



Smith/Wicker Bill Represents Extreme Attack on Access to Abortion Care

On January 20, 2011, Rep. Chris Smith (R-NJ) reintroduced the deceptively titled No Taxpayer Funding for Abortion Act (H.R.3). The House of Representatives passed a revised version of this bill on May 4, 2011 by a vote of 251-175. Sen. Roger Wicker (R-MS) introduced a companion bill, S.906, the next day.

Far more sweeping in scope than its name implies, the Smith/Wicker legislation is not about public funding. Current law is clear: sadly, federal funding of abortion care is forbidden, except in very narrow circumstances. Moreover, contrary to what anti-choice lawmakers claim, a federal appeals court recently confirmed that no federal dollars may be used to pay for abortion services under the Patient Protection and Affordable Care Act (PPACA). “The express language of the PPACA does *not* provide for tax-payer funded abortion,” the court wrote. “That is a fact, and it is clear on its face.”¹

Instead, the Smith/Wicker bill outlines a radical new anti-choice attack on abortion access that puts women’s health at risk. Beyond permanently blocking low-income women’s, civil servants’, and military women’s access to abortion care, this proposal would deny tax credits to any small business that provides comprehensive health coverage to its employees; impose the core provision of the failed Stupak-Pitts abortion-coverage ban on the new health system; permanently codify the D.C. abortion ban; and jeopardize the availability of private abortion coverage nationwide.

Coming on the heels of a year of debate over health-care reform during which anti-choice lawmakers claimed they were “merely” trying to ban federal funding for abortion, this bill exposes that their view of “public funding” bears no resemblance to reality. In an unprecedented departure from current law, the Smith/Wicker legislation seeks to define public funding as falsely including *private* money that the government has decided not to tax – a politically driven fiction that is not supported by existing law.² The Smith/Wicker bill would extend unprecedented limitations on abortion access to a much larger share of the population than any current law and impose sweeping changes to tax policy.

The legislation would:

- **Force millions of small businesses to pay taxes on their health-insurance benefits if their plan includes abortion coverage.**

The Smith/Wicker bill denies insurance-related tax credits to small businesses that choose private health plans that cover abortion care. (At present, 87 percent of private plans cover abortion services.³) As confirmed by non-partisan congressional tax experts and the Congressional Budget Office (CBO), the Smith/Wicker bill would compel small businesses to drop health-insurance plans that cover abortion care.⁴

Additionally, the legislation would shift onerous administrative costs onto the backs of small businesses by forcing small-business employers to spend hours poring over the fine print of health plans to determine which ones do and do not include abortion coverage – time that those employers could spend growing their businesses.

Curiously, the bill imposes no such restrictions or tax increases on large-business employers who offer their employees health plans that include abortion coverage. The only apparent explanation for this inconsistency is that the bill’s sponsors do not want their anti-abortion proposal to antagonize another political constituency – large corporate interests.

- **Potentially spur the Internal Revenue Service (IRS) to audit rape and incest survivors who seek abortion care.**

The Smith/Wicker bill eliminates medical-expense deductions for abortion care, with exceptions only for cases of rape, incest, or when the life of the woman is in danger. Tax experts confirm that the IRS would have to enforce this provision – and could audit any “questionable” benefit claims. As a result, a sexual-assault survivor could be forced to defend her abortion claim to *tax agents* if she were the victim of rape or incest. Furthermore, the burden of proof for demonstrating the validity of the claim would fall on her.

- **Implement the core provision of the failed Stupak-Pitts amendment.**

The Smith/Wicker bill effectively would end abortion coverage in state health-insurance exchanges and jeopardize the availability of private insurance coverage of abortion for all women. The legislation forbids subsidized individuals to purchase health plans that include abortion coverage, even if they use their own money to pay most of their premium cost. Experts have concluded that this restriction will have the effect of diminishing the availability of comprehensive reproductive-health coverage for all women obtaining insurance in the new state exchanges, subsidized and private-pay individuals alike.⁵ Moreover, the bill’s virtual ban on abortion coverage will affect not only state health-insurance exchanges, but can be expected to have a detrimental, industry-wide impact on abortion coverage in the entire private insurance market.⁶

According to health-policy experts, as insurance exchanges grow they will have a greater effect on the health-insurance industry as a whole, eventually becoming the de-facto standard for benefits packages.⁷ Over time, the Smith/Wicker bill’s requirements could cause the elimination of coverage of abortion services for most women – not just those who purchase plans through a health-insurance exchange. In fact, during a House Judiciary subcommittee hearing on H.R.3, an anti-choice witness predicted this exact outcome, stating that “the new legislation, when combined with other existing laws, may provide a

‘tipping point’ where coverage without abortion becomes the usual norm for health insurance.”⁸

In addition, this extreme proposal would permanently deny low-income women access to abortion care by:

- **Permanently codifying the D.C. abortion ban**, robbing Washington, D.C.’s city council of its ability to use locally raised revenue to provide abortion care to the District’s low-income residents. Congress recently used the appropriations process to impose this unfair restriction on the District as part of the FY’11 continuing resolution passed in April 2011. If the Smith/Wicker bill is enacted, this ban will become permanent law, undermining the city’s right to self-rule and denying thousands of women their constitutional rights in our nation’s capital.
- **Recodifying the Hyde amendment** which bars low-income women’s access to abortion services except in extreme circumstances. (Currently, the Hyde amendment is renewed annually in the Labor, Health and Human Services, and Education appropriations bill.)
- **Recodifying the Helms amendment**, a policy that denies some of the world’s poorest women access to safe abortion care by prohibiting the use of U.S. funds to pay for abortion services in developing countries.

The bill also targets health-care access for the nation’s civil servants and military personnel by:

- **Permanently banning abortion coverage for federal employees** even though these workers pay a portion of their insurance premiums with their own private dollars.
- **Recodifying the ban on abortion care for women in military hospitals overseas**, a policy which a majority of members of the Senate Armed Services Committee voted to repeal last year.

Again, current law already unacceptably bans public funding for abortion care except in extremely narrow circumstances; regardless of one’s view of that policy, it is indisputably already the law of the land. Reiterating the abortion bans in permanent law adds insult to already deeply injurious policies. Moreover, these discriminatory bans require no bolstering: a CBO report on the H.R.3’s fiscal impact states that gains for the federal government would be negligible⁹ – confirming that no prohibited dollars are used to fund abortion services that fall outside of the exceptions provided for in the Hyde amendment.

Beyond attacking insurance coverage of abortion, refusal language in the Smith/Wicker bill:

- **Could put women’s lives at risk by failing explicitly to respect long standing law requiring hospitals to provide life-saving care.** Debate around this bill has raised

questions about whether the Smith/Wicker legislation stands in tension with the Emergency Medical Treatment and Labor Act (EMTALA), which requires hospitals to provide emergency abortion care to women who will die without it.

Shockingly, when offered an opportunity to vote for an amendment in committee that would have reiterated a woman's right to emergency abortion care if she will die without it, anti-choice House members refused and the amendment failed.¹⁰ This alarming development signaled that the bill could indeed create uncertainty about whether a woman facing death could receive abortion services under the federal EMTALA law. As one final, ironic note on this subject, even the anti-choice Catholic Health Association, which supports refusal clauses, does not elevate them over the obligation to provide life-saving emergency care.¹¹

Finally, until sponsors were forced to remove them after public outcry, the original version of H.R.3 had two additional extreme and mean-spirited provisions that would have made it more difficult for sexual-assault survivors to access abortion care. These provisions, which were dropped from H.R.3 and were not included in the Senate companion bill, S.906, would have:

- **Narrowed the already severely limited rape and incest exceptions in the Hyde amendment.** This restriction would have denied abortion coverage to survivors of statutory rape and any incest survivor 18 years of age or older. This draconian measure would have applied to all federal programs, affecting not only low-income women in Medicaid, but women in the military and all federal employees, as well.¹²
- **Allowed states to refuse coverage for abortion in all cases, even when a woman's life was in danger.** A provision of the original H.R.3 would have eliminated the narrow protections included in federal law which require state Medicaid programs to cover abortion when the pregnancy occurred because of rape or incest, or when the woman's life is jeopardized. This would have permitted states to deny Medicaid coverage for abortion in all cases.

In sum, the Smith/Wicker bill represents an extreme new anti-choice agenda that drastically alters the concept of "public funding." In trying to redefine this term falsely, this proposal not only does further injustice to low-income women, but also jeopardizes the ability of private citizens to use their own dollars to purchase abortion coverage in the new health system and levies harsh penalties on small businesses that choose comprehensive insurance coverage. Reasonable lawmakers, even those who may not agree with the pro-choice perspective on the issue of public funding for abortion, should recognize this bill for what it is: a radical departure from the already-unacceptable status quo.

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- ¹ *Susan B. Anthony List v. Driehaus*, F. Supp. 2d. (S.D. Ohio 2011).
- ² H.R. REP. NO. 112-38, at 44, 45 (2011). *See also* *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 675 (1970).
- ³ Adam Sonfield et. al., *U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates*, 2002, *Perspectives on Sexual Reproductive Health*, 36(2):72-79 (2004).
- ⁴ *Hearing on the Tax Related Provisions of H.R.3: Hearing Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways and Means*, 112th Cong. (2011) (oral testimony of Thomas A. Barthold, chief of staff of the Joint Committee on Taxation).
- ⁵ Sara Rosenbaum et. al., *An Analysis of the Implications of the Stupak/Pitts Amendment for Coverage of Medically Indicated Abortions*, at 1 (Nov. 16, 2009), at http://www.gwumc.edu/sphhs/departments/healthpolicy/dhp_publications/pub_uploads/dhpPublication_FED314C4-5056-9D20-3DBE77EF6ABF0FED.pdf (last visited Oct. 23, 2011).
- ⁶ Sara Rosenbaum et. al., *An Analysis of the Implications of the Stupak/Pitts Amendment for Coverage of Medically Indicated Abortions*, at 9 (Nov. 16, 2009), at http://www.gwumc.edu/sphhs/departments/healthpolicy/dhp_publications/pub_uploads/dhpPublication_FED314C4-5056-9D20-3DBE77EF6ABF0FED.pdf (last visited Oct. 23, 2011)..
- ⁷ Sara Rosenbaum et. al., *An Analysis of the Implications of the Stupak/Pitts Amendment for Coverage of Medically Indicated Abortions*, at 9 (Nov. 16, 2009), at http://www.gwumc.edu/sphhs/departments/healthpolicy/dhp_publications/pub_uploads/dhpPublication_FED314C4-5056-9D20-3DBE77EF6ABF0FED.pdf (last visited Oct. 23, 2011).
- ⁸ *No Taxpayer Funding for Abortion Act: Hearing Before the Subcomm. on Constitution of the H. Comm. on the Judiciary*, 112th Cong. (2011) (hereinafter “Constitution Subcomm. Hearing”) (oral testimony of Richard M. Doerflinger).
- ⁹ Congressional Budget Office, *Cost Estimate of H.R.3, No Taxpayer Funding for Abortion Act* (March 15, 2011) at <http://www.cbo.gov/ftpdocs/121xx/doc12105/hr3.doc.pdf> (last visited Oct. 23, 2011).
- ¹⁰ <http://judiciary.house.gov/hearings/pdf/Roll%20Call%20Vote%2011Chu%20Amdt%2012.pdf>;
<http://judiciary.house.gov/hearings/pdf/Roll%20Call%20Vote%2011Chu%20Amdt%2012%20TEXT.pdf>;
<http://judiciary.house.gov/hearings/pdf/3%203%2011%20HR%203%20Full%20Comm%20Markup.pdf>
p. 172
- ¹¹ Letter from Sr. Carol Keehan, President and CEO, Catholic Health Association of the United States, to Joseph R. Pitts, Chairman, House Energy and Commerce Subcommittee on Health, U.S. House of Representatives (Feb. 9, 2011) (submitted for the record of the Constitution Subcomm. Hearing, *supra* note 7).
- ¹² Report language from the revised version of H.R.3 makes clear that it remains the bill’s sponsors’ intent to deny abortion coverage to survivors of statutory rape. “Reverting to the original Hyde Amendment language should not change longstanding policy. H.R. 3, with the Hyde Amendment language, will still appropriately *not* allow the Federal Government to subsidize abortions in cases of statutory rape. The Hyde Amendment has not been construed to permit Federal funding of abortion based solely on the youth of the mother, nor has the Federal funding of abortions in such cases ever been the practice.” H.R. REP. NO. 112-38, at 28 (2011).