



ST. MARY'S  
UNIVERSITY

The Scholar: St. Mary's Law Review on Race  
and Social Justice

---

Volume 15 | Number 4

Article 5

---

1-1-2013

## Hardline Ideology Stymies Real Results: Texas Lawmakers' Battle over Family Planning Leaves Texas Women Unprotected.

Mariel Puryear

Follow this and additional works at: <https://commons.stmarytx.edu/thescholar>



Part of the [Law Commons](#)

---

### Recommended Citation

Mariel Puryear, *Hardline Ideology Stymies Real Results: Texas Lawmakers' Battle over Family Planning Leaves Texas Women Unprotected.*, 15 THE SCHOLAR (2013).

Available at: <https://commons.stmarytx.edu/thescholar/vol15/iss4/5>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in The Scholar: St. Mary's Law Review on Race and Social Justice by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu), [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu).

## COMMENTS

### HARDLINE IDEOLOGY STYMIES REAL RESULTS: TEXAS LAWMAKERS' BATTLE OVER FAMILY PLANNING LEAVES TEXAS WOMEN UNPROTECTED

BY: MARIEL PURYEAR\*

I. Introduction.....	830
II. History of Legislative Funding for Family Planning.....	833
A. Department of State Health Services (DSHS).....	833
B. Women's Health Program.....	835
C. Planned Parenthood in Texas.....	838
III. Budget Cuts Reduce Family Planning Services.....	840
A. Tiered System of Budget Allocation.....	842
B. Where is the Money Going?.....	844
C. Consequences of Reduced Funding.....	845
IV. "Affiliate Ban" Rules and Their Aftermath.....	851
A. The Launch of the Texas Women's Health Program..	858
B. Planned Parenthood's State Court Claim.....	860
C. Planned Parenthood's Most Recent Filings.....	862
D. Texas Women's Health Program.....	866
V. Likely Next Steps – Funding and Planned Parenthood Suits.....	867
A. Restoration of Family Planning Funding.....	867
B. Service Providers Going Around State in Bid for Title X Grants.....	869
C. Planned Parenthood in the Courts.....	870

---

\* Candidate for Juris Doctorate at St. Mary's University School of Law, Class of 2014. I would like to thank everyone who supported me in the comment-writing process, including all the members of *The Scholar* Volume 15, and the Volume 15 Editorial Board, who pushed all of us to do our best. I would especially like to thank my family and loved ones, whose patience, guidance, encouragement, and support make everything I do possible.

VI. Policy Recommendations . . . . .	871
A. Restore the Family Planning Budget . . . . .	871
B. Restore Planned Parenthood as a Provider in the Women's Health Program . . . . .	872
VIII. Conclusion . . . . .	873

## I. INTRODUCTION

“[T]here is, perhaps, one invention that historians a thousand years in the future will look back on and say, ‘That defined the 20th century.’ It is also one that a time-traveler from 1000 would find breathtaking—particularly if she were a woman. That invention is the contraceptive pill.”<sup>1</sup>

Family planning—specifically oral contraception—has opened economic and social doors for women, allowing them to choose when to have children, how far apart their children will be born, or whether to even have children.<sup>2</sup> This freedom empowers women to pursue higher education and careers when they might not have otherwise been able to do so.<sup>3</sup>

---

1. *The Liberator*, THE ECONOMIST, Dec. 23, 1999, <http://www.economist.com/node/347484>; see also Martha J. Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women's Life Cycle Labor Supply*, 121 Q. J. OF ECON. 289, 295 (2006).

While a number of relatively effective contraceptive methods were available well before the introduction of Enovid in 1960, oral contraception revolutionized the technology of birth control in three important ways. First, the pill constituted the first female contraceptive. A woman could independently decide to take the pill. . . . Second, the pill divorced the decision to use contraception from the time of intercourse. This lowered the marginal costs of preventing births during sex to zero and shifted decisions about contraception to times separate from the act of intimacy. Third, the pill's effectiveness far exceeded that of all other methods available in 1960.

*Id.*

2. See *Ten Great Public Health Achievements—United States 1900-1999*, 48 MORBIDITY & MORTALITY WKLY. REP. 241, 242 (1999), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00056796.htm> (describing the following as direct results of the availability of family planning).

Access to family planning and contraceptive services has altered social and economic roles of women. Family planning has provided health benefits such as smaller family size and longer interval between the birth of children; increased opportunities for preconceptional counseling and screening; fewer infant, child, and maternal deaths; and the use of barrier contraceptives to prevent pregnancy and transmission of human immunodeficiency virus and other STDs.

Martha J. Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women's Life Cycle Labor Supply*, 121 Q. J. OF ECON. 289, 318 (2006) (hypothesizing that earlier access to oral contraception has significantly shaped female labor markets); see also Minh N. Nguyen, *Refusal Clauses & Pro-Life Pharmacists: How Can We Protect Ourselves from Them?*, 8 SCHOLAR 251, 269 (2006) (discussing family planning options as “procreative decisions.”).

3. See RACHEL BENSON GOLD ET AL., GUTTMACHER INST., NEXT STEPS FOR AMERICA'S FAMILY PLANNING PROGRAM: LEVERAGING THE POTENTIAL OF MEDICAID

The increase in education for women levels the playing field between genders and brings more women into professions that have been traditionally male-dominated, such as law and medicine.<sup>4</sup> In addition to the economic and social changes for women in general, the increased use of family planning and contraceptive measures dramatically impacts low-income families.<sup>5</sup> Family planning involves counseling on family planning and contraception as well as life-saving services such as cancer screenings and testing and treatment for sexually transmitted infections (STIs).<sup>6</sup> The World Health Organization has identified numerous benefits to family planning, including “[p]reventing pregnancy-related health risks in women[,] [r]educing infant mortality[,] [h]elping to prevent HIV/AIDS[,] [e]mpowering people and enhancing education[,] [r]educing adolescent pregnancies[,] [and] [s]lowing population growth.”<sup>7</sup>

The role of family planning clinics is much more important in a state like Texas, where 35% of the population is without insurance,<sup>8</sup> and 53% of all pregnancies are unintended.<sup>9</sup> Moreover, Texas ranks third in the nation for teen births.<sup>10</sup> Further, in 2004, the Centers for Disease Control

---

AND TITLE X IN AN EVOLVING HEALTH CARE SYSTEM 6 (2009), available at [www.guttmacher.org/pubs/NextSteps.pdf](http://www.guttmacher.org/pubs/NextSteps.pdf) (citing Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730, 731(2002)) (concluding that “oral contraceptives have increased women’s age at marriage, which in turn has led to a significant increase in women’s participation in the labor force, resulting in their greater financial independence.”).

4. GOLD ET AL., *supra* note 3.

5. See *id.* at 10 (concluding that “[o]ne of the most notable successes of the national family planning effort during its first quarter-century was the near elimination of the income and racial disparities in contraceptive use . . .”).

6. Jordan Smith, *The War on Women's Health: To Attack Planned Parenthood, Lawmakers Undermine Health Care . . . and promote more abortions*, AUSTIN CHRON. (Apr. 22, 2011), <http://www.austinchronicle.com/news/2011-04-22/the-war-on-womens-health/>.

7. *Family Planning Fact Sheet*, WHO (last visited Feb. 24, 2013), <http://www.who.int/mediacentre/factsheets/fs351/en/index.html>.

8. *State Facts About Title X and Family Planning: Texas*, GUTTMACHER (last visited Feb. 24, 2013), <http://www.guttmacher.org/statecenter/title-X/TX.html>. The percentage of uninsured Texans varies depending upon the research study, but what is certain is that Texas has the highest rate of uninsured individuals in the United States. Cindy George, *HHS Secretary Sebelius 'would love to work with Texas' on solving state's uninsured crisis*, HOUSTON CHRON. (Apr. 9, 2013), <http://blog.chron.com/advocate/2013/04/hhs-secretary-sebelius-would-love-to-work-with-texas-on-solving-state%E2%80%99s-uninsured-crisis/>. “[Texas has] the highest number of uninsured people in the country and at least, thus far, Gov. Perry has indicated he has no interest at all in expanding Medicaid even though the federal government will pay 100 percent of the newly insured costs.” *Id.*

9. *Family Planning Fact Sheet*, *supra* note 8.

10. *Lowering the Teen Birth Rate in Texas: Armed with PRC Tools and Tactics*, HOUSTON COMMUNITIES FIGHT A WINNABLE BATTLE, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/prc/stories-prevention-research/stories/lowering-the-teen-birth-rate>.



and Prevention reported that, “[in] the most-recent year for which data [is] available, Texas was ranked number one in repeat teen births (24% statewide vs. 20% for the nation as a whole).”<sup>11</sup> With these kinds of statistics, Texas lawmakers should take initiative and maximize efforts to educate the population about reproductive health and provide them with family planning and contraception.

However, despite the acknowledged benefits of family planning, and the historical impact family planning has had especially on women in the twentieth century,<sup>12</sup> the Texas Legislature is looking backwards, decreasing family planning budgets and seriously restricting access to care. These policy changes are influenced by political pressures, designed by socially conservative lawmakers who view contraception and abortion as one in the same.<sup>13</sup>

This Comment begins by identifying and discussing some of the major components and key players in the most recent changes to women’s health care in Texas. Part II discusses the history of legislative funding for family planning. Part III examines the dramatic effect the most recent legislative changes have had on the availability and quality of women’s healthcare within the Department of State Health Services’ family planning programs. Part IV considers the recent changes to the Women’s Health Program and the legal battles being waged as a result of those changes. Part V presents information regarding changes we can expect to see not only in the next legislative cycle, but in the courts as well. Finally, Part VI will propose recommendations for what steps lawmakers should take next, considering the impact already being seen by the number of family planning clinics that have had to close, as well as the thousands of Texas women now going without family planning services.

---

htm (last updated June 30, 2011). See Amber Hausenfluck, *A Pregnant Teenager’s Right to Education in Texas*, 9 Scholar 151, 153 (2006) (discussing the fact that since 1995, Texas schools have not been required to teach sex education, but if one chooses to do so, it must teach abstinence as the preferred behavior choice, contributing to the state teen pregnancy rate).

11. *Lowering the Teen Birth Rate in Texas*, *supra* note 10.

12. See GOLD ET AL., *supra* note 3, at 12 (reporting on the “substantial and far-reaching economic consequences that unintended pregnancy could have—particularly among teenagers—by increasing a woman’s risk of living in poverty and reducing her ability to participate in the workforce or complete an education.”).

13. See Wade Goodwyn, *Gov. Perry Cut Funds for Women’s Health in Texas*, NAT’L PUB. RADIO (Sept. 20, 2011, 12:01 AM), <http://www.npr.org/2011/09/20/140449957/gov-perry-cut-funds-for-womens-health-in-texas> (quoting Texas Congressman Wayne Christian as stating that, “[w]ell of course this [family planning budget cut] is a war on birth control and abortions and everything—that’s what family planning is supposed to be about.”).

## II. HISTORY OF LEGISLATIVE FUNDING FOR FAMILY PLANNING

### A. Department of State Health Services (DSHS)

The battle over family planning in Texas is nothing new. Many conservative lawmakers erroneously equate family planning—the notion of responsibly planning when and how to grow a family—with abortion.<sup>14</sup> Planned Parenthood is the contractor with the most pronounced target on its back; conservative lawmakers have linked the family planning non-profit organization to abortion for many years, and view defunding Planned Parenthood as a necessary step to stopping abortions altogether.<sup>15</sup> This idea has thrived among conservatives despite the fact that over 95% of Planned Parenthood's services go to health care services other than abortion.<sup>16</sup> Many conservatives claim that their issue with the non-profit organization stems, in part, from a disagreement over whether to pay for abortions using government funds.<sup>17</sup> However, because federal law prohibits using federal funds to pay for abortions, *all* federal funding for Planned Parenthood pays for other health care services.<sup>18</sup>

Prior to the most recent budget cuts in the 82nd Legislative Session, the last major legislative attack came in 2005, with Senator Robert Deuell's budget rider,<sup>19</sup> which required the Texas DSHS to first direct ten million dollars of the state's family planning budget to Federally Qualified Health Centers (FQHCs) and then distribute any remaining funds to the

14. *Id.*

15. Smith, *The War on Women's Health*, *supra* note 6. Representative Sid Miller, R-Stephenville, expressed in a floor debate on defunding Planned Parenthood, that “[t]he state of Texas is not interested in proliferating the abortion business . . . I [do not] see that the Legislature views [reproductive health care and abortion] as two separate entities.” *Id.*

16. See Amanda Terkel, *Cecile Richards on Mitt Romney's Pledge to Defund Planned Parenthood: 'He Can't Get Rid of Us'*, HUFF. POST, [http://www.huffingtonpost.com/2012/11/05/cecile-richards-mitt-romney-planned-parenthood\\_n\\_2079335.html](http://www.huffingtonpost.com/2012/11/05/cecile-richards-mitt-romney-planned-parenthood_n_2079335.html) (last updated Nov. 5, 2012, 10:00 PM) (reporting that, “[w]hile Planned Parenthood clinics do offer abortion services, they account for just 3% of what the [non-profit] does.”).

17. See *Text of Gov. Perry's Remarks at Women's Health Program Press Conference*, OFFICE OF THE GOV. RICK PERRY (Oct. 31, 2012), <http://governor.state.tx.us/news/speech/17817/> (stating that the move to the fully state-funded Texas Women's Health Program ensures no taxpayer money goes to abortion providers and their affiliates, despite the fact that this has been the case since the program's inception in 2007).

18. See Population Research and Voluntary Family Planning Programs, 42 U.S.C. § 300a-6 (2012) (prohibiting the use of federal funding for performance of abortions).

19. A legislative rider is a “legislative directive, inserted in the General Appropriations Act following appropriation line items for an agency, which provides either direction, expansion, restriction, legislative intent, or an appropriation. The term also applies to special provisions at the end of each article and general provisions in the General Appropriations Act.” RESEARCH DIV. OF THE TEX. LEGIS. COUNCIL, GUIDE TO TEX. LEGIS. INFO. 55, available at <http://www.tlc.state.tx.us/pubslegref/gtli.pdf>.

rest of the state's providers, such as Planned Parenthood.<sup>20</sup> This budget plan, which went into effect in 2006, had dire consequences on the availability of reproductive health care—indeed, in 2006, more than 41,000 fewer women were provided with reproductive health care funded by the three main sources of federal money—Title V, Title XX, and Title X.<sup>21</sup> In 2005, the year prior to the Deuell rider, 326,106 family planning clients were served under a state-funded program; by 2010, 68,211 family planning clients were dropped from state-funded programs due to budget cuts, reducing the total number of family planning clients served to just 257,895.<sup>22</sup> This is a small fraction of the total number of Texas women who need publicly funded family planning services.<sup>23</sup> Amazingly, despite the immediate and negative effects of this “tiered” system of budget allocation, Representative Warren Chisum, R-Pampa, introduced a bill in the 82nd Legislature which not only extended the Deuell funding rider, but also set forth how the remaining money would be allocated to other family planning service providers.<sup>24</sup> This tiered system is discussed later and in greater detail.

---

20. See General Appropriations Act, 79th Leg., R.S., art. II, rider 81, at II-65; see also TEX. DEP'T OF STATE HEALTH SERVS., LEGIS. RIDERS AND FAMILY PLANNING 2 (May 19, 2010), available at <http://www.dshs.state.tx.us/WorkArea/DownloadAsset.aspx?id=22724> (explaining how funding has been allocated for family planning services as provided by FQHCs); Smith, *The War on Women's Health*, supra note 6 (noting how lawmakers “direct[ed] the Department of State Health Services to direct \$10 million each year from the state's family-planning money first to fund FQHCs before allocating the remaining money to the rest of state's providers.”).

21. Maternal & Child Health Services Block Grant, 42 U.S.C. § 701 (2012); Social Services Block Grant, 42 U.S.C. § 1397 (2012); Population Research & Voluntary Family Planning Programs, 42 U.S.C. § 300 (2012); Smith, *The War on Women's Health*, supra note 6.

22. *Family-Planning Budget: Families Don't Come First in This Funding Scheme*, AUSTIN CHRON. (Apr. 22, 2011), <http://www.austinchronicle.com/news/2011-04-22/family-planning-budget/>.

23. See GUTTMACHER INST., STATE FACTS ABOUT UNINTENDED PREGNANCY: TEXAS, available at <http://www.guttmacher.org/statecenter/unintended-pregnancy/pdf/TX.pdf> (reporting that “[i]n 2008, 1,462,400 Texas women aged [thirteen to forty-four] were in need of publicly funded family planning services.”).

24. See General Appropriations Act, 82nd Leg., R.S., ch. 1355, art. II, rider 77, at II-71 (outlining the tiered system of allocating family planning money). The allocation system uses:

a methodology that prioritizes distribution and reallocation to first award public entities that provide family planning services [including FQHCs] . . . ; secondly, non-public entities that provide comprehensive primary and preventative care as a part of their family planning services; and thirdly, non-public entities that provide family planning services but do not provide comprehensive primary and preventative care.

*Id.*; see also SIDE BY SIDE COMPARISON OF KEY ITEMS IN THE HOUSE AND SENATE BUDGETS, 82ND LEGISLATIVE SESSION, FRIDAY, (May 06, 2011), available at <http://www.tachc>.

### B. *Women's Health Program*<sup>25</sup>

In 2007, the implementation of the Women's Health Program (WHP), a saving grace to the immense losses suffered under the Deuell rider, brought back some family planning clients that had been lost.<sup>26</sup> In the first year of implementation, it brought in nearly 59,000 clients.<sup>27</sup> The family planning services provided through the WHP are separate and apart from those provided through family planning services, which are overseen by the Department of State Health Services. The process of implementing the WHP began in 2005 when the Texas Legislature amended the Human Resources Code to allow for a demonstration project through the medical assistance program with the purpose of "expand[ing] access to preventive health and family planning services for women."<sup>28</sup> The program was intended to expand access to health services for uninsured women that were currently not covered under the state Medicaid plan.<sup>29</sup> Prior to the passage of the demonstration program, only those living at or below 17% of the federal poverty level were eligible for Medicaid coverage.<sup>30</sup> Senate Bill 747, which introduced the WHP, required the Health and Human Services Commission, the state agency that would be in charge of overseeing the proposed WHP, to extend services to women living at or below 185% of the federal poverty level, thus greatly increasing the number of Texas women eligible for federally funded family planning services.<sup>31</sup> At this level, a woman in a family of four would qualify as long as the family's monthly income did not exceed \$3,554.<sup>32</sup> Eligibility requirements for the program stated that the woman: must be between eighteen and forty-four years old, an American citizen or legal immigrant, must reside in Texas, may not have full Medi-

---

org/content/Budget\_Side-by-Side\_Highlights.pdf (reiterating how the Department of State Health Services allocates funding to family planning services).

25. Act of May 30, 2005, 79th Leg., R.S., ch. 816, §1, 2005 Tex. Gen. Laws 2816, 2816-18 (expired Sept. 1, 2011).

26. Smith, *The War on Women's Health*, *supra* note 6.

27. *Id.*

28. TEX. HUM. RES. CODE ANN. § 32.0248(a) (West 2012).

29. *See* S. 747, 2005 Leg., 79th Sess. (Tex. 2005) (giving statement of intent in introducing the bill for the Women's Health Program).

30. *See id.* (noting statement of intent in introducing the bill for the Women's Health Program).

31. *See id.* (mandating "the Health and Human Services Commission to create a Medicaid waiver program expanding eligibility to women living at or below 185% of the federal poverty level for preventative health and family planning services, increasing access to these services and allowing the state to draw down additional federal Medicaid funding.").

32. *Who Can Get Women's Health Program Benefits?*, TEX. WOMEN'S HEALTH PROGRAM, <http://www.texaswomenshealth.org/page/who-can-get-womens-health-program-benefits> (last visited Feb. 24, 2013).

caid benefits, Medicare Part A or B, or CHIP, may not be pregnant, sterile or infertile, and must make less than “185% of the federal poverty guidelines.”<sup>33</sup> Further statutory requirements stated, in relevant part, that “money spent under the demonstration project, regardless of the funding source, [would not be] used to perform or promote elective abortions.”<sup>34</sup>

Since its inception, the statutory language of the WHP has prohibited providers within the program from “contract[ing] with entities that perform or promote elective abortions or are affiliates of entities that perform or promote elective abortions.”<sup>35</sup> Planned Parenthood providers held their position within the program since it began in 2007.<sup>36</sup> While the statutory language prohibited the providers from “contract[ing] with entities that perform or promote elective abortions or are affiliates of entities that perform or promote elective abortions[,]” since none of the Planned Parenthood providers participating in the program performed abortions, and all retained separate corporate entities from any abortion provider, they were still able to participate in the program.<sup>37</sup>

By calendar year 2010, the impact of the WHP on Texas women’s health care could not be overstated. Between 2007 and 2010, the state spent \$6.7 million on the program, but this expenditure generated a savings of \$87 million.<sup>38</sup> This savings was possible because for every dollar spent on family planning, about \$3.74 is saved in Medicaid expenditures for pregnancy-related care related to births from unintended pregnancies.<sup>39</sup> To date, the numbers demonstrating the success of the

---

33. *Id.*

34. TEX. HUM. RES. CODE ANN. §32.0248(h) (West 2012).

35. *Id.*

36. See *Planned Parenthood Ass’n of Hidalgo Cnty. Tex., Inc. v. Suehs*, 828 F.Supp.2d 872, 877 (W.D. Tex. 2012) *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012) (stating that Planned Parenthood providers “have participated in the Women’s Health Program since its inception, despite their relationship to Planned Parenthood Federation of America, a national reproductive health-care provider that advocates for women’s access to abortion.”).

37. See Brief for Plaintiff-Appellees at 9–10, *Planned Parenthood Ass’n of Hidalgo Cnty. Tex., Inc. v. Suehs*, 828 F.Supp.2d 872 (W.D. Tex. 2012), *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012) (describing the extent of separation between Planned Parenthood and separate corporate entities, who had “distinguishable names, separate boards of directors and governing bodies, no direct or indirect subsidies of abortion services, detailed employee timekeeping, clear signage, and separate books.”).

38. Becca Aaronson, *Spirited Testimony at Women’s Health Program Hearing*, TEX. TRIBUNE (Sept. 4, 2012), <http://www.texastribune.org/texas-health-resources/womens-health-program/texas-womens-health-program-faces-public-oppositio/> (quoting Texas Senator Kirk Watson as stating that, “[c]learly spending less than \$7 million to save over \$87 million is a smart investment in women’s health[.]”).

39. JENNIFER J. FROST ET AL., GUTTMACHER INST., CONTRACEPTIVE NEEDS AND SERVS.: NAT’L AND STATE DATA, 2008 UPDATE 5 (2010), *available at* <http://www.guttmacher.org/pubs/2008update5>.

program are staggering. More than 200,000 women enrolled in the program, more than 100,000 unduplicated claims were received by the program, over 8,000 unwanted pregnancies were averted, and over \$90 million were saved due to forestalled unwanted pregnancies.<sup>40</sup>

In 2011, when the original WHP demonstration program was set to expire, the Texas Legislature enacted a new no-affiliation provision to ensure that the restrictive language of the original Act would remain.<sup>41</sup> Several months later, in response to a request<sup>42</sup> for an opinion from the Attorney General regarding the definition for the word “affiliate,” and the subsequent opinion, the Texas Health and Human Services Commission (THHSC) adopted new rules defining the terms “affiliate” and “promote.”<sup>43</sup> As a result of these new rules (discussed further in the comment) Planned Parenthood clinics that had been service providers

---

gutmacher.org/pubs/win/contraceptive-needs-2008.pdf; see also *Facts on Publicly Funded Contraceptive Services in the United States*, GUTTMACHER INST. (May 2012), [http://www.gutmacher.org/pubs/fb\\_contraceptive\\_serv.html](http://www.gutmacher.org/pubs/fb_contraceptive_serv.html) (providing information on publicly funded contraceptive services in the U.S.).

40. HEALTH & HUMAN SERVS. COMM'N, RIDER 48 REPORT: 2011 ANNUAL SAVINGS AND PERFORMANCE REPORT FOR THE WOMEN'S HEALTH PROGRAM 3–4 (2012), available at <http://www.hhsc.state.tx.us/reports/2013/Rider-48-Annual-Report.pdf>.

41. See Act of June 28, 2011, 82nd Leg., 1st C.S., ch. 7, § 1.19, sec. 32.024, 2011 Tex. Gen. Laws 5390, 5425 (codified at TEX. HUM. RES. CODE § 32.024 (c–1)) (effective Sept. 28, 2011) (clarifying the responsibility of the Health and Human Services Commission to ensure that “money spent for the purposes of the demonstration project for women’s health care services under former Section 32.0248, Human Resources Code, or a similar successor program is not used to perform or promote elective abortions, or to contract with entities that perform or promote elective abortions or affiliate with entities that perform or promote elective abortions.”).

42. Tex. Att’y Gen. Op. No. GA-0845 (2011). In 2011, Attorney General Greg Abbott issued two opinions regarding the WHP. The opinion cited here was issued in response to a request from former THHSC Commissioner Thomas Suehs, while the other was issued in response to a request from Senator Robert Deuell, of the Deuell budget rider; see also Tex. Att’y Gen. Op. No. GA-0844 (2011) (outlining Attorney General Greg Abbott’s response to Senator Deuell’s inquiry about taking preventative measures toward contraceptives and family planning).

43. See 37 TEX. REG. 1696 (2012) (to be codified at 1 TEX. ADMIN. CODE §§ 354.1361–.1364) (originally proposed Aug. 26, 2011) (TEX. HEALTH & HUMAN SERVS. COMM'N) (stating background and justification for HHSC’s new rules defining “affiliate.”); see also 1 TEX. ADMIN. CODE § 354.1362 (2012) (defining “affiliate” as “[a]n individual or entity that has a legal relationship with another entity, which relationship is created or governed by at least one written instrument that demonstrates: (i) common ownership, management, or control; (ii) a franchise; or (iii) the granting or extension of a license or other agreement that authorizes the affiliate to use the other entity’s branch name, trademark, service mark, or other registered identification mark.”) (emphasis added).

within the program since it began were suddenly disqualified as WHP participants.<sup>44</sup>

### C. *Planned Parenthood in Texas*

Clearly, the success of the WHP was due, in large part, to the service providers working within the program. The Office of the Governor is quick to point out that Planned Parenthood clinics represented less than 2% of providers in the WHP.<sup>45</sup> However, of the family planning clients receiving services in calendar year 2010, at least 49% of WHP participants received some services at a Planned Parenthood provider.<sup>46</sup> Of the non-Planned Parenthood providers in the WHP, most see only a handful of WHP clients each year.<sup>47</sup> Planned Parenthood has had a positive impact and everlasting presence in Texas for over seventy-five years, working to provide “affordable health care and birth control, [and] accurate sexual health information . . . .”<sup>48</sup> In the year leading up to the 2011 Legislative budget cuts to family planning, eighty-one Planned Parenthood clinics served “more than 260,000 Texas women, men, and teens . . . .”<sup>49</sup> Of those served, “more than 120,000 were screened for cervical and breast cancers, and more than 380,000 received testing and treatment for STIs.”<sup>50</sup> While Planned Parenthood’s services are available to anyone, “more than a quarter of [Planned Parenthood’s] Texas patients [are] low-income women” enrolled in programs such as WHP, and other state-funded family planning programs.<sup>51</sup>

The wide range of available services at Planned Parenthood varies from location to location.<sup>52</sup> For instance, Planned Parenthood of Greater

44. See Brief for Plaintiff-Appellees at 10, *Planned Parenthood Ass’n of Hidalgo Cnty. Tex., Inc. v. Suehs*, 828 F.Supp.2d 872 (W.D. Tex. 2012), *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012).

45. *Women’s Health Program, Fighting for Women’s Health*, OFFICE OF THE GOV. RICK PERRY, [http://governor.state.tx.us/initiatives/womens\\_health/](http://governor.state.tx.us/initiatives/womens_health/) (last visited Feb. 24, 2013).

46. Brief for Plaintiff-Appellees at 47, *supra* note 44, at \*17.

47. See LEIGHTON KU ET AL., DEP’T OF HEALTH POLICY, DETERIORATING ACCESS TO WOMEN’S HEALTH SERVICES IN TEXAS: POTENTIAL EFFECTS OF THE WOMEN’S HEALTH PROGRAM AFFILIATE RULE 15 (Oct. 11, 2012), *available at* <http://sphhs.gwu.edu/departments/healthpolicy/publications/TexasWHP.pdf> (concluding that “in the markets they serve, Planned Parenthood affiliates serve half, and sometimes much more than half, of all WHP patients.”).

48. *Our History*, PLANNED PARENTHOOD OF GREATER TEXAS, INC., <http://www.plannedparenthood.org/greater-texas/our-history-40204.htm> (last visited Feb. 24, 2013).

49. Smith, *The War on Women’s Health*, *supra* note 6.

50. *Id.*

51. *Id.*

52. *Compare For Patients*, PLANNED PARENTHOOD OF GREATER NORTH TEXAS, INC., <http://www.plannedparenthood.org/greater-texas/patients-40023.htm> (last visited Feb. 24,

Texas, the nonprofit that resulted from the merger of the Austin, North Texas and Waco nonprofits, has over 125,000 health care and health education clients being served in twenty-eight different clinics.<sup>53</sup> According to the organization's 2012 estimates, Planned Parenthood of Greater Texas has performed the following services for clients:

109,000 clients left a Planned Parenthood health center with the birth control method of their choice[;] 105,000 tests and/or treatments for sexually transmitted infections (STIs)[;] 31,000 breast cancer screenings[;] 29,000 cervical cancer screenings[;] 22,000 HIV tests[;] 14,000 teens and parents [ ] received health education to prevent teen pregnancy[;] 6,800 adoption and prenatal referrals[;] [and] 508 HPV vaccines to prevent cervical cancer.<sup>54</sup>

The family planning clients served by Planned Parenthood clinics throughout the state are largely low-income. For instance, 90% of the clients of Planned Parenthood of Hidalgo County (PPAHC), along Texas's border with Mexico, are living at or below the federal poverty level.<sup>55</sup> PPAHC is the largest WHP provider in its service area, serving

---

2013) (listing available services including: “[a]nnual gynecological exams, [i]nformation about [a]bortion (at select locations), [a]doption referrals, [b]irth control including emergency contraception, [b]reast health and cervical cancer screenings, [t]esting and treatment for sexually transmitted infections for men and women, HPV vaccine, [r]apid HIV testing, [u]rinary tract and vaginal infection treatment, [and] [v]asectomy referrals (at select locations)”), with PLANNED PARENTHOOD OF NEW YORK CITY, INC., <http://www.plannedparenthood.org/nyc/> (last visited Feb. 24, 2013) (listing “[a]bortion, [b]irth control, [m]orning after pill, [s]exually [t]ransmitted [d]iseases (STDs), [and] [b]reast [c]ancer [s]creenings” under a section entitled “Health Info & Services”), and *Canoga Park Health Ctr.—Canoga, Park, CA*, PLANNED PARENTHOOD, [www.plannedparenthood.org/health-center/centerDetails.asp?f=2235&a=90070&v=details](http://www.plannedparenthood.org/health-center/centerDetails.asp?f=2235&a=90070&v=details) (last visited Feb. 24, 2013) (citing services offered as follows: “[a]bortion [s]ervices, [b]irth [c]ontrol, HIV [t]esting, [m]en’s [h]ealth [c]are, [m]orning-[a]fter [p]ill (Emergency Contraception), [p]regnancy [t]esting & [s]ervices, STD [t]esting, [t]reatment & [v]accines, [and] [w]omen’s [h]ealth [c]are.”).

53. *By the Numbers*, PLANNED PARENTHOOD OF GREATER TEXAS, INC., <http://www.plannedparenthood.org/greater-texas/numbers-40203.htm> (last visited Feb. 24, 2013).

54. *Id.*

55. *Planned Parenthood of Greater Tex. v. Tex. Health & Human Servs. Comm’n*, No. D-1-GN-12-003365 at \*18 (261st Dist. filed Oct. 26, 2012). *Accord* Mary Tuma, *Texas Woman Searches For Health Care As State Officials Move to Defund Planned Parenthood*, HUFF. POST (Oct. 29, 2012), 12:21 PM, [www.huffingtonpost.com/2012/10/29/planned-parenthood-texas\\_n\\_2023822.html](http://www.huffingtonpost.com/2012/10/29/planned-parenthood-texas_n_2023822.html) (noting that Planned Parenthood is “integral to maintaining a healthy life for many” in Hidalgo County because of the poverty rate); *see also* Carolyn Jones, *A Nightmare Scenario for Women’s Health: By Excluding Planned Parenthood from the Women’s Health Program, Rick Perry Has Intensified Texas’ Family Planning Crisis*, TEX. OBSERVER (Sept. 3, 2012, 10:42 AM), [www.texasobserver.org/a-nightmare-scenario-for-womens-health/](http://www.texasobserver.org/a-nightmare-scenario-for-womens-health/) (stating that four clinics had to shut down due to previous cutbacks and current plans would mean three more clients closing in Hidalgo County, “which serves 23,000 clients, 90 [%] of them below the poverty line . . .”).



about 6,500 women.<sup>56</sup> 90% percent of Planned Parenthood of Lubbock's (PPAL) patients are also at or below the federal poverty level.<sup>57</sup> In these regions of Texas, where the vast majority of Planned Parenthood's clients are at or below the federal poverty level, the role of Planned Parenthood within women's healthcare is that much more vital because women in these areas often come to Planned Parenthood not only for their family planning care, but for other health care services, such as yearly breast and cervical cancer screenings and well-woman check-ups.<sup>58</sup>

### III. BUDGET CUTS REDUCE FAMILY PLANNING SERVICES

The battle over family planning and women's health care in Texas began in full force with the changes and budget cuts for family planning proposed by the 2011 Texas Legislature. The 2011 Texas Legislature, faced with serious budgetary concerns, cut funding for many state-run programs.<sup>59</sup> However, family planning programs were among those most affected by the budget cuts;<sup>60</sup> state lawmakers cut the family planning budget by two-thirds, taking the budget from \$111 million, to just over \$37 million over a two-year period.<sup>61</sup> These cuts affected the family planning programs run by the Texas Department of State Health Services, specifically cutting \$13.1 million in state matching dollars for Title V funding, \$46.8 million in state matching dollars for Title XX funding, in-

---

56. *Planned Parenthood of Greater Tex.*, No. D-1-GN-12-003365 at \*18; see also, KU ET AL., *supra* note 47, at 3 (finding that "Planned Parenthood affiliates are the dominant providers of care in the WHP in their markets . . .").

57. *Planned Parenthood of Greater Tex.*, No. D-1-GN-12-003365 at \*19; see also Carolyn Jones, *A Nightmare Scenario for Women's Health: By Excluding Planned Parenthood from the Women's Health Program, Rick Perry Has Intensified Texas' Family Planning Crisis*, TEX. OBSERVER (Sept. 3, 2012), 10:42 AM, [www.texasobserver.org/a-nightmare-scenario-for-womens-health/](http://www.texasobserver.org/a-nightmare-scenario-for-womens-health/) (noting that if Lubbock were to lose this revenue, "5,000 poor women in West Texas could lose access to preventative services and birth control.").

58. See GOLD ET AL., *supra* note 3, at 15 (describing the package of services provided at family planning centers beyond contraception).

59. See *Texas House Budget Proposes Sweeping Cuts*, TEX. TRIBUNE (Jan. 19, 2011), <http://www.texastribune.org/texas-taxes/2011-budget-shortfall/texas-house-budget-proposes-sweeping-cuts/> (laying out the extensive proposed budget cuts for many state-run programs).

60. See Ross Ramsey et al., *Texas Legislature Passes \$15 Billion in Cuts*, TEX. TRIBUNE (May 28, 2011), <http://www.texastribune.org/texas-taxes/budget/liveblog-texas-legislature-passes-15-billion/> (summarizing 2011 Legislative budget cuts, in which health and human services and education were most affected).

61. See Becca Aaronson, *Family Planning Cuts Caused 53 Clinics to Close*, TEX. TRIBUNE (Sept. 26, 2012), <http://www.texastribune.org/texas-health-resources/reproductive-health/report-family-planning-cuts-caused-50-clinics-clos/> (describing that over fifty clinics providing family planning services have had to close their doors due to budget cuts).

cluding Social Services Block Grants and Temporary Assistance to Needy Families (TANF).<sup>62</sup>

According to an analysis by the Legislative Budget Board, conducted prior to the enactment of the cuts, these proposed cuts would result in 17,782 fewer men and 283,909 fewer women being served by family planning programs in the 2012–13 biennium.<sup>63</sup> Undoubtedly, by providing 284,909 women with family planning services, the rate of pregnancies among these women was greatly decreased.<sup>64</sup> In their analysis of the impact of the budget cuts on the number of increased births among the population formerly enrolled in a DSHS family planning program, the Legislative Budget Board estimated an additional 20,511 births, costing \$231,117,948 in Emergency Medicaid funds.<sup>65</sup> In fiscal year 2009, the average total cost of an Emergency Medicaid delivery and subsequent infant costs was \$11,268; of this, the state is responsible for about \$4,507.20, or about 40%, per birth.<sup>66</sup> Therefore, according to the projections issued by the Legislative Budget Board, by cutting the budget and forcing nearly 284,000 women from state-funded family planning services, the state of Texas will end up spending over \$98 million on the additional births and Medicaid costs for those women who do become pregnant over the next two years.<sup>67</sup> The 2011 budget cuts were, at least in part, the product of a dire economic situation in which cuts were made across the board.<sup>68</sup> However, in the long run, these budget cuts will end up costing Texans far

---

62. Memorandum from the Legislative Budget Bd. on the Analysis of Family Planning Reductions at the Dep't of State Health Servs. to Pamela McPeters with the Office of State Rep. Dawnna Dukes (May 5, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*), available at <http://www.lrl.state.tx.us/scanned/archive/2011/15623.pdf>.

63. *Id.*; see Jordan Smith, *Jumping the Shark on Women's Health: For the Sake of Anti-abortion Politics, the Governor and the Legislature Are Putting Women in Danger*, AUSTIN CHRON. (Jan. 18, 2013), <http://www.austinchronicle.com/news/2013-01-18/jumping-the-shark-on-womens-health/> (reporting that 127,000 family planning clients were losing service from 2011 to 2012).

64. See HEALTH & HUMAN SERVS. COMM'N, *supra* note 40, at 4 (stating that as a result of the WHP, Texas saw a reduction of an estimated 8,215 expected births for calendar year 2010).

65. Memorandum from the Legislative Budget Bd., *supra* note 62.

66. *Id.*

67. See *id.* (explaining the cost of emergency Medicaid deliveries and the subsequent infant costs in 2009).

68. See *Texas House Budget Proposes Sweeping Cuts*, *supra* note 59 (discussing the proposed 2011 budget and the various cuts to different department spending including reductions to Medicaid, public education, business and economic development, and public safety and criminal justice).

more than if the family planning programs had been able to continue unchanged.<sup>69</sup>

#### A. *Tiered System of Budget Allocation*

In addition to the sweeping cuts, lawmakers also set up a three-tiered system of distributing money to DSHS family planning programs, giving priority to public health clinics that provide primary and preventative care in all areas of health care, over clinics, such as Planned Parenthood, that specialize in providing family planning services.<sup>70</sup> Supporters of this budget allocation approach assert that women are better served when full-service health care is funded over community health clinics that only offer specialized service, such as family planning.<sup>71</sup> The reality, however, is that family planning centers such as Planned Parenthood are a significant provider of health care for women in the United States, perhaps because of their specialized services.<sup>72</sup> Indeed, the majority of low-income women who receive care at a family planning clinic report that it is their primary source of health care.<sup>73</sup>

According to Joseph Potter, a University of Texas sociologist and researcher and head of the University's Texas Policy Evaluation Project, Federally Qualified Health Centers currently provide family planning services to about 10,000 Texas women—about 40,000 fewer family planning

---

69. See Memorandum from the Legislative Budget Bd., *supra* note 62 (illustrating the cost of emergency Medicaid deliveries to Texas over a two year period).

70. General Appropriations Act, 82nd Leg., R.S., ch. 1355, art. II, rider 77, at II-71; see also Aaronson, *Family Planning Cuts Caused 53 Clinics to Close*, *supra* note 61 (describing how the Texas tiered budgeting system has adversely impacted family planning facilities); Thanh Tan, *Video Series: Fertile Ground, The Price of Unplanned Pregnancies: Part 6 of 6*, TEX. TRIBUNE (July 19, 2012), <http://www.texastribune.org/library/multimedia/video-series-fertile-ground/> (documenting the effect of reduced availability of family planning services on unplanned pregnancies and the economic effects here in Texas, specifically Bexar County).

71. See Smith, *The War on Women's Health*, *supra* note 6 (quoting testimony at a House Human Services Committee hearing by Joe Pojman, Executive Director of Austin-based Texas Alliance for Life, stating, “[i]f Planned Parenthood in Texas was defunded . . . these women will be far better off because they would [be given] a medical home.”).

72. See Rachel Benson Gold, *The Role of Family Planning Centers as Gateways to Health Coverage and Care*, 14 GUTTMACHER POL’Y REVIEW, no. 2, Spring 2011 at 15 (summarizing the significant role of family planning centers in the United States health care system, stating that “[i]t is therefore not at all surprising that six in [ten] women who obtain care at a family planning center describe it as their usual source of medical care.”).

73. See GOLD ET AL., *supra* note 3, at 16 (reporting that “[a]bout three-quarters of poor women who obtain care at a family planning center consider the center to be their usual source of care.”).

clients than Planned Parenthood.<sup>74</sup> To expect these FQHCs to absorb a client base five times what they currently serve is an unreasonable and unrealistic expectation that will result in tens of thousands fewer women receiving family planning services.<sup>75</sup> Planned Parenthood is also able to provide these services at a lower price per client.<sup>76</sup> By cutting the budget for these specialty clinics, lawmakers are further jeopardizing the health and welfare of Texas women, and likely increasing not only the number of unplanned pregnancies in Texas, but also tax-dollars spent on paying for those unplanned pregnancies.

Another important issue is whether the FQHCs have the ability to take over state-wide and provide services for the tens of thousands of family planning clients currently receiving services at a Planned Parenthood clinic.<sup>77</sup> When this tiered approach was first introduced in 2005, the consequences were drastic.<sup>78</sup> One of the reasons so many family planning clients were dropped from the state-funded programs in 2005 was because the FQHCs could not handle the influx of new clients.<sup>79</sup> There are currently sixty-nine FQHCs throughout Texas, operating around three hundred sites state-wide.<sup>80</sup> However, not all of these FQHCs have been receiving state funding for family planning, and in the years after the introduction of the tiered system, those FQHCs that were receiving funding could not spend all of what they were receiving.<sup>81</sup> From fiscal year 2006 (the first year after the tiered budget system went into effect), until fiscal

74. See Becca Aaronson, *Planned Parenthood to Remain in Women's Health Program*, KUT NEWS (Nov. 8, 2012, 7:25 PM), <http://kutnews.org/post/planned-parenthood-remain-womens-health-program> ("FQHCs currently provide services to about 10,000 women in the Women's Health Program, while Planned Parenthood serves about 50,000.").

75. See *id.* (quoting UT researcher Joseph Potter as stating "there isn't this large base of providers with space in their practices that is there ready, willing and able to take on this client base.").

76. Smith, *The War on Women's Health*, *supra* note 6; see also Carolyn McClanahan, *Planned Parenthood and High Deductible Insurance - Could The Combo Be The Answer?*, FORBES (June 7, 2012, 12:40 PM), <http://www.forbes.com/sites/carolynmcclanahan/2012/06/07/planned-parenthood-and-high-deductible-insurance-could-the-combo-be-the-answer/> (explaining the cost-effectiveness of the services provided by Planned Parenthood clinics nation-wide, providing reproductive services to clients for just \$266 per person per year).

77. See Smith, *The War on Women's Health*, *supra* note 6 (setting out the sheer number of operations Planned Parenthood conducts).

78. *Id.*

79. See *id.* (stating that "it takes the entire spectrum of providers, including Planned Parenthood, to meet the needs of the growing population of low-income people without access to reproductive and other basic health care services," according to a senior director of government relations at a Houston FQHC, Legacy Community Health Services).

80. *Texas Primary Care Office (TPCO) - Federally Qualified Health Centers*, TEX. DEPT. OF STATE HEALTH SERVS., <https://www.dshs.state.tx.us/chpr/fqhcmain.shtm> (last updated Aug. 27, 2012).

81. Smith, *The War on Women's Health*, *supra* note 6.

year 2010 (just prior to the Legislative budget cuts to family planning), FQHCs were allocated, but did not spend, \$18,179,314, simply because they could not absorb the additional clients.<sup>82</sup>

### B. *Where is the Money Going?*

Some of the funds being diverted from family planning have gone to other very worthy state agencies and projects, such as early childhood intervention and services for autistic children.<sup>83</sup> Additionally, an increasing percentage of funds diverted from family planning budgets over the past several legislative sessions have gone to a new project known as the Texas Alternatives to Abortion Program, which is overseen by THHSC.<sup>84</sup> A legislative rider in the 79th Legislative Session approved this program, and aims to “implement a statewide program for females seeking alternatives to abortion focused on pregnancy support services that promote childbirth.”<sup>85</sup> THHSC awarded a contract to provide these services to the Texas Pregnancy Care Network (TPCN), a “non-profit, charitable organization that is committed to assisting organizations that help women in crisis pregnancies via free and compassionate, practical and life-affirming services.”<sup>86</sup>

Since 2005, when the program went into effect, it has received \$26.3 million in public money, which comes from the state budget for family planning, health screenings, and preventative care.<sup>87</sup> However, there is no requirement that the service providers within the TPCN promote medically accurate information about reproductive health; in fact, many service providers in the program are not medical facilities at all.<sup>88</sup> One

82. *Family Planning Budget: Families Don't Come First in This Funding Scheme*, AUSTIN CHRON. (Apr. 22, 2011), <http://www.austinchronicle.com/news/2011-04-22/family-planning-budget/>.

83. Patricia Kilday Hart, *State Senators Oppose Cut of Family Planning Funds*, MY SAN ANTONIO (Apr. 5, 2011, 9:57 AM), [http://www.mysanantonio.com/news/local\\_news/article/State-senators-oppose-cut-of-family-planning-funds-1322488.php](http://www.mysanantonio.com/news/local_news/article/State-senators-oppose-cut-of-family-planning-funds-1322488.php).

84. General Appropriations Act, 79th Leg., R.S., art. II, Section 50, Special Provisions (Tex. 2005).

85. *Id.*; ALBERT HAWKINS, TEX. HEALTH & HUMAN SERVS. COMM'N, REQUEST FOR PROPOSALS FOR PROGRAM AND ADMINISTRATIVE SERVICES, RFP No. 529-06-0277, 4 (2005).

86. *About Texas Pregnancy Care Network*, TEXAS PREGNANCY CARE NETWORK, [http://texaspregnancy.org/index.php?option=com\\_content&view=article&id=53&Itemid=54&lang=en](http://texaspregnancy.org/index.php?option=com_content&view=article&id=53&Itemid=54&lang=en) (last visited Feb. 25, 2013).

87. Carolyn Jones, *Pregnant? Scared? Can They Help?: The Rise of Crisis Pregnancy Centers and the Abortion-Alternative Industry in Texas*, TEX. OBSERVER (Dec. 11, 2012), <http://www.texasobserver.org/pregnant-scared-can-they-help/>.

88. Jordan Smith, *No Real Alternative: In the Name of "Promoting Childbirth," the State Finds Yet Another Way to Deny Health Care to Thousands of Texas Women*, AUSTIN CHRON. (Jan. 26, 2007), <http://www.austinchronicle.com/news/2007-01-26/439247/print/>.

such provider, Pregnancy Resources of Abilene, does not provide breast or cervical cancer screenings, or family planning counseling and contraception—all services that were provided by family planning clinics from which funds were diverted. The center's website does not even mention contraception, but rather merely advocates abstaining from sex outside of marriage.<sup>89</sup> The center provides pregnancy testing, and counseling related to unintended pregnancies, or “crisis pregnancies.”<sup>90</sup> A visit to a crisis pregnancy center costs the state about \$237 per client, compared with an average cost of \$160 at a now defunded family planning clinic in Abilene.<sup>91</sup>

While it is entirely within the state's right to take a position in favor of childbirth over abortion, the concern many critics have expressed is that, by funding crisis pregnancy centers over family planning centers, there will be a decrease in *preventive* care.<sup>92</sup> By dealing with unintended pregnancies after the fact, rather than funding education about reproductive health, and providing contraception in the hopes of avoiding unintended pregnancies, the number of unintended pregnancies will increase, thus leading to an increase in the number of abortions.<sup>93</sup>

### C. *Consequences of Reduced Funding*

To implement the new budget cuts, the state had to reduce the number of state-funded family planning organizations from seventy-six to forty-one.<sup>94</sup> Since the Legislature cut funding to family planning, fifty-three out of the two hundred and forty clinics that were receiving public funding have closed, and another thirty-eight have reduced service hours.<sup>95</sup>

89. See *Sexual Health*, PREGNANCY RESOURCES OF ABILENE, <http://prabilene.com/sexhealth.html> (last visited Dec. 31, 2012) (stating that “when you have sex outside of marriage, you are opening the door to a host of issues—STD's, broken hearts and unplanned pregnancies to name a few. The good news is that you can experience sex to its [sic] fullest—within the safety and security of marriage.”).

90. *Id.*

91. Jones, *supra* note 87.

92. See Smith, *No Real Alternative*, *supra* note 88 (quoting Sarah Wheat, then-director of public affairs for Planned Parenthood of the Texas Capital Region, saying “[t]hese are dollars [that are supposed to] pay for high-quality preventative health care.”).

93. See LEGISLATIVE STUDY GROUP, BILL ANALYSIS FOR THE CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1 10, available at [www.texaslsg.org/82nd/fr05282011budget](http://www.texaslsg.org/82nd/fr05282011budget) (stating that the budget cuts, “passed under the guise of reducing abortion, will likely actually increase the number of abortions as more women are unable to access contraceptive medications as nearly 200,000 women are left without services each year.”).

94. Kari White et al., *Cutting Family Planning in Texas*, 367 NEW ENG. J. MED., no. 13, Sept. 27, 2012 at 1179-80.

95. Becca Aaronson, *Report: Family Planning Cuts Caused 53 Clinics to Close*, TEX. TRIBUNE (Sept. 26, 2012), [www.texastribune.org/texas-health-resources/reproductive-health/report-family-planning-cuts-caused-50-clinics-clos/](http://www.texastribune.org/texas-health-resources/reproductive-health/report-family-planning-cuts-caused-50-clinics-clos/).

As a result of the tiered budget scheme, the budget cuts are affecting “tier three” clinics much more drastically than “tier one” or “tier two;” out of 164 total “tier one” and “tier two” clinics in the state, 127 have had to make no changes in their services or hours.<sup>96</sup> On the other hand, of the seventy-six “tier three” clinics, only twenty-two have experienced no change—the majority have had to close clinics or reduce service hours—resulting in thousands of women no longer receiving family planning services.<sup>97</sup>

In the Houston area alone 15% of clinics that received state funding for family planning services have had to close since budget cuts went into effect; another 30% have had to reduce their hours.<sup>98</sup> Other areas of Texas have been even harder hit, such as Hidalgo County, along the Texas-Mexico border, in which half of the state-funded family planning clinics have closed, and wait times at the remaining area clinics is sometimes up to four weeks.<sup>99</sup> Clinics, however, are not the only places being affected by the extreme budget cuts to family planning. The state’s largest single provider of family planning services, Parkland Hospital in Dallas, previously received \$6.9 million in 2010, and served more than 38,000 clients.<sup>100</sup> However, after the 2011 legislative budget cuts went into effect, Dallas County Hospital District, which operates Parkland, received just \$2.8 million, and served less than 19,000 clients—less than half of the clients served in 2010.<sup>101</sup> The University of Texas Medical Branch in Galveston reported a decrease in family planning allocation, going from \$4.4 million in 2011 to \$1.6 million in 2012.<sup>102</sup> The Baylor College of Medicine Teen Health Clinic saw its budget cut by 25%.<sup>103</sup> These staggering cuts to funding, and the resulting decrease in the number of clients served by family planning services has had, and will continue to have, a drastic effect on the overall health and well-being of Texas families.

---

96. White et al., *supra* note 94, at 1180, figs. & tbl. “Effects on Clinics in Texas of Cuts in Family Planning Funding.”

97. *See id.* (reporting that although there are fewer tier three clinics, “they served approximately [41%] of women seeking publicly funded family planning services.”).

98. Jennifer Radcliffe, *Family Planning Clinics Hard Hit by Budget Cuts*, HOUSTON CHRON. (Sept. 27, 2012), <http://www.chron.com/news/houston-texas/article/Family-planning-clinics-hard-hit-by-budget-cuts-3900483.php>.

99. Pam Belluck & Emily Ramshaw, *Women in Texas Losing Options for Health Care in Abortion Fight*, N.Y. TIMES (Mar. 7, 2012), [http://www.nytimes.com/2012/03/08/us/texas-womens-clinics-retreat-as-finances-are-cut.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/03/08/us/texas-womens-clinics-retreat-as-finances-are-cut.html?pagewanted=all&_r=0).

100. Jordan Smith, *Jumping the Shark on Women’s Health: For the Sake of Anti-Abortion Politics, the Governor and the Legislature are Putting Women in Danger*, TEX. TRIBUNE (Jan. 18, 2013), <http://www.austinchronicle.com/news/2013-01-18/jumping-the-shark-on-womens-health/>.

101. *Id.*

102. Radcliffe, *supra* note 98.

103. *Id.*

The clinics that have been able to remain open are being forced to reduce their services, further jeopardizing the health of the women that have come to rely on them for their family planning needs.<sup>104</sup> Most clinics have limited access to the most effective contraceptive methods, such as IUDs and implants, in favor of less expensive options, such as contraceptive pills.<sup>105</sup> This is due to the fact that they have lost their Title X funding, which would have allowed them to purchase a wide range of birth control methods at wholesale cost.<sup>106</sup> In addition, women are being provided with fewer contraceptive pills per visit, which has the effect of lowering rates of continuation of use.<sup>107</sup> Without continuous use, the likelihood of unintended pregnancy may increase.<sup>108</sup>

The motivation of lawmakers throughout the nation as a whole, and in Texas specifically, in making these cuts to family planning services, is sold in two very different ways: money and morals. Some lawmakers have attempted to put forth the argument that budget cuts to family planning programs have been a purely financial decision—a product of recession-era spending—while others have come out and said that cuts to family planning are, in effect, cuts to abortion providers.<sup>109</sup>

104. See White et al., *supra* note 94, at 1181 (“Already, the legislation has created circumstances that force clinics and women in Texas to make sacrifices that jeopardize reproductive health and well-being.”).

105. *Id.*; see also Lindsey Tanner, *IUDs, Implants Urged For Teen Girls' Birth Control*, HUFF. POST (Sept. 20, 2012), [http://www.huffingtonpost.com/2012/09/21/iuds-implants-urged-for-t\\_n\\_1903511.html](http://www.huffingtonpost.com/2012/09/21/iuds-implants-urged-for-t_n_1903511.html) (noting from the American College of Obstetricians and Gynecologists that, “IUD and implants are safe and nearly 100[%] effective at preventing pregnancy, and should be ‘first-line recommendations.’”).

106. Jordan Smith, *Family Planning Clinics to Seek Federal Funds on Own*, AUSTIN CHRON. (Nov. 19, 2012), <http://www.austinchronicle.com/blogs/news/2012-11-19/family-planning-clinics-to-seek-federal-funds-on-own>.

107. White et al., *supra* note 94, at 1180; see also Brooke Winner et al., *Effectiveness of Long-acting Reversible Contraception*, 366 NEW ENG. J. MED., no. 21, May 24, 2012 at 1998, 1998 (finding that the contraceptive failure rate of the pill, patch or ring was higher than that of long-acting reversible contraception, and concluding that “[t]he effectiveness of long-acting reversible contraception is superior to that of contraceptive pills, patch, or ring . . .”).

108. White et al., *supra* note 94, at 1180; see also *Facts on Unintended Pregnancy in the United States*, GUTTMACHER INST. (Jan. 2012), <http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html> (stating that reducing the number of unintended pregnancies is a nationwide “public health goal.”).

109. See Esm E. Deprez, *Family Planning Loses Out in the Budget Brawl*, BLOOMBERG BUSINESSWEEK (May 18, 2011), <http://www.businessweek.com/stories/2011-05-18/family-planning-loses-out-in-the-budget-brawl> (quoting New Jersey Governor Chris Christie’s Spokesperson, Michael Drewniak, explaining that cuts to family planning in New Jersey were “about the budget, making the hard choices and responsible spending.”); see also Chuck Lindell, *Budget Conferees Prepare to Cut More Family Planning Money*, AUSTIN AM. STATESMAN, <http://www.statesman.com/news/news/state-regional-govt-politics/budget-conferees-prepare-to-cut-more-family-plan-1/nRbJJ/> (May 24, 2011) (quoting Rep.



Texas is part of a larger nation-wide effort to defund Planned Parenthood. Family planning programs are viewed as expendable, apparently worth the inevitable costs for conservative lawmakers' larger goals of making abortion a thing of the past.<sup>110</sup> This nation-wide war on Planned Parenthood came to the forefront when the U.S. House of Representatives voted to cut the entire federal family planning program, known as Title X, in 2011.<sup>111</sup> Fortunately, the Senate voted down the bill.<sup>112</sup> However, the issue remains a contentious one. A record 570 bills were introduced in state legislatures seeking to restrict access to abortion, many by way of the budget.<sup>113</sup> In so doing, funding is also cut to services that provide general women's wellness, sex education, and contraceptive services.<sup>114</sup>

---

Bryan Hughes, R-Mineola, stating that the House "funded [family planning] the absolute minimum amount required to comply with federal law . . . because federal family planning money is the income stream for the abortion industry."); see also Laura Bassett, *House GOP Targeting Title X in Push to Axe Family Planning Programs*, HUFF. POST, [http://www.huffingtonpost.com/2011/10/04/title-x-republicans-planned-parenthood-family-planning\\_n\\_993957.html](http://www.huffingtonpost.com/2011/10/04/title-x-republicans-planned-parenthood-family-planning_n_993957.html) (last updated Dec. 4, 2011, 5:12 AM) (revealing that while the GOP states they are cutting family planning funding to help lower the deficit, in reality the cuts hurt millions of low-income families depending on the funds for preventative health measures).

110. See Rick Perry, Governor of Tex., Address at the Source Pregnancy Center in Houston (Dec. 11, 2012), available at <http://governor.state.tx.us/news/speech/17959/> ("Now, to be clear, my goal, and the goal of many of those joining me here today, is to make abortion, at any stage, a thing of the past.").

111. *House Republican Spending Cuts in H.R. 1 Devastating to Women, Families, and the Economy*, NAT'L WOMEN'S LAW CTR. (Mar. 30, 2011).

H.R. 1, the House Republicans' spending plan for the rest of the fiscal year 2011, slashes funding for services vital to women and girls at every stage of their lives, from early childhood to K-12, through their working and childbearing years, and into old age, while more costly tax breaks for millionaires and corporate special interests are untouched. In addition, the bill prohibits the federal government from enforcing important legal protections for women.

*Id.*; see also Belluck and Ramshaw, *supra* note 99 (explaining how financing for women's health was cut by two-thirds by the Republican-controlled budget, resulting in the closure of over a dozen of clinics and decreased access to affordable healthcare options for many low-income families).

112. Belluck and Ramshaw, *supra* note 99.

113. See Deprez, *supra* note 109 (describing efforts in state legislatures to limit women's access to family planning services by using drastic cuts to budgets for such services. The author notes that a record number of bills have been filed in state houses with the intent of limiting participation of certain programs in women's health initiatives or limiting funding for certain programs).

114. See *id.* (noting that such draconian cuts to programs not only limit women's choices for reproductive services, but also their choices for general gynecological care, sex education programs, and access to contraceptives).

With these budget cuts in effect for less than a year, their full impact is not yet known.<sup>115</sup> What is known, however, is that since the budget cuts went into effect, thousands fewer women are being served by programs supported by the family planning budget.<sup>116</sup> Estimates have shown that the number of women no longer receiving family planning services could be as high as 150,000.<sup>117</sup> The budget cuts, therefore, amount to over 100,000 fewer women getting screened for breast and cervical cancer, tested for STIs, and receiving family planning services and contraception.<sup>118</sup>

What remains to be seen is what impact the budget cuts will have on women's health, and the health of an estimated 20,000<sup>119</sup> babies born to mothers who were not planning for them. Unintended pregnancies result in a variety of negative health consequences, including reduced use of prenatal care, lower breastfeeding rates, and poor maternal and neo-natal outcomes.<sup>120</sup> The committee on unintended pregnancy from the Institute of Medicine issued a report in which the authors concluded that "the consequences of unintended pregnancy are serious, imposing appreciable burdens on children and families."<sup>121</sup> In light of these negative conse-

115. See Thanh Tan, *Measuring the Effects of State Family Planning Cuts: Part 1 of 6, Video Series: Fertile Ground*, TEX. TRIBUNE (July 19, 2012), <http://www.texastribune.org/library/multimedia/video-series-fertile-ground/> (outlining how the Texas Legislature's unprecedented slashes to funding for family planning programs could have long range effects and reporting that researchers with UT's Texas Policy Evaluation Project estimate that the full effects of the budget cuts will not be known until 2014).

116. Jordan Smith, *A World Without Planned Parenthood?*, AUSTIN CHRON. (Oct. 26, 2012), <http://www.austinchronicle.com/news/2012-10-26/a-world-without-planned-parenthood/> (stating that "just 90,237 women were served during that six-month period [from December 2011 through May 2012], 50% fewer than were served during the same period a year earlier[.]" according to the Department of State Health Services).

117. See Crystal Conde, *Physicians Worry About Women's Access to Care*, 108 TEX. MED., no. 7, July 2012 at 18, 18 (affirming that recent estimates show that upwards of 150,000 low-income women have lost their access to preventive care and birth control due to drastic budget cuts in the 2011 legislative session).

118. See *id.* (noting that doctors interviewed have expressed concerns that the budget cuts will also limit women's access to cancer screenings, screenings for Sexually Transmitted Infections, assistance with general health issues such as high cholesterol, and the ability to receive contraceptives).

119. See Memorandum from the Legislative Budget Bd., *supra* note 62 (estimating that the funding reductions could result in approximately 20,000 additional births to Medicaid eligible women in the state of Texas).

120. See White et al., *supra* note 94, at 1180 (affirming that unplanned pregnancies can have a multitude of effects on both the mother and baby). Documented effects include a lessened use of prenatal medical care, lower rates of breast-feeding, and generally poor neonatal outcomes. *Id.*

121. *The Best Intentions: Unintended Pregnancy and the Well-Being of Children and Families*, NAT'L ACADEMIES PRESS, <http://www.nap.edu/html/bestsum/summary.html>.

quences, many groups, including the Institute of Medicine and the Department of Health and Human Services, have recommended instituting programs meant to educate the public about not only the dangers of unintended pregnancy, but also about reproductive health and family planning in general.<sup>122</sup> Clearly, by taking funding away from an organization that has made it its mission to do just that, lawmakers are putting their political agenda ahead of the health and welfare of Texas women.

Ironically, another expected consequence of the family planning budget cuts is the likely increase in the number of abortions sought amongst low-income women especially, who were previously receiving family planning services.<sup>123</sup> Although conservative lawmakers have argued that by cutting Planned Parenthood's funding they will be able to reduce the number of abortions, the result will likely be quite the opposite.<sup>124</sup> Research shows that by increasing family planning services, the number of unintended pregnancies goes down, and thus, the number of abortions goes down.<sup>125</sup> Planned Parenthood clinics and other specialty family planning clinics serve a vital role in providing low or no-cost contraceptives to low-income women. As a result of the budget cuts, low-income women will be forced to choose between obtaining contraception, which once was low or no-cost, and other needs for themselves and their families.<sup>126</sup> In addition to disproportionately affecting the low-income women who have come to rely on their services, the budget cuts have had a more significant impact on clinics in impoverished areas, where private

---

122. See *id.* (recommending, as part of a long-term campaign, the need to “educate the public about the major social and public health burdens of unintended pregnancy and [to] stimulate a comprehensive set of activities at national, state, and local levels to reduce such pregnancies.”); see also *Reproductive Health and Healthy People 2020*, OFFICE OF POPULATION AFFAIRS (Dec. 2010) available at <http://www.hhs.gov/opa/pdfs/reproductive-health-and-healthy-people-2020.pdf> (emphasizing the importance of family planning and stating the need, as a goal of the Department of Health and Human Services, to “[i]mprove pregnancy planning and spacing, and prevent unintended pregnancy.”).

123. See LAWRENCE B. FINER & MIA R. ZOLNA, GUTTMACHER INST., UNINTENDED PREGNANCY IN THE UNITED STATES: INCIDENCE AND DISPARITIES, 2006 8 (Aug. 25, 2011), <http://www.guttmacher.org/pubs/journals/j.contraception.2011.07.13.pdf> (reporting on the connection between the availability of family planning and the rate of unintended pregnancies, as well as abortions (though excluding miscarriages)).

124. See White et al., *supra* note 94, at 1180 (linking the inevitable decline in the availability of family planning to a decrease in consistent contraceptive use, and therefore, an increase in the likelihood of unintended pregnancies, thus increasing the number of abortions); see also FINER & ZOLNA, *supra* note 123, at 9 (reporting that “[f]orty-three percent of unintended pregnancies ended in abortion in 2006 . . .”).

125. See FROST ET AL., *supra* note 39, at 5 (reporting that “[c]ontraceptive services at Title X-funded clinics in 2008 helped to avert some 973,000 unintended pregnancies, which would have resulted in 433,000 unplanned births and 406,000 abortions.”).

126. White et al., *supra* note 94, at 1181.

donations are rare.<sup>127</sup> Thus, the budget cuts have had double the impact on low-income families; not only are the services in existing clinics reduced, but the actual number of clinics in especially impoverished areas is reduced as well.

#### IV. “AFFILIATE BAN” RULES AND THEIR AFTERMATH

In addition to the drastic cuts to funding of family planning programs within the Department of State Health Services, the new rules promulgated by THHSC have further jeopardized access to family planning for Texas women. From the time the WHP was implemented in 2007, providers have been prohibited from “contract[ing] with entities that perform or promote elective abortions or are affiliates of entities that perform or promote elective abortions.”<sup>128</sup> Because of a ruling issued by the Fifth Circuit in 2005, as long as there was legal and financial separation between entities that “performed or promoted” elective abortions and their family planning affiliates, those affiliates were allowed to participate in the WHP and receive federal funding.<sup>129</sup> Following this ruling, Planned Parenthood restructured its Texas organization in order to comply with the requirements, ensuring that entities receiving public funds did not engage in abortion services, allowing Planned Parenthood family planning clinics to remain as service providers in the WHP.<sup>130</sup>

However, in 2011, during the same legislative session in which funding for family planning was cut by two-thirds, legislators also approved a new bill which would exclude Planned Parenthood and other contractors affiliated with abortion providers from the WHP.<sup>131</sup> This was accomplished through the THHSC, which issued new definitions of “affiliate” and “pro-

127. *See id.* (stating that “Planned Parenthood affiliates in more affluent communities have offset funding cuts with private donations, but that hasn’t been possible for affiliates in impoverished or politically conservative areas . . .”).

128. TEX. HUM. RES. CODE ANN. § 32.0248(h) (West 2012).

129. General Appropriations Act, 82nd Leg., R.S., ch. 1355, art. II, rider 52, at II-64-65. *See generally* Planned Parenthood of Hous. and Se. Tex. v. Sanchez, 403 F.3d 324 (5th Cir. 2005) (interpreting a legislative budget rider to permit affiliates in order to prevent the statute in question from being unconstitutionally violative of the supremacy clause).

130. *See* Brief of Plaintiffs-Appellees, Planned Parenthood Ass’n of Hidalgo Cnty. Tex., Inc. v. Suehs, 828 F. Supp. 2d 872 (W.D. Tex. 2012) *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012) (describing the settlement reached after the *Sanchez* holding, in which “the Planned Parenthood entities created separate corporate entities[—]with distinguishable names, separate boards of directors and governing bodies, no direct or indirect subsidies of abortion services, detailed employee timekeeping, clear signage, and separate books.”).

131. *See* 37 Tex. Reg. 1696 (Mar. 9, 2012) (adopting with changes to the proposed text as originally published in the August 26, 2011 issue of the Texas Register, 36 Tex. Reg. 5279).

mote” as those terms applied to the WHP.<sup>132</sup> According to THHSC, the new rules were “adopted to implement § 32.024(c–1)[,]” the section of the Human Resources Code restricting the use of WHP funding.<sup>133</sup> Further, according to THHSC, they reflected the Legislature’s intent “to establish certain qualifications for providers to participate in WHP and to prohibit the participation of specialty providers that share a common mission or purpose with entities that perform or promote elective abortions.”<sup>134</sup>

The new rules were adopted on February 23, 2012, against the advisement of the Center for Medicaid and CHIP Services (CMS), which informed Texas officials that the new rules violated “statutory provisions that assure free choice of family planning providers . . . .”<sup>135</sup> The State Medicaid Manual, in referencing the Social Security Act, explicitly states that “any individual eligible for medical assistance (including drugs) under the plan may obtain the services available under the plan from *any* institution, agency, community pharmacy, or practitioner *qualified to perform the services required*.”<sup>136</sup> CMS included the free choice provision “to allow . . . recipients the same opportunities to choose among available providers of covered health care and services as are normally offered to the general population.”<sup>137</sup> Because the new rules restricted recipients’ choice of service provider, Texas officials were advised that federal funding for WHP, which amounted to 90% of overall funding for the program, or about \$36 million, would be withdrawn if no changes were

---

132. *See id.* (defining “affiliate” narrowly, requiring a “finding of a legal relationship that indicates common control or organization around a common mission or purpose and is more than a mere arm’s length relationship to coordinate care or services” and defining “promotes” in accordance with its “common usage”).

133. *Id.*; *see also* TEX. HUM. RES. CODE § 32.024 (c–1) (2011) (stating that “money spent for the purposes of the demonstration project for women’s health care services under former section 32.0248, Human Resources Code, or a similar successor program is not used to perform or promote elective abortions, or to contract with entities that perform or promote elective abortions.”).

134. 37 Tex. Reg. 1696 (Mar. 9, 2012).

135. Letter from Cindy Mann, Dir., Center for Medicaid and CHIP Services, to Billy Millwee, Assoc. Comm’r for Medicaid & CHIP, Health & Human Services Comm’n (Mar. 15, 2012), *available at* <http://www.lrl.state.tx.us/scanned/archive/2012/17970.pdf>.

136. CENTERS FOR MEDICARE AND MEDICAID SERVICES (CMS), STATE MEDICAID MANUAL § 2100 (emphasis added).

137. *Id.*

made.<sup>138</sup> This withdrawal of funds would occur over a two-stage phase-out period.<sup>139</sup> This phase-out period expired December 31, 2012.<sup>140</sup>

In response to the news CMS would be cutting federal funding from the state program, the State of Texas filed a lawsuit against the Secretary of Health and Human Services, Kathleen Sebelius, arguing, among other things, that the decision to withhold federal funding violated the constitution “by seeking to commandeer and coerce the States’ lawmaking processes into awarding taxpayer subsidies to elective abortion providers.”<sup>141</sup> Essentially, Texas lawmakers wanted to continue to receive federal funding while violating the provision of the federal law that provided for that funding.<sup>142</sup> However, in a ruling on December 21, 2012, U.S. District Judge Walter Smith denied the state’s request for a temporary injunction—which would have kept the funding in place—siding with the federal government’s argument that denying Planned Parenthood admission to the program violates Health and Human Service’s guidelines.<sup>143</sup>

Since the passage of the new “affiliate ban” rules, Planned Parenthood organizations throughout the state have joined together as plaintiffs and instituted a number of their own lawsuits against the state. The first of these, against former Texas Health and Human Services Commissioner Thomas Suehs, argued that the new rules were unconstitutionally restricting plaintiff’s First and Fourteenth Amendment rights.<sup>144</sup> Planned Parenthood affiliates argued that the new regulations passed by the

138. See *Planned Parenthood Stays in Women’s Health Program in Texas*, DALLAS MORNING NEWS, (Oct. 31, 2012), <http://www.dallasnews.com/news/state/headlines/20121031-planned-parenthood-stays-in-womens-health-program-in-texas.ece> (stating that the federal government usually funds approximately 90% of the program, which costs approximately \$40 million annually); see also Letter from Cindy Mann, *supra* note 135 (explaining that CMS would have “been willing to continue to provide full federal funding for WHP as long as Texas refrained from implementing a rule that is inconsistent with . . . legal requirements.”).

139. See Letter from Cindy Mann, *supra* note 135 (warning that “[i]n light of Texas’ actions, CMS is not in a position to extend or renew the current Demonstration, except for the purposes of phasing out the Demonstration.”).

140. See *id.* (explaining “if the State continues to impose its restriction on women’s choice of family planning providers, federal funding will not continue past December 31, 2012, when the authority for the current demonstration, as extended, ends.”).

141. *State v. Sebelius*, No. 6:12-CV-62 (W.D. Tex. Mar. 16, 2012).

142. See *Waco Judge Rejects State’s Argument For Cutting off Planned Parenthood Funding*, WACO TRIBUNE (Dec. 22, 2012), <http://www.wacotrib.com/news/184529321.html> (quoting Joseph Mead, an attorney from the U.S. Department of Justice, as saying “[t]he state wants to have its cake and eat it too[.]”).

143. *Id.*

144. Brief for Plaintiff-Appellees, *Planned Parenthood Ass’n. of Hidalgo Cnty. Tex. v. Suehs*, 828 F. Supp. 2d 872 (W.D. Tex. 2012), *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012).

THHSC created unconstitutional conditions, restricting many services providers' constitutionally protected rights to freedom of speech.<sup>145</sup> Most prominent among these service providers, Planned Parenthood is known for their advocacy in protecting a woman's right to choose a safe and legal abortion.<sup>146</sup> Their affiliates, the WHP service providers/plaintiffs in *Planned Parenthood Association of Hidalgo County Texas, Inc. v. Suehs*—although operating under the Planned Parenthood trademark—do not provide or encourage women to have abortions.<sup>147</sup> Rather, they provide neutral, educational information to their patients, offering them all the information they need to make an informed decision—a decision that the Supreme Court of the United States has affirmed, and re-affirmed.<sup>148</sup>

Some proponents of the new regulations argue, among other things, that although women have a constitutionally-protected right to an abortion, the government is in no way obligated to pay for that abortion.<sup>149</sup> The plaintiffs/service providers in *Planned Parenthood Association of Hidalgo County Texas, Inc.*, however, were not arguing that the government *should* pay for the abortion; rather, they were correctly arguing that the government should not be allowed to place unfair and unconstitutional conditions on government-funded family planning programs.<sup>150</sup>

The State has argued that promulgating the new rules is within their rights, under the Tenth Amendment, to determine standards for Medicaid

145. *Id.*

146. See PLANNED PARENTHOOD OF GREATER TEXAS, <http://www.plannedparenthood.org/greater-texas/index.htm> (last visited Sept. 30, 2012) (describing the history and philosophy of Planned Parenthood).

147. *Planned Parenthood Ass'n. of Hidalgo County Tex. v. Suehs*, 692 F.3d 343 (5th Cir. 2012).

148. See Brief for Plaintiff-Appellees at 10–11, *Planned Parenthood Ass'n. of Hidalgo Cnty. Tex. v. Suehs*, 828 F. Supp. 2d 872 (W.D. Tex. 2012), *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012) (stating that plaintiffs do not “promote” abortion, they instead offer neutral, factual information that allows a woman to make her own choice); see also *Roe v. Wade*, 410 U.S. 113, 163 (1973) (recognizing, for the first time, a woman's right, for the period of pregnancy prior to the end of the first trimester (now viability), to seek an abortion “free from interference by the State.” The right recognized in this case is implicated in all post-*Roe* cases); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992) (reaffirming the Court's decision in *Roe v. Wade* recognizing a woman's right to choose an abortion before fetal viability. Further, it establishes the “undue burden” test, as opposed to the trimester framework, when evaluating a state statute's abortion restrictions).

149. Brief for Appellant at 19–20, *Planned Parenthood Ass'n. of Hidalgo Cnty. Tex. v. Suehs*, 828 F. Supp. 2d 872 (W.D. Tex. 2012), *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012).

150. *Id.*; see *Planned Parenthood of Mid-Mo. & E. Kan. v. Dempsey*, 167 F.3d 458, 463–64 (8th Cir. 1999) (holding the same).

providers.<sup>151</sup> While the state does have the authority to establish some rules, the Supreme Court has recognized a limitation on government power, holding that “even though a person has no ‘right’ to a valuable governmental benefit . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”<sup>152</sup> The reasoning behind the Court’s holding is that, were the government able to deny benefits to a person based on their “constitutionally protected interests,” the government would essentially be able to “produce a result which [it] could not command directly.”<sup>153</sup> To allow such an outcome would be to do away with the protections that the Constitution provides.<sup>154</sup>

The Supreme Court has recognized several times the distinction that should be made between “limitations on the use of government *funds* (which are permissible) and regulations that condition receipt of funds on the *recipient* foregoing constitutionally protected conduct outside of the funding project (which are impermissible).”<sup>155</sup> The key difference between these two scenarios—what has marked a bright line for courts to use when analyzing governmental funding issues—has been whether the organization is free to “engage in constitutionally protected activity

151. See Letter from U.S. House Members to The Honorable Barack Obama, Pres. of the United States (Mar. 21, 2012) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*), available at [http://governor.state.tx.us/files/press-office/Texas\\_Womens\\_Health\\_Program\\_Letter.pdf](http://governor.state.tx.us/files/press-office/Texas_Womens_Health_Program_Letter.pdf) (detailing U.S. House Members' complaints regarding the decision to cut federal funding from the WHP).

152. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

153. *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

154. See *id.* (stating that “such interference [of the government ‘produc[ing] a result which [it] could not command directly’] with constitutional rights is impermissible.”); see also *Rust v. Sullivan*, 500 U.S. 173, 196–97 (1991) (holding that “here, the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized . . . . In contrast, our ‘unconstitutional conditions’ cases involved situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.”); *Planned Parenthood Ass’n of Hidalgo Cnty. Tex. v. Suehs*, 692 F.3d 343, 349 (5th Cir. 2012) (stating “such a choice [between a benefit and free speech] will tend to penalize a constitutionally protected right.”).

155. Brief for Plaintiff-Appellees at 20, *Planned Parenthood Ass’n of Hidalgo Cnty. Tex. v. Suehs*, 828 F. Supp. 2d 872 (W.D. Tex. 2012), *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012); see *Regan v. Taxation With Representation*, 461 U.S. 540, 543 (1983) (recognizing the constitutionality of Congress imposing lobbying restrictions on 501(c)(3) organizations, because of their ability to lobby through affiliated organizations); see also *F.C.C. v. League of Women Voters*, 468 U.S. 364, 398–99 (1984) (striking down a law that barred entities from receiving federal funds if they “editorialized ‘on controversial issues’ of ‘public importance’” because the ban on editorializing did not allow for the affiliate option recognized in *Regan*).



outside the government program . . . [,]” for instance, by acting through an independent affiliate.<sup>156</sup>

The Fifth Circuit relied upon this analysis in *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, in which the court was called upon to determine whether a legislative rider would have prohibited Planned Parenthood affiliates from receiving federal funds.<sup>157</sup> At least three other federal district courts have used this same analysis to allow for federal funding to go to affiliates of abortion providers, as long as those affiliates maintained legal and financial separation.<sup>158</sup> This same standard should have been applied to the question of whether the plaintiffs/appellees—service providers in the WHP since its inception—should be prohibited from maintaining affiliations with entities that perform or promote elective abortions. In applying this analysis, the court should have determined that the new “affiliate ban” rules go against precedent.<sup>159</sup> Instead, lawmakers are moving the benchmark for affiliates of

156. Brief for Plaintiff-Appellees at 21, *Planned Parenthood Ass’n of Hidalgo Cty. Tex. v. Suehs*, 828 F. Supp. 2d 872 (W.D. Tex. 2012), *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012); *see* *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324 (5th Cir. 2005) (construing a Texas statute as allowing Planned Parenthood the formation of financially-independent affiliates in order to avoid constitutional problems).

157. *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 338 (5th Cir. 2005) (“Whether Rider 8 permits the formation of separate entities and its effect if it does not permit them is the controlling question on this appeal.”).

158. *See* Brief for Plaintiff-Appellees at 22, *Planned Parenthood Ass’n of Hidalgo Cnty. Tex. v. Suehs*, 828 F. Supp. 2d 872 (W.D. Tex. 2012), *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012) (“Other appellate courts have also recognized this constitutionally required balance of protecting liberties while allowing government to ensure that its funds are spent for the purposes for which it intends, in situations that involved abortion providers participating in government programs.”); *see also* *Planned Parenthood Greater Memphis Region v. Dreyzehner*, 853 F. Supp. 2d 724, 734 (M.D. Tenn. 2012) (“[A]lthough the government can elect not to subsidize the abortion or advocacy for access to abortion as a form of government speech, the government cannot disqualify an otherwise eligible recipient of public funds based on that recipient’s conduct outside of the government program.”); *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 491 (M.D. N.C. 2011) (relying, in part, on the *Sanchez* opinion regarding constitutionality of affiliates in granting a preliminary injunction in favor of the Planned Parenthood plaintiff); *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1232 (D. Kan. 2011) (“The court holds that [the statute in question] serves to create an additional condition for a successful subgrant application, completely excluding a class of entities who are otherwise qualified under federal law for Title X participation.”).

159. *See* *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 343 (5th Cir. 2005) (holding that as long as affiliates of abortion providers maintain legal and financial separation, they would not be running afoul of State law); *see also* Brief for Plaintiff-Appellees at 23, *Planned Parenthood Ass’n of Hidalgo Cnty. Tex. v. Suehs*, 828 F. Supp. 2d 872 (W.D. Tex. 2012), *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012) (contending that “[t]he Affiliate Rule, by its express terms, bars the recipient of government funds from engaging in constitutionally protected conduct, even outside the government-funded pro-

entities that perform or promote elective abortions, now advancing policies that, in effect, argue that financial and legal separation—as agreed to under the settlement post-*Sanchez*—are no longer acceptable.<sup>160</sup>

Plaintiffs also argued that the new regulations promulgated by the THHSC are in violation of the First Amendment because they are targeting a particular viewpoint.<sup>161</sup> To counter this argument, former Commissioner Suehs relied on two Supreme Court cases citing to the Hatch Act, which restricts federal employees from engaging in certain political activity.<sup>162</sup> However, reliance on these two cases was in error for two reasons. First, the employees of service providers in the WHP are not federal employees, but rather, are “private actors who furnish services to low-income women in return for government reimbursement.”<sup>163</sup> Second, the Hatch Act restricts *all* political activity, regardless of its viewpoint, and is, therefore, viewpoint neutral.<sup>164</sup> THHSC’s new regulations, on the other hand, are clearly discriminating against only “those who advocate on one side of a public policy debate.”<sup>165</sup> There are no statutory restrictions on advocating *against* abortion, only on advocating for the protection of a woman’s right to choose safe and legal abortion.

---

*gram* and even through a legally and financially separate affiliate. It therefore . . . runs afoul of all the relevant precedent.”).

160. See Gen. Appropriations Act, 82nd Leg., R.S., ch. 1355, art. II, rider 52, at II-64–65 (“An entity otherwise eligible to receive funds distributed under Strategy B.1.3, Family Planning Services, (the “family-planning affiliate”) will not be disqualified from receipt of such funds because of its affiliation with an entity that performs elective abortions (the “abortion-services affiliate”) provided that such affiliation satisfies [separation requirements].”); see also *Balquinta v. Tex. Health & Human Servs. Comm’n*, No. D-1-GN-12-003887 (419th Dist. Dec. 11, 2012) (“All of the Planned Parenthood Plaintiffs except [Planned Parenthood Association of Hidalgo County] has an affiliate relationship permitted under the *Sanchez* settlement and the appropriations riders.”).

161. Brief for Plaintiff-Appellees at 28, *Planned Parenthood Ass’n of Hidalgo Cnty. Tex. v. Suehs*, 828 F. Supp. 2d 872 (W.D. Tex. 2012), *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012) (“[T]he [affiliate ban] Rule bars participation in WHP only by those who advocate on one side of a public policy debate—i.e. for access to safe and legal abortion.”).

162. Hatch Act, 5 U.S.C. § 7323 (Supp. 2008); see *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947), and *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548 (1973) (upholding the Hatch Act’s restrictions on federal government employees engaging in certain political activity).

163. Brief for Plaintiff-Appellees at 27, *Planned Parenthood Ass’n of Hidalgo Cnty. Tex. v. Suehs*, 828 F. Supp. 2d 872 (W.D. Tex. 2012), *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012).

164. Hatch Act, 5 U.S.C. § 7323 (Supp. 2008); Brief for Plaintiff-Appellees, *Planned Parenthood Ass’n of Hidalgo Cnty. Tex. v. Suehs*, 828 F. Supp. 2d 872 (W.D. Tex. 2012), *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012).

165. Brief for Plaintiff-Appellees, *Planned Parenthood Ass’n of Hidalgo Cnty. Tex. v. Suehs*, 828 F. Supp. 2d 872 (W.D. Tex. 2012), *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012).

Planned Parenthood affiliates were initially successful when a U.S. District Court judge for the Western District of Texas issued a preliminary injunction in favor of the providers.<sup>166</sup> However, the State of Texas appealed, and in August, 2012 a three-judge panel from the Fifth Circuit reversed the ruling of the District Court, holding that:

Texas may deny WHP funds from organizations that promote elective abortions. This specific restriction on the breadth of the program functions as a direct regulation of the definitional content of a state program, and it is therefore unnecessary to examine it within the framework of the unconstitutional conditions doctrine.<sup>167</sup>

Planned Parenthood sought an *en banc* review of this decision, but their request was denied in late October 2012.<sup>168</sup>

#### A. *The Launch of the Texas Women's Health Program*

In response to the decision by the Centers for Medicare and Medicaid Services (CMS) to pull federal funding from the Women's Health Program, Gov. Rick Perry announced that Texas would move to a fully state-funded women's health program, the Texas Women's Health Program (TWHP), from which clinics who are affiliated with abortion providers, such as Planned Parenthood, would be excluded.<sup>169</sup> The process of proposing and adopting rules authorizing the TWHP proved to be challenging, as many doctors and providers throughout the state expressed extreme reluctance to join as a provider within the program because of a "gag rule" which would have prohibited doctors from even providing "neutral, factual information and nondirective counseling" about abortions.<sup>170</sup> Service providers throughout the state made it known that they would not participate in the program if the rules contained the "gag rule,"

166. See *Planned Parenthood Ass'n of Hidalgo Cnty. Tex. v. Suehs*, 828 F. Supp. 2d 872 (W.D. Tex. 2012), *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012) (reasoning that, because "[p]laintiffs' [forty-nine] health centers, providing family-planning services through the Women's Health Program, have legally and financially distanced themselves from the Planned Parenthood organizations that perform abortion . . . [the new "affiliate ban" rule] impinges on Plaintiffs' First Amendment speech and associational rights.").

167. *Id.*

168. Alana Rocha, *Appeals Court Refuses to Rehear Planned Parenthood Case*, TEX. TRIBUNE (Oct. 25, 2012), <http://www.texastribune.org/texas-health-resources/womens-health-program/court-refuses-to-rehear-planned-parenthood-case/>.

169. Letter from Rick Perry, Gov. of Tex., to Barack Obama, Pres. of the United States (Mar. 8, 2012) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*), available at [http://governor.state.tx.us/initiatives/womens\\_health/](http://governor.state.tx.us/initiatives/womens_health/) (follow link for "Letter from Gov. Rick Perry informing President Obama of his decision" in "Related Content").

170. *Women's Health Program Gag Rule Defeated*, TEX. MED. ASS'N (Nov. 2, 2012), <http://www.texmed.org/template.aspx?id=25748>.

likely meaning that the new TWHP would not have enough providers to absorb the nearly 50,000 patients previously served at Planned Parenthood clinics.<sup>171</sup> Texas Health and Human Services Executive Commissioner Kyle Janek amended the proposed rules by removing the “gag rule,” and the rules went into effect November 1, 2012.<sup>172</sup>

After adopting the final rules, the fully state-funded TWHP was set to begin operating November 1, 2012.<sup>173</sup> In a press conference with Governor Rick Perry, Commissioner Janek announced the new TWHP was ready to go.<sup>174</sup> However, the day before the new program was set to begin, state officials announced that they would delay launching the program until on-going court battles were resolved or federal funding stopped.<sup>175</sup> Following this announcement, there was some speculation that the move was due to the fact that the new program still did not have enough doctors and resources to sustain the transition.<sup>176</sup> This possibility was especially troubling considering the announcement came just days after statements from Commissioner Janek in which he communicated “he [was] confident—but couldn’t guarantee—that enough clinics and doctors will be available to serve all 115,000 of the program’s patients.”<sup>177</sup>

---

171. See *TMA Condemns Women’s Health Rules*, TEX. MED. ASS’N (Sept. 17, 2012), <http://www.texmed.org/template.aspx?id=25422> (quoting TMA President Michael E. Speer, MD, in a letter written to DSHS, stating “[i]f the state indeed wants doctors to participate in the program, this is a step in the opposite direction.”).

172. See TEX. ADMIN. CODE § 39.33 (West 2012) (providing definitions for TWHP, in which the so-called “gag rule” does not appear).

173. *Id.*

174. See Kyle Janek, Tex. Health & Human Servs. Exec. Comm’r, Women’s Health Program Press Conference (Oct. 31, 2012), available at <http://governor.state.tx.us/news/speech/17817/> (“We’re here this morning to announce the new Texas Women’s Health Program is ready to go, and also to reassure women across the state that they can, and will receive services.”).

175. Peggy Fikac, *Planned Parenthood In—For Now*, SAN ANTONIO EXPRESS NEWS (Nov. 1, 2012, 1:48 AM), [http://www.mysanantonio.com/news/local\\_news/article/Planned-Parenthood-in-for-now-3998205.php](http://www.mysanantonio.com/news/local_news/article/Planned-Parenthood-in-for-now-3998205.php).

The state program is ready to go, but . . . we will continue in the federal program until such time as the courts say, “Either let in Planned Parenthood or other affiliate groups or stop the program entirely, in which case we would stop the program entirely and revert to the Texas Women’s Health Program,” Janek said, referring to the solely state-funded program.

*Id.*

176. See *id.* (quoting Mara Posada of the Planned Parenthood Trust of South Texas stating “they [THHSC] are not ready to start this program, which by all accounts has been deemed a disaster[.] There are simply not enough providers with the capacity to see the same number of patients as Planned Parenthood.”).

177. Chuck Lindell, *State Readies Takeover of Women’s Health Program*, AUSTIN AM. STATESMAN (Oct. 18, 2012), <http://www.statesman.com/news/news/state-regional-govt-politics/state-readies-takeover-of-womens-health-program/nShBM/>.

The move to a fully state-funded women's health program, overseen by the Department of State Health Services, has further highlighted the funding void for family planning programs in what many have speculated will be an impossible situation of paying for, and providing care for, the more than one hundred thousand women that were enrolled in the WHP.<sup>178</sup> Texas lawmakers took a gamble, deciding to commit to a fully state-funded program before knowing exactly how to pay for the new TWHP.<sup>179</sup> The future of the program was left to hang in the balance as lawmakers battled back and forth, preparing for a fight over family planning.<sup>180</sup> Fortunately, on April 4, 2013, the 83rd Texas Legislature did vote to fund the Texas Women's Health Program, restoring the \$9-to-\$1 match that was previously funded by the federal government.<sup>181</sup>

### B. *Planned Parenthood's State Court Claim*

The second lawsuit, filed in state court on October 26, 2012 against THHSC and current Texas Health and Human Services Commissioner Kyle Janek, challenged the rules under state law only, arguing that the rules are invalid under state statutes, and sought declaratory and injunctive relief.<sup>182</sup> Specifically, six Planned Parenthood affiliates/plaintiffs argued that Chapter 32 of the Texas Human Resources Code prevents the

178. Smith, *Jumping the Shark on Women's Health*, *supra* note 100.

The slashed family planning budget provided care for just 75,160 clients in 2012, down 63% from the number served in 2011. In all, more than 127,000 people lost access to health care last year. Unless something radical happens this year, the number of women going without care is likely to persist or increase over the coming biennium, due at least in part to the demise of the Medicaid-funded Women's Health Program.

*Id.*

179. See Nomaan Merchant, *Judge Denies Ruling to Keep Federal Funding for Texas Women's Health Program Funding Request*, ASSOC. PRESS (Dec. 21, 2012, 11:48 PM), <http://www.reporternews.com/news/2012/dec/21/judge-denies-texas-womens-health-program-funding/> (quoting a THHSC spokeswoman saying that the commission had found "pockets of money" to fund the new program).

180. See Emily Ramshaw, *For Women's Health Funding, Davis Was House Negotiator*, TEX. TRIB. (Apr. 5, 2013), <http://www.texastribune.org/2013/04/05/womens-health-funding-davis-was-house-negotiator/> (stating that the "behind-the-scenes, bipartisan negotiations . . . kept Thursday's budget battle from devolving into a fight over abortion and Planned Parenthood.").

181. *Id.*

182. See *Petition for Declaratory and Injunctive Relief at 2, Planned Parenthood of Greater Tex. v. Tex. Health & Human Servs. Comm'n*, No. D-1-GN-12-003365 (261st Dist. Ct. Oct. 26, 2012) (explaining that the Women's Health Program has been in existence since 2007 and receives reimbursements from Defendant Health & Human Services Commission for providing preventative healthcare services to low income women). The petition further alleges that 90% of these reimbursements come from federal funds. *Id.* The petition also notes that the plaintiffs serve nearly half of the women receiving Women's Health Program services statewide. *Id.*

“affiliate ban” rules from being authorized, and thus, the rules are invalid.<sup>183</sup> Chapter 32 provides:

If a provision of this chapter conflicts with a provision of the Social Security Act or any other federal act and renders the state program out of conformity with federal law to the extent that federal matching money is not available to the state, the conflicting provision of state law shall be inoperative to the extent of the conflict but shall not affect the remainder of this chapter.<sup>184</sup>

CMS communicated to state officials that the new rules conflict with federal law and that federal funding would no longer be made available to the state to help fund the WHP.<sup>185</sup> Therefore, the above referenced statutory provision should render the rules “inoperative” as argued by Planned Parenthood affiliates/plaintiffs.<sup>186</sup>

Again, the Planned Parenthood plaintiffs were initially successful when a state District Court judge issued a temporary restraining order barring Texas from excluding Planned Parenthood affiliates from the WHP until a full hearing on the merits.<sup>187</sup> This temporary restraining order was followed by the granting of a temporary injunction, in which the ruling judge stated that Planned Parenthood was “likely to prevail on their claim that the [“affiliate ban”] rule is inconsistent with the instructions of the Texas Legislature.”<sup>188</sup> In response to this temporary injunction, Texas Attorney General Greg Abbott brought an appeal before the Third Court of Appeals, and on December 7, 2012, the court, in a per curiam opinion, de-

183. *See id.* (noting that the Texas Human Resources Code Chapter 32 requires the Women’s Health Program to obtain approval from the Centers for Medicare and Medicaid Services (CMS) for implementation). The petition specifically alleges that CMS told Defendant Health & Human Services Commission that because “the rules” conflict with federal law, Women’s Health Program will no longer receive funding if they are enforced. *Id.*

184. TEX. HUM. RES. CODE ANN. § 32.002(b) (West 1979).

185. *See* Letter from Cindy Mann, *supra* note 135 (stating that under the new rule clinics that provided nearly half of Women’s Health Program services will most likely be excluded).

186. *See* Petition for Declaratory and Injunctive Relief at 3, Planned Parenthood of Greater Tex. v. Tex. Health & Human Servs. Comm’n, No. D-1-GN-12-003365 (261st Dist. Ct. Oct. 26, 2012) (“Because the Rules would render Section 32.024 (c-1) inoperative, the Rules cannot be authorized by statute, and are invalid.”); *see generally* TEX. HUM. RES. CODE ANN. § 32.002(b) (West 1979).

187. *See* Alana Rocha, *Planned Parenthood Sues Texas Over “Affiliate Ban Rule,”* TEX. TRIBUNE (Oct. 26, 2012), <http://www.texastribune.org/2012/10/26/planned-parenthood-suing-over-affiliate-ban-rule/> (reporting on the ruling by State District Court judge Amy Clark-Meachum granting a temporary restraining order).

188. Aaronson, *Planned Parenthood to Remain in Women’s Health Program*, *supra* note 74.

nied Planned Parenthood's motion for temporary orders and injunctive relief.<sup>189</sup>

### C. *Planned Parenthood's Most Recent Filings*

Despite conservative lawmakers' strict adherence to their political agenda, instituting roadblocks at every turn, Planned Parenthood affiliates have not yet given up the battle to provide quality healthcare and preventative screening to the women of Texas. Planned Parenthood filed two more lawsuits in early December, 2012—one in state court and one in federal court—in the hopes of furthering their mission of providing affordable health care and family planning.<sup>190</sup> The lawsuit filed in federal court will act as a placeholder of sorts while the state lawsuit is decided.

In the state court case plaintiff Marcela Balquinta, a WHP enrollee residing in McAllen, Texas, joins seven other Planned Parenthood affiliates as plaintiffs.<sup>191</sup> In their petition, plaintiffs point out several statutory provisions and legislative actions that support their claim that their exclusion from the TWHP should be ruled invalid.<sup>192</sup> Plaintiffs reiterate their claim made in *Planned Parenthood of Greater Texas v. Texas Health & Human Services Commission*, and argue that the above referenced language of Chapter 32 of the Texas Human Resources Code should make the affiliate ban rules inoperative because they conflict with the federal statute.<sup>193</sup> Further, Rider 52 of the 2012–13 General Appropriations Act provides that “[a]n entity otherwise eligible to receive funds distributed under Strategy B.1.3, Family Planning Services, (the ‘family-planning affiliate’) will not be disqualified from receipt of such funds because of its affiliation with an entity that perform selective abortions (the ‘abortion-services affiliate’) provided that such affiliation satisfies [requirements adopted post-*Sanchez*].”<sup>194</sup> Clearly, the statutory language of Chapter

189. *Tex. Health & Human Servs. Comm'n v. Planned Parenthood of Greater Tex. Family Planning and Preventative Health Servs.*, No. 03-12-00745-CV, 2012 WL 6110011, at \*1 (Tex. App.—Austin Dec. 7, 2012).

190. Karen Gullo, *Planned Parenthood Sues Texas Again Over Funding Cutoff*, BLOOMBERG (Dec. 11, 2012), <http://www.bloomberg.com/news/2012-12-12/planned-parent-hood-sues-texas-again-over-funding-cutoff.html>.

191. Original Verified Petition for Declaratory and Injunctive Relief and for Temporary Restraining Order at 1, 5, *Balquinta v. Tex. Health & Human Servs. Comm'n*, No. D-1-GN-12-003887 (Dist. Ct. Tex. Dec. 11, 2011).

192. *See generally id.* (stating plaintiffs' claims against THHSC).

193. TEX. HUM. RES. CODE ANN. § 32.002 (b) (West 2012); Original Verified Petition for Declaratory and Injunctive Relief and for Temporary Restraining Order at 11, 24, 25, *Balquinta v. Tex. Health & Human Servs. Comm'n*, No. D-1-GN-12-003887 (Dist. Ct. Tex. Dec. 11, 2011).

194. General Appropriations Act, H.R. 82-1, R.S., at II-69 (Tex. 2011); *see Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324 (5th Cir. 2005) (construing the

32, as well as the Appropriations Act voted on by the Legislature in 2011, demonstrates that the Planned Parenthood plaintiffs should not be excluded from the TWHP.

The plaintiffs further argue that the “poison-pill” provision included in the rules authorizing the TWHP goes against the intent of the legislature.<sup>195</sup> The rules authorizing the TWHP, which were proposed and adopted by Commissioner Janek, include a provision requiring that the TWHP end entirely if a court determines that the exclusion of affiliates of abortion providers is unconstitutional.<sup>196</sup> This “severability” clause could mean the end of family planning care for over 100,000 women in Texas, and lawmakers are holding it over the heads of Planned Parenthood plaintiffs. In a speech announcing the readiness of the TWHP, Governor Perry stated:

Let me be very clear, Texas law will not allow a program that includes abortion providers or their affiliates like Planned Parenthood to be a provider. If they file a lawsuit challenging the Texas program, and were they to prevail, they would kill this program, and they would be responsible for denying these important health services to the low-income women of Texas.<sup>197</sup>

However, this argument can be made on both sides of the issue. Critics of the new rules have argued that this is where the hardline ideology of many state lawmakers severely endangers women’s health, maintaining that lawmakers are putting politics before the health and welfare of Texas women.<sup>198</sup>

---

legislative rider in question as allowing for affiliates of abortion providers as long as they maintain legal and financial separation).

195. See Original Verified Petition for Declaratory and Injunctive Relief and for Temporary Restraining Order at 28, *Balquinta v. Tex. Health & Human Servs. Comm’n*, No. D-1-GN-12-003887 (Dist. Ct. Tex. Dec. 11, 2011) (pointing out that the Texas Legislature previously rejected a similar provision).

196. See 25 TEX. ADMIN. CODE § 39.45(d) (2012) (stating that: “to the extent that § 39.33(1), § 39.38, or this section is determined by a court of competent jurisdiction to be unconstitutional or unenforceable, or to the degree an official or employee of DSHS, HHSC, or the State of Texas is enjoined from enforcing these sections, DSHS shall regard this entire subchapter as invalid and unenforceable and shall cease operation of the program.”).

197. Speech, Gov. of Tex. Rick Perry, Gov. Perry’s Remarks at Women’s Health Program Press Conference (Oct. 31, 2012), <http://governor.state.tx.us/news/speech/17817/>. Governor Perry accused Planned Parenthood of caring more about “their own profits and their pro-abortion agenda” than the wellbeing of Texas women. *Id.*

198. See Carolyn Jones, *Texas Women’s Health Program to Launch Nov. 1*, TEX. OBSERVER (Oct. 19, 2012) <https://www.texasobserver.org/texas-womens-health-program-to-launch-nov-1/> (quoting CEO and President of Planned Parenthood of Greater Texas as saying it was “shocking that state officials would rather end low-income women’s access to



Moreover, as argued by Planned Parenthood plaintiffs, the Legislature already considered legislation that would have required the WHP to cease operation if a court had determined that the ban on contracting with abortion-related affiliates was invalid; the proposed legislation was not adopted.<sup>199</sup> In response to comments on the proposed rules, the DSHS stated that the “poison-pill” provision was needed to “ensure the TWHP is operated strictly in accordance with legislative intent.”<sup>200</sup> However, by not adopting the aforementioned proposed legislation, the Legislature was clearly demonstrating their intent to avoid such a provision.<sup>201</sup>

Because federal funds for the WHP ran out December 31, 2012, plaintiff Balquinta appeared in court on December 28th to request a temporary restraining order which, if granted, would have kept Planned Parenthood, and other contractors affiliated with abortion providers, in the TWHP until a ruling on January 11, 2013.<sup>202</sup> However, on December 31, 2012, a visiting judge denied the request, ruling that Texas could temporarily exclude otherwise qualified doctors and clinics from receiving state funding if they advocate for abortion rights.<sup>203</sup> The judge’s order denying the temporary restraining order stated that “[t]he Court does not find that an immediate, concrete[,] and irreparable injury, loss or damage will likely result to the Planned Parenthood Plaintiffs before a temporary injunction hearing can be held.”<sup>204</sup> That the court could come to such a conclusion underscores the lack of understanding amongst state lawmakers of how thousands of Texas women receive care, as well as the

---

family planning and preventive health services altogether than allow Planned Parenthood to provide these vital health services to women who chose to come to Planned Parenthood for care.”).

199. See Petition for Declaratory and Injunctive Relief at 12, *Balquinta v. Tex. Health & Human Servs. Comm’n*, No. D-1-GN-12-003887, 2012 WL 6162248 (Dist. Ct. Tex. Dec. 11, 2012), *denied*, No. D-1-GN-12-003887, 2012 WL 6763017 (Dist. Ct. Tex. Dec. 31, 2012), *and* No. D-1-GN-12-003887, 2013 WL 174105 (Dist. Ct. Tex. Jan. 11, 2013) (stating original text of legislation considered by the 2011 Legislature, containing language almost identical to that found in the “poison pill” provision).

200. 37 Tex. Reg. 8592 (Oct. 26, 2012).

201. Essentially, this means that the [TWHP] can shut down if it is no longer in line with Texas law barring abortion providers from receiving state funds. This clause has been called the ‘poison pill’ in previous debates, and its more immediate effect would be that the [TWHP] could self-destruct should the federal court rule in favor of Planned Parenthood. Jones, *supra* note 198.

202. Bayan Raji, *Patient Asks for Restraining Order on Texas Women’s Health Program*, Hous. Bus. J. (Dec. 28, 2012), <http://www.bizjournals.com/houston/news/2012/12/28/patient-files-restraining-order-on.html>.

203. *Balquinta v. Tex. Health & Human Servs. Comm’n*, No. D-1-GN-12-003887, 2012 WL 6763017 (Dist. Ct. Tex. Dec. 31, 2012).

204. *Id.*

important role family planning clinics play in the provision of health care and family planning services.<sup>205</sup>

Statements from State Representative Donna Howard following the announcement indicated disappointment at the ruling and concern over what will happen to the women who relied on Planned Parenthood for services.<sup>206</sup> Planned Parenthood's reaction to the denial was also one of disappointment—however, Ken S. Lambrecht, president and CEO of Planned Parenthood of Greater Texas, indicated that the battle was not over, stating “[r]egardless of what happens in the courts, Planned Parenthood will be here for our patients. Our doors remain open today and always to Texas women in need. We only wish Texas politicians shared this commitment to Texas women, their health, and their wellbeing.”<sup>207</sup>

A further blow came on January 11, 2013, when District Court Judge Stephen Yelenosky denied Planned Parenthood's bid for a temporary injunction, stating that, “because it is unlikely that the plaintiffs will succeed at trial, I will deny the temporary injunction.”<sup>208</sup> The attorney for Planned Parenthood maintained that the organization “is confident in the merits of our case,” and indicated that a trial on the merits was still under consideration.<sup>209</sup>

205. See GOLD ET AL., *supra* note 3 (reporting that three-fourths of low-income women receive services at family planning clinics); see also Gold, *supra* note 72 (explaining that nearly 60% of “women who obtain care at a family planning center describe it as their usual source of medical care.”).

206. Interview with Donna Howard, State Rep. Dist. 48 (D-Austin), in Austin, Tex. (Dec. 31, 2012).

207. See Becca Aaronson, *Judge: Texas WHP Can Proceed Without Planned Parenthood*, TEX. TRIBUNE, (Dec. 31, 2012), <http://www.texastribune.org/texas-health-resources/womens-health-program/judge-denies-request-allow-planned-parenthood-twhp/> (quoting Planned Parenthood of Greater Texas president and CEO stating “[i]t is shocking that once again Texas officials are letting politics jeopardize health care access for women. This case isn't about Planned Parenthood—it's about women like Marcy Balquinta who rely on us for basic, preventive health care[.]”).

208. Order Denying Temporary Injunction, *Balquinta v. Tex. Health & Human Servs. Comm'n*, No. D-1-GN-12-003887, 2013 WL 174106 (Dist. Ct. Tex. Jan. 11, 2013); Becca Aaronson, *Updated: Planned Parenthood Loses Bid for Injunction*, TEX. TRIBUNE (Jan. 11, 2013), <http://www.texastribune.org/2013/01/11/legal-battle-over-womens-health-program-continues/>.

209. Becca Aaronson, *Updated: Planned Parenthood Loses Bid for Injunction*, TEX. TRIBUNE (Jan. 11, 2013), <http://www.texastribune.org/2013/01/11/legal-battle-over-womens-health-program-continues/>; see also Corrie MacLaggan, *Judge keeps Planned Parenthood Out of Texas Program*, REUTERS (Jan. 11, 2013), [http://www.nbcnews.com/id/50438374/ns/health-health\\_care/#.URaruGfheSo](http://www.nbcnews.com/id/50438374/ns/health-health_care/#.URaruGfheSo).

#### D. *Texas Women's Health Program*

After officially launching the TWHP on January 1, 2013, there remains concern that the new program does not have enough providers to absorb those patients who had been receiving care at a Planned Parenthood clinic.<sup>210</sup> Although THHSC, along with participating providers throughout the state, keep reassuring Texans that there will be enough doctors and clinics to take in the nearly 50,000 former Planned Parenthood clients, these claims seem unrealistic.<sup>211</sup> In Abilene alone, a Planned Parenthood clinic (which closed in November 2012) served 601 WHP clients in 2012, compared with a combined total of 285 WHP clients served at sixteen other providers within thirty miles of Abilene.<sup>212</sup> In response to a THHSC survey, seven of those sixteen providers project that they will be able to serve an astonishing 5,750 TWHP clients in 2013.<sup>213</sup> That is an increase of more than 1,900 %.

Other concerns revolve around whether the information on the website is accurate.<sup>214</sup> Just four days before the ruling on the temporary injunction in the *Balquinta* case, HHSC reported that the new TWHP actually had a greater capacity to serve Texas women than the previous WHP.<sup>215</sup> HHSC spokeswoman Stephanie Goodman was reported saying “she was positive that the state’s count of 3,500 current providers in the program excludes duplicates.”<sup>216</sup> However, three days after the *Balquinta* ruling, State health officials had to take down the TWHP website because it was filled with mistakes, including doctors listed who had not signed up to be a part of the program, listings of clinics that were not accepting new pa-

---

210. See Ben Philpott, *Women's Health Program Still Has Provider Problems*, KUT NEWS (Jan. 4, 2013), <http://kutnews.org/post/womens-health-program-still-has-provider-problems> (quoting Representative Donna Howard, D-Austin: “One of my staff members actually typed in the zip code for [downtown Austin] and contacted the first [thirty] providers on that list and only found five of the [thirty] who actually serve women in the Women’s Health Program.”).

211. See *id.* (discussing the lack of available providers).

212. See Smith, *Jumping the Shark on Women's Health*, *supra* note 100 (reporting on a blog post by Stacey Pogue, formerly of THHSC, who is now a senior policy analyst at the Center for Public Policy Priorities).

213. *Id.*

214. See Anna Werner, *Thousands Search for Doctors after Texas Planned Parenthood Ban Upheld*, CBS NEWS (Jan. 14, 2013), [http://www.cbsnews.com/8301-18563\\_162-57563941/thousands-search-for-doctors-after-texas-planned-parenthood-ban-upheld/](http://www.cbsnews.com/8301-18563_162-57563941/thousands-search-for-doctors-after-texas-planned-parenthood-ban-upheld/) (reporting that, “[w]hen CBS News randomly selected [twenty-five] [doctors or clinics listed on the TWHP website] in the Austin area and called, they found just four were participating in the program. Fifteen didn’t offer women’s health services at all.”).

215. Becca Aaronson, *HHSC: New Women's Health Program Has Enough Providers*, TEX. TRIBUNE (Jan. 7, 2013), <http://www.texastribune.org/2013/01/07/state-survey-twhp-has-greater-capacity-ever/>.

216. *Id.*

tients, and duplicates of doctors listed.<sup>217</sup> After checking the accuracy of the list on the website, 975 practices were taken off the list, reducing the total to 2,448 doctors and clinics across the state.<sup>218</sup>

Once the revised list was posted, THHSC surveys show that there are still at least two regions of Texas—San Angelo and Corsicana—that are still not likely to have enough providers to serve enrolled WHP patients without Planned Parenthood.<sup>219</sup> While Governor Perry has said he’s “not in the game of what-if’s,” tens of thousands of Texas women are concerned about the seemingly likely answer to the question of whether the new program will have enough providers.<sup>220</sup>

## V. LIKELY NEXT STEPS – FUNDING AND PLANNED PARENTHOOD SUITS

### A. *Restoration of Family Planning Funding*

Considering the drastic funding cuts to DSHS family planning programs and the current exclusion of Planned Parenthood as a service provider within the new TWHP, the outlook for women’s health care and family planning in Texas seems bleak. Nonetheless, lawmakers are taking notice of the predicted consequences of the funding cuts.<sup>221</sup> In 2011, when the Legislative Budget Board warned lawmakers of the likely increased costs in Medicaid-financed births that would result from the proposed cuts to family planning, lawmakers moved forward with the cuts anyway, deeming cutting funding to Planned Parenthood as more important than reducing the number of unintended births and providing repro-

---

217. *Doubts Justified About State-Run Women’s Health Program*, AUSTIN AM. STATESMAN (Jan. 24, 2013), <http://www.statesman.com/news/news/opinion/doubts-justified-about-state-run-womens-health-pro/nT59Y/>.

218. Chuck Lindell, *Website Back Up for Texas Women’s Health Program*, AUSTIN AM. STATESMAN (Jan. 29, 2013), <http://www.statesman.com/news/news/national-govt-politics/website-back-up-for-texas-womens-health-program/nT9bn/>.

219. Aaronson, *HHSC: New Women’s Health Program Has Enough Providers*, *supra* note 215.

220. *See* Werner, *supra* note 214 (quoting Governor Perry) (“I’m not in the game of ‘what-if’s’ . . . [t]here are the providers there to take care of this, and the funding is there as well.”).

221. *See* Ramshaw, *For Women’s Health Funding, Davis Was House Negotiator*, *supra* note 180 (reporting on the House version of a 2014–15 budget which included “an additional \$100 million for women’s health funding via a bolstered primary care system—dollars that first made it through the Senate . . . .”); *see also* Becca Aaronson, *Restoring Family-Planning Cuts Without Ruffling Feathers*, N.Y. TIMES (Mar. 1, 2013), [http://www.nytimes.com/2013/03/01/us/texas-may-restore-some-family-planning-budget-cuts.html?\\_r=0](http://www.nytimes.com/2013/03/01/us/texas-may-restore-some-family-planning-budget-cuts.html?_r=0) (reporting on state Republican senators proposing adding \$100 million to a state-run primary care program for women’s health services).

ductive health and family planning services to Texas women.<sup>222</sup> Now, after the most recent Health and Human Services projections have made their way around the Capitol, lawmakers have had to back-peddle to restore some of the funding that was lost during the 82nd Legislative session.<sup>223</sup>

The HHS projections forecast that as a result of reduced access to state-subsidized birth control, an estimated 23,760 additional babies will be delivered in the 2014-2015 biennium by women who would have otherwise received services from one of the state-funded family planning programs—costing taxpayers up to \$273 million.<sup>224</sup> These estimates are even higher than those given in the Legislative Budget Board's initial analysis of the proposed cuts.<sup>225</sup> Perhaps because of the gravity of these numbers, not only in terms of lives affected, but also in tax dollars spent, lawmakers finally took the projections seriously and did something about it.<sup>226</sup> Some of Planned Parenthood's staunchest critics, including Senator Bob Deuell, R-Greenville, of the 2005 Deuell budget rider, have evidently grasped what family planning experts have been saying all along—that funding for family planning actually reduces the number of abortions.<sup>227</sup>

---

222. See Emily Ramshaw, *Lawmakers Could Restore Family Planning Funds*, TEX. TRIBUNE (Dec. 7, 2012), <http://www.texastribune.org/texas-health-resources/reproductive-health/lawmakers-could-restore-family-planning-funds/> (quoting Lucy Nashed, Gov. Rick Perry's spokeswoman, "[l]ast session the Legislature had to prioritize . . . [.] [e]very two years we take a fresh look at our resources and our needs.").

223. See Ramshaw, *For Women's Health Funding, Davis Was House Negotiator*, *supra* note 180 (stating that both the House and the Senate had passed budgets restoring much of the funding lost in 2011).

224. See Ramshaw, *Lawmakers Could Restore Family Planning Funds*, *supra* note 222 (relaying that these numbers were distributed to state lawmakers, and contributed to the movement to restore funds to family planning programs).

225. See Memorandum Analyzing Family Planning Reductions at the Department of State Health Services, *supra* note 62 (estimating an additional 20,511 births, costing \$231,117,948.00, based on the average expense of an Emergency Medicaid delivery and subsequent infant costs per child in the year 2009); see also Stephanie Simon, *States Slash Birth Control Subsidies as Federal Debate Rages*, REUTERS (Mar. 2, 2012), <http://www.reuters.com/article/2012/03/02/us-usa-contraception-subsidies-idUSTRE8211VY20120302> (citing the Legislative Budget Board's analysis in discussing the financial burden the 2011 cuts have created).

226. Ramshaw, *For Women's Health Funding, Davis Was House Negotiator*, *supra* note 180.

227. See Ramshaw, *Lawmakers Could Restore Family Planning Funds*, *supra* note 222 (quoting Senator Deuell's response to the debate over family planning funding, stating "you have to look at what happens if we don't [provide family planning]. We don't want more abortions."); see also *Planned Parenthood at a Glance*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/about-us/who-we-are/planned-parenthood-glance-5552.htm> (last visited Feb. 15, 2013) (claiming Planned Parenthood services prevent more than 684,000 unintended pregnancies each year).

While the restoration of funding to women's health services is a huge win for family planning, and women's health care in general, the *manner* in which the funding will be restored still evidences a lack of understanding on the part of lawmakers as to how women and especially poorer women access health care.<sup>228</sup> Democratic lawmakers were persuaded to find a middle ground, foregoing their fight to restore funding to Planned Parenthood, at least for now, in order to restore funding to women's health services.<sup>229</sup> In the game of politics, however, this type of compromise is necessary for the larger goal of increasing access to care.<sup>230</sup>

#### B. *Service Providers Going Around State in Bid for Title X Grants*

Another ray of hope for the future of family planning in Texas is the ability of family planning service providers bypassing the state and receiving Title X grants on their own.<sup>231</sup> One family planning organization, the Women's Health and Family Planning Association of Texas, applied for available Title X grant funding in an effort to restore some of the funding that was cut in the 2011 Legislative session.<sup>232</sup> The family planning organization, a group of statewide service providers including Planned Parenthood, was successful in their bid, receiving \$6.5 million from the U.S. Department of Health and Human Services.<sup>233</sup> The family planning organization beat out its state competition—Texas Health and Human Services—in their bid for the federal grant money.<sup>234</sup> The federal government announced the award on March 25, 2013; four other organizations around the country also received grant money, although the award

---

228. See GOLD ET AL., *supra* note 3, at 16 (reporting that “[a]bout three-quarters of poor women who obtain care at a family planning center consider the center to be their usual source of care.”); see also Ramshaw, *For Women's Health Funding, Davis Was House Negotiator*, *supra* note 180 (reporting that the new budget would help fund a *primary* care system, but not necessarily increase funding for specialty family planning clinics, which have seen the most cuts since 2011).

229. See *id.* (“[Democrats in the Women's Health Caucus] agreed to persuade their Democratic colleagues to pull down their amendments under the rationale that opening the floor for debate might inadvertently lead to Republican-led measures to strip funding.”).

230. See *id.* (quoting Donna Howard, State Rep. Dist. 48 (D-Austin)) (“Our No. 1 priority was to make sure that we did all we could to restore funding so low-income women would have access to care.”).

231. Jones, *supra* note 198.

232. Smith, *Family Planning Clinics to Seek Federal Funds on Own*, *supra* note 106.

233. HHS grants for Title X Family Planning Program, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Mar. 25, 2013), <http://www.hhs.gov/ash/news/20130325.html>.

234. Emily Ramshaw, *Women's Coalition Gets Federal Money State Vied For*, TEX. TRIBUNE (Mar. 25, 2013), <http://www.texastribune.org/2013/03/25/womens-coalition-gets-federal-money-state-vied/>.

to the Women's Health and Family Planning Association of Texas was the largest.<sup>235</sup>

Restoring Title X funds to family planning centers in Texas will have multiple benefits for family planning clinics and their patients. First and foremost, it will relieve some of the financial pressures that clinics have experienced since the funding cuts went into effect.<sup>236</sup> Secondly, restoring Title X funds will ensure standards of care for family planning.<sup>237</sup> This approach seems favorable over other methods increasingly being funded by the Texas Legislature, in which there are no requirements or state oversight of administered care, such as the Texas Alternatives to Abortion Program.<sup>238</sup> Moreover, it will also allow for group pricing of birth control, meaning some clinics can return to the more expensive—yet more effective—methods of birth control such as IUDs.<sup>239</sup> Finally, regaining Title X funds will reinstate the confidentiality requirement tied to Title X funds, which means that women—especially teens—can access family planning services without worrying about the information being disclosed to unwanted persons.<sup>240</sup>

### C. *Planned Parenthood in the Courts*

If Planned Parenthood's state court case is not successful, their federal case—claiming that the new TWHF violates their constitutional rights—

235. *HHS grants for Title X Family Planning Program*, *supra* note 233.

236. *See* Smith, *Family Planning Clinics to Seek Federal Funds on Own*, *supra* note 106 (suggesting Title X would provide funds for infrastructure, such as rent and salaries and extend group pricing on birth control, including more expensive contraceptive methods); *see also* Jones, *supra* note 198 (noting that “some providers, whose clinics teeter on the edge of financial viability, could continue operations” with Title X monies).

237. *See* RACHEL BENSON GOLD, GUTTMACHER INST., *TITLE X: THREE DECADES OF ACCOMPLISHMENT* (2001), available at [www.guttmacher.org/pubs/tgr/04/1/gr040105.pdf](http://www.guttmacher.org/pubs/tgr/04/1/gr040105.pdf) (concluding that “Title X essentially sets the standards for the provision of publicly funded family planning services and supplies in the United States.”).

238. *See* Smith, *No Real Alternative*, *supra* note 88 (quoting Senator Eliot Shapleigh, D-El Paso, asking Senator Tommy Williams, R-Woodlands, the sponsor of the Alternatives to Abortion Bill: “Don’t you want to license [the Crisis Pregnancy Centers], [to] make sure that the information being given out is accurate?” to which Senator Williams responded by saying, “Uh, you know, that wouldn’t be proper.”).

239. *See* Brooke Winner et al., *Effectiveness of Long-acting Reversible Contraception*, 366 *NEW ENG. J. MED.*, no. 21, May 24, 2012 at 1998, 1999 (concluding that long-acting reversible contraception such as IUDs had a lower failure rate than the pill, patch or ring); *see also* Smith, *Family Planning Clinics to Seek Federal Funds on Own*, *supra* note 106 (describing the costs of various family planning methods).

240. *See* GOLD ET AL., *supra* note 3 (reporting that “program regulations require that centers that receive any funding through Title X must ensure confidentiality for all their clients.”); *see also* Smith, *Family Planning Clinics to Seek Federal Funds on Own*, *supra* note 106 (describing the costs of various family planning methods).

will likely go to trial in 2013.<sup>241</sup> Whether a ruling in their favor will really help secure greater access to care, however, is still unknown considering the “poison pill” provision in the TWHP rules.<sup>242</sup> The provision has created a lose-lose situation not only for Planned Parenthood clinics, but for Texas women as well; they will be faced with the decision of either changing from their provider of choice, or losing access to care altogether.

What must be acknowledged on all sides is that the solution to this problem lies not in the courts, but in the legislature. As the *maker* of the law, rather than the *interpreter* of the law, the Legislature has the ability to evaluate the implications of bad policies and make changes to remedy the problems. It is not up to the court system to write policies. Lawmakers should put political pressures aside and take action that serves the best interest of their constituents, rather than serving their own interest.

## VI. POLICY RECOMMENDATIONS

Lawmakers have a unique and challenging job; they are able to effect change on such a large scale, impacting the lives of millions of people with each new bill. Unfortunately, the political pressures put on lawmakers can cloud their better judgment, and can result in situations, such as the current family planning crisis, in which the consequences of their actions turn out to be further reaching than they anticipated.<sup>243</sup>

### A. *Restore the Family Planning Budget*

While the negative repercussions of the budget cuts to family planning should come as no surprise considering the predications made by family planning experts as well as non-partisan committees such as the Legislative Budget Board, lawmakers can fortunately still take action to correct their past mistakes. By voting to restore family planning funding to the DSHS administered programs, lawmakers will save taxpayers millions of

---

241. Gullo, *supra* note 190.

242. See TEX. ADMIN. CODE §39.45 (West 2012).

To the extent that §39.33(1), §39.38, or this section is determined by a court of competent jurisdiction to be unconstitutional or unenforceable, or to the degree an official or employee of DSHS, HHSC, or the State of Texas is enjoined from enforcing these sections, DSHS shall regard this entire subchapter as invalid and unenforceable and shall cease operation of the program.

*Id.*

243. See Ramshaw, *Lawmakers Could Restore Family Planning Funds*, *supra* note 222 (reporting that some lawmakers are now having second thoughts related to the 2011 budget cuts, after seeing what impact they're having on access to family planning programs).



dollars in Medicaid expenses.<sup>244</sup> While many state lawmakers have identified reducing abortions as their primary goal, their actions to reduce family planning funding will likely have the opposite effect.<sup>245</sup> However, by funding reproductive health and education, and increasing access to family planning and contraception, thousands of unintended pregnancies would be averted, thus decreasing the number of abortions.<sup>246</sup>

#### B. *Restore Planned Parenthood as a Provider in the Women's Health Program*

The success of the Women's Health Program (WHP) was due in large part to the services offered by its largest provider, Planned Parenthood.<sup>247</sup> In his letter to President Obama announcing that Texas would pursue a fully state-funded women's health program, Governor Perry acknowledged the success of the WHP, stating that "[t]he WHP is a cost-effective Texas solution that connects more than 100,000 low-income women to vital health and wellness services each year."<sup>248</sup> One of the reasons it was so cost effective is because Planned Parenthood clinics were able to provide the same services as primary care facilities at a lower cost.<sup>249</sup> Furthermore, numerous studies have shown that among low-income women, specialty clinics like Planned Parenthood provide a majority of family planning services, as well as other wellness check-ups.<sup>250</sup> The Women's Health Program can return to being as successful as it was, but only if state lawmakers put aside political pressures and take action based on what will best serve Texas women—restoring funding to the provider of choice for nearly 50,000 women in the program.

244. See Memorandum from the Legislative Budget Bd., *supra* note 62 (reporting on expected costs to taxpayers as a result of 2011 legislative budget cuts).

245. See White et al., *supra* note 94, at 1180 (connecting the inevitable decline in the availability of family planning to the likely increase in unintended pregnancies, leading to an increase in the number of abortions).

246. See *id.* (connecting the inevitable decline in the availability of family planning to the likely increase in unintended pregnancies, leading to an increase in the number of abortions).

247. See KU ET AL., *supra* note 47, at 3 (reporting that "Planned Parenthood affiliates are currently the dominant WHP providers in their markets.").

248. Letter from Rick Perry, Gov. of Tex., to Barack Obama, Pres. of the United States, *supra* note 169.

249. See Carolyn McClanahan, *Planned Parenthood and High Deductible Insurance - Could The Combo Be The Answer?*, FORBES (June 7, 2012), <http://www.forbes.com/sites/carolynmcclanahan/2012/06/07/planned-parenthood-and-high-deductible-insurance-could-the-combo-be-the-answer/> (explaining the cost-effectiveness of the services provided by Planned Parenthood clinics nation-wide, providing reproductive services to clients for just \$266 per person per year).

250. See GOLD ET AL., *supra* note 3 (reporting that a majority of low-income women consider their visits to family planning centers to be their primary form of care).

## VIII. CONCLUSION

The Pill really did give a woman the right to choose. And though the consequences of that choice are still working themselves out, as both men and women adjust to the new reality, one difference between the passing millennium and those to come is clear: women have taken a giant step towards their rightful position of equal partnership with men.<sup>251</sup>

Increased access to publicly funded family planning could potentially be the single most important policy decision for women and low-income families in the past half-century.<sup>252</sup> Availability of contraception and family planning for all, regardless of income, has allowed women to pursue higher education and careers, creating more equality in the workplace.<sup>253</sup> Publicly funded family planning has also allowed more low-income families to escape the cycle of poverty, eliminating some of the disparities in access to contraception between low-income women and more affluent women.<sup>254</sup> Forty-two years after the passage of Title X, the sole federal program dedicated to family planning, the long-term effects of the program have been well-documented; yet, attacks on the program remain as present as they ever were, particularly in Texas.<sup>255</sup> Whether examining the issue from a public health standpoint or from an economic standpoint, increasing access to publicly funded family planning is the most responsible decision legislators could make.<sup>256</sup> However, in the past several Texas legislative sessions, the opposite has occurred.

Reduced funding for family planning programs and restricted access to qualified family planning clinics does a disservice to Texas women and low-income families who have come to rely on these services. Although

251. *The Liberator*, *supra* note 1.

252. *See id.* (reporting on the historical impact contraception has had on women's economic and social conditions).

253. *See* GOLD ET AL., *supra* note 3 (reporting that increased availability of contraception has increased the age of marriage among women, which in turn led to increased investment in higher education).

254. *See id.* ("One of the most notable successes of the national family planning effort during its first quarter-century was the near elimination of the income and racial disparities in contraceptive use that spurred the government's initial involvement in family planning.").

255. *See* Chuck Lindell, *Budget Conferees Prepare to Cut More Family Planning Money*, AUSTIN AM. STATESMAN (May 24, 2011) <http://www.statesman.com/news/news/state-regional-govt-politics/budget-conferees-prepare-to-cut-more-family-plan-1/nRbJJ/> (discussing the reasons that the House of Representatives gave family planning the absolute minimum required by federal law).

256. *See* GOLD ET AL., *supra* note 3. (reporting on findings of "researchers, advocates[,] and policymakers that enabling women and couples to better control the number and timing of their pregnancies could play an important role in reducing disparities in three key areas: poverty and government dependency, public health and human aspirations.").

some aspects of family planning are no doubt contentious, the broader goals of decreasing unintended pregnancies, decreasing abortions, and increasing the quality of care for women and low-income families should be the primary motivation for lawmakers.<sup>257</sup> Texas women, and Texas families, deserve nothing less.

---

257. See KU ET AL., *supra* note 47, at 3 (concluding that as a result of the 'affiliate ban' rules, "tens of thousands of low-income Texas women could lose access to affordable family planning services and to other women's health services.").