NARAL Pro-Choice America

Smith Bill Represents Extreme Attack on Access to Abortion Care

In 2011, anti-choice lawmakers, led by Rep. Chris Smith (R-NJ), launched a new attack on a woman's right to choose: the deceptively titled the "No Taxpayer Funding for Abortion Act" (H.R.7 in the 114th Congress).[1]

Far more sweeping in scope than its name implies, the Smith legislation is *not* about public funding. Current law is clear: sadly, abortion services are banned in most federal government health-care programs, except in very narrow circumstances (for more information, please see the fact sheet *Bans on Abortion Coverage in Government-Run Health-Care Programs*). Moreover, contrary to what anti-choice lawmakers claim, it is a plain fact (confirmed by federal courts) that no federal dollars may be used to pay for abortion services under the Affordable Care Act (ACA). "The express language of the [ACA] does *not* provide for tax-payer funded abortion," the court wrote. "That is a fact, and it is clear on its face."[2]

Instead, the Smith bill opens an entirely new front in anti-abortion forces' unending campaign to ban the procedure. The bill permanently blocks abortion coverage for low-income women, civil servants, D.C. residents, and military women, but it goes even further. It also imposes tax penalties on any small business that provides comprehensive health coverage to its employees; imposes the failed Stupak-Pitts abortion-coverage ban on the new health system; and jeopardizes the availability of private abortion coverage nationwide.

Coming on the heels of the debate over the ACA 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 legislation seeks to redefine public funding as including *private* money.[3] The Smith bill would extend unprecedented limitations on abortion access to a much larger share of the population than any current law and impose radical changes to tax policy.

The House passed the bill in 2011, 2014, and again in 2015. The Senate has never taken it up.

Key Provisions

The legislation would:

- **Impose the failed Stupak-Pitts amendment on health-insurance exchanges.**

The Smith 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.[4]

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.[5] 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.[6] Over time, the Smith 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 an earlier version of this bill, 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."[7]

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

  The Smith bill denies insurance-related tax credits to small businesses that choose private health plans that cover abortion care. (Absent political interference, 87 percent of private plans cover abortion services.[8]) As confirmed by non-partisan congressional tax experts and the Congressional Budget Office, this provision of the Smith bill would compel small businesses to drop health-insurance plans that cover abortion care.[9] 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.

In addition, this extreme proposal would reiterate and expand existing bans on abortion coverage that deny civil servants, military personnel, low-income women, and others access to abortion care, such as the:

- **Abortion coverage ban for federal employees,** even though these workers pay a portion of their insurance premiums with their own private dollars.[10]

- **Ban on abortion care for women in military hospitals overseas**, a policy that a majority of members of the Senate Armed Services Committee voted to repeal in 2012.[11]

- **Abortion coverage ban on the Medicaid and Medicare programs** (also known as the Hyde amendment), which bars access to abortion services for low-income women and women with disabilities except in extreme circumstances. (Currently, this ban is renewed annually in the Labor, Health and Human Services, and Education appropriations bill.)[12]

- **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.[13]

- **Helms amendment**, a policy that denies some of the world's poorest women access to safe abortion care by severely restricting the use of U.S. funds to pay for abortion services in developing countries.[14]

Again, unacceptably, current law already bans public coverage for abortion care except in extremely narrow circumstances. Reiterating these bans adds insult to already deeply injurious policies. Moreover, these harmful bans require no bolstering: a CBO report on the bill's fiscal impact states that gains for the federal government would be negligible[15]—confirming yet again that no prohibited dollars are used to cover abortion services that fall outside of the exceptions provided for in existing public coverage bans.

The Bill's Controversial History

The Smith legislation has a long and controversial history, and its sponsors have developed a record of changing the bill's legislative language unexpectedly. First introduced in 2011 as H.R.3, the original version of the bill included a number of provisions that provoked wide public outrage, eventually forcing the bill's authors to remove them. Years later, after the bill was reintroduced as H.R.7 and had already received a committee mark-up, the bill's sponsors changed the legislation again, removing provocative language and inserting two new sections lifted from other freestanding anti-choice bills just days before the bill made its way to the floor.

Controversial Provision Dropped After Public Criticism

Until sponsors were forced to remove it after public outcry, the first iteration of H.R.7 (then H.R.3) had a notorious provision that would have made it more difficult for sexual-assault survivors to get abortion care. The provision would have:

- **Narrowed the already severely limited rape and incest exceptions in the current-law abortion coverage ban.** 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 federal employees, Peace Corps volunteers, women in the military, low-income women, and others who get their health care through the federal government.[16]

In 2014, after the reintroduced legislation had received a committee hearing and mark-up, H.R.7's sponsors were forced to remove yet another callous provision that experts warned could trigger IRS investigations of rape and incest survivors who require abortion services. It would have:

- **Potentially spurred the IRS to audit rape and incest survivors who required abortion services.** The bill eliminated 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 confirmed that the IRS would have to enforce this provision—and could audit any "questionable" benefit claims.[17] As a result, a woman could have been forced to defend her abortion claim to *tax agents* if she were a survivor of rape or incest.

Under public pressure, sponsors were forced to drop this section.

Eleventh-Hour Additions to H.R.7 in the 113th Congress

Then, as the bill was poised for a floor vote in 2014, its sponsors made even more abrupt changes. Specifically, they added provisions culled from other freestanding anti-choice bills—bills that have never received a hearing or a mark-up. These provisions would:

- **Ban abortion coverage in multi-state health plans available under the ACA.**

  This provision, based on the freestanding bill, H.R.346 (113th Congress), would prohibit coverage of abortion services for women insured by multi-state health plans. Under the ACA, consumers in the state health-insurance exchanges are offered a choice of private health-insurance plans. Among these plans, the law requires that at least two must be multi-state plans—private health-insurance plans administered by the Office of Personnel Management which must offer consumers a uniform array of health benefits in every state in which they operate. As a provision intended to mollify anti-choice lawmakers, the law also requires that at least one of the multi-state plans must not provide coverage for abortion services. The Smith legislation would prohibit all multi-state plans from including abortion coverage.

- **Mandate health plans to mislead consumers about abortion coverage.**

  - H.R.7 would require all plans in the health-insurance exchanges that include abortion coverage to display that fact prominently in all advertising, marketing materials, or information from the insurer. Tellingly, H.R.7 does not require the same disclosure from plans that do not cover abortion. To be clear, NARAL Pro-Choice America strongly supports disclosure and transparency in health care, and has no objection to plans being required to disclose whether they include abortion coverage—or any other health-care service—to consumers. But the disclosure should be even-handed, not one-sided or biased.

- H.R.7 would also force health plans to mislead consumers about the law's treatment of abortion. The ACA requires insurance plans participating in the new health system to segregate monies used for abortion services from all other funds, a measure anti-choice lawmakers insisted was necessary so that no federal funds are used to cover abortion care. In order to aid in identifying these funds and simplify the process of segregating general premium dollars from those used to cover abortion services, the law further requires that health plans estimate the cost of abortion coverage at no less than $1 per enrollee per month. The Smith bill requires plans covering abortion to call this—incorrectly—an "abortion surcharge," and to "disclose and identify separately" this portion of the consumer's premium. By describing abortion coverage in this way, H.R.7 makes it look as though it is an added, extra cost, available only at an additional fee. Because of this, some consumers—men, consumers not of reproductive age—could assume incorrectly that they can opt out of the "surcharge," leaving them without comprehensive coverage when needed. (Note: whether through drafting error or malintent, these disclosure provisions reference a section of the ACA that H.R.7, as amended, also happens to repeal.)

Conclusion

It seems obvious that the entire point of H.R.7 is to insert politicians into a private marketplace, in a multitude of ways, in order to end insurance coverage for abortion. Not only is this a disturbing policy goal, it is directly at odds with the proponents' view of government in virtually every other context. In fact, this bill is the antithesis of "small government."

Moreover, irrespective of one's view of abortion, are we prepared to live in a society where a minority is allowed to seize control of the federal government and impose its beliefs on the provision of basic health care? This flies in the face of America's democratic and pluralistic ideals. In fact, one of our key opponents agrees. During a hearing on the bill, the spokesman for the U.S. Conference of Catholic Bishops was presented with a list of health-care services, each of which is opposed by a segment of the American public on religious or moral grounds, such as blood transfusions, vaccinations, and substance-abuse treatment, and when asked if the government should ban them, he responded, repeatedly and unequivocally, "no."[18] Apparently, anti-choice activists' view of pluralism and democracy embraces a wide array of private health-care decisions but not a constitutionally protected right.

In sum, the Smith 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 an injustice to women who receive health care through the federal government, but also jeopardizes the ability of private citizens to use their own dollars to purchase abortion coverage under the ACA 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 coverage for abortion care, should recognize this bill for what it is: a radical departure from the already-unacceptable status quo.

January 1, 2017

Notes:

[1] Subsequently, Sen. Roger Wicker (R-MS) introduced a companion bill (S.946). However, the content in the House version of the bill was altered dramatically in early 2014, departing significantly from the Senate version.

[2] *Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 423, 431 (S.D. Ohio 2011).

[3] H.R. REP. NO. 112-38, at 44, 45 (2011). *See also Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 675 (1970).

[4] Sara Rosenbaum et. al., *An Analysis of the Implications of the Stupak/Pitts Amendment for Coverage of Medically Indicated Abortions* 1 (2009), *available at* https://publichealth.gwu.edu/departments/healthpolicy/DHP_Publications/pub_uploads/dhpPublication_FED314C4-5056-9D20-3DBE77EF6ABF0FED.pdf (last visited Sept. 23, 2015).

[5] Sara Rosenbaum et. al., *An Analysis of the Implications of the Stupak/Pitts Amendment for Coverage of Medically Indicated Abortions* 9 (2009), *available at* https://publichealth.gwu.edu/departments/healthpolicy/DHP_Publications/pub_uploads/dhpPublication_FED314C4-5056-9D20-3DBE77EF6ABF0FED.pdf (last visited Sept. 23, 2015).

[6] Sara Rosenbaum et. al., *An Analysis of the Implications of the Stupak/Pitts Amendment for Coverage of Medically Indicated Abortions* 9 (2009), *available at* https://publichealth.gwu.edu/departments/healthpolicy/DHP_Publications/pub_uploads/dhpPublication_FED314C4-5056-9D20-3DBE77EF6ABF0FED.pdf (last visited Sept. 23, 2015).

[7] *No Taxpayer Funding for Abortion Act*: *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (2011) (oral testimony of Richard M. Doerflinger, associate director, Secretariat of Pro-Life Activities at the United States Conference of Catholic Bishops (USCCB)). While the testimony pertained to an earlier version of this bill (H.R.3), H.R.7 includes identical tax-related provisions in its current form.

[8] Adam Sonfield et. al., *U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates, 2002*, 36 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 2, 72–79 (2004), *available at* http://www.guttmacher.org/pubs/journals/3607204.html (last visited Sept. 23, 2015).

[9] *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, the Joint Comm. on Taxation). While the expert findings pertained to an earlier version of this bill (H.R.3), H.R.7 includes identical tax-related provisions in its current form.

[10] Kirstin B. Blom & Ada S. Cornell, *Laws Affecting the Federal Employee Health Benefits Program (FEHBP)*, Congressional Research Service, Jul. 22, 2015, at n. 4-5, *available at* http://www.fas.org/sgp/crs/misc/R42741.pdf (last visited Oct. 7, 2015).

[11] 10 U.S.C. § 1093(a) (2013).

[12] Commonly known as the Hyde amendment, this budget rider has been in place since the 1970s as part of the Health and Human Services appropriation budget, but was first enacted in its current form in 1994. *See* 107 STAT. 1084, 1113 (1994); Jon O. Shimabukuro, *Abortion: Judicial History and Legislative Response*, Congressional Research Service, Sept. 16, 2015, at 11, *available at* www.fas.org/sgp/crs/misc/RL33467.pdf; Like Medicaid, Medicare also receives its funding through the Health and Human Services appropriations and is therefore subject to the Hyde amendment. Several decades ago, however, there was some debate on that issue due to the trust system Medicare funds are subject to. In the late 1990s, however, the Secretary of Health and Human Services clarified that Hyde applied to Medicare funds. Letter from U.S. Health and Human Services Secretary Donna E. Shalala to U.S. Senator Don Nickles (June 22, 1998) (on file with the Clinton Presidential Library; http://www.clintonlibrary.gov/_previous/KAGAN%20DPC/DPC%201-4/515_DOMESTIC%20POLICY%20COUNCIL%20BOXES%201-4.pdf). That clarification was later codified in the 1999 Omnibus Appropriations Act. 112 STAT. 2681–362 (1998).

[13] P.L. 112-10, 112th Cong. (2011); Jon O. Shimabukuro, *Abortion: Judicial History and Legislative Response*, Congressional Research Service, Sept. 16, 2015, at 12, *available at* www.fas.org/sgp/crs/misc/RL33467.pdf.

[14] The Foreign Assistance Act, 22 U.S.C. § 2151b(f)(1) (First passed in 1961, amended to include relevant provision in 1973).

[15] Cong. Budget Office Cost Estimate, H.R.3: No Taxpayer Funding for Abortion Act (Mar. 15, 2011), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/121xx/doc12105/hr3.doc.pdf (last visited Sept. 23, 2015). While the report's findings pertained to an earlier version of this bill (H.R.3), H.R.7 includes identical tax-related provisions in its current form.

[16] Report language from the revised version of H.R.3—the original version of H.R.7—makes clear that it remains the bill 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).

[17] *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, the Joint Comm. on Taxation).

[18] *No Taxpayer Funding for Abortion Act*: *Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 113th Cong. (2014) (oral testimony of Richard M. Doerflinger, associate director, Secretariat of Pro-Life Activities at the United States Conference of Catholic Bishops (USCCB)).