiffs in the current de-funding litigation the most likely—and most powerful—remedy. Granted, the government “is . . . free to determine how it should allocate its subsidies.”¹⁶⁹ The government cannot fund everything, so it cannot help but choose what projects will or will not receive funding.¹⁷⁰ Moreover, in

165. 42 C.F.R. § 59.3 (2011).

166. See 42 C.F.R. § 59.5 (2011) (enumerating the requirements that must be met by family planning projects that accept a Title X grant but no mention of regulation of services provided using non-Title X funds).

167. See 42 C.F.R. § 59.7 (2011).

168. *Sanchez*, 403 F.3d at 341.

169. Georges Nahitchevansky, *Free Speech and Government Funding: Does the Government Have an Obligation to Fund What it Doesn’t Like?*, 56 BROOK. L. REV. 213, 219 (1990).

170. *Id.*

allocating funds, the government necessarily chooses to endorse or support competing interests, which is a function of making public policy.¹⁷¹ In making public policy, the government will inevitably express a preference for one interest over another.¹⁷² Finally, even if an activity—such as abortion—is constitutionally protected, the government is under no affirmative obligation to fund that activity.¹⁷³

However, there are constitutional limitations on the government's broad discretion to choose the activities it will or will not fund. The Supreme Court has stated that “even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.”¹⁷⁴ Indeed, the Court has not hesitated to strike down government regulations that condition or qualify the receipt of government benefits “because of their tendency to inhibit constitutionally protected activity.”¹⁷⁵

171. *Id.* at 221.

172. *Id.*

173. *See* *Harris v. McRae*, 448 U.S. 297, 317 (1980) (“Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”); *Maher v. Roe*, 432 U.S. 464, 475 (1977) (holding that the states do not have to reimburse expenses incident to abortion services if they reimburse expenses incident to childbirth, because “there is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy”).

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

175. *Sherbert v. Verner*, 374 U.S. 398, 403–404 (1963) (invalidating decision of South Carolina state court to deny plaintiff unemployment benefits when she refused to work on Saturday for religious reasons). *See also* *Bd. of Cnty. Comm’rs, Wabensee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 678–81 (1996) (holding that independent contractors may not be terminated for exercising their First Amendment rights); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996) (holding that the “unconstitutional conditions” doctrine applies to government regulations of commercial speech, and striking down a Rhode Island law that forbid liquor stores from advertising their prices); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (holding that exactions imposed on landowners as a condition of granting building or development permits must be in “rough proportionality . . . both in nature and extent to the impact of the proposed development” or they will place an unconstitutional condition on a landowner’s right to just compensation for a Fifth Amendment taking); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 400 (1984) (invalidating federal law that forbid non-commercial TV and radio stations that receive federal grants from editorializing); *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (citing *Sherbert*) (“A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate exercise her constitutionally protected freedom to terminate her pregnancy by abortion.”); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574–75 (1968) (holding that a public school teacher may not be dismissed for exercising his First Amendment rights and criticizing a board of education’s handling of a school bond issue); *Speiser v. Randall*, 357 U.S. 513, 518–19 (1958) (holding that government may not deny tax exemptions based on the content of the applicant’s speech).

The Supreme Court applied this principle in the abortion and family planning context. In *Rust v. Sullivan*, the Court upheld the DHHS “gag rule,” which had three major components.¹⁷⁶ First, Title X projects could not provide counseling about or referrals for abortion as a method of family planning.¹⁷⁷ Second, no Title X project could engage “in activities that ‘encourage, promote or advocate abortion as a method of family planning.’”¹⁷⁸ Finally, any Title X project had to be “physically and financially” separated from prohibited abortion activities.¹⁷⁹ Several Title X grantees and doctors challenged the rule on the grounds that it was not authorized by Title X and that it violated the First and Fifth Amendment rights of Title X clients, as well as the First Amendment rights of Title X grantees.¹⁸⁰

The Court upheld the regulations against all of the plaintiff’s challenges. The Court reasoned that the gag rule did not violate Title X because it was consistent with that statute’s prohibition on using abortion as a method of family planning.¹⁸¹ Essentially, the Court found that the DHHS’s interpretation of the statute was reasonable and deserving of deference.¹⁸² The Court proceeded to hold that the gag rule did not violate Title X grantees’ First Amendment free speech rights because the rule simply prohibited grantees from using government funds to “engag[e] in activities outside of the project’s scope.”¹⁸³ The Court concluded that the regulations govern and restrict the scope of the Title X project, but leave the *grantee* free to use independent funding to engage in abortion-related activities that are outside the scope of the Title X project:

The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X

176. *Rust v. Sullivan*, 500 U.S. 173, 200–03 (1991). President Clinton later rescinded the Gag Rule, noting it “endangers women’s lives and health by preventing them from receiving complete and accurate medical information and interferes with the doctor-patient relationship by prohibiting information that medical professionals are otherwise ethically and legally required to provide to their patients. The Title X Gag Rule, 58 Fed. Reg. 7455, 7455 (Jan. 22, 1993).

177. *Rust*, 500 U.S. at 180.

178. *Id.* (citations omitted).

179. *Id.*

180. *Id.* at 181 (noting that both Congressional history and the language of the statute are ambiguous, but that the Secretary’s decision to implement the regulations was based on a desire to follow the statute’s original intent and to provide guidance to grantees on how to separate their Title X program and other abortion-related programs).

181. *Id.* at 190. *See also* 42 U.S.C. § 300a-6 (2006) (disallowing the use of Title X funds where abortion is a method of family planning).

182. *Rust*, 500 U.S. at 186.

183. *Id.* at 194.

activities. Title X expressly distinguishes between a Title X *grantee* and a Title X *project*. The grantee, which normally is a health-care organization, may receive funds from a variety of sources for a variety of purposes The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.¹⁸⁴

Thus, Congress has not infringed upon a Title X grantee's First Amendment rights merely by forbidding them from engaging in activities outside of Title X's scope, or by requiring that they engage in abortion-related activities separately from their Title X activities. Rather, it has merely refused to subsidize abortion-related activities "out of the public fisc."¹⁸⁵ *Rust* is therefore in accord with the principles the Court established in *Maher v. Roe* and *Harris v. McRae*: the government is under no affirmative obligation to fund or support a woman's right to an abortion.¹⁸⁶

Of course, as several courts have recently recognized, the de-funding laws do exactly what *Rust* forbids: place restrictions on the Title X *grantee* as opposed to the Title X *project*.¹⁸⁷ The specific intent of these laws is to deny organizations such as Planned Parenthood "from receiving funding even for non-abortion-related projects [e.g., family planning services] based on their other activities [e.g., abortion-related services] for which they have not sought funding."¹⁸⁸ In decisions such as *Maher* and *Rust*, the Court upheld regulations restricting the use to which Title X funds and projects could be put.¹⁸⁹ In those instances, the Supreme Court held that the government could legitimately refuse to fund a constitutionally-protected activity—abortion—without offending the Constitution.¹⁹⁰ In the de-funding context, however, the government is not placing conditions on the use of government *funds*, but on the behavior of the *recipients* of those funds. It is in effect saying that Planned Parenthood cannot receive family planning funds because of its participation in unrelated, constitutionally

184. *Id.* at 196 (emphasis in original).

185. *Id.* at 198.

186. See *supra* note 173 and accompanying text.

187. *Planned Parenthood of Kan. and Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1233–1234 (D. Kan. 2011); *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 494–95 (C.D.N.C. 2011).

188. *Cansler*, 804 F. Supp. 2d at 494.

189. *Brownback*, 799 F. Supp. 2d at 1233.

190. *Id.* (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)).

protected activities.¹⁹¹ Thus, under the standard established in *Rust*, Planned Parenthood could argue that these de-funding laws are unconstitutional conditions on a grantee's receipt of public funds, because the laws impermissibly "place[] a condition on the *recipient* of the subsidy rather than on the particular program or service."¹⁹²

The question in any "unconstitutional conditions" case is: on what right does the government regulation place an unconstitutional condition? In the context of de-funding laws, Planned Parenthood could make a number of arguments. First, Planned Parenthood could argue that the de-funding laws violate the Equal Protection Clause of the Fourteenth Amendment.¹⁹³ A court would not likely apply strict or even intermediate scrutiny to this claim because abortion providers are not members of a suspect class, and they have no fundamental right to an abortion—rather, it is their patients that enjoy such a right. However, abortion providers could make a compelling case that these de-funding laws do not even pass the lowest level of judicial scrutiny because they are not rationally related to furthering a legitimate government purpose.¹⁹⁴ In current litigation, no state has been able to successfully allege that Planned Parenthood impermissibly uses Title X funds for abortions.¹⁹⁵ Indeed, as mentioned above, there is simply no relationship between Title X funds and abortions, because organizations like Planned Parenthood are forbidden by federal law from using Title X funding for abortions in the first place.¹⁹⁶ Therefore, these laws do not rationally further the state's interest in promoting childbirth over abortion¹⁹⁷ because the funds at issue are for *non-abortion-related* services.¹⁹⁸

However, given the deference that the Court gives to government regulation under the rational basis standard, Planned Parenthood could also argue that these laws violate its First Amendment right to Free Speech, which would trigger strict scrutiny. In particular, Planned Parenthood could argue that these laws are impermissible viewpoint-based and content-based regulations that discriminate against Planned Parenthood on the basis of its identity as an abortion provider.¹⁹⁹ The First Amendment, prohibits

191. *Id.* at 1234.

192. *Rust*, 500 U.S. at 197.

193. U.S. Const. amend. XIV.

194. See *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 497 (C.D.N.C. 2011) (quoting *Romer v. Evans*, 517 U.S. 620, 632–33 (1996)).

195. *Id.* at 497; *Planned Parenthood of Kan. and Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1223 (D. Kan. 2011).

196. See *supra* note 69.

197. See *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 873–878 (1992).

198. See, e.g., *Cansler*, 804 F. Supp. 2d at 497–98.

199. See *Nahitchevansky*, *supra* note 169, at 225 (noting that the government cannot discriminate because of the subject matter, viewpoint, or identity of the speaker, for this would "produce

regulations “that suppress, disadvantage, or impose differential burdens upon speech because of its content.”²⁰⁰ It also “flatly prohibits the government from engaging in viewpoint discrimination,”²⁰¹ which occurs when the rationale for a government regulation is “the speaker’s specific motivating ideology, opinion, or perspective.”²⁰²

In this case, the de-funding laws violate the Supreme Court’s prohibitions on content-based and viewpoint-based discrimination. Planned Parenthood engages in speech when it advises or counsels clients on receiving an abortion, and this speech is politically unpopular, especially in the eyes of many religiously conservative state legislatures. The de-funding laws effectively force Planned Parenthood to choose between engaging in this constitutionally protected speech and receiving Title X funds. They therefore “single out Planned Parenthood on the basis of its advocacy of certain unpopular ideals,”²⁰³ and “force the Title X grantee [Planned Parenthood] to give up abortion-related speech” to receive federal family planning funds.²⁰⁴ Accordingly, these laws regulate Planned Parenthood based on both the content of its speech and on its identity as an abortion provider—an outcome that *Rust* clearly prohibits.²⁰⁵ Planned Parenthood can therefore argue that the laws place an unconstitutional burden on its right to free speech.

With respect to the Free Association claim, Planned Parenthood could argue that the state may not deny a Title X or Medicaid provider access to funding merely because of that provider’s association with abortion-related services or affiliates that provide those services. Indeed, a number of circuits have held that these de-funding laws are constitutional, but only because they allow the Title X grantee to establish an affiliate that performs abortion.²⁰⁶ These courts have recognized that blanket bans precluding abortion providers from receiving Title X funding are unconstitutional if

a result which [the government] could not command directly”) (internal quotation marks omitted) (internal citations omitted).

200. *Turner Broad. Sys., Inc. v. Fed. Comm. Comm’n*, 512 U.S. 622, 642 (1994)

201. Joseph Blocher, *Viewpoint Neutrality in Government Speech*, 52 B.C. LAW REV. 695, 702 (2011).

202. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 820 (1995).

203. *Planned Parenthood of Kan. v. City of Wichita*, 729 F. Supp. 1282, 1287–88 (D. Kan. 1990) (enjoining the Wichita City Commission from terminating its contract for family planning services with Planned Parenthood because it impermissibly impeded Planned Parenthood’s “First Amendment freedom to disseminate relevant medical information” (quoting *Planned Parenthood Fed’n of Am. v. Bowen*, 680 F.Supp. 1465, 1477 (D.Colo. 1988))).

204. *Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

205. *Id.* at 196–97.

206. *See Planned Parenthood of Hous. and Se. Tex. v. Sanchez*, 403 F.3d 324, 342 (5th Cir. 2005) (upholding Texas law on the basis that forming affiliates was an option); *Planned Parenthood of Mid-Mo. and Eastern Kan. v. Dempsey*, 167 F.3d 458, 463–64 (8th Cir. 1999).

they “prohibit grantees from having any affiliation with abortion providers.”²⁰⁷ The difficulty of this theory, of course, is demonstrating that the state denied funding because of Planned Parenthood’s association with or advocacy for abortion-related services.²⁰⁸ However, given the open manner in which legislatures have attacked Planned Parenthood recently, discriminatory intent has not been difficult for the organization to prove.²⁰⁹ Thus, the “unconstitutional conditions” theory offers a number of avenues by which Planned Parenthood and other abortion providers can attack these de-funding laws. The simplicity of this theory is what makes it so advantageous. There are no procedural hurdles to overcome to successfully assert an “unconstitutional conditions” argument. There are no questions about whether Congress intended to provide a private right of action, as there is under § 1983 and Medicaid. Rather, the organization needs only to show that these de-funding laws unconstitutionally condition receipt of federal family planning funds, and they can do so—with a good chance of success—on any of the theories above.²¹⁰

CONCLUSION

Given the deferential standard that the Supreme Court applies to state laws under *Casey*, §1983, preemption, and the First Amendment provide pro-choice plaintiffs with a novel means by which to challenge state de-funding laws. This Note demonstrates that, among these three claims, litigants have a greater likelihood of success against state de-funding laws on “unconstitutional conditions” grounds. To bring a private right of action under § 1983 against a state de-funding law that violates federal Medicaid law, plaintiffs must bring forth unequivocal evidence that Congress intended to provide them with such a cause of action under Title XIX. This poses a significant procedural barrier for litigants asserting claims against state laws that violate Medicaid and Title X, as those statutes do not contain the sort of “individual-focused, rights-creating” language that *Gonzaga* requires. Similarly, while it was once thought that preemption claims under the Supremacy Clause do not contain as stringent a threshold, the Court’s

207. *Dempsey*, 167 F.3d at 463. *See also Sanchez*, 403 F.3d at 338–39.

208. *See Nahitchevansky*, *supra* note 169, at 235–36.

209. *See Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 495–96 (C.D.N.C. 2011) (illustrating the legislative history in North Carolina); *Planned Parenthood of Kan. and Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1224–25 (D. Kan. 2011)

210. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“If the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘produce a result which (it) could not command directly.’ . . . Such interference with constitutional rights is impermissible.” (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1952))).

decision in *Douglas* casts doubt on this conventional belief. As far as challenges against de-funding laws are concerned, the “unconstitutional conditions” theory—rather than Supremacy Clause or § 1983—may prove to be the ultimate guarantor of a woman’s access to vital family services.

—David Zoppo^{*†}

* J.D. candidate 2013, Vermont Law School; B.A. 2010, University of North Carolina, Chapel Hill.

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