No. 16-4027

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PLANNED PARENTHOOD OF GREATER OHIO; PLANNED PARENTHOOD OF SOUTHWEST OHIO REGION,
Plaintiffs-Appellees,

v.

LANCE HIMES, in his official capacity as Director of the Ohio Department of Health,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Ohio
(No. 1:16-cv-00539, Hon. Michael R. Barrett)

BRIEF *AMICUS CURIAE* FOR REARING EN BANC OF AMERICANS UNITED FOR LIFE IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Americans United for Life has no parent corporations or stock of which a publicly held corporation can hold.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Americans United for Life (AUL) is the oldest and most active pro-life non-profit advocacy organization. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), AUL has dedicated nearly 50 years to advocating for comprehensive legal protections for human life from conception to natural death. AUL attorneys are highly-regarded experts on the constitution and pro-life legal language and are often consulted on various bills and amendments across the country. AUL has created comprehensive model legislation and works extensively with state legislators to enact constitutional pro-life laws, including legislation directed at allocating public funds away from the subsidization of elective abortion providers and toward comprehensive and preventive women's health care. *See, e.g.*, Americans United for Life, Defending Life 460–61 (2018 ed.) (AUL state policy guide providing model bills that reallocate public funds to comprehensive and preventive health care providers). It is AUL's long-time policy position that funds appropriated or controlled by a state

[1] No party's counsel authored any part of this brief. No person other than *Amicus* and its counsel contributed any money intended to fund the preparation or submission of this brief.

should not be allocated to providers of elective abortions. AUL has filed *amicus* briefs in every Supreme Court case involving the rights of states and the federal government not to use public funds and resources to subsidize elective abortions or abortion providers. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 507 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). Both parties consented to the filing of this brief, and AUL filed a motion for leave by the Court to file this brief.

ARGUMENT

I. Ohio's law cannot unconstitutionally condition a constitutional right that does not exist.

There is no "right" to a government benefit, and the government may deny benefits for a number of reasons. *Perry v. Sindermann*, 408 U.S 593, 597 (1972). There are, however, "some reasons upon which the government may not rely." *Id*. It "may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983)). Thus, to state a successful unconstitutional conditions claim, there must be a constitutional right that is infringed upon. Here, there is no such right.

There is no constitutional right to provide abortions. There is no constitutional right to receive funding for abortion. And there certainly is no constitutional right of abortion providers to receive funding for non-abortion related services.

A. The right to abortion does not contain a constitutional right to perform abortions.

For the first time in 1973, the United States Supreme Court recognized a federal constitutional right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973). The right created in *Roe* and clarified in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), has been consistently, specifically, and narrowly defined as the personal right *of a woman* to "terminate her pregnancy."[2] Most recently in 2016, the Supreme Court in *Whole Woman's Health v. Hellerstedt* reaffirmed that the right in *Casey* was that *of a woman* "to decide to have an

[2] *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) ("to terminate her pregnancy"); *Casey*, 505 U.S. at 844, 846 ("terminate her pregnancy"); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 420 n.1 (1983) ("terminate her pregnancy"); *Harris v. McR*ae, 448 U.S. 297, 312, 316 (1980) ("the freedom of a woman to decide whether to terminate her pregnancy"); *Maher v. Roe*, 432 U.S. 464, 473–74 (1977) ("her freedom to decide whether to terminate her pregnancy"); *Roe*, 410 U.S. at 153, 163 ("a woman's decision whether or not to terminate her pregnancy").

abortion." 136 S. Ct. 2292, 2300 (2016). While *Hellerstedt* modified the "undue burden" standard, it did not modify the underlying right.

Any right of abortion providers to provide abortions is derivative of a woman's right to terminate her pregnancy. *Casey*, 505 U.S. at 884 (1992) (plurality op.). Thus, an abortion provider's rights cannot be greater than the rights of the woman. In some instances, abortion providers can assert third party standing to enforce the rights of their patients, but the right they are enforcing is *the woman's* personal right to choose an abortion, not their personal right to provide abortions. *See Singleton v. Wulff*, 428 U.S. 106, 118 (1976) ("[I]t generally is appropriate to allow a physician to assert *the rights of women patients* as against governmental interference with the abortion decision." (emphasis added)). The Sixth Circuit panel erroneously conflated the right of a woman to terminate her pregnancy with the third party standing of abortion providers to enforce that right by defining the issue in this case in terms of the abortion provider's "right to provide safe and lawful abortions." Panel Op. 11. But there is no constitutional right to provide abortions; the right to abortion is a personal right that belongs *to a woman*.

B. The right to abortion does not contain a constitutional right to government funding for abortions.

"[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 507 (1989); *see also Regan*, 461 U.S. at 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."). "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977). That is why the Supreme Court has consistently upheld the right of states to "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." *Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991) (quoting *Maher*, 432 U.S. at 474).

In *Maher v. Roe*, the Supreme Court held that a state's ban on public funding for nontherapeutic abortions "does not impinge upon the fundamental right recognized in *Roe*," because the ban "places no

obstacles—absolute or otherwise—in the pregnant woman's path to an abortion." 432 U.S. at 474.

In *Harris v. McRae*, the Court upheld the constitutionality of the Hyde Amendment, which denied public funding for certain medically necessary abortions, because "[t]he Hyde Amendment, like the [funding ban] at issue in *Maher*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." 448 U.S. 297, 312, 315 (1980). "[R]ather, by means of unequal subsidization of abortion and other medical services, [the Hyde Amendment] encourages alternative activity deemed in the public interest." *Id.* "[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.* at 316.

In *Webster v. Reproductive Health Services*, the Court upheld a state ban "on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions," because to hold otherwise would "strain[] logic." 492 U.S. at 509, 511. The Court reiterated that the increased difficulty a woman may encounter to attain an abortion under the restrictions left her in no different or

worse position than she would have been if the government had not provided those services in the first place. *Webster*, 492 U.S at 509; *see also Harris*, 448 U.S. at 317.

Maher, *Harris*, and *Webster* make clear that there is no constitutional right to government funding for abortions, and that states may choose not to fund or subsidize abortion through their resources, in their programs, and with their limited public funds.

C. The right to abortion does not contain a constitutional right to government funding for non-abortion related services.

If the right to abortion does not contain a right to government funding and resources for abortion, it "strains logic" to reach a contrary result for the use of public funds for non-abortion related services. *See Webster*, 492 U.S. at 509. This is exactly what the Supreme Court held in *Rust v. Sullivan*.

In *Rust*, the Supreme Court upheld the ability of the U.S. Department of Health and Human Services to condition receipt of federal funds under Title X on forgoing abortion counseling and referral within the Title X federal family planning project, as well as on maintaining physical and financial separation from the prohibited

abortion activities. 500 U.S. at 178–81. Title X was enacted to provide grants to health care organizations offering family planning services, but explicitly prohibited grant funds from being "used in programs where abortion [wa]s a method of family planning." *Id.* at 178. Thus, abortion was (and is) outside the scope of Title X projects, and under the regulations in *Rust*, receipt of Title X grant funding was contingent on forgoing activities outside of the program.

The Court rejected the argument that the conditions on Title X grant funding were unconstitutional because they "penalized" protected rights funded outside the scope of Title X. *Id.* at 199 n.5. Title X grant funds are subsidies, it explained, and "the recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations it can simply decline the subsidy." *Id.* By accepting the grant funds, a recipient "voluntarily consents to any restrictions placed on [the funds]." *Id.*

The Supreme Court has never held that giving potential recipients a choice between accepting government subsidies and declining the subsidy and financing their own unsubsidized program violates the Constitution. *Id.* The Court reaffirmed this position more recently in

Agency for International Development v. Alliance for Open Society International, Inc. (*AOSI*), when it explained that the government's policy requirement violated the unconstitutional conditions doctrine because it went "*beyond* preventing recipients from using private funds in a way that would undermine the federal program" by requiring recipients "to pledge allegiance to the Government's policy." 570 U.S. 205, 220 (2013) (emphasis added).

Like in *Rust*, the scope of the six programs mentioned in Ohio's law do not cover abortion, and Ohio conditioned funding on forgoing activities outside of the six programs that are inconsistent with its policy choices. *See* Ohio Rev. Code § 3701.034. Unlike in *AOSI*, Ohio does not require recipients to pledge alliance to or adopt the State's policy as its own; it only requires that recipients act consistently with the State's policy to not perform or promote nontherapeutic abortions while receiving funds from the State. Under Ohio's law, beneficiaries of the six federal health programs are in no worse position than if Ohio had never allocated state and federal funds under any of the six programs; in fact, they are in an equal position since they can still receive benefits through other program providers. Similarly, Planned

Parenthood as a service provider is in the same position as if Ohio had chosen not to allocate funds under the six programs—Planned Parenthood remains free to provide abortions and use private, non-state allocated funds to finance their non-abortion related services.

Ohio's law does not condition the receipt of funds on a woman forgoing her constitutional right to choose an abortion. And since there is no constitutional right to perform abortions, fund abortions, or fund non-abortion related activities, Ohio's law cannot impose an unconstitutional condition on a constitutional right that does not exist.

II. Ohio's law and other abortion-related funding laws are not subject to the "undue burden" standard.

The Supreme Court has never applied the undue burden standard to abortion-related funding laws. In determining the constitutionality of a similar state funding law, the Seventh Circuit applied the undue burden standard because it incorrectly assumed that *Maher*, *Harris*, *Webster*, and *Rust* held that "the government's refusal to subsidize abortion does not unduly burden a woman's right to obtain an abortion". *See Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 987–88 (7th Cir. 2012). But *Maher*, *Harris*, *Webster*, and *Rust* all predate *Casey*'s undue burden standard. And in

Webster, no Justice joined Justice O'Connor's opinion, which would have determined the constitutionality of the statute at issue on the basis that the statute did not impose an undue burden. 492 U.S. at 530 (O'Connor, J., concurring in part and concurring in the judgment).

The undue burden standard created in *Casey* and modified in *Hellerstedt* requires that "courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Hellerstedt*, 136 S. Ct. at 2309 (citing *Casey*, 505 U.S. at 887–98 (opinion of the court)). When read in context, this standard applies "when determining the constitutionality of laws *regulating abortion procedures*." *Id.* at 2310 (emphasis added). It does not make sense to apply the undue burden standard to any law tangentially related to abortion no matter how attenuated the regulation is to the abortion procedure itself—such as the policy choice of a state to not provide government subsidies *for non-abortion related services*.

The undue burden standard cannot apply to *any* law that might apply to an abortion provider. For example, if the last abortion provider in a state has to shut down because it violated unlawfully sold drug products or committed Medicaid fraud, the result would presumably

create an undue burden on the ability of a woman to choose an abortion. But it strains logic that the undue burden standard would apply in such a way that abortion providers get a free pass to disregard or invalidate any law so long as it would allegedly prevent them from continuing to provide abortions.

A funding law for non-abortion related services is not a regulation on the abortion procedure, and thus should not be subject to the undue burden standard. The absurdity of applying the undue burden standard to Ohio's funding law can be seen when one considers the natural results. The law either has no effect on Planned Parenthood's ability to provide abortions or it has an effect on their ability to provide abortion. If the law has no effect, as Planned Parenthood concedes (Appellant Suppl. Br. 1), then there is obviously no burden—much less an *undue* burden—on the right of a woman to choose an abortion.

If the law does have an effect on the ability of Planned Parenthood to provide abortions, then there must be a direct correlation between the funds allocated and abortion. Thus, to say that Ohio's law places pressure on "[*Planned Parenthood's*] *patients'* abortion rights" or that there would be a "drastic reduction" in the availability of abortion in

Ohio (Appellees Br. in Opp. at 4, 5 (citing Panel Op. 24, 25)) is to admit that these funds directly impact and supplement the provision of abortion. But the funds under those six programs are supposed to be separate from abortion. Ohio has the right to allocate its public funds consistent with its policy choices and away from abortion. *See Rust*, 500 U.S. at 192–93.

Further, an abortion provider's private business practices and decisions made for a whole host of reasons that have nothing to do with avoiding an "undue burden" on a woman's right to choose an abortion should have no bearing on the application of the undue burden standard on a state law. Abortion providers choose where to open clinics—and conversely, where not to open clinics. They choose how much to pay their staff. They choose the cost they charge for abortions. They choose whether to provide services unrelated to abortion and how much to charge for those services. These decisions are made based on business, economic, and other reasons, not solely on whether it will make it more difficult for a woman to choose an abortion. Thus, Planned Parenthood's private business decision—whether they will continue to offer abortion in the wake of Ohio's reallocation of public funds away from the non-

abortion related services that Planned Parenthood offers—should have no bearing on the Court's determination of whether Ohio's law poses an undue burden on a woman's choice to terminate her pregnancy.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
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1. I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(g), that this brief complies with the type-volume limit because the Argument Section contains no more than 12.5 pages.

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CERTIFICATE OF SERVICE

I certify that on July 27, 2018, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals of the Sixth Circuit through the CM/ECF system. All parties to the case are registered CM/ECF users and pursuant to Circuit Rule 25(f), filing through the CM/ECF system constitutes service on all parties registered for electronic filing.

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