Nos. 12-1039 & 12-1159

IN THE

Supreme Court of the United States

PLANNED PARENTHOOD OF INDIANA, INC., ET AL.,
Cross-Petitioners,

v.

SECRETARY OF THE INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION,
IN HER OFFICIAL CAPACITY, ET AL.,
Cross-Respondents.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an Indiana statute that disqualifies abortion services providers from Medicaid subsidies in order to avoid taxpayer cross-subsidy of abortion impose an unconstitutional condition in violation of the Fourteenth Amendment to the United States Constitution?

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STATEMENT OF THE CASE

1. On May 10, 2011, the Governor of Indiana signed into law House Enrolled Act 1210, which prohibits entities that perform abortions (excepting hospitals or state-licensed ambulatory surgical centers) from receiving state contracts or grants. *See* HEA 1210, § 1 (codified at Ind. Code § 5-22-17-5.5(b)) (providing that "[a]n agency of the state may not . . . enter into a contract with [or] make a grant to[] any entity that performs abortions or maintains or operates a facility where abortions are performed that involves the expenditure of state funds or federal funds administered by the state").

The same day, Cross-Petitioners Planned Parenthood of Indiana, Inc., Michael King, M.D., Carla Cleary, C.N.M., Letitia Clemons, and Dejiona Jackson (by her guardian and next friend Jackie Grubbs) (collectively "Planned Parenthood") filed a complaint in the Southern District of Indiana against several state officials (the "State") under 42 U.S.C. § 1983. Planned Parenthood sought declaratory as well as preliminary and permanent injunctive relief against the State with regard to enforcement of this new qualification insofar as it precludes abortion providers from participating in both Medicaid and the Disease Intervention Services grant program (which funds activities related to screening and treating sexually transmitted diseases). *See* 42 U.S.C. § 247c.

Among other claims, Planned Parenthood asserted that HEA 1210 imposes an unconstitutional condition on abortion services providers by excluding them from both Medicaid and the DIS grants.

2. On June 24, 2011, the district court preliminarily enjoined enforcement of HEA 1210 Section 1 as applied to both Medicaid payments and Disease Intervention Services grants. Pet. App. 91a, 111a-112a. It did so on the grounds that the statutes governing these programs preclude states from excluding abortion providers. *Id.* Because the district court enjoined enforcement of HEA 1210 on statutory grounds, it did not reach the unconstitutional conditions question. *See* Pet. App. 60a.

The Seventh Circuit affirmed the injunction against the operation of HEA 1210 Section 1 only as applied to Planned Parenthood's Medicaid claims, holding that the Medicaid Act's provider-choice plan requirement precludes states from excluding abortion services providers. Pet. App. 32a, 51a. It reversed, however, the district court's injunction as applied to the DIS grants, 42 U.S.C. § 247c. Pet. App. 51a. First it held that, unlike with Medicaid, there was no statutory barrier to disqualifying abortion services providers from DIS grants. Pet. App. 36a. Second, it held that the State's exclusion of abortion providers from state grants and contracts does not contravene the constitutional rights of abortion services providers. Pet. App. 36a.

On the unconstitutional-conditions issue, the court observed that "Planned Parenthood does not argue that the loss of its block-grant funding imposes an undue burden—directly or indirectly—on a woman's right to obtain an abortion." Pet. App. 50a. Further, because "the government's refusal to subsidize abortion does not unduly burden a woman's right to obtain an abortion, then Indiana's ban on public funding of abortion providers—even for unrelated services—cannot *indirectly* burden a woman's right to obtain an abortion." Pet. App. 50a.

3. On February 20, 2013, the State filed a Petition for Writ of Certiorari. The Petition presents two questions: (1) Does 42 U.S.C. § 1396a(a)(23) create federal "rights" in Medicaid beneficiaries that may be privately enforced under 42 U.S.C. § 1983 by Medicaid beneficiaries and providers? and (2) Does a state deprive Medicaid beneficiaries of choice among qualified providers under Section 1396a(a)(23) by mandating that providers refrain from providing elective abortions as a condition of Medicaid eligibility?

Similarly unsatisfied by the Seventh Circuit's resolution of important issues in the case, Planned Parenthood has now submitted its own conditional cross-petition.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

While National Interest in Abortion-Provider-Exclusion Laws Supports Review, the Unconstitutional Conditions Argument Is Too Weak to Warrant Consideration by the Court

1. It is certainly true that the groundswell of national interest in disqualifying abortion providers from government contracts supports *both* the State's Petition and the Conditional Cross-Petition. *See* State Pet. at 39-43. The many states interested in preventing even indirect taxpayer subsidy of abortion services would benefit from a decision clearing up any plausible constitutional uncertainties. *See*, *e.g.*, Mary Ziegler, *Sexing Harris: The Law and Politics of the Movement to Defund Planned Parenthood*, 60 Buff. L. Rev. 701, 747 (2012) ("How will courts react to the new laws promoted by the [defunding] movement? There are no straightforward answers to these questions. What is clear, however, is the difference they will make to the future of the abortion debate."). Indeed, the unconstitutional conditions question has already arisen in several states. *See id.* at 729.

And national interest only continues to grow. On April 17, 2013, a bill that would have excluded abortion providers from government grants (excluding Medicaid) passed the Arkansas Senate and fell just one vote short of success in a House

Committee. John Lyon, *Arkansas Legislature: Bill to Halt Grants to Planned Parenthood Fails in House Committee*, Southwest Times Record, Apr. 17, 2013, http://swtimes.com/sections/news/politics/arkansas-legislature-bill-halt-grants-planned-parenthood-fails-house. Indeed, it is reasonable to infer from Planned Parenthood's pursuit of the unconstitutional-conditions issue that it remains concerned about national efforts to exclude abortion providers from government contracts.

Even so, the high national profile of the effort to exclude abortion providers from government contracts is insufficient to justify review of the Fourteenth Amendment issue. Planned Parenthood cites no circuit tensions, conflicts among state and federal courts, or doctrinal confusion or uncertainty. The best that it can do is allege—erroneously—that the decision below misapplied this Court's unconstitutional-conditions precedents, particularly *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). In short, Planned Parenthood's unconstitutional-conditions argument simply has not generated sufficient danger to state contract qualification rules to be worth the Court's attention. It is better addressed, if at all, on its own in another case, rather than as a third-tier issue in this one.

2. Certiorari on the unconstitutional-conditions issue is especially unneeded when Planned Parenthood's argument on the merits is so weak. Unlike the typical unconstitutional-conditions claim,

Planned Parenthood's theory does not arise from government restrictions on private advocacy or otherwise relate to First Amendment rights. *Cf. Planned Parenthood Ass'n of Hidalgo County Tex., Inc. v. Suehs*, 692 F.3d 343 (5th Cir. 2012); *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218 (2d Cir. 2011), *cert. granted*, 133 S. Ct. 928 (argued Apr. 22, 2013) (No. 12-10). Rather, it arises from the Fourteenth Amendment's "substantive due process" protections, and indeed would require the Court to recognize an entirely new liberty interest: a supposed right *to provide* abortions.

The Conditional Cross-Petition very carefully disguises the novelty of this claim. It refers generally in the question presented—and in much of the argument—to an undifferentiated "violation of the Fourteenth Amendment." Conditional Cross-Pet. at i, 1, 4, 7, 12. Not until page 11 does Planned Parenthood more precisely describe the Fourteenth Amendment right supposedly being burdened, and even then does so only in the most indirect terms: "protection from unconstitutional conditions applies with equal force to all who engage in constitutionally protected conduct, including those who provide abortion care." Conditional Cross-Pet. at 11.

The Court has never held, however, that providers or physicians have a constitutional right to perform abortions—or any medical procedure for that matter—independent of the rights of their

patients. In fact, the Court has even declined to determine that a physician has a "constitutional right[] to practice medicine." *Singleton v. Wulff*, 428 U.S. 106, 113 (1976) (plurality opinion) (citation and internal quotations omitted). To the contrary, it is clear that the State may regulate the ability of physicians to practice medicine, including with respect to abortions. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion); *see also Lambert v. Yellowley*, 272 U.S. 581, 596 (1926) ("[T]here is no right to practice medicine which is not subordinate to the police power of the states[.]").

Consequently, any right that a physician may have to perform an abortion is entirely derivative of, and no broader than, the rights of the patient. *See Casey*, 505 U.S. at 884 ("Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position."); *Harris v. McRae*, 448 U.S. 297, 318 n.21 (1980) ("[T]he constitutional entitlement of a physician who administers medical care to an indigent woman is no broader than that of his patient . . . .") (citing *Whalen v. Roe*, 429 U.S. 589, 604 & n.33 (1977)). As a result, physicians have standing to assert the right to abortion as a barrier to government regulation only to the extent that the governmental action allegedly "interfere[s] with the abortion decision[.]" *Singleton*, 428 U.S. at 118.

HEA 1210 does not affect a woman's right to an abortion—it merely ensures that taxpayers are not subsidizing abortion, even indirectly. It "places no obstacles absolute or otherwise in the pregnant woman's path to an abortion" because she "continues as before to be dependent on private sources for the service she desires." *Maher v. Roe*, 432 U.S. 464, 474 (1977) (upholding prohibitions on the use of Medicaid to pay for non-therapeutic abortions).

Furthermore, HEA 1210 does not prevent women from procuring abortions from other privately funded facilities, making this case analogous to the regulation against using public hospitals for abortions upheld in *Webster v. Reproductive Health Services*, 492 U.S. 490, 509-10, 522 (1989). There, the Court reasoned that Missouri's law prohibiting use of public facilities for abortions "leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all." *Id.* at 509. Here, similarly, Indiana's law leaves pregnant women seeking abortions with the same choices as if the State had chosen not to participate in Medicaid at all.

The Court in *Webster* speculated that the case "might [] be different if the State barred doctors who performed abortions in private facilities from the use of public facilities for any purpose." *Id.* at 510 n.8; Conditional Cross-Pet. at 11-12. There is a substantive difference between that hypothetical and HEA 1210, however. Prohibiting doctors who

perform abortions from using public facilities for non-abortion services would serve no purpose other than to punish the practice of abortion. By contrast, Indiana's statute disqualifies abortion clinics from government contracts not to punish doctors or clinics for performing abortions, but to prevent indirect taxpayer subsidy of abortion, such as by helping to finance personnel, capital resources, and general overhead that support both abortion and non-abortion practices. The *Webster* hypothetical does not admit of any similar legitimate public-interest concern, since it presumes all abortion procedures would take place in private facilities with no possibility of indirect subsidization.

Accordingly, the Seventh Circuit was correct when it held that "Indiana's ban on public funding of abortion providers—even for unrelated services—cannot *indirectly* burden a woman's right to obtain an abortion." Pet. App. 50a. This is true because "the government's refusal to subsidize abortion does not unduly burden a woman's right to obtain an abortion," end of story. *Id.*

Furthermore, if Planned Parenthood wants to continue to receive subsidies from government programs, it can do so through the simple expedient of separating its abortion services into a separate, yet affiliated, entity (so long as there is no cross-subsidy). In *Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458, 463 (8th Cir. 1999), the Eighth Circuit held that a

Missouri law resembling HEA 1210 did not impose an unconstitutional condition on receipt of Title X family-planning funds because recipients could continue "to exercise their constitutionally protected rights through independent affiliates." *Id.* at 463.

While such an allowance is not constitutionally required, its availability under HEA 1210 nevertheless reinforces the law's constitutionality. HEA 1210 provides that "[a]n agency of the state may not . . . enter into a contract with [or] make a grant to[] any entity that performs abortions or maintains or operates a facility where abortions are performed that involves the expenditure of state funds or federal funds administered by the state." Ind. Code § 5-22-17-5.5(b). Nothing in this text prohibits Planned Parenthood from remaining a state contractor or grantee if it establishes a financially independent affiliate that provides abortion services. Such an understanding of the law is consistent with legislative intent, which was to prevent governmental monies from indirectly funding abortions. Allowing a system of affiliation wherein cash flows are separate and clearly accounted for adequately resolves the legislature's concern.[1]

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[1] Indeed, prior to the district court's injunction in this matter, the Indiana Family and Social Services Administration issued a notice of proposed rulemaking announcing that HEA 1210's reference to "any entity that performs abortions or maintains or operates a facility where abortions are performed," Ind. Code § 5-22-17-5.5(b)(2), "does *not* include a separate affiliate of such

In sum, Planned Parenthood's unconstitutional-conditions claim is insufficiently substantial to justify Supreme Court review, notwithstanding the broad national interest in laws excluding abortion providers from government contracts and grants that supports granting the State's Petition.

CONCLUSION

The Conditional Cross-Petition should be denied.

Respectfully submitted,

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entity, if the entity does not benefit, even indirectly, from government contracts or grants awarded to the separate affiliate[.]" Pet. App. 121a (emphasis added). In light of the injunction issued by the district court, FSSA has taken no further action to promulgate such a rule, but the limits of the statutory text alone is enough to preclude disqualification of mere *affiliates* of abortion providers.