16-4027

United States Court of Appeals
for the Sixth Circuit

PLANNED PARENTHOOD OF GREATER OHIO,
PLANNED PARENTHOOD SOUTHWEST OHIO REGION,

Plaintiffs-Appellees,

v.

LANCE HIMES, IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Ohio

EN BANC BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, VERMONT, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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Dated: August 29, 2018

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INTERESTS OF AMICI CURIAE

Amici are the States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, Washington, and the District of Columbia. Amici explained their interests in their initial brief to the Court ("N.Y. et al. Br." 2-3), and briefly restate those interests here. Amici seek to ensure the availability of safe abortion services from accessible providers within each of the States, as well as the ability of providers of such services to engage in related First Amendment activities, such as the promotion of safe and lawful abortion services. Amici have an interest in the provision of abortion services from accessible providers for patients who may be residents of amici States but present in Ohio and affected by this law. Amici also have an interest in ensuring that the government-speech doctrine is not misused, as Ohio seeks to use that doctrine here, to infringe upon the First Amendment rights of abortion providers to speak on matters unrelated to a governmental program.

STATEMENT OF THE CASE

Amici previously demonstrated (N.Y. et al. Br. 14-23) that Ohio's defunding law violates plaintiffs' first amendment and due process rights. Amici submit this brief to explain (1) that Ohio's defunding law imposes an unconstitutional condition in violation of the Due Process Clause, notwithstanding plaintiffs' stated intention

not to accept the condition, but rather to continue providing abortion services, and (2) that the condition cannot be upheld as the equivalent of a tax on abortion providers, as suggested by the United States as amicus curiae, because the hypothesized tax would itself be unconstitutional.

Ohio Revised Code § 3701.034 prohibits the state and county departments of health from awarding public funds and material assistance for six federally funded public-health programs to "any entity that performs or promotes nontherapeutic abortions" or any organization that affiliates with such an entity. *Id*. § 3701.034(B)-(G).[1] As we previously explained (N.Y. et al. Br. 4-7), Ohio's defunding law is not unique. Numerous States have passed laws or taken executive actions similarly to prohibit the award of family-planning and other public-health funds to providers of abortion services, even when those funds are used for services that have nothing to do with abortion. Since filing our initial amicus brief in this Court, three more States

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[1] The six public-health programs covered by the statute make federal funds or materials available to health-care providers under (1) the Violence Against Women Act, 42 U.S.C. § 13295 et seq., (2) the Breast and Cervical Cancer Mortality Prevention Act, 42 U.S.C. §§ 300k through 300n-5, (3) an infertility prevention project providing testing and treatment for sexually transmitted diseases, (4) the minority HIV/AIDS initiative, (5) infant-mortality reduction and infant-vitality initiatives, and (6) an education program about personal responsibility. The amicus briefs of the American Public Health Association describe in detail the important function that these public-health programs serve and the effect that precluding plaintiffs from participating in these programs would have on Ohio's vulnerable populations.

have adopted similar defunding measures,[2] bringing to twenty the total number of such States. And two of those States recently took additional steps to defund abortion providers.[3] As we previously noted (N.Y. et al. Br. 8-9) a number of these defunding measures have been judicially invalidated.

We also previously explained (N.Y. et al. Br. 7) that Congress and federal agencies have similarly sought to defund providers of abortion services. Since filing our initial brief in this Court, the Department of Health and Human Services has

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[2] Iowa: Iowa Code § 217.41B (eff. July 1, 2018) bars funds from State's family-planning services program from being paid to entities that provide abortion services.

Nebraska: 2017 Neb. Laws 944, § 76 (enacted April 4, 2018) prohibits federal Title X family-planning funds from being paid to organizations that perform abortion, counsel in favor of abortion, or make referrals for abortion services, and allows affiliated organizations to receive Title IX funds only if they are legally, physically, and financially separate from the disqualified organization.

South Carolina: By executive order, the governor directed that abortion providers and affiliated physicians be deemed "unqualified" to participate in and terminated from the state Medicaid program. *See* S.C. Exec. Order No. 2018-21 (eff. July 13, 2018), *at* https://tinyurl.com/SC-EO-2018-21 (last accessed August 22, 2018).

[3] Missouri: Budget bill prohibits Medicaid and state family-planning funds from being provided to an entity where such funds would indirectly fund administrative services of an abortion provider. *See* Mo. H.B. 2010, 99th Gen. Assembly, 2nd Reg. Sess., § 10.720 (enacted June 29, 2018), *at* https://tinyurl.com/Missouri-HB2010 (last accessed August 22, 2018).

Tennessee: Tenn. Code Ann. § 71-5-157 (eff. April 12, 2018) requires submission of a Medicaid waiver to exclude from Medicaid program abortion providers who perform more than 50 abortions annually.

proposed a Title X "gag rule" that would prevent health-care providers who participate in Title X's family-planning program from referring their patients for safe, legal abortions. *Compliance with Statutory Program Integrity Requirements*, Proposed Rule, 83 Fed. Reg. 25502, 25517-25518 (June 1, 2018). The rule would target abortion providers, many of which are Planned Parenthood affiliates, by imposing stringent financial- and physical-separation requirements on Title X programs that many Planned Parenthood affiliates would not satisfy. *See* 83 Fed. Reg. at 25518-25520.

Plaintiffs Planned Parenthood of Greater Ohio and Planned Parenthood Southwest Ohio Region have for years used funds and materials received under the six federal programs implicated here to provide public health services unrelated to abortion to many thousands of low-income Ohio women. They sued to enjoin implementation of Ohio's defunding law, arguing it was unconstitutional under the First Amendment and Due Process and Equal Protection Clauses. The district court found in plaintiffs' favor and permanently enjoined the law's enforcement. (Op., R.60, PageID#2144.)

On Ohio's appeal, a unanimous panel of this Court affirmed, holding that the law imposes unconstitutional conditions in violation of the First Amendment and Due Process Clause because it penalizes plaintiffs for engaging in protected speech and making constitutionally protected abortion services available outside the funded

programs. This Court vacated the panel decision and granted Ohio's petition for rehearing en banc.

ARGUMENT

POINT I

OHIO'S DEFUNDING LAW IS UNCONSTITUTIONAL BECAUSE IT REQUIRES PLAINTIFFS TO TAKE STEPS, AS A CONDITION OF FUNDING, THAT WOULD IMPOSE AN UNDUE BURDEN ON THEIR PATIENTS' DUE PROCESS RIGHT

It is well established that the unconstitutional-conditions doctrine applies in cases implicating due process. *See Koontz v. St. Johns River Water Mgt. Dist.*, 570 U.S. 595, 604 (2013)*; R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 434 (6th Cir. 2005). It is equally well established that providers have third-party standing to assert women's due process right to terminate a pregnancy without undue government interference. *Singleton v. Wulff*, 428 U.S. 106, 117-18 (1976) (plurality opinion). Ohio's defunding law is unconstitutional because it imposes a condition on plaintiffs that, if accepted, would unduly burden their patients' due process right.

Third-party standing generally permits abortion providers to challenge the regulation of abortion services on the ground that it violates women's due process right. *Singleton*, 428 U.S. at 114 (plurality opinion); *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (granting relief to plaintiff abortion providers who challenged on due process grounds regulations imposed on their services). A law that directly regulates abortion services satisfies the two criteria for third-party

standing. First, such a law has a direct effect on abortion providers, who therefore suffer an injury in fact in their own right. *Singleton*, 428 U.S. at 113 (plurality opinion). Second, recognizing third-party standing in this context satisfies prudential concerns. Women's concern for privacy and the risk of imminent mootness constitute sufficient obstacles to the ability of women to assert their own right. *Id.* at 117-18 (plurality opinion). And providers can be relied upon to serve as effective proponents of the rights of their patients because of the close and dependent relationship between the ability of providers to make abortion services available and the ability of women to exercise their due process right. *Id.* at 117 (plurality opinion).

Precisely the same considerations justify recognizing plaintiffs' third-party standing to challenge a funding condition that, if accepted, would violate women's due process right. Plaintiffs suffer an injury in fact because the condition requires them to choose between accepting the funding condition or continuing to provide abortion services, a "concrete injury from the operation of the challenged statute" that creates the required "case or controversy in the constitutional sense" between the parties to the litigation. *Id.* at 113 (plurality opinion). Patients are not as well situated to challenge the funding condition that forces providers to choose between accepting funding or enabling patients to exercise their due process right to abortion access. And plaintiffs serve as reliable proponents of the rights of their patients because they are so deeply involved in facilitating the exercise of those rights. Thus,

the prudential concerns identified in *Singleton* are satisfied. Indeed, in *Rust v. Sullivan*, 500 U.S. 173 (1991), neither the federal government nor the Court considered it relevant that the providers were raising the due process claims of their patients as well as their own First Amendment claims in challenging the funding condition as unconstitutional.

Ohio and its amici contend that plaintiffs cannot prevail because plaintiffs have no constitutional right of their own to provide abortion services, and the rights of patients will not be affected because plaintiffs have stated that they intend to continue providing those services. (Deft. Supp. Br. 5-7, 11, 12-14, 19-20; Michigan et al. En Banc Br. 6-8; U.S. Br. 3-7, 8-9; Americans United for Life En Banc Br. 3-4, 12). They are mistaken.

Whether or not plaintiffs have a due process right to perform abortion services, they have third-party standing to assert the right of their patients. As noted above, the reasons for recognizing providers' third-party standing to assert their patients' due process right apply with equal force whether Ohio imposes an unconstitutional condition on abortion providers or a direct regulation of abortion services.

And as Ohio recognizes (Deft. Supp. Br. at 18-19), under the unconstitutional-conditions doctrine, a litigant need not succumb to the unconstitutional condition to assert a claim; the imposition of a coercive condition by itself establishes a violation.

See Koontz, 570 U.S. at 606; *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 214 (2013); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). The claim is therefore not defeated by the fact that plaintiffs do not intend to accept the conditions of Ohio's law, but rather intend to continue providing abortion services.

To see this more clearly, suppose that Ohio conditioned a woman's eligibility for low-cost cervical-cancer screening on her agreement to refrain from obtaining abortion services. Such a condition would violate her due process right, whether or not she was willing to accept that condition. And a provider would have third-party standing under *Singleton* to challenge the condition.

Now suppose that instead of imposing the condition on patients, Ohio imposes the condition on providers: Ohio conditions a provider's eligibility for funding to provide low-cost cervical-cancer screening on its agreement to refrain from providing abortion services. That is essentially this case; as a condition for receiving funding for six health-care programs, providers must refrain from providing abortion services (and also from promoting those services).

In either of these two examples, the condition would restrict patients' access to abortion, and thereby violate their due process right; one does so by discouraging patients from obtaining services and the other by discouraging providers from offering services. The latter is similarly an unconstitutional condition, because the provision of abortion services by providers is critical to women's ability to exercise

their due process right. *Singleton*, 428 U.S. at 117 (plurality opinion). The mere imposition of the condition threatens women's ability to exercise their due process right and constitutes an unconstitutional condition, regardless of whether a provider chooses to comply with the condition, or to reject the condition and reject the funds. And the provider has third-party standing to assert a claim for that violation, for the same reasons that providers of abortion services are generally given third-party standing to assert the rights of their patients.

Moreover, as the district court properly held (Op., R.60, PageID#2140-2141), it is a mistake for defendants to suggest that, to prevail, plaintiffs must establish that Ohio's defunding law will *in fact* impose an undue burden on women's due process right. (*See* Deft. Supp. Br. 10.) To establish an unconstitutional condition, it is necessary to show only that the condition *if accepted* would violate constitutional rights. And that requirement is satisfied here, because Ohio does not dispute that its funding condition, if accepted, would unduly burden women's due process right. (*See* Pl. Initial Br. 44 (citing record evidence).)

Plaintiffs therefore have third-party standing to challenge Ohio's defunding law on due process grounds. And the law violates due process because it requires plaintiffs to take steps, as a condition of funding, that would impose an undue burden on their patients' due process right.

POINT II

THE FUNDING CONDITION CANNOT BE UPHELD AS EQUIVALENT TO A TAX ON ABORTION SERVICES, AS SUGGESTED BY AMICUS UNITED STATES, BECAUSE ANY SUCH TAX WOULD SIMILARLY BE UNCONSTITUTIONAL

The United States as amicus curiae argues (U.S. Br. 2-3, 9-13) that Ohio's defunding law does not violate the Due Process Clause because it does indirectly what Ohio could have done directly, namely discourage plaintiffs from providing abortion services by taxing those services in a way that imposes an equivalent financial burden. This argument is mistaken.

First, the argument is doomed by its faulty premise. To be sure, "a funding condition cannot be unconstitutional if it could be constitutionally imposed directly." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 59 (2006). But Ohio's defunding law is not equivalent to a tax on providing abortion services. Because the law conditions participation in six federally funded public-health programs on plaintiffs' agreement to refrain not only from providing abortion services but also from promoting them, an equivalent tax would also tax promoting those services. To utilize the rule of *Rumsfeld,* Ohio would therefore have to show that it could directly tax not only the provision of abortion services, but the promotion of abortion services as well. And Ohio could not do so.

It is well settled that a state may not impose a tax on protected speech on the basis of its content. The Supreme Court long ago declared that "[a] state may not

impose a charge for the enjoyment of a right granted by the Federal Constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943); *id*. at 108 ("It could hardly be denied that a tax laid specifically on the exercise of those [i.e., First Amendment] freedoms would be unconstitutional."). Thus, for example, the Supreme Court has invalidated a state sales tax scheme that taxed general interest magazines but exempted newspapers and religious, professional, trade and other specified publications. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987). The Court held the tax unconstitutional because it singled out the press for differential treatment and was impermissibly content-based. *Ragland*, 481 U.S. at 229-30. A tax on the promotion of abortion services would fail for the same reason—it would single out abortion providers and tax them on the basis of the content of their speech.

Nor would a direct tax on the *provision* of abortion services fare any better. "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes," but tax statutes are subject to "a higher level of scrutiny if they interfere with the exercise of a fundamental right." *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983); *see also Armour v. City of Indianapolis*, 566 U.S. 673, 673 (2012) (subjecting tax classification to rational basis review because it did not involve a fundamental right or suspect classification). Because a direct tax on the provision of abortion services would single out constitutionally

protected activities for differential treatment, it could be sustained only if it were necessary to achieve a compelling state interest. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983); *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (applying that test to a permit fee for the use of a public forum). Ohio could not demonstrate that a tax on the provision of abortion services would be *necessary* to achieve any compelling interest.

Finally, an equivalent tax on the provision of abortion services would be a significant tax. Such a tax could well amount to an undue burden on women's ability to access abortion services and thus be unconstitutional under *Whole Woman's Health* and *Casey*. Because, however, no party raised this argument below, the record does not make clear how such a tax would operate and precisely what burdens it would impose on women seeking abortion services. The United States' hypothetical thus fails to dispel the unconstitutionality of this funding condition.

CONCLUSION

The judgment of the district court enjoining enforcement of the Ohio defunding law should be affirmed.

Dated: Albany, New York
August 29, 2018

Respectfully submitted,
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DESIGNATION OF DISTRICT COURT RECORD

Amici State of New York et al., pursuant to Sixth Circuit Rule 30(g), designate the following filings from the district court's electronic records:

***Planned Parenthood of Greater Ohio, et al., v. Hodges*, 1:16-cv-539**

Date Filed	R. No.; Page ID#	Document Description
8/12/16	60; 2140-2141, 2144	Permanent Injunction Op.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 2018, this *Motion for Leave to Appear as Amicus Curiae in Support of Plaintiffs* with proposed brief was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ *Laura Etlinger*
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