

DISSENTING VIEWS TO ACCOMPANY H.R. 7, THE “NO TAXPAYER FUNDING FOR ABORTION ACT”

H.R. 7, the “No Taxpayer Funding for Abortion Act,” changes existing law in ways that will endanger the health of women and deprive them of their constitutionally-protected right to decide whether to carry a pregnancy to term. The proponents of this bill seek to substantially restrict the existing Hyde Amendment exception that permits funding in cases of rape to exclude assistance for children and teenagers who are the victims of statutory rape. H.R. 7 also extends current funding restrictions that are limited in time and scope and applies them to all federal laws, without any effort to determine how such a sweeping and permanent expansion would impact American women and their families. And, contrary to the misleading title of the bill, this legislation is not needed to achieve what has already long been accomplished: Congress has prohibited the use of federal funds for abortion for more than three decades.

Although proponents of this legislation claim that it merely codifies existing restrictions on federal funding for abortion, H.R. 7 goes well beyond any existing law and would interfere with both public and private funding. For the first time, privately-funded health expenses that receive preferential tax treatment would be made equivalent with federal spending under this bill in order to raise taxes on women, families, and small business employers who use their own money to pay for abortion or purchase insurance that covers abortion. The intent of this legislation is clear: to make abortion completely unavailable even when paid for with purely private, non-federal funds.

Contrary to proponents assertions, H.R. 7 is not necessary to prevent federal funding of abortion under the Patient Protection and Affordable Care Act (Affordable Care Act).¹ This is because the Affordable Care Act fully preserves the ban on federal funding of abortion.² H.R. 7's radical departure from current tax treatment of medical expenses and insurance coverage – which goes well beyond the approach taken in the Stupak/Pitts Amendment to the House-passed Affordable Health Care for America Act³ – is not justifiable nor necessary to prevent federal funding of abortion.

Not surprisingly, H.R. 7 is strenuously opposed by a broad cross-section of women's rights, religious, civil liberties, small business, and health organizations.⁴ The Administration, in

¹Pub. L. No. 111-148, 124 Stat. 120 (2010); Pub. L. No. 111-152, 124 Stat. 1029 (2010).

²Pub. L. No. 111-148, §§ 1303 & 1334(a)(6) (2010).

³H.R. 3962, 111th Cong., § 265 (as passed by House, Nov. 7, 2009).

⁴Advocates for Youth, American Association of University Women (AAUW), American Civil Liberties Union, American Congress of Obstetricians and Gynecologists, American Public Health Association, American Society for Reproductive Medicine, Asian & Pacific Islander American Health Forum, Association of Reproductive

issuing a veto threat with regard to H.R. 7's predecessor in the last Congress, aptly observed that the legislation "intrudes on women's reproductive freedom and access to health care; increases the tax burden on many Americans; unnecessarily restricts the private insurance choices that consumers have today; and restricts the District of Columbia's use of local funds, which undermines home rule."⁵

In sum, H.R. 7 is not necessary and is an unbridled attack on the health of women and their constitutionally-protected right to decide whether to carry a pregnancy to term. For these reasons and those described below, we must respectfully dissent and adamantly urge our colleagues to reject this seriously flawed bill.

DESCRIPTION AND BACKGROUND

Title I of H.R. 7 adds new provisions to title I of the United States Code that would alter existing law and superimpose funding restrictions that are similar – but not identical to – restrictions that have been enacted as part of various appropriations bills. H.R. 7 would make these modified restrictions permanent and applicable to all federal laws. Title II of the bill imposes an unprecedented tax penalty on the use of purely private funds to pay for abortion or for insurance that will cover abortion. During the Judiciary Committee Markup of H.R. 7, Chairman Goodlatte informed members that the Committee's jurisdiction is limited only to title I of the bill. Accordingly, the following section by section analysis does not include title II of the bill.

Section 101 of H.R. 7 amends title I of the United States Code by adding a new chapter at the end titled "Prohibiting Taxpayer Funded Abortions" consisting of nine separate provisions

Health Professionals (ARHP), Black Women's Health Imperative, Catholics for Choice, Center for Reproductive Rights, Choice USA, Feminist Majority, Guttmacher Institute, Hadassah: The Women's Zionist Organization of America, Inc., Jewish Women International, Joint Action Committee for Political Affairs, Methodist Federation for Social Action, NARAL Pro-Choice America, National Abortion Federation, National Asian Pacific American Women's Forum (NAPAWF), National Center for Lesbian Rights, National Council of Jewish Women, National Family Planning and Reproductive Health Association, National Health Law Program, National Latina Institute for Reproductive Health, National Organization for Women, National Partnership for Women & Families, National Women's Health Network, National Women's Law Center, People For the American Way, Physicians for Reproductive Health, Planned Parenthood Federation of America, Population Connection Action Fund, Population Institute, Raising Women's Voices for the Health Care We Need, Religious Coalition for Reproductive Choice, Religious Institute, Reproductive Health Technologies Project, Sexuality Information and Education Council of the U.S. (SIECUS), South Carolina Small Business Chamber of Commerce, Unitarian Universalist Association, Unitarian Universalist Women's Federation, United Church of Christ, Justice and Witness Ministries. *See, e.g.,* Coalition Letter to Members of the House of Representatives (Jan. 15, 2014) (expressing the view that H.R. 7 "jeopardizes women's health by directly banning abortion coverage, by raising taxes on families and small businesses that purchase comprehensive insurance coverage, and by putting women who have survived sexual violence through intrusive tax audits") (on file with H. Comm. on the Judiciary Democratic staff).

⁵Executive Office of the President, Office of Management and Budget, Statement of Administration Policy on H.R. 3 - the No Taxpayer Funding for Abortion Act (May 2, 2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr3r_20110502.pdf.

that seek to extend and make permanent existing funding restrictions that currently are limited in time and scope. A detailed section-by-section explanation of these new provisions as added by section 101 follows.

New section 301 mandates that no federal funds shall be used to pay for any abortion, unless, by virtue of section 308, the pregnancy results from rape or incest, or where continuing a pregnancy places a woman in danger of death.

New section 302 prohibits any federal funds from being used to purchase health benefits coverage (i.e., insurance) that includes abortion, unless, by virtue of section 308, the pregnancy results from rape or incest, or where continuing a pregnancy places a woman in danger of death.

New section 303 prohibits the performance of an abortion in any health care facility owned or operated by the federal government or by any person employed by the federal government to provide health care services while acting in the scope of that employment. By virtue of section 308, section 303's prohibition does not apply in cases of rape, incest, or where continuing a pregnancy places a woman in danger of death.

New section 304 preserves the right of any individual, entity, or state or locality to use their own funds to purchase separate abortion or health benefits coverage that includes abortion. Section 304 further provides that such coverage shall not be purchased using matching funds required for a federal program, including Medicaid matching funds.

New section 305 preserves the right of non-federal health benefits coverage providers (i.e., insurers) to offer abortion coverage, and the right of states and localities to purchase such coverage with their own funds. Section 305 further provides that such coverage shall not be purchased using matching funds required for a federal program, including Medicaid matching funds.

New section 306 protects any federal law that imposes greater limitations on the use of funds for abortion or for health benefits coverage that includes abortion.

New section 307 clarifies that title I does not apply to the treatment of any infection, injury, disease, or disorder that is caused or exacerbated by the performance of an abortion.

New section 308 includes an exception to the restrictions imposed by sections 301, 302, and 303 where pregnancy results from an act of rape or incest, or where a physician certifies that continuing a pregnancy is life threatening.

New section 309 specifies that the term "funds appropriated by Federal law" applies to funds within the budget of the District of Columbia and that the term "Federal Government" includes the government of the District of Columbia. Section 309 effectively prohibits the use of local funds for abortion.

CONCERNS WITH H.R. 7

I. H.R. 7 IS ENTIRELY UNNECESSARY AS FEDERAL FUNDING OF ABORTION ALREADY IS PROHIBITED

Although H.R. 7's proponents assert that the bill merely codifies existing funding restrictions, and that passage of the Affordable Care Act necessitates additional restrictions to ensure that the current policy of banning federal funds for abortion is continued, this is not the case.

The Affordable Care Act addresses the coverage of abortion services by qualified health plans available through health benefit exchanges. The Act clearly distinguishes between abortions for which federal funding is allowed and for which such funding is prohibited "as based on the law as in effect," thus incorporating the Hyde Amendment distinctions, which allow federal funding only in cases of rape, incest, or possible death of the mother.

As is true under the Hyde Amendment, the Affordable Care Act allows for the purchase or provision of supplemental coverage for abortion services or a plan that provides broader abortion coverage. To ensure that only non-federal funds are used for such coverage, the Act requires plan providers to segregate from the funds used to purchase broader abortion coverage an amount equal to the portion of the premium to be paid directly by the enrollee (i.e., not paid for by the amount attributable to the tax credit or cost-sharing reduction) for the broader abortion coverage. Similarly, individuals may purchase plans that qualify for tax credits under the Affordable Care Act that include broader coverage for abortion, but payments for the additional coverage must come exclusively and remain segregated from non-federal sources.

H.R. 7's proponents assert that this required segregation effectively amounts to an "abortion surcharge" that must be borne by all individuals enrolled in a health plan that covers abortion.⁶ As Professor Wood explained in the following exchange with Constitution Subcommittee Ranking Member Representative Jerrold Nadler (D-NY) during the hearing on the bill, this claim is inaccurate:

MR. NADLER. Professor Wood, the Affordable Care Act requires participating insurance plans to segregate monies for abortion services from all other funds, a measure my anti-choice colleagues insist was necessary to prevent Federal funding of abortion. To aid in identifying these funds, both in terms of premiums being paid for coverage and costs for services provided, the law requires companies to estimate the cost of abortion coverage at no less than \$1 a month. Some have characterized this segregation of funds as an abortion

⁶Unofficial Tr. of *No Taxpayer Funding for Abortion Act: Hearing on H.R. 7 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 113th Cong. (2014), at 39 [hereinafter H.R. 7 Hearing].

surcharge. Is this an accurate description?

Ms. WOOD. The short answer to that question is no. As you have correctly stated, this is a general premium to provide for all health care services. . . . [T]he segregation of the private dollar contribution of at least \$1 a month is to be set aside to pay directly for [abortion] services. . . . [I]t's clearly not a surcharge. It's a segregation of the premium."⁷

In addition, President Obama, following enactment of the Affordable Care Act, issued Executive Order 13535 confirming that "the Act maintains current Hyde Amendment restrictions governing abortion policy and extends those restrictions to the newly created health insurance exchanges."⁸ The Executive Order further proposed pre-regulatory model guidelines establishing standards for the segregation of funds for private health plans that elect to cover abortion services. The guidelines ensure that funds used for abortion coverage are segregated and that federal funds are not used for abortion services, except in cases of rape or incest, or when the life of the woman is endangered.

Further, the Department of Health and Human Services promulgated regulations that reinforce the prohibition on the use of federal funds for abortion services, providing that health plans that opt to cover abortion services "must not use any amount attributable to" either the advance payment of premium tax credits available under section 1412 of the Affordable Care Act or the reduced cost-sharing for individuals enrolling in Qualified Health Plans under section 1402 of the Affordable Care Act.⁹ To implement this directive, the final regulation further instructs health plans that opt to cover abortion services to establish separate allocation accounts in which to deposit and thus segregate the premium payments collected directly from private consumers from the premium tax credits available under section 1412 of the Affordable Care Act.¹⁰ The regulation provides that allocation accounts holding funds attributable to the premium tax credits must be "used exclusively to pay for services other than [abortion services]," consistent with existing prohibition on the use of federal funding for abortion services as well as Executive Order 13535.¹¹

As this makes clear and contrary to the claims of its proponents, H.R. 7 is not needed to

⁷H.R. 7 Hearing at 40 (testimony of Susan Wood).

⁸Exec. Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 29, 2010), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2010-03-29/pdf/2010-7154.pdf>.

⁹Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers, Final Rule and Interim Final Rule. 77 Fed. Reg. 18,472 (Mar. 27, 2012) (to be codified at 45 C.F.R. pt. 156).

¹⁰*Id.*

¹¹*Id.*

prevent federal funding of abortion. Nor is the bill a mere codification of existing funding bans.

II. H.R. 7 PLACES WOMEN AT RISK

H.R. 7 adds several new provisions to title 1 of the United States Code that will modify and extend funding restrictions in numerous respects that will harm women's health and place their lives at risk.

First, section 308(1) will be used to further limit the Hyde Amendment's existing exception for cases of rape to "forcible" rape. This provision adopts the Hyde Amendment exception, which allows funding where pregnancy is the result of rape or incest. As originally introduced last Congress, the legislation would have narrowed the Hyde Amendment rape exception and allowed funding only in cases of "forcible" rape. As explained by Majority witness Richard Doerflinger from the United States Conference of Catholic Bishops at the Constitution Subcommittee hearing in the last Congress, the intent was to close "a very broad loophole for federally funded abortions for any teenager," making clear that the change was not inadvertent and was intended (possibly among other things) to limit access to abortion for teenagers, who might otherwise fall within the exception for statutory rape.¹²

Following public outrage over this proposed change, the bill's sponsors claimed that they had no intent to change existing law on this issue and removed the word "forcible." Yet the Committee Majority made clear in their Committee report accompanying the bill that their intent was still to *not* allow funding in cases of statutory rape.¹³ The report incorrectly stated that the Hyde Amendment never had been construed to permit funding in cases of statutory rape and, therefore, this would remain the practice (refusing such funding) under the legislation.

A 1978 regulation implementing the Hyde Amendment clarified that the term "rape" included statutory rape. In that regulation, the Department of Health, Education and Welfare responded to comments that "criticized the regulations for including statutory rape within the exception permitting Federal funding of abortions for victims of rape."¹⁴ As the Department explained, both the text of the Hyde Amendment and its legislative history demand this interpretation. The text itself does not qualify the term rape to distinguish between "forcible" and "statutory" rape and Congress rejected a proposed amendment that would have limited

¹²*No Taxpayer Funding for Abortion Act: Hearing on H.R. 3 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 112th Cong. 69 (2011) (testimony of Richard Doerflinger).*

¹³H.R. Rep. No. 112-38, pt. I, at 28 (2011) ("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.")

¹⁴Federal Financial Participation in State Claims for Abortions, 43 Fed. Reg. 31,873 (July 21, 1978).

funding to instances of “forced” rape.¹⁵ H.R. 7’s proponents continued effort to deprive some of the most vulnerable victims – children and teens who are the subject of sexual predators – of critical assistance finds no support in the text of Hyde Amendment or its legislative history and should be rejected by any administrative agency or court that is called upon to implement the longstanding exception that allows funding in cases of rape and incest.

Second, section 308(2) will endanger women’s lives by failing to include the constitutionally required exception to protect a woman’s health. Although this provision allows funding where continuing a pregnancy would “place the woman in danger of death,” it fails to include the constitutionally required exception to protect a woman’s health.

The Supreme Court in *Roe v. Wade* was unequivocal: “A . . . criminal abortion statute . . . that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.”¹⁶ The Court affirmed this rule in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, explaining that any prohibition must make an exception for where an abortion “is necessary, in appropriate medical judgement, for the preservation of the life or health” of the woman.¹⁷

During Committee markup, Democratic Members offered amendments to address H.R. 7’s failure to include an exception to the funding ban that takes into account and preserves women’s health. Representative Sheila Jackson Lee (D-TX) sought to broaden section 308 to allow funding when continuing a pregnancy could result in “severe and long-lasting damage to a woman’s health.” Representative Suzan K. DelBene (D-WA) sought to amend section 308 to ensure an exception for women with cancer who need life-saving treatment that is incompatible with continuing a pregnancy. Both amendments were voted down by party-line vote.

Representative Judy Chu (D-CA) also offered an amendment to protect women’s health by ensuring that nothing in H.R. 7 would prevent health care providers from disclosing relevant information to patients, and to ensure that principles of informed consent and the ethical standards of care are followed. Her amendment also was voted down by party-line vote.

By failing to include an exception that preserves women’s health, H.R. 7 not only violates long established constitutional protections, but jeopardizes the lives of women.

¹⁵*Id.*; see also Memorandum of National Women’s Law Center, The House Judiciary Committee Report on HR 3 Reflect and Attempt to Narrow the Rape Exception Even Though the Statutory Term “Forcible” Was Removed and misrepresents Longstanding Policy on the Rape Exception, *available at* http://www.nwlc.org/sites/default/files/pdfs/hr_3_rape_language_memo.pdf.

¹⁶410 U.S. 113, 164 (1973).

¹⁷505 U.S. 833, 879 (1992) (QUOTING *Roe v. Wade*, 410 U.S. 113, at 164-165).

Third, section 309 usurps the right of the District of Columbia to determine how to use its own funds and will reinstate and make permanent funding restrictions. While some Congresses have restricted the District of Columbia's use of its own funds, other Congresses have afforded it the same right as the states to use local, non-Federal funds for abortion-related services. Section 309 would impose a permanent ban on the District's use of local funds for abortion-related services. Like the states, the District of Columbia should be able to make its own decisions about how best to serve its residents with its own money. As explained more fully in Section IV, below, Representative John Conyers, Jr., Ranking Member of the Committee, offered an amendment to remove the restriction on the District's use of its own funds. That amendment was voted down by party-line vote.

Fourth, sections 301 and 302 impose a permanent, blanket restriction on funding. Sections 301 and 302 are modeled on the Hyde Amendment. Enacted in 1979, the Hyde Amendment prohibits the use of funds appropriate in particular laws (e.g., annual appropriations for the Department of Health and Human Services) from being used for abortion. But unlike the Hyde Amendment, sections 301 and 302 would never expire and would apply to *all* federal funds, not just funds appropriated for a particular agency or purpose.

Fifth, section 303 ban abortion services in federal health care facilities or by any federal employee. Section 303 imposes a sweeping prohibition on the inclusion of abortion as part of any health care service furnished in a health care facility "owned or operated" by the federal government or by any federal employee. Although Congress previously has prohibited abortion services in prisons (though requiring transportation from prison when necessary)¹⁸ and in Department of Defense facilities,¹⁹ H.R. 7 would impose this ban on *all* federal facilities and *all* federal employees. These bans would not apply in cases of rape, incest, or where the woman's life is in danger by virtue of section 308.

Sixth, section 304 narrows the Hyde Amendment's broad right to use non-federal funds. The Hyde Amendment recognizes and preserves a broad right to use private funds, without specifying or limiting items that may be purchased with those funds.²⁰ Rather than mirroring this language exactly, section 304 protects only the purchase of "separate abortion coverage or health benefits coverage that includes abortion" with non-federal funds. The impact of limiting a broad, unspecified right is unclear but notably places the use of funds for abortion (as compared to insurance coverage) at risk, particularly when coupled with the bill's unprecedented tax penalties on the use of private funds, as codified in title II of H.R. 7. Those penalties may make the right

¹⁸See, e.g., Pub. L. No. 111-117, div. B, tit. II, §§ 203-04, 123 Stat. 3034, 3139 (2009).

¹⁹See, e.g., 18 U.S.C. § 1093(b) (2006) (prohibiting the performance of abortions in Department of Defense facilities).

²⁰See, e.g., Pub. L. No. 111-117, div. D, tit. II, § 508(b), 123 Stat. 3034, 3280 (2009) ("None of the federal funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion.").

allegedly protected by sections 304 purely symbolic for many women and their families.

Seventh, section 305 alters Hyde Amendment protections for providers who offer abortion coverage. The Hyde Amendment broadly preserves the right for “any” managed care provider to offer abortion coverage,²¹ while section 305 protects only the right of a “non-Federal” health benefits plan provider to offer coverage that includes abortion. It is not clear who might fall in or outside this category, and whether any insurer who participates in an exchange established under the Affordable Care Act might be considered a federal provider for purposes of H.R. 7.

Eighth, section 306 preserves only those federal laws that impose greater restrictions on access to abortion. Section 306 makes clear that H.R. 7 would supersede any law that does not impose equal or greater restrictions on access to abortion. As a result of this provision, Congress would be deprived of any discretion or flexibility to, for example, provide greater protections for a woman’s health in a particular setting or circumstance.

Ninth, section 307 allows funding for treatments of complications that might arise from abortion. This section apparently is intended to protect women against wrongful denials of coverage by clarifying that funding restrictions do not apply to treatment for complications that might arise from an abortion. It is unclear whether section 307 will be sufficient to overcome the chilling effect of title I, sections 304 and 305, and title II on insurers coverage decisions, given the broad prohibitions and tax penalties imposed on abortion coverage.

III. TITLE II OF H.R. 7 WILL INCREASE TAXES AND DRIVE INSURERS TO EXCLUDE ABORTION FROM INSURANCE PLANS

Title II of H.R. 7 makes several amendments to the Internal Revenue Code of 1986. During markup of the bill, Minority Members were informed that any amendments to title II would not be germane as it falls within the jurisdiction of the Ways and Means Committee. In light of the fact that the predecessor to this legislation in the last Congress was considered by the House under a closed rule, Representative Nadler expressed concern that, unless the bill is considered by the Ways and Means Committee, Members of the House may have no opportunity to amend this legislation’s harmful tax provisions that impact the rights of all Americans to spend their own money to cover their health care expenses as they see fit.

Even though the tax provisions were outside our power to amend through the Committee process, we oppose H.R. 7’s use of the tax code to penalize private health care choices and provide this explanation in the hopes that our colleagues will join us in opposing this harmful bill.

A. H.R. 7 Imposes Unprecedented Tax Penalties on Extremely Personal and

²¹See, e.g., Pub. L. No. 111-117, div. D, tit. II, § 508(c), 123 Stat. 3034, 3280 (2009).

Constitutionally-Protected Health Care Decisions.

H.R. 7 imposes unprecedented burdens – in the form of tax increases and the denial of tax credits – on the use of private money to pay for abortion or insurance that would cover abortion. Title II is not about federal money. It is about the federal government penalizing individuals, families, and small employers when they make a particular, constitutionally-protected health care choice that some Members of Congress oppose.

Under current law, medical expenses (including money spent to purchase insurance) receive favorable tax treatment in recognition of the fact that they reduce an individual's ability to pay taxes and to encourage the purchase of insurance that helps ensure health care and reduces the costs - and shared burden - of uncompensated care. H.R. 7 radically alters existing law by requiring forfeiture of favorable tax treatment any time private, non-federal funds are spent to pay for abortion services and in many instances when insurance is purchased that would cover such services in the event they were needed.

Last Congress, the House Ways and Means Committee considered the tax provisions that were substantively similar to title II of H.R. 7²². Several Democratic Members on that Committee filed dissenting views opposing these provisions, explaining, among other things, that they “not only represen[t] an unprecedented move down a path that takes the Committee’s jurisdiction squarely into an extremely private and personal decision that a woman and her family may have to make – [they] would also increase taxes on women and families during that difficult time.”²³ H.R. 7 would do so in the following ways.

1. H.R. 7 Increases Taxes on Women and Families

H.R. 7 denies women and their families the itemized deduction for medical expenses for any expense that relates to an abortion. This singles out a perfectly lawful medical procedure for unfavorable treatment simply because a woman has made a decision that the legislation’s sponsors do not like.

H.R. 7 also treats as taxable income any distribution from a health savings account, an Archer medical savings account, or health flexible spending accounts that is used to pay for abortion expenses. An estimated 30 million Americans currently use flexible-savings accounts to set aside pre-tax money to pay for medical expenses,²⁴ and approximately 11.4 million are

²²H.R. 1232, 112th Cong (2011) (ordered to be reported favorably by a 22 to 14 vote on Mar. 31, 2011).

²³H.R. Rep. No. 112-55, at 28 (2011).

²⁴Jordan Rau, *Defending the Flex Spending Accounts*, Kaiser Health News (Feb. 2, 2011), <http://www.politico.com/news/stories/0211/48627.html>.

enrolled in health-savings accounts.²⁵ H.R. 7 would effectively increase taxes for these individuals and families if they use the money that they have set aside to cover medical expenses to pay for abortion.

2. H.R. 7 Denies Middle- and Lower-Income Families the Premium Tax Credits That They Need To Buy Insurance If That Insurance Covers Abortion

Under the Affordable Care Act, income-eligible women and families (those under 400 percent of the poverty line, which was \$89,400 for a family of four in 2011) are eligible for a premium tax credit. H.R. 7 would require forfeiture of this tax credit if a woman chooses insurance that covers abortion.

Denial of this tax credit will mean that some women and families are forced to choose insurance that excludes abortion coverage. For example, a single mother with two children who earns \$24,000 a year is eligible to purchase insurance through an exchange under the Affordable Care Act. If the family's health insurance plan includes coverage for abortion, title II requires them to forfeit the premium assistance credit that makes it possible to purchase this insurance. This effectively forces them to purchase insurance that excludes abortion coverage, making the right allegedly protected by sections 304 and 305 of title I, which purport to protect the right to use one's own funds to contract for and purchase insurance that covers abortion, purely symbolic for this mother and her family.

3. H.R. 7 Increases Taxes for Small Business Employers

The Affordable Care Act provides a tax credit for small business contributions to purchase health insurance for employees. H.R. 7 would require that credit to be forfeited if the insurance offered by a small employer covers abortion.

The Council of Economic Advisors estimates that 4 million small businesses are eligible for a tax credit under the Affordable Care Act if they provide health care to their workers, and that "millions of workers at small firms and their families would be eligible for their own tax credits to purchase coverage through the Exchange if their firms did not offer coverage."²⁶ All of these businesses, individuals, and families would lose their tax credits under title II of H.R. 7 if

²⁵America's Health Insurance Plans, January 2011 Census Shows 11.4 Million People Covered by HSA Qualified High-Deductible Health Plans (2011), <http://www.ahipresearch.org/hsacensus.html>.

²⁶Christina Romer & Mark Duggan, Council of Econ. Advisors, Health Insurance Reform Will Help Small Businesses (Feb. 26, 2010), *available at* www.whitehouse.gov/blog/2010/02/26/health-insurance-reform-will-help-small-businesses. Appointed by the President with the advice and consent of the Senate, the Council of Economic Advisors offers the President objective economic advice on foreign and domestic economic policy.

their insurance covers abortion, thus raising taxes on potentially millions of small businesses and their workers.

B. H.R. 7 Will Drive Insurance Companies To Drop Coverage for Abortion Altogether

H.R. 7 creates a number of penalties and disincentives for insurance companies that provide abortion coverage as part of their basic health insurance plans. For example, and as described above, the bill disallows premium tax credits under the Affordable Care Act for coverage that includes abortion. As our colleagues on the House Ways and Means Committee observed in their dissent to substantively similar legislation last Congress, “insurance companies would respond in the individual market by solely offering coverage that does not include abortion services given the value of the premium tax credits.”²⁷ H.R. 7 bill similarly denies tax credits to small employers who offer coverage that includes abortion, making it likely that such employers will seek products that exclude abortion.

Testifying before the Constitution Subcommittee, Professor Susan Wood explained how the tax penalties contained in H.R. 7, particularly when added to the restrictions already in the Affordable Care Act that impose significant accounting and administrative burdens, could lead insurers to stop offering coverage that includes abortion.²⁸ Because the vast majority of insurance plans currently cover abortion services, this would have a significant impact on millions of American women and their families. She explained:

If Congress enacts this bill, you are taking away coverage from women who live in places where private insurance plans that include abortion coverage are sold today[.]

* * *

Further changing the tax benefits for employees and for employers providing health coverage as proposed in H.R. 7 could create a tipping point in the nature of insurance whereby women lose abortion coverage because insurers may no longer provide plans that include it.

Since approximately 60 percent of women of reproductive age, 37 million women, get their health care coverage through private insurance, this legislation could have a far-reaching effect. It represents more than just meddling in their personal decisions,

²⁷H.R. Rep. No. 112-55, at 26 (2011).

²⁸H.R. 7 Hearing (written statement of Susan Wood at 2-3).

by making it unaffordable, it effectively bans abortion for some women.²⁹

A Majority witness at the hearing, Richard Doerflinger, frankly acknowledged the likelihood that the bill will alter existing insurance coverage:

[T]he new legislation when combined with existing laws may produce a ‘tipping point’ where coverage without abortion becomes the usual norm for health insurance; coverage that includes abortion will be permitted but rare.³⁰

In fact, Mr. Doerflinger expressed no concern for the millions of American women and families whose current insurance coverage would be changed when he stated, “My response to this prediction is that I hope it is correct.”³¹

Congress should not embrace such cavalier disregard for the well-being of millions of American women and their families who currently have insurance that covers abortion services.³²

C. H.R. 7 Places Women at Risk of Intrusive “Rape Audits” by the Internal Revenue Service and Insurance Companies

H.R. 7 has absolutely no corollary in existing law. It is a completely novel and untested use of the Internal Revenue Code that places women at risk of intrusive auditing by the Internal Revenue Service (IRS).

As Professor Susan Wood testified during the Constitution Subcommittee hearing on the bill, women might be required to document a rape or incest for the IRS or their insurance company. As she further explained, the burden and risk placed on insurers having to make coverage decisions (i.e., whether a particular expense falls within the exception for rape, incest, or where the life of a woman is endangered and can be covered without penalty or the need to segregate funds) likely will drive insurers to drop abortion coverage altogether.

MR. NADLER. So last year we had concerns give the unprecedented tax

²⁹H.R. 7 Hearing at 29-30.

³⁰H.R. 7 Hearing (written statement of Richard M. Doerflinger, at 9).

³¹*Id.*

³²A federally supported study conducted by the Guttmacher Institute found that 87% of typical employer-based insurance plans covered abortion, and a 2003 survey by the Kaiser Family Foundation found that 46% of insured workers had coverage for abortion. See Guttmacher Institute, Memo on Insurance Coverage of Abortion (updated Sept. 18, 2009), <http://www.guttmacher.org/media/inthenews/2009/07/22/index.html>.

provisions in the bill that this could require some pretty invasive regulatory enforcement procedures for women who are pregnant as a result of rape or incest and for women whose lives are endangered if they continue pregnancy. Is this a concern?

MS. WOOD. Absolutely. Having to make that determination is not something that either the IRS, insurance companies or Congress should really be involved in.

MR. NADLER. And setting aside the privacy concerns, how might uncertainty over how an expense be treated by the IRS impact women and how might it impact insurers?

MS. WOOD. Well, I think impacting women, to have to document a rape or condition of incest is traumatic at the minimum. I think in terms of insurers, they do not want to be in the place of having to make a determination of which is an acceptable exception to the ban on coverage, or whether it needs to be covered by either the woman herself or by this potential rider that would then need to be coordinated with the base plan.

This raises a lot of regulatory and oversight and implementation concerns that insurers have traditionally never been involved in and would – in their traditional way would be to just cut out that entire set of coverage entirely and not want to go into making those determinations, leaving all abortions uncovered.³³

Our colleagues on the House Ways and Means Committee have also noted in that intrusive abortion tax audits are likely if similar legislation were to become law. As they explained last Congress, “the Internal Revenue Service would be required to use the tools currently available as part of its tax enforcement duties, including the Internal Revenue Service’s ability to audit taxpayers, to determine whether tax benefits had properly or improperly been claimed with respect to expenses related to abortion services.”³⁴ The burdens that H.R. 7 would impose on a woman’s right to abortion and her access to health care services related to that constitutionally-protected choice should be rejected.

D. H.R. 7 Is At-Odds with Congress’s Longstanding Tax Treatment of Private Funds in Other Circumstances

There is no precedent for the position that the tax treatment of private funds – whether through exemption, deduction, credit or any other favorable treatment – converts money that the

³³H.R. 7 Hearing at 44.

³⁴H.R. Rep. No. 112-55, at 28 (2011).

government has decided not to collect from individual taxpayers or businesses into federal funds. That position, adopted to justify H.R. 7's tax penalty on the purely private funding of abortion, directly conflicts with Congress's and the courts' longstanding view of the tax treatment of private funds.

Under this theory, for example, favorable tax treatment for religious organizations or for individual contributions to religious organizations would qualify as federal funding of religion, raising First Amendment Establishment Clause concerns. Of course, the Supreme Court has never considered the favorable tax treatment of private funds to constitute federal funding in that context:

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.' There is no genuine nexus between tax exemption and establishment of religion.³⁵

Just as favorable tax treatment does not convert private funds paid to religious organizations into federal funding of religion, allowing private funds paid for abortion-related services to be treated as permissible medical expenses under the Internal Revenue Code does not convert those private funds into federal funding of abortion. Title II does not target federal funds but, instead, targets and penalizes the use of private funds. H.R. 7 is a radical departure from current tax treatment of medical expenses and insurance coverage; and it is not justifiable nor necessary to prevent federal funding of abortion.

IV. H.R. 7 SINGLES OUT WOMEN AND FAMILIES IN THE DISTRICT OF COLUMBIA FOR PARTICULAR HARM, UNJUSTIFIABLY RESTRICTING THE DISTRICT'S USE OF LOCAL FUNDS

H.R. 7, through the provisions of new section 309 of the United States Code, singles out the District of Columbia and places additional limits on the District's use of its own, non-federal funds for abortion-related care or coverage. Because of H.R. 7's unprecedented impact on her district, Representative Eleanor Holmes Norton (D-DC) asked to testify before the Constitution Subcommittee at the January 9, 2014 hearing on this legislation. Breaking with the Committee's past practice of granting other Members with a particular interest in a bill or issue the opportunity to testify, the Majority refused our colleagues' request.

³⁵Walz v. Tax Commission of City of New York, 397 U.S. 664, 675 (1970) (upholding property tax exemptions for religious organizations); *see also* Ariz. Christian Sch. Tuition Org. V. Winn, 131 S. Ct. 1436 (2011) (finding that - because tax credits do not involve the expenditure of government funds - Arizona taxpayers lacked standing to challenge a state law providing tax credits for individual or business contributions to a private "school tuition organization that, among others, awarded grants to students attending religious schools).

Having been denied the opportunity to appear, Representative Norton submitted a prepared statement, explaining among other things, how H.R. 7 imposes unique harms on her district:

H.R. 7 would permanently prohibit the District of Columbia government, but no other local government, from using its local funds for abortion services for low-income women, uniquely denying the District government the right local and state governments exercise to protect the reproductive rights of their female residents. . . . In particular, the bill, subject to very limited exceptions, would ban abortions in facilities owned or operated by the federal government, which, by definition in H.R. 7, would ban abortions in facilities owned or operated by the D.C. government. Moreover, the bill would prohibit a physician or other individual employment by the federal government from performing an abortion, which, by definition in H.R. 7, would prohibit a physician or other individual employed by the D.C. government from performing an abortion. The contortions upon which this provision depends undermine any basis for its legitimacy.³⁶

Similarly, District of Columbia Mayor Vincent Gray “express[ed] outrage” about the fact that H.R. 7 “contains language extremely offensive” to the District.³⁷

While some Congresses have restricted the District’s use of its own funds, others have accorded the District the same respect afforded to the states with regard to decisions about the use of local funds. If H.R. 7 should become law, the District’s discretion to make the funding decisions that best serve the needs of its residents will be permanently restricted.

During the Committee’s markup of H.R. 7, Ranking Member John Conyers, Jr. (D-MI) offered an amendment to prevent imposition of this permanent restriction. Expressing his disappointment that the Committee had not honored Representative Norton’s request to testify, Ranking Member Conyers sought to ensure that, as with constituents in other Members’ districts, the women and families who reside in the District of Columbia should have the same assurance that their elected representatives can spend local funds to serve their best interests, not those of certain Members of Congress. He explained:

My Amendment removes the permanent ban on the District’s ability to spend its own local taxpayer-raised funds as it chooses. . . .

Just because we can interfere by virtue of our unique power

³⁶H.R. 7 Hearing (written statement of Rep. Eleanor Holmes Norton (D-DC), at 1-2).

³⁷Letter from Vincent C. Gray, Mayor of the District of Columbia, to Representative Trent Franks, Chair, Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary (Jan. 8, 2014) (on file with H. Comm. on the Judiciary Democratic staff).

with regard to the District of Columbia does not mean that we should. I have long supported statehood for the District of Columbia because of these types of egregious examples of Congress overriding and restricting the reasoned judgment of District Officials about how best to serve Americans who live here in the city to which we are all visitors.³⁸

Unfortunately, his amendment was rejected by a vote of 11 to 19.

H.R. 7's permanent restriction on the District's use of its own local funds should be rejected. Women and families who live in the District should not be subject to additional harm simply because of where they live. They deserve the same guarantee afforded to constituents elsewhere: the fundamental assurance that their local elected representatives will act in their best interests or answer to the democratic process. We would never tolerate Congress treating our own constituents this way; we should show the same regard for the Americans who live in the Nation's Capitol.

CONCLUSION

H.R. 7 is not a modest effort to codify existing restrictions on federal funding of abortion. Rather, it is part of an aggressive campaign to roll back women's rights in complete disregard for the impact it would have on women's health, lives, or families. H.R. 7's aggressive tax provision has no corollary in existing law. It is an untested and unjustifiable penalty on privately-funded health care choices that some Members of Congress oppose.

Through federal funding restrictions that have been in place for more than three decades, Congress has used economic coercion in an effort to limit women's access to abortion. Until now, that coercion has been directed against the poor and women dependent on the federal government for health care. Now, all women and their families have been targeted.

Women in America have the fundamental right – guaranteed by the Constitution that we take an oath to support and defend – to make the profound and deeply personal decision of whether to carry a pregnancy to term. H.R. 7 burdens that right in a variety of ways that have nothing to do with federal funding of abortion.

For these reasons, we respectfully dissent and urge our colleagues to oppose this bill.

³⁸Unofficial Tr. of the Markup of H.R. 7, the No Taxpayer Funding for Abortion Act, by the H. Comm. on the Judiciary, 113th Cong. (2014) (written statement of Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary).