THE FACTS ABOUT "THE NO TAXPAYER FUNDING FOR ABORTION ACT"

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The New Battle to Eliminate Insurance Coverage for Abortion

On January 20, 2011, Congressman Chris Smith (R-NJ) introduced H.R. 3, the No Taxpayer Funding for Abortion Act. At the press conference unveiling the bill, Speaker John Boehner, stated that the bill would be "one of [the House of Representative's] highest legislative priorities."

The ACLU strongly opposes H.R. 3. Despite the sponsors' series of changes to the bill, the harm caused by H.R. 3 remains. At its core, the bill is an attack on basic health care for women. It is a multi-pronged and deeply misguided measure that represents the worst kind of government interference in private, medical decisions.

The bill should be rejected because it further entrenches discriminatory laws that deny abortion care to women enrolled in Medicaid and other federal health care programs ***and*** extends these unjust prohibitions into the private sector. It is an insidious and unprecedented attempt to eliminate insurance coverage for abortion and deny all women access to the health care they need. Key elements of the bill include:

1. **Imposes the Stupak abortion coverage ban in the new insurance exchanges**

The Patient Protection and Affordable Care Act (ACA) created new state-based market places called exchanges for individuals and small businesses to buy health insurance. Although the original bill ensured that no federal dollars could be used to pay for abortion except in cases of rape, incest and life endangerment, Representative Stupak (D-MI) offered an amendment that would have barred anyone receiving a subsidy from buying a policy in the exchange that includes abortion coverage. Because the overwhelming majority of individuals in the exchange would have received some subsidy, it is clear that this would have meant that no policy sold in these exchanges would include abortion. Additionally, because larger businesses will, over time, be able to purchase insurance in the exchanges, more individuals will be impacted by the lack of insurance coverage for abortion in the exchange.

After a public outcry, Congress defeated the Stupak Amendment. And instead, it enacted strict requirements that insurance companies must adhere to if they wish to offer (and consumers if they wish to buy) policies that include abortion. Under those requirements, insurance companies who want to offer policies that cover abortion must obtain two separate payments from the individual seeking insurance – some dollar amount for abortion coverage and some dollar amount for everything else – and they must deposit the funds in two separate accounts. This procedure applies to everyone who purchases a plan with abortion coverage in the exchange.

H.R. 3 would resurrect the Stupak Amendment that the 111th Congress rejected and eliminate privately funded insurance coverage for abortion in the exchanges.

2. Makes Permanent the Prohibition on the Use of Federal Funds to Pay for Abortion

H.R. 3 provides that "no funds authorized or appropriated by federal law, and none of the funds in any trust fund to which funds are authorized or appropriated by federal law, shall be expended for any abortion." This language would do away with Congress' need to consider each year riders that harm women by singling out and excluding

abortion from a host of programs that fulfill the government's obligation to provide health care to certain populations, including Native Americans, federal employees, Peace Corps volunteers, poor women, and women in federal prisons.

H.R. 3 is a new assault on women's access to care, but it is premised on the same shameful disregard for and coercive interference in women's lives.

3. Rewrites Long-standing Tax Laws and Policies to Impose a New Penalty on Millions of Americans

H.R. 3 rewrites long-standing tax laws to penalize a single, legal, medical procedure: abortion. It would end certain preferential tax treatment for medical expenses where abortion is involved. Specifically, under the bill:

- small business employers who make a qualified nonelective contribution to purchase a health insurance plan that includes coverage for abortion would not receive a small business tax credit provided under the health care law;
- individuals who make tax deductible contributions to a health savings account (HSA) would be required to include in income any amounts paid out of an HSA when those proceeds are used for expenses relating to an abortion;
- any individual who uses funds from a health Flexible Spending Arrangement (FSA) for an abortion would now be required to include those funds in their gross income for the taxable year;
- amounts distributed from an Archer medical savings account (Archer MSA) for the cost of an abortion would be included in the employee's taxable income.

4. Makes Permanent the District of Columbia Abortion Ban

Although under current law federal funds may not be used to cover most abortions, states are free to include coverage for abortion in their medical assistance programs if they pay for it themselves. This is true under H.R. 3 as well. The only exception is the District of Columbia.

H.R. 3 makes permanent a provision—lifted by Congress in 2009 but reinstated in 2011— that violates the District's autonomy and forbids it from choosing for itself whether to use its own locally raised non-federal dollars to provide coverage for abortion for its low-income residents.

In 1973, Senators and Representatives holding widely divergent political views, recognized that the citizens of the District of Columbia had been denied the most basic privilege enjoyed by all other Americans – the right to elect those men and women who will control their local governments. They enacted the Home Rule Act to grant to the inhabitants of the District of Columbia powers of local self government and relieve Congress of the burden of legislating upon essentially local District matters. The Home Rule Act was viewed by many as a key civil rights victory for the predominantly African American residents of the District.

Thus Congress clearly recognized the importance of allowing the District's leadership and residents to exercise control over their municipal affairs. While the scope of the local legislative prerogative has never been precisely defined, the Supreme Court has held that our system of limited federalism reserves certain subject areas, including fire prevention, police protection, sanitation, public health, and parks and recreation for state and local decision-making. The provision of services to pregnant women— including abortion care— is clearly a matter of local public health policy intended to be left to the District of Columbia under home rule. Congress should respect the democratic process in the District and respect the choices its residents and leaders make.

As one member of Congress noted, "The government of the District of Columbia representing the wishes of its citizenry must…be able to choose how to spend its revenues collected through property and income taxes and other sources."[1]

The District abortion ban is antithetical to the spirit of the Home Rule Act. Measures such as the abortion ban serve only to disenfranchise and marginalize the District's leaders and residents. Through this provision, non-resident Members of Congress impose their own ideology, morality or religious belief upon the District's residents and utterly disregard the needs or wishes of the broader community or those directly impacted. Most egregiously, those who seek to negate the will of the District's residents or leaders are not accountable to the people of the District. That which they could not do in their own home districts, they do with impunity against the residents of the District. Measures such as the abortion ban erode and undermine such progress and serve only to accentuate the voicelessness of those residing in the District.

5. Expands the Federal Refusal Law (Weldon Amendment) and Writes it Into Permanent Law

H.R. 3 codifies the Federal Refusal Law (also known as the Weldon Amendment), expands its reach, and provides new remedies for those allegedly aggrieved, including a private right of action.

Since 2004 the Labor, Health and Human Services and Education appropriations bill has contained a rider known as the Weldon Amendment that provides broad immunities for hospitals and insurance companies that refuse to provide, pay for, cover, or even refer for abortions. The Amendment offers immunities to health care institutions and professionals who deny women access to critical information about their health care options and sets up roadblocks for states seeking to enforce their own laws.

The Smith bill would expand these immunities by applying them not only to federal agencies and programs funded under the Labor-HHS-Education appropriations bill but to all federal agencies and programs. Moreover, it would make these broad and unnecessary immunities permanent.

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[1] *See* 132 Cong. Rec. H4872 (daily ed. July 24, 1986; statement by Rep. Theodore Weiss (NY)).