

# AN ILLUSION OF CHOICE: DEFUNDING THE RIGHT TO CHOOSE

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*“Abortion restrictions, in practical effect, target poor women and poor women only.”*<sup>1</sup>

## I. INTRODUCTION

Rosie Jimenez was a single mother living on welfare in south Texas, working to support herself and her daughter, and studying to earn a degree in special education.<sup>2</sup> She grew up in poverty and wanted a better life for her daughter than the one she had lived.<sup>3</sup> When Rosie learned that she was pregnant again, she chose to have an abortion.<sup>4</sup> The day after the abortion, Rosie was taken to the hospital with a severe bacterial infection.<sup>5</sup> She died after fighting the infection for seven days.<sup>6</sup> It was the fall of 1977, and the Hyde Amendment had taken effect only a short time prior.<sup>7</sup>

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\* J.D. 2020. I wrote this note in the hopes that there is a path to abortion access for all in the United States, regardless of wealth. This is for Rosie Jimenez and all those who have been and continue to be denied a meaningful right to choose. I am so grateful to all those who helped me make this article come to life. Thank you first to my brilliant friend Kleya Dhenin for sparking the idea for this note and helping to educate me about reproductive rights. I also want to thank Professors Mark Cammack and Emily Rehm for their guidance with this process and Professor Tracy Turner for giving me confidence in my writing. To Erica Jansson and Kelsey Finn, extraordinary editors in chief and even better friends, thank you for listening, providing feedback, and inspiring new avenues of thought. And thank you most of all to my family, especially my parents, for their endless encouragement, wisdom, and love always, but particularly over the past year and a half.

1. Bloomberg, *Ruth Bader Ginsburg: Abortion Restrictions Should Concern Women*, YOUTUBE (Feb. 12, 2015), <https://www.youtube.com/watch?v=ZbsbKI3K9m4>.

2. Alexa Garcia-Ditta, *Reckoning with Rosie*, OBSERVER (Nov. 3, 2015), <https://www.texasobserver.org/rosie-jimenez-abortion-medicaid/>.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. H.R. Res. 14232, 94th Cong. (1976) (enacted).

The Hyde Amendment prevents states from directing federal Medicaid funds to pay for abortions.<sup>8</sup> Rosie was a Medicaid recipient.<sup>9</sup> She did not have the money to pay for an abortion out of pocket.<sup>10</sup> Her only option was to terminate the pregnancy with an illegal abortion, performed in unsanitary conditions without a doctor.<sup>11</sup> Rosie Jimenez was the first fatality of the Hyde Amendment.<sup>12</sup>

In *Roe v. Wade* in 1973, the Supreme Court affirmed that the right to an abortion is constitutionally protected.<sup>13</sup> Since 1973, factions of American society have persistently worked to weaken and ultimately abolish the right to choose an abortion over childbirth.<sup>14</sup> State legislatures and Congress have enacted laws, and have also paved the way for government agencies to adopt regulations, that target many facets of abortion rights.<sup>15</sup> Rosie Jimenez fell victim to one of the first, and arguably one of the most successful, of these efforts in the Hyde Amendment.

The federal government plays a central role in impeding abortion rights through its control over the funding of government programs, especially healthcare.<sup>16</sup> The Hyde Amendment's general prohibition on the use of Medicaid funding for abortions is not the only limitation on federal funding that has a significant impact on abortion access. The Title X Family Planning Program (Title X) is a grant program, administered and regulated by the Department of Health and Human Services (HHS) pursuant to federal statute, which prohibits any of its federal grants from going to "programs where abortion is a method of family planning."<sup>17</sup> Congress gave HHS the latitude to create and interpret rules in furtherance of the Title X objectives.<sup>18</sup> In the 1980s, and then again in 2019, HHS implemented a particularly restrictive interpretation of the anti-abortion language in Title X.<sup>19</sup> The federal government's hostility to abortion rights through initiatives like these has the

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8. *Id.*

9. Garcia-Ditta, *supra* note 2.

10. *Id.*

11. *Id.*

12. Sharman Stein, *Groups Offer Poor a Place to Turn for Abortion Aid*, N.Y. TIMES, June 9, 1989, at A14.

13. 410 U.S. 113, 153.

14. Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, 126 YALE L.J.F. 149, 150-53 (2016).

15. *An Overview of Abortion Laws*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> (last updated Nov. 1, 2020).

16. See generally Megan K. Donovan, *In Real Life: Federal Restrictions on Abortion Coverage and the Women They Impact*, 20 GUTTMACHER POLICY REV., (Jan. 5, 2017).

17. 42 U.S.C. § 300a-6.

18. *Id.* § 300a(a).

19. See 42 C.F.R. § 59 (2019); 42 C.F.R. § 59 (1988).

practical effect of depriving poor individuals,<sup>20</sup> specifically, of their constitutional right to choose.<sup>21</sup>

The Hyde Amendment and Title X rules do not stand alone. They opened the floodgates for scores of other abortion-funding restrictions at the federal level. Abortion coverage is restricted for those insured through Medicare and the Children's Health Insurance Program (CHIP).<sup>22</sup> It is also limited for other individuals who receive health insurance through the federal government, including federal employees and their dependents, military personnel, Native Americans, federal prisoners, and low-income individuals in Washington D.C.<sup>23</sup>

The Supreme Court has held that neither federal nor state governments have a constitutional obligation to provide funding for abortion services, even when the patient is insured through Medicaid or receives coverage under other government-subsidized health insurance.<sup>24</sup> Furthermore, the Court has also found it constitutionally permissible for the federal government to prohibit Title X grant funds from being issued to programs that offer abortion counseling and referrals, but do not provide abortions.<sup>25</sup>

This Note argues that the federal funding restrictions on abortion and abortion-related services, epitomized by the Hyde Amendment and Title X, should be analyzed by the courts using the undue burden test, consistent with judicial review of any other law impacting the right to an abortion. The Supreme Court has held that abortion regulations are constitutional only when they do not amount to an undue burden on abortion access.<sup>26</sup> Yet, the Court has consistently reiterated that the government does not have an

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20. In this note, I use gender-neutral terms for the words “woman/en,” “mother” and any pronouns that are not gender-neutral, in recognition of the fact that not all people who are or can get pregnant identify as women. See Caitlin Van Horn, *Trans and Nonbinary People Too*, ALLURE (July 30, 2019), <https://www.allure.com/story/abortion-gender-neutral-language-transgender-men-nonbinary>. In certain cases, such as when talking about a specific person who identified as a woman, when the word “woman” is used in the name of a case, or when I employ a direct quote that uses female terms and pronouns, I retain the original word used for the sake of accuracy regarding those sources.

21. See USHA RANJI, ET AL., FINANCING FAMILY PLANNING SERVICES FOR LOW-INCOME WOMEN: THE ROLE OF PUBLIC PROGRAMS, KAISER FAMILY FOUNDATION (Oct. 2019), <https://www.kff.org/wp-content/uploads/2019/10/Issue-Brief-Financing-Family-Planning-Services-for-Low-income-Women-1.pdf>.

22. Donovan, *supra* note 16, at 1.

23. *Id.*

24. *Harris v. McRae*, 448 U.S. 297, 326 (1980); *Maher v. Roe*, 432 U.S. 464, 480 (1977).

25. *Rust v. Sullivan*, 500 U.S. 173, 203 (1991).

26. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion).

affirmative obligation to fund abortion through programs of its own creation, even when those programs provide the only feasible path to abortion access.<sup>27</sup>

The government discriminates when it provides coverage and other support for healthcare, including general reproductive health and pregnancy, through programs such as Medicaid and Title X, from which abortion is excluded. This discrimination results in a substantial obstacle to abortion and abortion-related services for individuals who rely on government-funded healthcare, like Rosie Jimenez. When a law infringes on a constitutional right, such as the right to an abortion, it is not automatically deemed unconstitutional.<sup>28</sup> However, it should be, at the very least, analyzed consistently under the same judicial standard of review that is applied to any other law restricting abortion rights.

The Supreme Court has not heard a case touching on the issue of government funding for abortions since before undue burden became the applicable standard.<sup>29</sup> It follows then that it is time for the Court to address abortion defunding in a modern context, rather than relying on outdated precedent, created before many of the very same people who may seek abortions today were even born themselves.

Part II reviews the history of abortion rights from early America through *Roe v. Wade* before explaining the current state of Supreme Court precedent on abortion. It then addresses *Roe v. Wade* and the line of Supreme Court decisions regarding government funding of abortion. Part III further considers the line of Supreme Court cases on government funding of abortion and explains the purpose and impact of the Hyde Amendment and Title X. Part IV first imagines the outcome of the abortion-funding cases if the Supreme Court had applied strict scrutiny to the laws in those cases as it did to the laws at issue in other abortion cases during the same period of time. Second, Part IV argues that the Supreme Court should now apply the appropriate undue burden standard to analyze the constitutionality of the Hyde Amendment and Title X. There is no justifiable reason that the Court should not at least apply the undue burden test to abortion-funding restrictions, even if it finds that those burdens withstand constitutional muster.

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27. *Rust*, 500 U.S. at 201.

28. *See Harris*, 448 U.S. at 312.

29. The last abortion-funding case heard by the Supreme Court was *Rust v. Sullivan*, 500 U.S. 173 (1991). *See Timeline of Important Reproductive Freedom Cases Decided by the Supreme Court*, ACLU, <https://www.aclu.org/other/timeline-important-reproductive-freedom-cases-decided-supreme-court> (last visited Nov. 14, 2020) (providing a timeline and overview of each abortion-related case to come before the Supreme Court).

## II. THE ROAD TO ABORTION RIGHTS IN AMERICA

### A. *Early Abortion Regulations: Activism and Reaction Before Roe v. Wade*

Laws restricting abortion are *not* deeply rooted in the fabric of American society.<sup>30</sup> Until the mid-nineteenth century, “abortion was a regular practice” in America.<sup>31</sup> There was little regulation, but if anything, English common law generally prevailed.<sup>32</sup> Under English common law, abortion after quickening was considered a misdemeanor at most.<sup>33</sup> It was an unsanitary and unsafe procedure, but many people turned to abortion to terminate out-of-wedlock pregnancies, which were subject to harsh punishment and stigma.<sup>34</sup> Laws that truly criminalized abortion did not arise until the “social purity” movement in “the latter half of the 19<sup>th</sup> century.”<sup>35</sup> According to Justice Blackmun in his opinion for the Court in *Roe v. Wade*, these later criminal laws were far harsher than any of their earlier counterparts.<sup>36</sup>

State anti-abortion laws remained the status quo well into the twentieth century.<sup>37</sup> These laws often led to illegal abortions or even to attempts at self-induced abortion, both of which were incredibly dangerous practices.<sup>38</sup>

30. As noted by the Supreme Court,

[C]riminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman’s life are not of ancient or even common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19<sup>th</sup> century.

*Roe v. Wade*, 410 U.S. 113, 129 (1973).

31. ALESHA E. DOAN, *OPPOSITION AND INTIMIDATION: THE ABORTION WARS & STRATEGIES OF POLITICAL HARASSMENT* 41-42 (2007).

32. *Id.* at 46; *see also Roe*, 410 U.S. at 138.

33. DOAN, *supra* note 31, at 46.

34. *Id.* at 41-42.

35. *Roe*, 410 U.S. at 129; *see also* DOAN, *supra* note 31, at 45. These criminal laws targeted the “abortionists” rather than the person seeking an abortion. *See* LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973*, at 114, 16 (1997). Medical professionals were a driving force behind the anti-abortion movement as well, publishing books and articles addressing the medical and moral arguments against abortion and written for the general public to understand. DOAN, *supra* note 31, at 49.

36. *See Roe*, 410 U.S. at 138-39.

37. *See* Eugene Quay, *Justifiable Abortion: Medical and Legal Foundations*, 49 *GEO. L.J.* 395 app. at 447-520 (1961) (collecting anti-abortion legislation from the states).

38. REAGAN, *supra* note 35, at 119; Elisabeth Stevens, *When Abortion Was Illegal: A 1966 Post Series Revealed How Women Got Them Anyway*, *WASH. POST* (June 9, 2019, 4:00 AM), <https://www.washingtonpost.com/history/2019/06/09/when-abortion-was-illegal-post-series-revealed-how-women-got-them-anyway/>. The illegality itself is not what made abortions so dangerous pre-*Roe*. Qualified doctors did perform abortions in secret, but they still risked prosecution for violating the law, even if the procedure was relatively safe when performed by them. *Id.*

By the 1950s, it was estimated that between 200,000 and 1.2 million illegal or self-induced abortions were performed every year in the United States.<sup>39</sup>

Some states began to relax their severe abortion restrictions in the 1960s and early 1970s.<sup>40</sup> Public opinion on abortion started to shift as abortion rights advocacy groups appeared on the scene.<sup>41</sup> In 1970, Alaska, Hawaii, New York, and Washington all repealed laws that criminalized abortion in early pregnancy,<sup>42</sup> while fourteen other states adopted laws<sup>43</sup> that allowed abortions to be performed by a licensed doctor in very limited circumstances.<sup>44</sup>

The subtle changes in the law during the mid-twentieth century were precipitated by public health concerns attendant to the dangers of illegal abortions.<sup>45</sup> It was clear that the criminalization of abortion inflicted the most harm on poor individuals who generally had only two options: an illegal, potentially dangerous abortion or childbirth.<sup>46</sup> Scholars Linda Greenhouse and Reva B. Siegel assert that “no single narrative explains the shift in public consciousness, [but] it is clear that increasingly, Americans came to believe that, at least in some cases, abortion ought to be permitted.”<sup>47</sup> It was in this landscape that *Roe v. Wade* came to be decided by the Supreme Court.

### B. *A New Hope for Abortion Rights: Roe v. Wade*

*Roe v. Wade* materialized in the wake of and built upon several Supreme Court cases that addressed the constitutional right of privacy.<sup>48</sup> The two key cases, *Griswold v. Connecticut* and *Eisenstadt v. Baird*, recognized that the

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39. Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?*, 6 GUTTMACHER POL'Y REV. 8, 8 (2003). By this point, the fatalities resulting from illegal abortions had declined due to medical advancement, but there were still at least hundreds of illegal abortion-related deaths per year. *Id.*

40. DOAN, *supra* note 31, at 59-60.

41. *Id.* at 85.

42. Erwin Chemerinsky & Michelle Goodwin, *Abortion: A Woman's Private Choice*, TEX. L. REV. 1189, n. 137 (2017) (listing the statutes for Alaska, Hawaii, New York, and Washington).

43. *See Roe v. Wade*, 410 U.S. 113, 140 n.37 (1973) (listing the fourteen state statutes that followed the Model Penal Code).

44. MODEL PENAL CODE § 230.3(2) (AM. L. INST. 1962). The Model Penal Code would allow abortion by a licensed physician “if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born .with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse.” *Id.*

45. *See* LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING* 3 (2010).

46. *Id.*

47. *Id.* at 4.

48. *See Roe v. Wade*, 410 U.S. 113, 129 (1973).

Constitution safeguards a right of privacy even though it is never explicitly stated as a protected right in its text.<sup>49</sup> Justice Brennan, writing for the Court in *Eisenstadt*, stated that “[i]f the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>50</sup>

When *Roe v. Wade* was decided the following year, the Court maintained that there is a constitutional right of privacy, but found that it is rooted in the Due Process Clause of the Fourteenth Amendment rather than the penumbras of the Bill of Rights, as held in the two earlier cases.<sup>51</sup> This right of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>52</sup> However, the Court cautioned that the right is not absolute and that, at some point during pregnancy, “state interests as to protection of health, medical standards, and prenatal life become dominant.”<sup>53</sup> The aforementioned state interests were deemed “sufficiently compelling to sustain regulation of the factors that govern the abortion decision”<sup>54</sup> only after the first trimester of pregnancy.<sup>55</sup> Therefore, any state regulations that placed restrictions on abortion during the first trimester were

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49. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453, 461 (1972). The Court in *Griswold* held that the right of privacy comes from the “penumbras” of specific guarantees within the Bill of Rights, and the right is violated when married couples are forbidden from using contraceptives. 381 U.S. at 484-85. Later, *Eisenstadt* extended this holding to include unwed individuals using contraceptives. 405 U.S. at 453. The Supreme Court has also found that the Constitution protects other rights not enumerated in the Constitution. *Griswold*, 381 U.S. at 492.

50. *Eisenstadt*, 405 U.S. at 453.

51. 410 U.S. at 152-53. The Due Process Clause prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

52. *Roe*, 410 U.S. at 153.

53. *Id.* at 155. In determining when during pregnancy certain state interests become “dominant,” the Court found that during the first trimester, the decision whether to terminate pregnancy is entirely between the patient and the doctor. *See id.* at 164. Following the first trimester, the State can regulate abortions if the regulations are “reasonably related to maternal health.” *Id.*

54. *Id.* at 154.

55. *Id.* at 164. Under the framework in *Roe*, abortion during the first trimester was deemed to be a decision between the pregnant person and their doctor, “free of interference by the State.” *Id.* at 163. After this point, “a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.” *Id.* at 163. In addition, regarding the State’s interest in potential life as a justification for abortion regulation, that interest only becomes compelling when the fetus is deemed viable, meaning that it “presumably has the capability of meaningful life outside the mother’s womb.” *Id.* at 163.

required to be justified by a compelling state interest and “narrowly drawn to express only the legitimate state interests at stake.”<sup>56</sup>

The ruling in *Roe v. Wade* was at least partly responsible for reinventing the anti-abortion, anti-choice movement.<sup>57</sup> A broad spectrum of forces advocated against abortion, including “social movements and the Catholic Church but also strategists for the Republican Party seeking to attract traditionally Democratic voters in the 1972 presidential campaign.”<sup>58</sup> It is unquestionable that conflict around abortion increased after *Roe v. Wade*, although there are differing opinions as to the true role the decision itself played in this escalation.<sup>59</sup>

### C. *The Abortion Rights Landscape Today*

For almost fifty years, one Supreme Court case has been synonymous with reproductive rights: *Roe v. Wade*.<sup>60</sup> As discussed above, *Roe* is the decision that afforded abortion rights constitutional protection. That heart of that holding still stands today.<sup>61</sup> Although the Court in *Roe* never explicitly stated that abortion regulations should be analyzed using strict scrutiny, subsequent Supreme Court cases used that standard when analyzing “regulation[s] touching upon abortion.”<sup>62</sup> However, in 1992, the Supreme Court weakened the applicable level of judicial scrutiny for these laws.<sup>63</sup>

The plurality opinion in *Planned Parenthood v. Casey* rejected both strict scrutiny and the trimester framework laid out by *Roe v. Wade*, which was especially protective of the pregnant person during their first trimester, but less so later in pregnancy as the state’s interest in the patient’s health and eventually potential life grew stronger.<sup>64</sup> The *Casey* Court explained that

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56. *Id.* at 155. The Texas law at issue in *Roe* made abortions at any time during pregnancy unlawful unless the life of the pregnant person was in danger, and the Court accordingly struck it down as unconstitutional. *Id.* at 117-18, 166.

57. See Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2033, 2086 (2011). In the decade before *Roe v. Wade* was decided, there was already backlash against the more relaxed abortion regulations that had been passed in some states. *Id.* at 2035-36, 2046-47; David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 840-41 (1999).

58. Greenhouse & Siegel, *supra* note 57, at 2031 (footnotes omitted).

59. See generally *id.*

60. Mary Ziegler, *Roe v. Wade Was About More Than Abortion*, N.Y. TIMES (Jan. 21, 2018), <https://www.nytimes.com/2018/01/21/opinion/roe-v-wade-abortion.html>.

61. Jackson Women’s Health Org. v. Dobbs, 945 F.3d 265, 269 (5th Cir. 2019), *petition for cert. filed*, No. 19-1392 (U.S. June 15, 2020).

62. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (plurality opinion).

63. *Id.* at 876-77.

64. *Id.* at 872-73; see also Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 330 (2006).



abortions, even pre-viability, could be regulated by the state to promote a “thoughtful and informed” choice, as long as the regulations did not pose an undue burden on the right to choose.<sup>65</sup> After viability, the Court advised, abortions could be virtually prohibited with exceptions only if the pregnancy posed a danger to the life or health of the parent that required termination.<sup>66</sup>

Before *Planned Parenthood v. Casey* was decided, some members of the Court voiced support for use of the undue burden standard in abortion cases.<sup>67</sup> When the Court finally did adopt the undue burden standard, it explained that “[a] finding of an undue burden is a 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. A statute with this purpose is invalid.”<sup>68</sup>

In the years after *Planned Parenthood v. Casey*, “it seemed possible that *Casey*’s undue burden test would not be long for this world.”<sup>69</sup> However, after nearly twenty-five years of questions regarding the undue burden test, its veracity, and even its continued existence,<sup>70</sup> the Supreme Court handed down an unexpected decision with *Whole Woman’s Health v. Hellerstedt* in 2016.<sup>71</sup> Rather than abandoning the undue burden standard, the Court in *Hellerstedt* not only affirmed its continued existence but also reinforced the undue burden standard and gave pro-choice advocates hope about the future of reproductive rights.<sup>72</sup>

The *Hellerstedt* Court clarified that courts must consider “the burdens a law imposes on abortion access together with the benefits those laws confer.”<sup>73</sup> In addition, the Court refuted the notion that courts must give substantial deference to the factual findings and determinations of a

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65. 505 U.S. at 878.

66. *Id.* at 879.

67. *See id.* at 874 (listing past cases in which a member of the Court promoted the adoption of the undue burden standard).

68. *Id.* at 877.

69. Mary Ziegler, *Facing Facts: The New Era of Abortion Conflict After Whole Woman’s Health*, 52 WAKE FOREST L. REV. 1231, 1234 (2017).

70. Mary Ziegler, *Rethinking an Undue Burden: Whole Woman’s Health’s New Approach to Fundamental Rights*, 85 TENN. L. REV. 461, 481-83 (2017) (explaining how weak the undue burden standard appeared in a subsequent Supreme Court case and referring to it as a “thinly-veiled form of rational basis”).

71. 136 S. Ct. 2292.

72. *Id.* at 2300; *see also* Ziegler, *supra* note 69, at 1231; *Abortion Rights Advocates’ Reaction to Ruling on Texas Abortion Restrictions*, C-SPAN (June 27, 2016), <https://www.c-span.org/video/?411779-102/abortion-rights-advocates-reaction-supreme-court-ruling-texas-abortion-restrictions>; Adam Liptak, *Supreme Court Strikes Down Texas Abortion Restrictions*, N.Y. TIMES (Jan. 27, 2016), <https://www.nytimes.com/2016/06/28/us/supreme-court-texas-abortion.html?ref=todayspaper>.

73. 136 S. Ct. at 2309.

legislature when assessing the constitutionality of an abortion restriction and emphasized that such findings are *not* dispositive.<sup>74</sup> The undue burden standard should place “considerable weight” on the evidence and arguments presented in the judicial proceedings, in addition to giving appropriate deference to a legislature’s rationale in enacting the abortion restriction at issue.<sup>75</sup> The Court here held that both Texas laws at issue, one requiring doctors who perform abortions to have admitting privileges at a nearby hospital<sup>76</sup> and the other mandating that facilities used for abortions comply with strict surgical center requirements, had little or no ascertainable health benefits.<sup>77</sup> Furthermore, evidence in the record indicated that both laws placed a “substantial obstacle in the path of a woman seeking a pre-viability abortion.”<sup>78</sup> Without a sufficient justification for or benefit from these abortion restrictions, they were found to constitute an undue burden on the right to choose.<sup>79</sup>

The undue burden standard was affirmed again on June 29, 2020, in *June Medical Services LLC v. Russo*.<sup>80</sup> However, only a plurality of the Court supported the standard as it was construed in *Hellerstedt* only four years prior.<sup>81</sup> Chief Justice Roberts concurred in the judgment in *June Medical Services*, but adamantly opposed the benefit/burden balancing test adopted by the *Hellerstedt* majority and applied by the *June Medical Services* plurality.<sup>82</sup> The Chief Justice supported the more forgiving “substantial obstacle” test. Under *Casey*, “[l]aws that do not pose a substantial obstacle to abortion access are permissible so long as they are ‘reasonably related’ to

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74. *Id.* at 2310. In a 2007 case, the Court upheld the federal Partial Birth Abortion Ban, and in doing so acknowledged substantial deference to the legislature. *Gonzalez v. Carhart*, 550 U.S. 124, 163-64. The Court stated that it “has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.” *Id.* at 163.

75. *Hellerstedt*, 136 S. Ct. at 2310.

76. *Id.* at 2310.

77. *Id.* at 2318.

78. *Id.* at 2300, 2312, 2316. The number of facilities able to provide abortions in Texas would be cut in half with the enforcement of the admitting privileges law due to hospital requirements. *Id.* at 2312. Similarly, the District Court concluded based on evidentiary support, enforcement of the surgical center law would leave only seven or eight abortion providers in the state of Texas. *Id.* at 2316.

79. *Id.* at 2300.

80. 140 S. Ct. 2103, 2120 (plurality opinion).

81. *See id.* at 2112.

82. *See id.* at 2135-36 (Roberts, C.J., concurring).

a legitimate state interest.”<sup>83</sup> As such, the substantial obstacle test now arguably governs abortion cases.<sup>84</sup>

### III. THE HYDE AMENDMENT AND TITLE X: DEPRIVING PEOPLE OF A MEANINGFUL RIGHT TO CHOOSE

#### A. *Roe v. Wade Reactionaries and the Federal Defunding of Abortion*

In the 1970s, Congress counteracted the newly realized constitutional right to choose by legislating to make it as narrow as possible, while leaving unchallenged the “‘core’ constitutional mandate of *Roe*.”<sup>85</sup> In this context, Congress passed the Hyde Amendment to stop federal Medicaid funds from being used to subsidize abortion services.<sup>86</sup> Medicaid provides health coverage to millions of Americans, chiefly those living in poverty.<sup>87</sup> To participate in Medicaid, states must comply with the requirements of Title XIX of the Social Security Act.<sup>88</sup> The Hyde Amendment is not part of Title XIX, but Congress has attached it to the appropriations bill funding Medicaid every year since its introduction.<sup>89</sup> Therefore, it is a condition with which states must comply to receive Medicaid funding.<sup>90</sup>

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83. *Id.* at 2135 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion)).

84. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those [m]embers who concurred in the judgments on the narrowest grounds.’”); Erika Bachiochi, *The Chief Justice Restores the Casey Standard Even While Undermining Women’s Interests in Louisiana*, SCOTUSBLOG (June 30, 2020, 11:44 AM), <https://www.scotusblog.com/2020/06/symposium-the-chief-justice-restores-the-casey-standard-even-while-undermining-womens-interests-in-louisiana/>.

85. Garrow, *supra* note 57, at 841-42.

86. *Id.*

87. Andrew Villegas, *Medicaid Coverage Explained*, NPR (Oct. 5, 2009, 4:00 PM), <https://www.npr.org/2009/10/05/113339184/medicaid-coverage-explained>; see also MEDICAID.GOV, <https://www.medicaid.gov/medicaid/index.html> (last visited Nov. 10, 2020). Medicaid is administered on a state-by-state basis, but it is jointly funded by the federal government and the individual states. Villegas, *supra* note 87.

88. *Medicaid Administrative Claiming*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/financial-management/medicaid-administrative-claiming/index.html> (last visited Nov. 10, 2020).

89. ALINA SALGANICOFF ET AL., THE HYDE AMENDMENT AND COVERAGE FOR ABORTION SERVICES, HENRY J. KAISER FAM. FOUND. (Jan. 24, 2020), <http://files.kff.org/attachment/Issue-Brief-The-Hyde-Amendment-and-Coverage-for-Abortion-Services>.

90. *Id.*

When the Hyde Amendment took effect in 1977, Title X had already been in force for seven years.<sup>91</sup> Title X was signed into law in 1970, three years before *Roe v. Wade* was decided, and it already contained a provision prohibiting family planning funds from going to programs “where abortion is a method of family planning.”<sup>92</sup> In 1988, the Secretary of Health and Human Services (HHS) implemented what came to be known as the Title X “gag rule.”<sup>93</sup> The new rule required Title X grantees to refrain from abortion counseling or referrals, regardless of the patient’s wishes, and mandated that providers refer all pregnant patients for prenatal care and delivery.<sup>94</sup> Additionally, the rule established physical and financial separation requirements for grantees, meaning that any of the grantee’s programs that used private funding for abortion-related activities had to be completely severed from any Title X funded services.<sup>95</sup>

Most recently, HHS proposed a new abortion-funding restriction bearing on payment for abortions under the Patient Protection and Affordable Care Act (ACA).<sup>96</sup> The ACA already has a bar on use of its federal funds to pay for abortions that are not authorized under the Hyde Amendment.<sup>97</sup> States can choose to provide coverage for abortions and related services as long as they do not use federal funds.<sup>98</sup> However, any portion of the coverage premium related to “non-Hyde” abortions must be paid separately by the insured.<sup>99</sup> Neither the ACA nor subsequent HHS regulations issued mandatory directives on how insurers should comply with the requirement until 2018.<sup>100</sup>

HHS now requires that the enrollee pay two completely separate bills.<sup>101</sup> This new rule sparked concerns that it will result in confusion among patients at being asked to pay two different bills, which may lead to termination of

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91. See Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, § 1008, 84 Stat. 1504, 1508 (codified as amended at 42 U.S.C. § 300a-6 (1970)).

92. *Id.* The Secretary of Health and Human Services has the authority to create and implement regulations in furtherance of Title X. 42 U.S.C. §300(a).

93. *Title X ‘Gag Rule’ Is Formally Repealed*, 3 GUTTMACHER POL’Y REV. 13, 13 (Aug. 1, 2020), [https://www.guttmacher.org/sites/default/files/article\\_files/gr030412.pdf](https://www.guttmacher.org/sites/default/files/article_files/gr030412.pdf).

94. *Id.*

95. 42 C.F.R. § 59 (1988); *Title X ‘Gag Rule’ Is Formally Repealed*, *supra* note 93.

96. Patient Protection and Affordable Care Act; Exchange Program Integrity, 83 Fed. Reg. 56,015, 56,016, 56,021-24 (proposed Nov. 9, 2018) (codified as proposed at 45 C.F.R. pts. 155, 156 (2019)).

97. See 42 U.S.C. § 18023.

98. *Id.*

99. *Id.*

100. See *Planned Parenthood of Md. v. Azar*, No. CCB-20-00361, 2020 WL 3893241, at \*4 (D. Md. July 10, 2020), *appeal docketed*, No. 20-2006 (4th Cir. Sept. 18, 2020).

101. 45 C.F.R. § 156.280(e)(2)(ii)(B) (2020).

coverage and substantial cost to the insurers at having to overhaul their current systems.<sup>102</sup> In July 2020, a district court enjoined the enforcement of the rule, finding that it was “arbitrary and capricious.”<sup>103</sup> This regulation is just the latest action intended to further impede freedom of choice.

The Supreme Court heard challenges to two state abortion-funding restrictions in 1977. Unlike other abortion rights cases that the Court heard in the 1970s, which adhered to *Roe v. Wade* and were protective of the right to an abortion, *Beal v. Doe* and *Maher v. Roe* upheld restrictive abortion laws that prohibited government funding for abortions.<sup>104</sup> *Beal* and *Maher* laid the groundwork for subsequent cases addressing the constitutionality of the Hyde Amendment and Title X. The Supreme Court heard a challenge to the Hyde Amendment in 1980,<sup>105</sup> and to the 1988 Title X regulations in 1991,<sup>106</sup> which was the most recent abortion-funding case to come before the Court.<sup>107</sup>

In 1980, the Court held in *Harris v. McRae* that there was no statutory obligation for states to fund necessary abortions where Medicaid was barred from doing so, and, further that the Hyde Amendment did not violate the Constitution.<sup>108</sup> The Hyde Amendment was challenged on constitutional grounds as violating the First and Fifth Amendments.<sup>109</sup> Relying on *Maher*, decided in 1977, the Court reasoned that the Hyde Amendment “places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.”<sup>110</sup> The government may, if it chooses, encourage childbirth over abortion by refusing to fund abortion through government-subsidized healthcare.<sup>111</sup> An issue here not present in *Maher* was that the Hyde Amendment withholds funding even for some medically necessary abortions.<sup>112</sup> However, the Court explained:

[R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to

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102. *Id.*

103. *Azar*, 2020 WL 3893241, at \*45.

104. See *Beal v. Doe*, 432 U.S. 438, 447 (1977); *Maher v. Roe*, 432 U.S. 464, 479 (1977).

105. *Harris v. McRae*, 448 U.S. 297, 300-01.

106. *Rust v. Sullivan*, 500 U.S. 173, 177-78.

107. See Jennifer Davidson, *Lessons from Trinity Lutheran: An Entity Based Approach to Unconstitutional Conditions and Abortion Defunding Laws*, 43 N.Y.U. REV. L. & SOC. CHANGE 581, 590-91 (2016).

108. *Harris*, 448 U.S. at 326-27.

109. *Id.* at 301.

110. *Id.* at 315.

111. *Id.*

112. *Id.*

the financial resources to avail herself of the full range of protected choices.<sup>113</sup>

Because the government is not itself responsible for what the Court considers the true obstacle for Medicaid recipients seeking abortion, indigency, it has no obligation to remove that obstacle.<sup>114</sup> The government may not place an obstacle of its own creation in the path of abortion access.<sup>115</sup> But here, the Court reasoned that “the Hyde Amendment leaves an indigent woman with at least the same range of choice” as if Medicaid simply did not exist.<sup>116</sup> Because the Hyde Amendment places no government created obstacle in the path to an abortion, the Court does not consider it an infringement on any right and therefore it is subject only to rational basis review.<sup>117</sup>

The Supreme Court came to the same conclusions in *Rust v. Sullivan* in 1991<sup>118</sup> as it had in *Maher, Harris, and Webster v. Reproductive Health Services*,<sup>119</sup> a case the Court decided in 1989. This time, Title X was challenged before the Court after the gag rule on abortion counselling and referrals, and the physical and financial separation requirements were implemented in 1988.<sup>120</sup> The Court expanded upon its line of abortion-funding precedent by upholding the Title X funding prohibitions, which in some ways were more attenuated from abortion than the funding restrictions at issue in previous cases.<sup>121</sup> The majority explained that the government’s authority to selectively fund activities it believes to be in the public interest is derived from *Maher* and *Harris*.<sup>122</sup> Furthermore, because the Due Process Clause “generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests

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113. *Id.* at 316.

114. *Id.*

115. *Id.*

116. *Id.* at 317.

117. As long as the regulation is “rationally related to a legitimate government objective,” it is valid. *Id.* at 324.

118. 500 U.S. 173.

119. 492 U.S. 490, 507 (upholding a Missouri law that prohibited public employees from performing abortions in almost all cases and prohibited public facilities being used for abortions).

120. 500 U.S. at 178-81.

121. *Id.* at 203. The Court found that the Title X regulations did not violate the First Amendment and were not an unconstitutional condition on receiving Title X funding. *Id.* at 194, 196-98. The respondents argued that the new Title X regulations “condition[ed] the receipt of a benefit . . . on the relinquishment of a constitutional right,” which, in that case, was freedom of speech. *Id.* at 196. The Court found that the Government was only ensuring that funds be used in compliance with their authorized purposes, so, it reasoned, there was no benefit to be received at the expense of a constitutional right. *Id.* at 196-98.

122. *Id.* at 193.

of which the government itself may not deprive the individual,” the regulations did not violate the Fifth Amendment.<sup>123</sup>

In *Rust*, the petitioners challenged the facial validity of the Title X regulations.<sup>124</sup> To facially invalidate an entire rule, the Court stated, “the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.”<sup>125</sup> However, both *Casey* and later *Whole Woman’s Health* explained that the law must “impose a substantial obstacle” in a large fraction of cases to which the law is relevant.<sup>126</sup> In the case of the Hyde Amendment or Title X, it would be necessary then to ask whether a large fraction of the people to whom those restrictions are relevant face a substantial obstacle as a result.<sup>127</sup>

### B. *The Chilling Reality of The Hyde Amendment and Title X*

“[F]or women eligible for Medicaid -- poor women -- denial of a Medicaid-funded abortion is equivalent to denial of a legal abortion altogether.”<sup>128</sup> Justice Marshall uttered these words in his dissent in *Harris v. McRae* forty years ago. He sat on the Court for all of the abortion defunding challenges that came before it, and in every case he was on the dissenting side.<sup>129</sup> In *Rust v. Sullivan*, Justice Marshall joined Justice Blackmun in dissent, responding to the majority’s assertion that poor individuals lack access to abortion services because they live in poverty and not as a result of Title X and other government subsidized healthcare programs.<sup>130</sup> Justice Blackmun wrote, “For these women, the Government will have obliterated the freedom to choose as surely as if it had banned abortions outright. The denial of this freedom is not a consequence of poverty, but of the Government’s ill-intentioned distortion of information it

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123. *Id.* at 201 (quoting *Webster*, 492 U.S. at 507).

124. *Id.* at 183.

125. *Id.* (alterations in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

126. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016).

127. *See id.*

128. *Harris v. McRae*, 448 U.S. 297, 338 (1980) (Marshall, J., dissenting).

129. *Rust*, 500 U.S. at 203 (Marshall, J., dissenting); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 537 (1989) (Marshall, J., dissenting); *Harris*, 448 U.S. at 337 (Marshall, J., dissenting); *Beal v. Doe*, 432 U.S. 438, 454 (1977) (Marshall, J., dissenting); *Maher v. Roe*, 432 U.S. 464, 482 (1977) (Marshall, J., dissenting).

130. *Rust*, 500 U.S. at 203.

has chosen to provide.”<sup>131</sup> Even though these words were written decades ago, they ring just as true today.

Medicaid recipients do indeed lack access to abortions because they are poor, but by providing government-subsidized healthcare, the government ensures that these individuals rely on those government-subsidized programs. Further, many of the clinics that *do* provide free or more affordable healthcare services, including abortion, rely on federal funding through grant programs like Title X.<sup>132</sup> Title X grantees are likely to be faced with a choice either to comply with the conditions of funding or to leave the program and forgo funding as a result.<sup>133</sup> In either scenario the new Title X restrictions are likely to make it more challenging for these clinics to fully operate.<sup>134</sup>

Today, millions of people have minimal or no abortion access at all because of their financial circumstances.<sup>135</sup> The struggle for affordable, accessible healthcare has been well-documented in the United States.<sup>136</sup> Medicaid and Title X provide access to care for millions of people who would ordinarily be left out in the cold.<sup>137</sup> However, these programs provide access to abortion and abortion-related services only in the most limited circumstances.<sup>138</sup>

The Supreme Court’s jurisprudence protecting abortion rights excludes those who rely on these government services, and consequently, abortion can only be realized as an unimpeded right for people with access to private

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131. *Id.* at 217 (Blackmun, J., dissenting).

132. Karen Pinchin, *With Planned Parenthood out of Title X, Clinics Face “A Terrible Choice”*, PBS FRONTLINE (Aug. 27, 2019), <https://www.pbs.org/wgbh/frontline/article/with-planned-parenthood-out-of-title-x-clinics-face-a-terrible-choice/>.

133. Ruth Dawson, *Trump Administration’s Domestic Gag Rule Has Slashed the Title X Network’s Capacity by Half*, GUTTMACHER INST. (Feb. 26, 2020), <https://www.guttmacher.org/article/2020/02/trump-administrations-domestic-gag-rule-has-slashed-title-x-networks-capacity-half>.

134. See Nicole Acevedo, *Nearly 900 Women’s Health Clinics Have Lost Federal Funding Over Gag Rule*, NBC NEWS (Oct. 22, 2019, 10:54 AM), <https://www.nbcnews.com/news/latino/nearly-900-women-s-health-clinics-have-lost-federal-funding-n1069591>.

135. Gretchen Borchelt, ABA Section C.R. & Soc. Just., *The Impact Poverty Has on Women’s Health*, 43 HUM. RTS. 16, 18-19 (2018).

136. See *id.* at 16-17; Susan Gluss, *Struggle for Americans to Get Healthcare Is a National Disgrace*, S.F. CHRON. (June 26, 2019, 10:42 AM), <https://www.sfchronicle.com/opinion/article/Struggle-for-Americans-to-get-health-care-is-a-14026624.php>; Noam N. Levey, *American’s Struggles with Medical Bills Are a Foreign Concept in Other Countries*, L.A. TIMES (Sept. 12, 2019, 5:00 AM), <https://www.latimes.com/politics/story/2019-09-11/american-struggle-insurance-deductibles-unique>.

137. Rachel Benson Gold, *Stronger Together: Medicaid, Title X Bring Different Strengths to Family Planning Effort*, 10 GUTTMACHER POL’Y REV. 13, 13 (2007).

138. *Regulating Insurance Coverage of Abortions*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/regulating-insurance-coverage-abortion> (Nov. 1, 2020).



health insurance.<sup>139</sup> People across the country face what amount to concrete roadblocks to abortion services when they rely on government-subsidized healthcare programs like Title X and Medicaid. These two programs are very different, but they are similar in two key ways: first, the main objective of both is to provide low-income individuals with healthcare,<sup>140</sup> and second, access to abortion and abortion services is severely restricted by each of them.<sup>141</sup>

Patients living in poverty are more likely than others to have to drive more than an hour to reach their closest abortion provider.<sup>142</sup> Many of them live in states where timing requirements, such as waiting periods, for receiving an abortion mean they will either have to stay overnight or make two trips.<sup>143</sup> Other complications include lack of transportation, either because they do not have a car or because they cannot afford public transportation.<sup>144</sup> Taking the time to get an abortion also may mean taking unpaid time off work.<sup>145</sup> And ultimately, getting an abortion at all is predicated on funding.<sup>146</sup> Some states use their state Medicaid dollars (not federal funding) to cover some abortions.<sup>147</sup> Some individuals in need of an abortion rely on loans from family or friends.<sup>148</sup> And many are forced to pay out of pocket entirely.<sup>149</sup> As of July 2019, there were six states with only one abortion clinic remaining.<sup>150</sup> This will no doubt be compounded by the loss of Title X funding for at least 900 clinics, which are no longer grantees due to the new regulations.<sup>151</sup>

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139. Many states actually place limits even on private insurance abortion coverage. So essentially, abortion is only consistently and readily accessible for women who, even absent insurance, can afford an abortion out of pocket. *Id.*

140. Benson Gold, *supra* note 137, at 13.

141. *See supra* Part II.C.

142. Dan Keating, et al., *Abortion Access Is More Difficult for Women in Poverty*, WASH. POST (July 10, 2019), <https://www.washingtonpost.com/national/2019/07/10/abortion-access-is-more-difficult-women-poverty/?arc404=true>.

143. *Id.*

144. *Id.*

145. *Id.*

146. *See How Do Women Pay for Abortions?*, GUTTMACHER INST. (2003), <https://www.guttmacher.org/sites/default/files/graphics/infographics/HowDoWomenPay-740.pdf>.

147. *Id.*

148. Sabrina Tavernise, *Why Women Getting Abortions Now Are More Likely to Be Poor*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2019/07/09/us/abortion-access-inequality.html>.

149. *Id.*

150. *Id.*

151. Acevedo, *supra* note 134; *see also* Dawson, *supra* note 133.

#### IV. JUDICIAL SCRUTINY FOR ABORTION-FUNDING CASES: MISSING IN ACTION

##### A. *If We Could Turn Back Time: Strict Scrutiny to Strike Abortion Defunding Laws*

When a law implicates a fundamental right, it typically triggers scrutiny in a court's analysis of whether the law at issue is constitutional.<sup>152</sup> For almost twenty years, laws restricting the right to an abortion were analyzed using strict scrutiny.<sup>153</sup> That changed after *Casey* in 1992, but in the two decades it was the applicable level of scrutiny, the Supreme Court never applied it, or seemingly any other type of heightened scrutiny or test, to restrictions on abortion funding.<sup>154</sup>

At the time *Harris v. McRae* was decided, *Roe v. Wade* was still the governing precedent, and the Court made clear in that case that the governmental interest in fetal life was not compelling until the point of viability.<sup>155</sup> Under *Roe v. Wade*, the state could prescribe whatever restrictions it wished using fetal life as the justification, but only after the point of viability.<sup>156</sup> Up until that point, the patient together with their doctor was free to decide whether to terminate the pregnancy without government interference.<sup>157</sup>

Strict scrutiny is no longer the controlling analysis for abortion restrictions. Instead, the Supreme Court has leached power from abortion rights through the line of abortion-funding cases and by implementing the undue burden test in *Planned Parenthood v. Casey*. When *Harris v. McRae* and *Rust v. Sullivan* were decided, the precedent for most abortion regulation cases was strict scrutiny. However, strict scrutiny was never once applied in any defunding cases. If strict scrutiny had been the standard of judicial review used to evaluate the constitutionality of funding restrictions, it is hard to believe the Supreme Court would have upheld the laws at issue.

A law will only be sustained under strict scrutiny if it is necessary to achieve a compelling government purpose.<sup>158</sup> Although not expressly declared in *Roe v. Wade*, the Court explained that “[w]here certain ‘fundamental rights’ are involved, the Court has held that regulations limiting

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152. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 856 (6th ed. 2019).

153. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (plurality opinion).

154. See Chemerinsky & Goodwin, *supra* note 42, at 1238-40.

155. See *Roe v. Wade*, 410 U.S. 113, 163 (1973).

156. *Id.* at 163-64.

157. See *id.* at 163.

158. CHEMERINSKY, *supra* note 152, at 727.

these rights may be justified only by a ‘compelling state interest,’ and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”<sup>159</sup> Later cases then applied strict scrutiny and struck down restrictive abortion laws.<sup>160</sup>

A prime example of the Court’s application of strict scrutiny to abortion restrictions can be found in *City of Akron v. Akron Center for Reproductive Health*. The Court in *City of Akron* reiterated that “restrictive state regulation of the right to choose abortion . . . must be supported by a compelling state interest.”<sup>161</sup> The two interests that the Court recognized as “compelling” were the potentiality of human life at viability<sup>162</sup> and the health of the pregnant person and related maintenance of medical standards at the end of the first trimester of pregnancy.<sup>163</sup>

There were several laws at issue in *City of Akron*. The Court struck down a parental notification requirement for unmarried minors seeking abortions, a requirement that the doctor make certain statements to the patient to ensure informed consent, and a twenty-four hour waiting period between consent and performance of to the procedure.<sup>164</sup> The parental consent requirement was overturned by the Court because it did not provide a judicial bypass that the minor could seek in the event consent was denied.<sup>165</sup> The Court reasoned that the informed consent requirement went “beyond permissible limits” and that the compelled information disclosures were designed to impede consent rather than inform the patient.<sup>166</sup> Finally, the twenty-four hour waiting period was deemed “arbitrary and inflexible,” and the Court found no evidence of any benefits.<sup>167</sup>

The type of analysis used in *City of Akron*, if applied to the Hyde Amendment and Title X, would surely result in both laws being struck down as unconstitutional. Were the Court confronted with another abortion defunding case now or in the future, a strict scrutiny analysis would be the most foolproof means of striking it down. Simply put, there is no compelling

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159. See *Roe*, 410 U.S. at 155 (citations omitted).

160. See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759-60, 772 (1986), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992) (plurality opinion); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 427 (1983), *overruled by* *Casey*, 505 U.S. at 882.

161. 462 U.S. at 427.

162. *Id.* at 428.

163. *Id.* at 428-29.

164. *Id.* at 422-24, 452.

165. *Id.* at 439.

166. *Id.* at 444. The required information included a speculative description of the unborn child and the assertion that life begins at the moment of conception. *Id.*

167. *Id.* at 450-51.

state interest as it is defined in *City of Akron* or even in *Roe v. Wade* to justify either the Hyde Amendment or Title X.

The right to choose an abortion, at least before fetal viability, is still considered fundamental. Without a compelling governmental interest to justify regulations on a fundamental right, such as abortion, the regulation must fail as in *City of Akron*. The fact that *Roe v. Wade* cautioned that the fundamental right to an abortion is not absolute<sup>168</sup> was not meant to lead to an open season on the right to choose.<sup>169</sup> Had the Court adhered to precedent in the defunding cases, it would have likely found that the Hyde Amendment and Title X do infringe upon the constitutional right to choose,<sup>170</sup> although it may have found that infringement permissible at least in part if it rigidly obeyed the principle that the government has no affirmative obligation to fund abortion as part of its self-created healthcare programs.

*Hyde Amendment/Harris v. McRae*. If the Hyde Amendment had been analyzed through the lens of strict scrutiny, it never would have passed muster for lack of a compelling state interest. Representative Henry Hyde, speaking on the floor of the House of Representative in January 1978, stated that “the amendment . . . sought to protect preborn human life insofar as [M]edicaid abortions are concerned.”<sup>171</sup>

The rendering of the Hyde Amendment challenged in *Harris v. McRae* prohibited Medicaid funding for abortions, “except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.”<sup>172</sup> As generous as this exception may have seemed to Representative Hyde,<sup>173</sup> it does not pass the strict scrutiny test applied in abortion cases during that time. The 2020 version of the Hyde Amendment is almost identical, although it now includes an exception for when the health, not just the life, of the parent is at risk.<sup>174</sup>

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168. 410 U.S. 113, 154 (1973).

169. *See id.* at 155.

170. *See* Alyssa Engstrom, Note, *The Hyde Amendment: Perpetuating Injustice and Discrimination After Thirty-Nine Years*, 25 S. CAL. INTERDISC. L.J. 451, 469 (2016).

171. 124 CONG. REC. 1476 (1978) (statement of Rep. Henry J. Hyde)

172. H.R.J. Res. 440, 96th Cong. § 109 (1979) (enacted); *see also id.* § 102, 109 (making further continuing appropriations for the fiscal year 1980 and other purposes and placing restrictions on use of federal funds for abortions).

173. 124 CONG. REC. 1476 (1978) (statement of Rep. Henry J. Hyde) (expressing frustration that the new abortion restrictions are the “weakest regulations possible, inviting massive fraud and providing no protection whatever to prenatal life”).

174. H.R. 2740, 116th Cong. §§ 506, 507(a)(1)-(2) (2019) (as passed by the House of Representatives, June 19, 2019).

The Hyde Amendment does not, and never has, treated pre-viability abortions any differently than later term abortions.<sup>175</sup> The bar on abortion funding for Medicaid recipients applies throughout pregnancy, and because the interest of “preborn life” was only considered compelling at the point of viability,<sup>176</sup> the Hyde Amendment would never have met the heightened scrutiny threshold.<sup>177</sup>

If nothing else, neither the current nor prior iterations of the Hyde Amendment are narrowly tailored because they include prohibitions on abortion funding even during the first trimester. First trimester abortions are exceptionally safe.<sup>178</sup> Moreover, there is typically no fetal viability before twenty weeks, which is well into the second trimester of pregnancy.<sup>179</sup> Therefore, the Hyde Amendment should have been declared unconstitutional under strict scrutiny during the first trimester using the same set of standards the Court used for all other abortion related cases.

In *Harris*, the Court explained that its decision in that case and its earlier decision in *Maher* did not signal a “retreat” from the right to choose, which is embodied in the Due Process Clause of the Fourteenth Amendment.<sup>180</sup> However, the Court explained, “[P]rotecting a woman’s freedom of choice[] did not translate into a constitutional obligation . . . to subsidize abortions.”<sup>181</sup> Such restrictions on government funding for abortion were considered “state encouragement of an alternative activity consonant with legislative policy” rather than “direct state interference.”<sup>182</sup>

This conclusion turns a blind eye to the realities of poverty and government-subsidized healthcare. If there were genuine alternatives to government-subsidized healthcare for those who do not have access to private health insurance, individuals with public health coverage under the existing insurance infrastructure may not even remain insured as such if there were other options available to them. But the fact is, while the government truly has no obligation to fund healthcare, it made the choice to do so through

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175. *See id.*

176. *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

177. *See Engstrom, supra* note 170, at 465-66.

178. *Induced Abortions*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/patient-resources/faqs/special-procedures/induced-abortion> (Apr. 2018); *see also June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2114-15 (2020) (plurality opinion) (listing findings of the district court showing that abortions are generally very safe).

179. Michelle Ye Hee Lee, *Setting the Record Straight on Measuring Fetal Age and the ‘20 Week Abortion’*, WASH. POST (May 26, 2015, 12:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2015/05/26/setting-the-record-straight-on-measuring-fetal-age-and-the-20-week-abortion/>.

180. 448 U.S. 297, 314 (1980).

181. *Id.* at 315.

182. *Id.*

insurance and grant programs. And while there is no affirmative obligation to provide care through Medicaid, once it was created, the government did not then have carte blanche to violate the Constitution by substantially or entirely impeding abortion access for millions of Medicaid recipients.

The essence of the Court's reasoning is that the government did not create the obstacle to abortion, and therefore the government is not impeding the right.<sup>183</sup> But the fact is, the government *did* create this particular obstacle. If government-subsidized healthcare never existed, there is no telling what abortion access would have been like post-*Roe*. It is possible other services and points of access would have been created that were not reliant on government funding if *Roe* had been decided before Medicaid existed. If the government established Medicaid but the Hyde Amendment did not exist, Medicaid recipients would have financial access to abortion. The only reason they do not is *because* of the Hyde Amendment, for which Congress is responsible. If Congress had chosen to abstain entirely from funding healthcare, no such funding restrictions would have been so zealously enacted because there would have been nothing to restrict.

*Title X/Rust v. Sullivan*. The constitutional issues with Title X are slightly more complicated than those implicit in the Hyde Amendment, but Title X would, nonetheless, also fail strict scrutiny. Unlike the Hyde Amendment, Title X does not provide health insurance to individuals. Instead, Title X provides federal family planning grants to programs that apply and are found to be eligible.<sup>184</sup> The mere fact that, from the beginning, Title X has prohibited funds from going to programs that use abortion as a method of family planning,<sup>185</sup> does not infringe on the right to choose. Title X's violation of that right is more attenuated.

First in 1988, and again starting in 2019, the Secretary for the Department of Health and Human Services implemented rules, which promulgate a strict interpretation of the Title X statute.<sup>186</sup> The rule in effect now provides that Title X grantees must be physically and financially separate from "activities that fall outside the program's scope," meaning that if any part of the facility provides abortion services, it must now be completely separate from Title X activities.<sup>187</sup> Title X providers are also now prohibited from referring patients to outside medical care for the purpose of

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183. *Id.* at 316-17.

184. 42 U.S.C. § 300a.

185. *Id.* § 300a-6.

186. Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714, 7725 (Mar. 4, 2019) (codified at 42 C.F.R. § 59). The current rule is only slightly more relaxed than the 1988 rule. See 42 C.F.R. § 59 (1988).

187. Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. at 7715.

an abortion, but they are allowed to provide non-directive pregnancy counseling, which may or may not include information about abortion.<sup>188</sup>

Consequences of the new interpretation of Title X are still unknown because it only took effect in the summer of 2019.<sup>189</sup> What is known is that multiple Title X grantees, who have relied on Title X funding grants for decades to enhance their capacity to provide services mainly for patients living in poverty, have now left the program rather than be forced to comply with the regulations and stop providing critical health care.<sup>190</sup> While it was their choice to leave, they were essentially forced to do so because the restrictive conditions placed on funding would have significantly curbed their ability to provide medical services on which their patients relied.<sup>191</sup>

Leaving Title X also leaves these providers with far less funding for medical services unrelated to abortions like breast cancer screenings.<sup>192</sup> Some former grantees may have to start charging their low-income patients for health care, and as time goes on, it will be more challenging to provide for the number of patients reliant on these facilities.<sup>193</sup> Planned Parenthood announced in August 2019 that it would be leaving Title X rather than complying with the “unethical gag rule.”<sup>194</sup> While it was part of the program, Planned Parenthood served forty percent of Title X patients nationwide.<sup>195</sup>

The 1988 version of the Title X rule was upheld by the Supreme Court in 1991,<sup>196</sup> and it was even more stringent than the rule in effect today. The Court in *Rust v. Sullivan* also did not subject the rule to strict scrutiny.<sup>197</sup> However, it is clear here that there was and still is no valid compelling state interest that justifies regulation of this degree. The Department of Health and Human Services published the final 1988 rule in the Federal Register and stated that “[t]he limitations on project involvement with abortion in the rules below are intended to convey to the public the Department’s concern for the

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188. 42 C.F.R. §§ 59.5(a)(5), 59.8(a)(3).

189. See Brittni Frederiksen et al., *Data Note: Impact of New Title X Regulations on Network Participation*, HENRY J. KAISER FAM. FOUND. (Sept. 20, 2019) <https://www.kff.org/womens-health-policy/issue-brief/data-note-impact-of-new-title-x-regulations-on-network-participation/>.

190. *Id.*

191. *Id.*

192. Elizabeth Chuck, *After Withdrawing from Title X, Reproductive Health Clinics Scramble for Cash*, NBC NEWS (Aug. 21, 2019, 6:47 AM), <https://www.nbcnews.com/news/us-news/after-withdrawing-title-x-reproductive-health-clinics-scramble-cash-n1044431>.

193. *Id.*

194. *Id.*

195. *Id.*

196. 500 U.S. 173.

197. See *id.* at 193.

well-being of both mothers and their unborn children.<sup>198</sup> Neither the well-being of the parent nor that of the unborn child was a compelling justification under this analysis until after the point of viability, especially when an actual abortion is not even an option through Title X grants.<sup>199</sup> The prohibition on abortion referrals and the required physical and financial separation demonstrate that the government will not stop at regulations on abortion procedures directly, but will attack the periphery as well. These attacks bear directly on abortion access and represent a cunning and more subtle, but no less effective, means of infringement upon the right to choose

### B. *An Equal Application of the Undue Burden Test*

The law is not static nor is the Supreme Court. Precedents *can* and *do* change.<sup>200</sup> The Supreme Court has long followed the principle of “stare decisis,” meaning “to stand by things decided.”<sup>201</sup> In his concurrence in *June Medical Services*, Chief Justice Roberts heavily relied on adherence to stare decisis as his reason for joining the majority in striking down the abortion restrictions at issue.<sup>202</sup> However, the precedent in that case was only four years old.<sup>203</sup>

Stare decisis is not an “inexorable command.”<sup>204</sup> There are cases which come before the Court where adherence to stare decisis is no longer the just choice.<sup>205</sup> The Court makes “prudential and pragmatic” considerations, including whether the rule has proven workable; whether it has come to be so relied upon that overruling it would cause severe hardships and inequities; whether related principles of law have significantly changed; and whether the facts have changed or are viewed so differently the precedent no longer makes sense.<sup>206</sup>

It is past time for the Supreme Court to reconsider its abortion-funding precedent, first developed in the 1970s, but silent since the early 1990s. The Court now has the opportunity to fairly address the constitutionality of such

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198. Statutory Prohibition on Use of Appropriated Funds in Programs When Abortion Is a Method of Family Planning, 53 Fed. Reg. 2817, 2944 (Feb. 2, 1988).

199. *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

200. See *Lawrence v. Texas*, 539 U.S. 558 at 564, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-495 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

201. *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) (plurality opinion) (citing *Stare Decisis*, BLACK’S LAW DICTIONARY 1696 (11th ed. 2019)).

202. *Id.*

203. *Id.* at 2133.

204. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020).

205. *Id.*

206. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992) (plurality opinion).



laws and reassess its holdings in *Harris* and *Rust* so there is real choice in the future. It would be futile to deny that the Court is highly unlikely, in its current iteration, to overturn that precedent,<sup>207</sup> but it is worth considering how it might be done.

If the Supreme Court had applied strict scrutiny to the abortion defunding cases when it was the prevailing level of scrutiny, millions of people around the country would likely feel more secure in their reproductive autonomy. However, the undue burden standard is now the proper test for evaluating whether the Hyde Amendment and Title X are constitutional.

In its precedent on abortion-funding laws, the Court has held fast to the concept that the government's general refusal to subsidize abortion does not qualify as an "obstacle in the path of a woman who chooses to terminate her pregnancy."<sup>208</sup> As discussed above, the obstacles posed by these regulations *are* created by the government because, but for the government established healthcare programs at issue, the government would not have placed restrictions on the use by said programs of funding for abortions.

The Hyde Amendment only allows a Medicaid recipient to have an abortion if that person's life or health are at risk, or if the pregnancy is the product of rape or incest.<sup>209</sup> A person who has health insurance through Medicaid is, by nature of Medicaid, poor.<sup>210</sup> That person cannot afford private health insurance, and if they cannot afford private health insurance, that means they most likely cannot afford an abortion outside of Medicaid.<sup>211</sup>

If a Medicaid patient needs an abortion, there are few options. They either must raise the funds to pay for it out of pocket and risk waiting too long for the procedure; go into financial distress paying out of pocket when they cannot afford it; subject themselves to an illegal, and potentially

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207. See *June Med. Servs. LLC*, 140 S. Ct. at 2103 (showing only four members of the Court are clearly supportive of abortion rights); *id.* at 2133-34 (Roberts, C.J., concurring in the judgment) (casting a fifth vote in favor of the outcome advanced by the plurality due to stare decisis after readily admitting he thinks the case establishing direct precedent was wrongly decided). Furthermore, the Court has now lost its fiercest abortion rights advocate, Justice Ruth Bader. Sarah McCammon, *Ginsburg's Death A 'Pivot Point' for Abortion Rights, Advocates Say*, NPR (Sept. 19, 2020 at 8:56 PM), <https://www.npr.org/sections/death-of-ruth-bader-ginsburg/2020/09/19/914864867/ginsburgs-death-a-pivot-point-for-abortion-rights-advocates-say>. She has been replaced by the conservative Justice Amy Coney Barrett, who has a much more adversarial stance on abortion. Lisa Mascaró, *Barrett Confirmed as Supreme Court Justice in Partisan Vote*, AP NEWS (Oct. 26, 2020), <https://apnews.com/article/82a02a618343c98b80ca2b6bf9eafe07>.

208. *Harris v. McRae*, 448 U.S. 297, 315 (1980).

209. H.R. 2740 116th Cong. §§ 506, 507(a)(1)-(2) (2019) (as passed by the House of Representatives, June 19, 2019).

210. *Harris*, 448 U.S. at 338 (Marshall, J., dissenting).

211. See *id.*

dangerous, abortion; or carry the child to term.<sup>212</sup> That is a clear infringement on the constitutional rights of any person who needs an abortion. There is no true choice among those options. Each possibility may be more of a hardship than the last,<sup>213</sup> and there is no doubt that a pregnant person on Medicaid faces substantial obstacles to an abortion amounting to an undue burden.

The harms from the stringent new Title X rule are speculative, but the rule still constitutes an undue burden. It impacts not only the patient's ability to receive counseling or referrals for an abortion, but the accessibility of an actual abortion.<sup>214</sup> The largest Title X grantee in the country was Planned Parenthood, which left Title X in August 2019 rather than comply with the new "unethical rules" it was required to abide by to stay in the program.<sup>215</sup> Planned Parenthood is also an abortion provider separate from its former Title X services.<sup>216</sup> However, withdrawing from Title X leaves less funding for the services that were within the scope of Title X.<sup>217</sup> The risk as a result is that there will be less funding in general and that this will restrict abortion access simply because there is not enough money to treat all patients without the influx of government funding.<sup>218</sup>

The danger of defunding laws lies not only in the act of barring funding for the actual abortion procedure, but also in the potential loss of essential government funding for other medical care offered by abortion providers.<sup>219</sup> Defunding proponents aim to further what they refer to as the fungibility principle, which is "the idea that money offered to any abortion provider for any service offsets other expenses, frees up funds for abortion, and thus constitutes money for abortion."<sup>220</sup> Title X is the latest victim of this idea. The many other ways in which the new Title X rules might constitute an undue burden are as yet unknown.

In *Harris v. McRae*, the Court explained that "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her

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212. *Id.* at 346 n.7.

213. See Engstrom, *supra* note 170, at 455-56 (discussing the many risks of carrying a pregnancy to term when abortion is not an option).

214. Chuck, *supra* note 192.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. Mary Ziegler, *Sexing Harris: The Law and Politics of the Movement to Defund Planned Parenthood*, 60 BUFF. L. REV. 701, 704 (2012).

220. *Id.*

indigency.”<sup>221</sup> The Court emphasized that point again a decade later in *Rust v. Sullivan* by quoting this exact language.<sup>222</sup>

In *California v. Azar*, a recent challenge to the new Title X rule, an en banc panel of the Ninth Circuit vacated any injunctions in place against the rule and held that it was constitutional in light of “Supreme Court approval of the 1988 regulations,”<sup>223</sup> despite having granted a motion for a stay on a preliminary injunction against the rule in the panel decision below.<sup>224</sup> In the initial order, the Ninth Circuit reiterated that the government does not have a duty to subsidize constitutionally protected activity and strictly adhered to the precedent of *Rust v. Sullivan*.<sup>225</sup> However, *Hellerstedt*’s undue burden standard was completely absent from the equation even though *Hellerstedt* was decided three years prior.<sup>226</sup> Moreover, the Fourth Circuit recently heard a similar case on the new Title X rules.<sup>227</sup> While that court actually upheld a permanent injunction on the implementation of the rules, it did so without applying the undue burden standard, but rather as a result of perceived statutory violations.<sup>228</sup> This serves as an example that a lower court, following in the decades-long lead of the Supreme Court, will not apply any heightened scrutiny to abortion funding restrictions, no matter how substantial of an obstacle to abortion they may pose.

Nowhere in *Hellerstedt* or *June Medical Services* is the undue burden test limited only to cases similar in nature.<sup>229</sup> Furthermore, no case has ever provided a reason that the undue burden standard should not apply when abortion-funding restrictions are being challenged.

There is no logical reason not to apply the same test to the Hyde Amendment and Title X that is used when other abortion restrictions are at issue. Ultimately, each of them has the same purpose and effect: to obstruct abortion access. Therefore, they should be treated in kind.

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221. 448 U.S. 297, 316 (1980).

222. 500 U.S. 173, 203 (1991) (quoting 448 U.S. at 316).

223. *California v. Azar*, 950 F.3d 1067, 1074 (2020) (en banc).

224. *California v. Azar*, 927 F.3d 1068, 1080-81 (9th Cir. 2019), *rev’d en banc*, 950 F.3d 1067 (9th Cir. 2020).

225. *Id.* at 1078.

226. *See id.* at 1075-81.

227. *Mayor of Baltimore v. Azar*, 973 F.3d 258, 266 (4th Cir. 2020).

228. *Mayor of Baltimore v. Azar*, 973 F.3d 258, 266 (4th Cir. 2020). It is important to note that the Fourth Circuit did not uphold the injunction using the undue burden standard because it demonstrates that even if this funding restriction has the potential to be struck down through other means, these same statutory considerations will not necessarily be applicable to all funding restrictions, whereas the undue burden standard would be.

229. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300-19 (2016); *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2112-32 (2020) (plurality opinion).

In light of the revelation in *Hellerstedt* that the courts should not be overly deferential towards the legislature,<sup>230</sup> the undue burden standard should be applied to abortion defunding laws. If courts give less deference to the legislature, there is more room for them to consider the actual benefits of funding restrictions rather than simply relying on the idea that a government has no obligation to provide funding for abortions. It may not lead to the desired result, but it would be a far more critical analysis of the benefits of such restrictions and the heavy burdens borne by those who face substantial obstacles to abortion access.

The recent development resulting from Chief Justice Roberts' concurrence in *June Medical Services* means that the Court will likely consider future abortion-related cases using only the substantial obstacle standard rather than the balancing test Justice Breyer announced in *Hellerstedt*.<sup>231</sup> Regardless, this narrow interpretation of the undue burden standard, which directs courts to uphold an abortion restriction if it does not pose a substantial obstacle to abortion access and is reasonably related to a legitimate state interest,<sup>232</sup> can still be applied to abortion-funding cases. Further, a challenge to such a law would likely be successful even under this standard. Funding restrictions *do* pose a substantial obstacle to abortion access. The trouble lies in the fact that defunding laws are not considered by the Court to be a substantial obstacle, not because they are not a significant hurdle in the path of abortion access, but because they were enacted to limit healthcare coverage that we, the people, were not entitled to in the first place.<sup>233</sup> And this issue is the stumbling block for every restriction on government funded abortions, regardless of the stringency of the analysis. Without an obstacle, there is no constitutional violation.

## V. CONCLUSION

At its heart, the right to an abortion is about privacy and bodily autonomy. It is irrelevant whether it is constricted by arbitrary medical regulations, intrusive consent requirements, futile waiting periods, or discriminatory funding prohibitions. These obstacles are created by the government and they damage the very underpinnings of the right to choose. Substantial government created obstacles to abortion access, especially earlier in pregnancy, are not the product of circumstance, and they are rarely

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230. 136 S. Ct. 2292, 2309 (2016).

231. See *supra* note 84 and accompanying text.

232. *June Med. Servs. LLC*, 140 S. Ct. at 2135 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion)).

233. See, e.g., *Harris v. McRae*, 448 U.S. 297, 317 (1980).

supported by science or factual considerations. Poverty is not a reason to deliberately deprive someone of their right to choose. The fact that Medicaid recipients and Title X patients are generally experiencing poverty and have no choice but to obtain medical care through those programs or go without does not mean that they lack abortion access through obstacles of their own creation. Rather, they were given access to healthcare by a government that then placed barrier after barrier before the only likely means these individuals have to obtaining a legal and safe abortion.

The right to choose has been fraught from the outset. No matter how persistent and innovative pro-choice activists and abortion rights lawyers remain, it is unimaginable to think that the Supreme Court, especially *this* Supreme Court, would alleviate the obstacles presented by government funding restrictions on abortion. Substantial obstacles will remain that way until the day the Supreme Court treats funding prohibitions like any other abortion regulation and applies the undue burden test to restrictions like the Hyde Amendment or Title X. Still, it is unfathomable that if the Court did apply the undue burden standard or any type of heightened scrutiny to a funding restriction, it would alter the line of precedent in any way. Not once between 1977 and 1991, when the first and last abortion defunding cases were decided, did the Court change direction on the issue. There is no reason to think they would do so now, especially in the face of extreme ideological polarization. The right to an abortion remains an illusion for many. It is something they know is protected by the Constitution, but to which they have no meaningful access. For them, the choice to have an abortion is really no choice at all.

