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112TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPT. 112–40 Part 1

PROTECT LIFE ACT

MARCH 17, 2011.—Ordered to be printed

Mr. UPTON, from the Committee on Energy and Commerce, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 358]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 358) to amend the Patient Protection and Affordable Care Act to modify special rules relating to coverage of abortion services under such Act, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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99–006

AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Protect Life Act".

SEC. 2. MODIFYING SPECIAL RULES RELATING TO COVERAGE OF ABORTION SERVICES UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT TO CONFORM TO LONG-STANDING FEDERAL POLICY.

(a) IN GENERAL.—Section 1303 of the Patient Protection and Affordable Care Act (Public Law 111–148), as amended by section 10104(c) of such Act, is amended—

(1) by redesignating subsections (c) and (d) as subsections (e) and (f), respectively;

(2) by redesignating paragraph (4) of subsection (b) as subsection (d) and transferring such subsection (d) after the subsection (c) inserted by paragraph (4) of this subsection with appropriate indentation (and conforming the style of the heading to a subsection heading);

(3) by amending subsection (b) to read as follows:

"(b) SPECIAL RULES RELATING TO TRAINING IN AND COVERAGE OF ABORTION SERVICES.—Nothing in this Act (or any amendment made by this Act) shall be construed to require any health plan to provide coverage of or access to abortion services or to allow the Secretary or any other Federal or non-Federal person or entity in implementing this Act (or amendment) to require coverage of, access to, or training in abortion services.";

(4) by inserting after subsection (b) the following new subsection:

"(c) LIMITATION ON ABORTION FUNDING.—

"(1) IN GENERAL.—No funds authorized or appropriated by this Act (or an amendment made by this Act), including credits applied toward qualified health plans under section 36B of the Internal Revenue Code of 1986 or cost-sharing reductions under section 1402 of this Act, may be used to pay for any abortion or to cover any part of the costs of any health plan that includes coverage of abortion, except—

"(A) if the pregnancy is the result of an act of rape or incest; or

"(B) in the case where a pregnant female suffers from a physical disorder, physical injury, or physical illness that would, as certified by a physician, place the female in danger of death unless an abortion is performed, including a life-endangering physical condition caused by or arising from the pregnancy itself.

"(2) OPTION TO PURCHASE SEPARATE COVERAGE OR PLAN.—Nothing in this subsection shall be construed as prohibiting any non-Federal entity (including an individual or a State or local government) from purchasing separate coverage for abortions for which funding is prohibited under this subsection, or a qualified health plan that includes such abortions, so long as—

"(A) such coverage or plan is paid for entirely using only funds not authorized or appropriated by this Act; and

"(B) such coverage or plan is not purchased using—

"(i) individual premium payments required for a qualified health plan offered through an Exchange towards which a credit is applied under section 36B of the Internal Revenue Code of 1986; or

"(ii) other non-Federal funds required to receive a Federal payment, including a State's or locality's contribution of Medicaid matching funds.

"(3) OPTION TO OFFER COVERAGE OR PLAN.—Nothing in this subsection or section 1311(d)(2)(B)(i) shall restrict any non-Federal health insurance issuer offering a qualified health plan from offering separate coverage for abortions for which funding is prohibited under this subsection, or a qualified health plan that includes such abortions, so long as—

"(A) premiums for such separate coverage or plan are paid for entirely with funds not authorized or appropriated by this Act;

"(B) administrative costs and all services offered through such coverage or plan are paid for using only premiums collected for such coverage or plan; and

"(C) any such non-Federal health insurance issuer that offers a qualified health plan through an Exchange that includes coverage for abortions for which funding is prohibited under this subsection also offers a qualified health plan through the Exchange that is identical in every respect except

that it does not cover abortions for which funding is prohibited under this subsection.";

(5) in subsection (e), as redesignated by paragraph (1)—

(A) in the heading, by striking "REGARDING ABORTION";

(B) in the heading of each of paragraphs (1) and (2), by striking each place it appears "REGARDING ABORTION";

(C) in paragraph (1), by striking "regarding the prohibition of (or requirement of) coverage, funding, or" and inserting "protecting conscience rights, restricting or prohibiting abortion or coverage or funding of abortion, or establishing"; and

(D) in paragraph (2)(A), by striking "Nothing" and inserting "Subject to subsection (g), nothing";

(6) in subsection (f), as redesignated by paragraph (1), by striking "Nothing" and inserting "Subject to subsection (g), nothing"; and

(7) by adding at the end the following new subsection:

"(g) NONDISCRIMINATION ON ABORTION.—

"(1) NONDISCRIMINATION.—A Federal agency or program, and any State or local government that receives Federal financial assistance under this Act (or an amendment made by this Act), may not subject any institutional or individual health care entity to discrimination, or require any health plan created or regulated under this Act (or an amendment made by this Act) to subject any institutional or individual health care entity to discrimination, on the basis that the health care entity refuses to—

"(A) undergo training in the performance of induced abortions;

"(B) require or provide such training;

"(C) perform, participate in, provide coverage of, or pay for induced abortions; or

"(D) provide referrals for such training or such abortions.

"(2) DEFINITION.—In this subsection, the term 'health care entity' includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

"(3) REMEDIES.—

"(A) IN GENERAL.—The courts of the United States shall have jurisdiction to prevent and redress actual or threatened violations of this section by issuing any form of legal or equitable relief, including—

"(i) injunctions prohibiting conduct that violates this subsection; and

"(ii) orders preventing the disbursement of all or a portion of Federal financial assistance to a State or local government, or to a specific offending agency or program of a State or local government, until such time as the conduct prohibited by this subsection has ceased.

"(B) COMMENCEMENT OF ACTION.—An action under this subsection may be instituted by—

"(i) any health care entity that has standing to complain of an actual or threatened violation of this subsection; or

"(ii) the Attorney General of the United States.

"(4) ADMINISTRATION.—The Secretary shall designate the Director of the Office for Civil Rights of the Department of Health and Human Services—

"(A) to receive complaints alleging a violation of this subsection; and

"(B) to pursue investigation of such complaints in coordination with the Attorney General.".

(b) CONFORMING AMENDMENT.—Section 1334(a)(6) of such Act is amended to read as follows:

"(6) COVERAGE CONSISTENT WITH FEDERAL POLICY.—In entering into contracts under this subsection, the Director shall ensure that no multi-State qualified health plan offered in an Exchange provides coverage for abortions for which funding is prohibited under section 1303(c) of this Act.".

PURPOSE AND SUMMARY

H.R. 358, Protect Life Act, amends the Patient Protection and Affordable Care Act (PPACA) to prevent federal funding of abortion or abortion coverage. It also ensures that nothing in PPACA can be construed to require coverage of, or access to, abortion and to ensure that nothing in PPACA allows anyone implementing PPACA to require "coverage of, access to, or training in abortion services."

The bill contains the Hyde limitation on funding for abortion and abortion coverage (life of the mother, rape and incest exceptions) consistent with the policies applied to Medicaid, the Federal Employee Health Benefits Program, and other federal programs.

H.R. 358 states that no funds authorized or appropriated by PPACA, including tax credits and cost-sharing reductions, may be used to pay for abortion or abortion coverage except in cases of rape, incest, or to save the life of the mother.

It specifies that any non-Federal entity (including individuals and State or local government) may purchase a separate elective abortion rider, or may purchase insurance coverage that includes elective abortion, so long as the coverage is not paid for with PPACA funds, and is not paid for using individual, State or local funds required to receive federal financial assistance.

The bill also provides that insurance issuers may offer health plans that include elective abortion and may offer separate elective abortion riders, so long as they ensure PPACA funds are not used for premiums or administrative costs. The legislation clarifies that issuers who offer elective abortion coverage must also offer a qualified health benefits plan that is identical except that it does not cover elective abortion.

H.R. 358 ensures nonpreemption of State laws "protecting conscience rights, restricting or prohibiting abortion or coverage or funding of abortion, or establishing procedural requirements on abortion." For the provision regarding Federal laws, a technical reference is included to ensure there is no conflict between this provision and the "Hyde-Weldon" conscience provision that was added to the Hyde amendment in FY2005.

The bill states that Federal programs and state or local governments that receive Federal financial assistance under PPACA may not subject any health care entity to discrimination or require any health plan to subject any entity to discrimination on the basis that the entity refuses to (A) undergo training in abortion, (B) require or provide such training, (C) perform, participate in, provide coverage of, or pay for abortions, or (D) provide referrals for training or abortion.

It defines "health care entity" to include individual health care professionals, hospitals, insurance plans, or "any other kind of health care facility, organization or plan."

The bill designates the Office for Civil Rights (OCR) at HHS to receive complaints and pursue investigations in coordination with the Attorney General. Under conscience regulations issued in January 2009, OCR is designated to receive complaints. However, this designation is not contained in Hyde-Weldon and could be rescinded in the future absent this new language.

Finally, the Protect Life Act requires the Director of the Office of Personnel Management to ensure that no multi-State plan covers elective abortion.

BACKGROUND AND NEED FOR LEGISLATION

PPACA does not contain comprehensive anti-mandate provisions with respect to abortion for qualified health benefits plans, nor does it clearly prohibit other methods of mandating abortion coverage—such as through preventive care requirements.

PPACA establishes "allocation accounts" to segregate federal funds from premium funds that can be used for abortion coverage. Under this system, the plan issuer is required to collect the enrollee's portion of the premium in two payments. One payment goes into an account for abortion coverage and the other payment goes into an account for all other coverage. This has sometimes been referred to as the "abortion surcharge."

PPACA requires the Director of the Office of Personnel Management to ensure that one multi-State plan does not cover elective abortion, while allowing all others to to offer plans that do cover abortion. Individuals who prefer the overall coverage in a plan that covers elective abortion must write a check to pay the abortion surcharge in order to take advantage of the coverage in that plan. A significant dilemma arises, however, when individuals who have a strong moral objection to abortion are forced to directly finance abortion coverage in order to purchase a health care plan they believe best provides for their needs and the needs of their family members. The Protect Life Act, by contrast, does not permit the use of any taxpayers' funds to subsidize abortion coverage.

Article 1, Section 8 of the United States Constitutions provides to Congress the power to allocate federal funds, and by extension the power to limit federal funding for certain activities. PPACA contains a definition of services that hinges on the Hyde amendment being retained each year through the appropriations process. This leaves the door open for the Hyde limitations to be dropped by a determined majority in one chamber of Congress or by a presidential veto. The Protect Life Act provides greater certainty that the Hyde limitations will continue to apply to PPACA.

After passage of PPACA, the President signed an Executive Order to address certain concerns about abortion funding. While there are different views about the effect of the Executive Order, it should be noted that a sitting president can change his mind and rescind it, a future president can have a different opinion, or opponents of the Executive Order can prevail in court by arguing that certain elements of the Executive Order do not have a sufficient legislative foundation to survive. The Protect Life Act provides greater certainty and permanence than any Executive Order.

The legislation also provides for increased conscience provisions in the law. The Committee is aware that a significant number of physicians would likely leave the medical profession rather than compromise their beliefs by performing acts they believe to be unethical, undermining access to care for significant numbers of patients. The Protect Life Act will allow these professionals to continue their work without concerns in this area.

HEARINGS

The Subcommittee on Health on February 9, 2011 held a hearing on H.R. 358, the Protect Life Act. The Subcommittee received testimony from:

- Helen Alvare, Associate Professor of Law, George Mason University School of Law
- Sara Rosenbaum, Chair, Department of Health Policy, George Washington University
- Douglas Johnson, Federal Legislative Director, National Right to Life Committee

COMMITTEE CONSIDERATION

On February 11, 2011, the Subcommittee on Health met in open markup session and approved H.R. 358, the Protect Life Act for Full Committee consideration, by a record vote of 14 yeas and 9 nays.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. A motion by Mr. Upton to order H.R. 358, reported to the House, as amended, was agreed to by a record vote of 33 yeas and 19 nays.

COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS
ROLL CALL VOTE # 1

BILL: H.R. 358, the "Protect Life Act"

AMENDMENT: An amendment to the Committee Print by Ms. DeGette, No. 1, to exempt the provision of information about abortion services from conscience protections for health plans, persons or entities.

DISPOSITION: **NOT AGREED TO**, by a roll call vote of 17 yeas to 32 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Waxman	X		
Mr. Barton		X		Mr. Dingell			
Mr. Stearns		X		Mr. Markey	X		
Mr. Whitfield		X		Mr. Towns	X		
Mr. Shimkus		X		Mr. Pallone	X		
Mr. Pitts		X		Mr. Rush			
Mrs. Bono Mack		X		Ms. Eshoo	X		
Mr. Walden		X		Mr. Engel	X		
Mr. Terry		X		Mr. Green	X		
Mr. Rogers		X		Ms. DeGette	X		
Mrs. Myrick		X		Mrs. Capps	X		
Mr. Sullivan		X		Mr. Doyle	X		
Mr. Murphy		X		Ms. Harman			
Mr. Burgess		X		Ms. Schakowsky	X		
Mrs. Blackburn		X		Mr. Gonzalez			
Mr. Bilbray		X		Mr. Inslee	X		
Mr. Bass		X		Ms. Baldwin	X		
Mr. Gingrey		X		Mr. Ross		X	
Mr. Scalise		X		Mr. Weiner	X		
Mr. Latta		X		Mr. Matheson			
Mrs. McMorris Rodgers		X		Mr. Butterfield	X		
Mr. Harper		X		Mr. Barrow	X		
Mr. Lance		X		Ms. Matsui	X		
Mr. Cassidy		X					
Mr. Guthrie		X					
Mr. Olson		X					
Mr. McKinley		X					
Mr. Gardner		X					
Mr. Pompeo		X					
Mr. Kinzinger		X					
Mr. Griffith		X					

Current as of 01/25/2011

COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS
ROLL CALL VOTE # 2

BILL: **H.R. 358**, the "Protect Life Act"

AMENDMENT: An amendment to the Committee Print by Ms. Schakowsky, No. 2, to limit the non-preemption of state conscience laws only to those related to abortion.

DISPOSITION: **NOT AGREED TO**, by a roll call vote of 19 yeas to 31 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Waxman	X		
Mr. Barton		X		Mr. Dingell			
Mr. Stearns		X		Mr. Markey	X		
Mr. Whitfield		X		Mr. Towns	X		
Mr. Shimkus		X		Mr. Pallone	X		
Mr. Pitts		X		Mr. Rush			
Mrs. Bono Mack		X		Ms. Eshoo	X		
Mr. Walden		X		Mr. Engel	X		
Mr. Terry		X		Mr. Green	X		
Mr. Rogers		X		Ms. DeGette	X		
Mrs. Myrick		X		Mrs. Capps	X		
Mr. Sullivan				Mr. Doyle	X		
Mr. Murphy		X		Ms. Harman	X		
Mr. Burgess		X		Ms. Schakowsky	X		
Mrs. Blackburn		X		Mr. Gonzalez	X		
Mr. Bilbray		X		Mr. Inslee	X		
Mr. Bass		X		Ms. Baldwin	X		
Mr. Gingrey		X		Mr. Ross		X	
Mr. Scalise		X		Mr. Weiner	X		
Mr. Latta		X		Mr. Matheson			
Mrs. McMorris Rodgers		X		Mr. Butterfield	X		
Mr. Harper		X		Mr. Barrow	X		
Mr. Lance		X		Ms. Matsui	X		
Mr. Cassidy		X					
Mr. Guthrie		X					
Mr. Olson		X					
Mr. McKinley		X					
Mr. Gardner		X					
Mr. Pompeo		X					
Mr. Kinzinger		X					
Mr. Griffith		X					

Current as of 01/25/2011

COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS
ROLL CALL VOTE # 3

BILL: H.R. 358, the "Protect Life Act"

AMENDMENT: An amendment to the Committee Print by Mr. Engle, No. 3, to add conscience protections for health plans, persons or entities that provide abortions.

DISPOSITION: **NOT AGREED TO**, by a roll call vote of 19 yeas to 31 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Waxman	X		
Mr. Barton		X		Mr. Dingell			
Mr. Stearns		X		Mr. Markey	X		
Mr. Whitfield		X		Mr. Towns	X		
Mr. Shimkus		X		Mr. Pallone	X		
Mr. Pitts		X		Mr. Rush			
Mrs. Bono Mack		X		Ms. Eshoo	X		
Mr. Walden		X		Mr. Engel	X		
Mr. Terry		X		Mr. Green	X		
Mr. Rogers		X		Ms. DeGette	X		
Mrs. Myrick		X		Mrs. Capps	X		
Mr. Sullivan				Mr. Doyle	X		
Mr. Murphy		X		Ms. Harman	X		
Mr. Burgess		X		Ms. Schakowsky	X		
Mrs. Blackburn		X		Mr. Gonzalez			
Mr. Bilbray		X		Mr. Inslee	X		
Mr. Bass		X		Ms. Baldwin	X		
Mr. Gingrey		X		Mr. Ross		X	
Mr. Scalise		X		Mr. Weiner	X		
Mr. Latta		X		Mr. Matheson	X		
Mrs. McMorris Rodgers		X		Mr. Butterfield	X		
Mr. Harper		X		Mr. Barrow	X		
Mr. Lance		X		Ms. Matsui	X		
Mr. Cassidy		X					
Mr. Guthrie		X					
Mr. Olson		X					
Mr. McKinley		X					
Mr. Gardner		X					
Mr. Pompeo		X					
Mr. Kinzinger		X					
Mr. Griffith		X					

Current as of 01/25/2011

COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS
ROLL CALL VOTE # 4

BILL: H.R. 358, the "Protect Life Act"

AMENDMENT: A motion by Mr. Upton to order H.R. 358 favorably reported to the House, amended. (Final Passage)

DISPOSITION: **AGREED TO**, by a roll call vote of 33 yeas to 19 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton	X			Mr. Waxman		X	
Mr. Barton	X			Mr. Dingell			
Mr. Stearns	X			Mr. Markey		X	
Mr. Whitfield	X			Mr. Towns		X	
Mr. Shimkus	X			Mr. Pallone		X	
Mr. Pitts	X			Mr. Rush		X	
Mrs. Bono Mack	X			Ms. Eshoo		X	
Mr. Walden	X			Mr. Engel		X	
Mr. Terry	X			Mr. Green		X	
Mr. Rogers	X			Ms. DeGette		X	
Mrs. Myrick	X			Mrs. Capps		X	
Mr. Sullivan	X			Mr. Doyle		X	
Mr. Murphy	X			Ms. Harman		X	
Mr. Burgess	X			Ms. Schakowsky		X	
Mrs. Blackburn	X			Mr. Gonzalez			
Mr. Bilbray	X			Mr. Inslee		X	
Mr. Bass	X			Ms. Baldwin		X	
Mr. Gingrey	X			Mr. Ross	X		
Mr. Scalise	X			Mr. Weiner		X	
Mr. Latta	X			Mr. Matheson	X		
Mrs. McMorris Rodgers	X			Mr. Butterfield		X	
Mr. Harper	X			Mr. Barrow		X	
Mr. Lance	X			Ms. Matsui		X	
Mr. Cassidy	X						
Mr. Guthrie	X						
Mr. Olson	X						
Mr. McKinley	X						
Mr. Gardner	X						
Mr. Pompeo	X						
Mr. Kinzinger	X						
Mr. Griffith	X						

Current as of 01/25/2011

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held a legislative hearing and made findings that are reflected in this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

H.R. 358 amends PPACA to prevent federal funding of abortion or abortion coverage. It also ensures that nothing in PPACA can be construed to require coverage of, or access to abortion and to ensure that nothing in PPACA allows anyone implementing PPACA to require "coverage of, access to, or training in abortion services."

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 358, Protect Life Act, would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

EARMARK

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI, the Committee finds that H.R 358, the Protect Life Act, contains no earmarks.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 28, 2011.

Hon. FRED UPTON,
Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 358, Protect Life Act.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 358—Protect Life Act

H.R. 358 would amend section 1303 of the Patient Protection and Affordable Care Act (Public Law 111–148) to prohibit the use of

federal funds provided under that Act to pay for abortion services or health costs of any health plan that provides abortion services, except in cases of rape or incest, or when the life of the pregnant woman is in danger. The bill would require that qualified health plans offering coverage of abortion services, other than under those excepted circumstances, through health insurance exchanges collect separate premiums for such coverage. In addition, any such plans would have to provide identical plans without such abortion coverage through the exchanges. The bill would preserve state conscience protection laws and expand nondiscrimination rules for health care providers that decline to engage in abortion-related activities.

Current federal law prohibits the use of federal funds to pay for abortion services and requires that qualified health plans providing abortion services under circumstances aside from those listed above collect separate premiums. Similarly, current federal and state laws protect the right of health care providers to decline to engage in abortion-related activities.

CBO estimates that enacting H.R. 358 could affect direct spending; therefore, pay-as-you-go procedures apply. However, because H.R. 358 overlaps current federal and state laws, CBO expects that enactment would have little effect on coverage offered by qualified health plans. Consequently, CBO estimates that the federal budgetary effects would be negligible for each year.

H.R. 358 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1—Short title: Protect Life Act

Section 2—Modifying special rules relating to coverage of abortion services under PPACA to conform to long-standing federal policy

Subsection (a) contains modifications to Section 1303 regarding abortion and abortion coverage. Subsection (b) contains a modification to Section 1334 regarding multi-State plans.

Subsection (a), paragraph (3) adds anti-mandate language to ensure that nothing in PPACA can be construed to require coverage of, or access to abortion and to ensure that nothing in PPACA allows anyone implementing PPACA to require "coverage of, access to, or training in abortion services." It also deletes the "voluntary choice in coverage" language and the accounting system currently contained in PPACA that was intended to prevent direct taxpayer funding of abortion.

Specific provisions deleted from PPACA include the prohibition on mandating abortion as a part of the essential benefits plan and the provison that the issuer of a qualified health benefits plan shall choose whether to provide abortion services. This is not a comprehensive anti-mandate provision and only applies to abortion mandates in the context of the essential benefits package and qualified health benefits plans. This language does not clearly prohibit other methods of mandating abortion coverage—such as through preventive care requirements.

The definition of abortion services in PPACA that hinges on the Hyde amendment being retained is also deleted. This definition is used as a "key" to decipher other sections of the accounting system but the accounting system would disappear altogether if the Hyde amendment is deleted in the future.

The provision in PPACA that health plans that cover elective abortion shall not use federal tax credits or cost sharing assistance for abortion is likewise deleted. This provision does not prevent funding for abortion coverage. It simply triggers the accounting system for insurance coverage that includes abortion.

The PPACA "allocation accounts" to segregate funds are deleted. Under this process, the plan issuer is required to collect the enrollee's portion of the premium in two payments. One payment would go into an account for abortion coverage—this payment is sometimes described as the abortion surcharge—and the other payment would go into an account for all other coverage. Under this scheme, a person would be required to pay the abortion fee even if they did not want coverage of abortion.

The directive in PPACA that State health insurance commissioners ensure compliance with the accounting system becomes moot and is therefore deleted, along with the allowance for individuals or health plans to appeal compliance actions by the commissioners in court.

An additional deletion from PPACA is the stipulation that health plans that cover elective abortion may notify the enrollee of abortion coverage "only as part of the summary of benefits and coverage explanation, at the time of enrollment . . ." Similarly, the directive that the summary of benefits and coverage explanation, advertising for plans, and information on the Exchange may only provide information about the total cost of the plan is deleted.

Subsection (a), paragraph (4) of H.R. 358 inserts language that prohibits funding for abortion and abortion coverage consistent with the policies applied to Medicaid, Children's Health Insurance Program, the Federal Employees Health Benefits Program, and other federal programs.

The limitation on abortion funding in paragraph (4) states that no funds authorized or appropriated by PPACA, including tax credits and cost-sharing reductions, may be used to pay for abortion or

abortion coverage except in cases of rape, incest or to save the life of the mother.

However, the limitation specifies that any non-Federal entity (including individuals and State or local government) may purchase a separate elective abortion rider, or may purchase insurance coverage that includes elective abortion, so long as the coverage is not paid for with PPACA funds, and is not paid for using individual, State or local funds required to receive federal financial assistance. (*e.g.*, the coverage cannot be paid for with the PPACA premium assistance, nor can it be paid for with the portion of the premium that must be paid in order to receive PPACA premium assistance.)

The limitation further specifies that insurance issuers may offer health plans that include elective abortion and may offer separate elective abortion riders, so long as they ensure PPACA funds are not used for premiums or administrative costs. The Act further clarifies that issuers that offer elective abortion coverage must also offer a qualified health benefits plan that is identical except that it does not cover elective abortion.

Subsection (a), paragraph (5) adjusts the current statutory language regarding preemption of state or federal laws to close loopholes. The state nonpreemption language currently contained in (c)(1) [redesignated at (e)(1) in the Protect Life Act] does not protect state conscience protection laws, and instead protects state laws requiring the provision of abortion and abortion funding. The Protect Life Act changes this language by removing protections for laws favoring abortion and instead ensures nonpreemption of State laws "protecting conscience rights, restricting or prohibiting abortion or coverage or funding of abortion, or establishing procedural requirements on abortion." For the provision regarding Federal laws, a technical reference ("subject to subsection (g)") is added to ensure there is no conflict between this provision and the "Hyde-Weldon" conscience provision added in subsection (g).

Subsection (a), paragraph (6) inserts "Subject to subsection (g)" before the clause regarding emergency services including the Emergency Medical Treatment and Active Labor Act (EMTALA). There is not a conflict between the conscience clause and EMTALA because EMTALA references stabilizing the woman and her "unborn child." The language clarifies that the general reference to "emergency services as required by State or Federal law" should not be construed to allow states to override conscience protections by labeling broad abortion mandates as "emergency service" requirements.

Subsection (a), paragraph (7) adds a new subsection (g), "Nondiscrimination on Abortion," which is very similar to the Hyde-Weldon conscience provision. It states that Federal programs and state or local governments that receive Federal financial assistance under PPACA may not subject any health care entity to discrimination or require any health plan to subject any entity to discrimination on the basis that the entity refuses to (a) undergo training in abortion, (b) require or provide such training, (c) perform, participate in, provide coverage of, or pay for abortions, or (d) provide referrals for training or abortion.

New subsection (g) in paragraph (7) includes a remedies section so that individuals who have been discriminated against or are under threat of discrimination may seek redress in court. The Of-

fice for Civil Rights at HHS is designated to receive complaints under this subsection and pursue investigations in coordination with the Attorney General.

Subsection (b) changes language in Section 1334 regarding multi-State plans run by the Director of the Office of Personnel Management. Currently PPACA includes a provision requiring the Director to ensure that at least one multi-State plan does not cover elective abortion. This permits the Director to offer additional multi-State plans that do cover abortion. The Protect Life Act replaces the current language with a new (a)(6) that instructs the Director to ensure that no multi-State plan covers elective abortion.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

PATIENT PROTECTION AND AFFORDABLE CARE ACT

* * * * * * *

TITLE I—QUALITY, AFFORDABLE HEALTH CARE FOR ALL AMERICANS

* * * * * * *

SUBTITLE D—AVAILABLE COVERAGE CHOICES FOR ALL AMERICANS

PART 1—ESTABLISHMENT OF QUALIFIED HEALTH PLANS

* * * * * * *

SEC. 1303. SPECIAL RULES.

(a) * * *

[(b) SPECIAL RULES RELATING TO COVERAGE OF ABORTION SERVICES.—

[(1) VOLUNTARY CHOICE OF COVERAGE OF ABORTION SERVICES.—

[(A) IN GENERAL.—Notwithstanding any other provision of this title (or any amendment made by this title)—

[(i) nothing in this title (or any amendment made by this title), shall be construed to require a qualified health plan to provide coverage of services described in subparagraph (B)(i) or (B)(ii) as part of its essential health benefits for any plan year; and

[(ii) subject to subsection (a), the issuer of a qualified health plan shall determine whether or not the plan provides coverage of services described in subparagraph (B)(i) or (B)(ii) as part of such benefits for the plan year.

[(B) ABORTION SERVICES.—

[(i) ABORTIONS FOR WHICH PUBLIC FUNDING IS PROHIBITED.—The services described in this clause are abortions for which the expenditure of Federal funds appropriated for the Department of Health and

Human Services is not permitted, based on the law as in effect as of the date that is 6 months before the beginning of the plan year involved.

[(ii) ABORTIONS FOR WHICH PUBLIC FUNDING IS ALLOWED.—The services described in this clause are abortions for which the expenditure of Federal funds appropriated for the Department of Health and Human Services is permitted, based on the law as in effect as of the date that is 6 months before the beginning of the plan year involved.

[(2) PROHIBITION ON THE USE OF FEDERAL FUNDS.—

[(A) IN GENERAL.—If a qualified health plan provides coverage of services described in paragraph (1)(B)(i), the issuer of the plan shall not use any amount attributable to any of the following for purposes of paying for such services:

[(i) The credit under section 36B of the Internal Revenue Code of 1986 (and the amount (if any) of the advance payment of the credit under section 1412 of the Patient Protection and Affordable Care Act).

[(ii) Any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act (and the amount (if any) of the advance payment of the reduction under section 1412 of the Patient Protection and Affordable Care Act).

[(B) ESTABLISHMENT OF ALLOCATION ACCOUNTS.—In the case of a plan to which subparagraph (A) applies, the issuer of the plan shall—

[(i) collect from each enrollee in the plan (without regard to the enrollee's age, sex, or family status) a separate payment for each of the following:

[(I) an amount equal to the portion of the premium to be paid directly by the enrollee for coverage under the plan of services other than services described in paragraph (1)(B)(i) (after reduction for credits and cost-sharing reductions described in subparagraph (A)); and

[(II) an amount equal to the actuarial value of the coverage of services described in paragraph (1)(B)(i), and

[(ii) shall deposit all such separate payments into separate allocation accounts as provided in subparagraph (C).

In the case of an enrollee whose premium for coverage under the plan is paid through employee payroll deposit, the separate payments required under this subparagraph shall each be paid by a separate deposit.

[(C) SEGREGATION OF FUNDS.—

[(i) IN GENERAL.—The issuer of a plan to which subparagraph (A) applies shall establish allocation accounts described in clause (ii) for enrollees receiving amounts described in subparagraph (A).

[(ii) ALLOCATION ACCOUNTS.—The issuer of a plan to which subparagraph (A) applies shall deposit—

[(I) all payments described in subparagraph (B)(i)(I) into a separate account that consists solely of such payments and that is used exclusively to pay for services other than services described in paragraph (1)(B)(i); and

[(II) all payments described in subparagraph (B)(i)(II) into a separate account that consists solely of such payments and that is used exclusively to pay for services described in paragraph (1)(B)(i).

[(D) ACTUARIAL VALUE.—

[(i) IN GENERAL.—The issuer of a qualified health plan shall estimate the basic per enrollee, per month cost, determined on an average actuarial basis, for including coverage under the qualified health plan of the services described in paragraph (1)(B)(i).

[(ii) CONSIDERATIONS.—In making such estimate, the issuer—

[(I) may take into account the impact on overall costs of the inclusion of such coverage, but may not take into account any cost reduction estimated to result from such services, including prenatal care, delivery, or postnatal care;

[(II) shall estimate such costs as if such coverage were included for the entire population covered; and

[(III) may not estimate such a cost at less than $1 per enrollee, per month.

[(E) ENSURING COMPLIANCE WITH SEGREGATION REQUIREMENTS.—

[(i) IN GENERAL.—Subject to clause (ii), State health insurance commissioners shall ensure that health plans comply with the segregation requirements in this subsection through the segregation of plan funds in accordance with applicable provisions of generally accepted accounting requirements, circulars on funds management of the Office of Management and Budget, and guidance on accounting of the Government Accountability Office.

[(ii) CLARIFICATION.—Nothing in clause (i) shall prohibit the right of an individual or health plan to appeal such action in courts of competent jurisdiction.

[(3) RULES RELATING TO NOTICE.—

[(A) NOTICE.—A qualified health plan that provides for coverage of the services described in paragraph (1)(B)(i) shall provide a notice to enrollees, only as part of the summary of benefits and coverage explanation, at the time of enrollment, of such coverage.

[(B) RULES RELATING TO PAYMENTS.—The notice described in subparagraph (A), any advertising used by the issuer with respect to the plan, any information provided by the Exchange, and any other information specified by the Secretary shall provide information only with respect to the total amount of the combined payments for services

described in paragraph (1)(B)(i) and other services covered by the plan.]

(b) SPECIAL RULES RELATING TO TRAINING IN AND COVERAGE OF ABORTION SERVICES.—Nothing in this Act (or any amendment made by this Act) shall be construed to require any health plan to provide coverage of or access to abortion services or to allow the Secretary or any other Federal or non-Federal person or entity in implementing this Act (or amendment) to require coverage of, access to, or training in abortion services.

(c) LIMITATION ON ABORTION FUNDING.—

(1) IN GENERAL.—No funds authorized or appropriated by this Act (or an amendment made by this Act), including credits applied toward qualified health plans under section 36B of the Internal Revenue Code of 1986 or cost-sharing reductions under section 1402 of this Act, may be used to pay for any abortion or to cover any part of the costs of any health plan that includes coverage of abortion, except—

(A) if the pregnancy is the result of an act of rape or incest; or

(B) in the case where a pregnant female suffers from a physical disorder, physical injury, or physical illness that would, as certified by a physician, place the female in danger of death unless an abortion is performed, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(2) OPTION TO PURCHASE SEPARATE COVERAGE OR PLAN.—Nothing in this subsection shall be construed as prohibiting any non-Federal entity (including an individual or a State or local government) from purchasing separate coverage for abortions for which funding is prohibited under this subsection, or a qualified health plan that includes such abortions, so long as—

(A) such coverage or plan is paid for entirely using only funds not authorized or appropriated by this Act; and

(B) such coverage or plan is not purchased using—

(i) individual premium payments required for a qualified health plan offered through an Exchange towards which a credit is applied under section 36B of the Internal Revenue Code of 1986; or

(ii) other non-Federal funds required to receive a Federal payment, including a State's or locality's contribution of Medicaid matching funds.

(3) OPTION TO OFFER COVERAGE OR PLAN.—Nothing in this subsection or section 1311(d)(2)(B)(i) shall restrict any non-Federal health insurance issuer offering a qualified health plan from offering separate coverage for abortions for which funding is prohibited under this subsection, or a qualified health plan that includes such abortions, so long as—

(A) premiums for such separate coverage or plan are paid for entirely with funds not authorized or appropriated by this Act;

(B) administrative costs and all services offered through such coverage or plan are paid for using only premiums collected for such coverage or plan; and

(C) any such non-Federal health insurance issuer that offers a qualified health plan through an Exchange that in-

cludes coverage for abortions for which funding is prohibited under this subsection also offers a qualified health plan through the Exchange that is identical in every respect except that it does not cover abortions for which funding is prohibited under this subsection.

[(4) NO DISCRIMINATION ON BASIS OF PROVISION OF ABORTION] *(d) NO DISCRIMINATION ON BASIS OF PROVISION OF ABORTION.*—No qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions

[(c)] *(e)* APPLICATION OF STATE AND FEDERAL LAWS [REGARDING ABORTION].—

(1) NO PREEMPTION OF STATE LAWS [REGARDING ABORTION].—Nothing in this Act shall be construed to preempt or otherwise have any effect on State laws [regarding the prohibition of (or requirement of) coverage, funding, or] *protecting conscience rights, restricting or prohibiting abortion or coverage or funding of abortion, or establishing* procedural requirements on abortions, including parental notification or consent for the performance of an abortion on a minor.

(2) NO EFFECT ON FEDERAL LAWS [REGARDING ABORTION].—

(A) IN GENERAL.—[Nothing] *Subject to subsection (g), nothing* in this Act shall be construed to have any effect on Federal laws regarding—

(i) * * *

* * * * * * *

[(d)] *(f)* APPLICATION OF EMERGENCY SERVICES LAWS.—[Nothing] *Subject to subsection (g), nothing* in this Act shall be construed to relieve any health care provider from providing emergency services as required by State or Federal law, including section 1867 of the Social Security Act (popularly known as "EMTALA").

(g) NONDISCRIMINATION ON ABORTION.—

(1) NONDISCRIMINATION.—A Federal agency or program, and any State or local government that receives Federal financial assistance under this Act (or an amendment made by this Act), may not subject any institutional or individual health care entity to discrimination, or require any health plan created or regulated under this Act (or an amendment made by this Act) to subject any institutional or individual health care entity to discrimination, on the basis that the health care entity refuses to—

(A) undergo training in the performance of induced abortions;

(B) require or provide such training;

(C) perform, participate in, provide coverage of, or pay for induced abortions; or

(D) provide referrals for such training or such abortions.

(2) DEFINITION.—In this subsection, the term "health care entity" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

(3) REMEDIES.—

(A) IN GENERAL.—The courts of the United States shall have jurisdiction to prevent and redress actual or threat-

ened violations of this section by issuing any form of legal or equitable relief, including—

(i) injunctions prohibiting conduct that violates this subsection; and

(ii) orders preventing the disbursement of all or a portion of Federal financial assistance to a State or local government, or to a specific offending agency or program of a State or local government, until such time as the conduct prohibited by this subsection has ceased.

(B) COMMENCEMENT OF ACTION.—An action under this subsection may be instituted by—

(i) any health care entity that has standing to complain of an actual or threatened violation of this subsection; or

(ii) the Attorney General of the United States.

(4) ADMINISTRATION.—The Secretary shall designate the Director of the Office for Civil Rights of the Department of Health and Human Services—

(A) to receive complaints alleging a violation of this subsection; and

(B) to pursue investigation of such complaints in coordination with the Attorney General.

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PART 4—STATE FLEXIBILITY TO ESTABLISH ALTERNATIVE PROGRAMS

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SEC. 1334. MULTI-STATE PLANS.

(a) OVERSIGHT BY THE OFFICE OF PERSONNEL MANAGEMENT.—

(1) * * *

* * * * * * *

[(6) ASSURED AVAILABILITY OF VARIED COVERAGE.—In entering into contracts under this subsection, the Director shall ensure that with respect to multi-State qualified health plans offered in an Exchange, there is at least one such plan that does not provide coverage of services described in section 1303(b)(1)(B)(i).]

(6) COVERAGE CONSISTENT WITH FEDERAL POLICY.—In entering into contracts under this subsection, the Director shall ensure that no multi-State qualified health plan offered in an Exchange provides coverage for abortions for which funding is prohibited under section 1303(c) of this Act.

* * * * * * *

DISSENTING VIEWS

We, the undersigned Members of the Committee on Energy and Commerce, oppose the passage of H.R. 358, *Protect Life Act,* and accordingly, submit the following comments to express our concerns about this deeply flawed and deeply divisive legislation.

INTRODUCTION

For decades, the law of the land has been that no federal funds can be used for abortion services (with the exception of those in which the pregnancy threatens the life of the woman or is the result of rape or incest). There have been GAO audits, inspector general audits, and congressional hearings, and all have concluded that the law of the land is being obeyed. No federal funds are being used for abortion services.

The Affordable Care Act continues that policy. In provisions that were probably more carefully scrutinized, edited, and debated than any others in the Act, the ban on federal payment for abortion services was clearly preserved. The Act goes so far as to require two separate premium payments for those people purchasing insurance that covers abortion services (other than in the case of rape or incest or to protect the life of the woman), providing a physical corollary to the legal requirement that federal funds be separately pooled—even at insurance companies.

So the record is clear: For decades, the federal law has been that no federal funds can be used for abortion services and the Affordable Care Act maintains that policy and law.

If this is the case, what is H.R. 358 all about? If no federal funds are or can be used, what is the purpose of this legislation?

The answer is that this bill clearly goes further than the regulation of federal funds. Its effect would be to harass and intimidate women and their families in their use of their own money. It makes the job of private insurance companies so artificially complicated and unworkable as to force them from the market. It takes anti-abortion politics far beyond where they have been for the decades of the Hyde Amendment and to put them right in the middle of private homes and workplaces and squarely in private citizens' paychecks and premiums. Its very essence is to create an undue burden on how people can exercise their own choices with their own money, and it creates a substantial obstacle to a woman seeking abortion services.

There are many particulars in the bill to which we object. But before discussing these, we feel it necessary to debunk the central argument made for the bill: It is not about the regulation of federal funds. For those members of Congress who have regularly said that they are opposed to federal funding of abortion, this bill is absolutely unnecessary. This bill should be supported only by those members who actually want to step far beyond that position and

to overturn the privacy rights enumerated by the Supreme Court and to place the government between a woman and her doctor when making this most personal decision.

CURRENT LAW

Enacted in 2010, the *Patient Protection and Affordable Care Act* (ACA)[1] makes significant changes to health coverage for women, expanding their access to care and broadening the health benefits many will receive.[2]

Coverage for abortion services, however, is given special and extensive consideration and is addressed separately under ACA.[3] It was authored by Senator Ben Nelson, a member whose anti-abortion views are well known. It is carefully crafted to produce a delicately balanced approach to this issue. Among the ACA provisions related to abortion coverage are:

- Prohibition of the requirement of abortion coverage as part of the essential health benefits package of any qualified health plan (ACA Section 1303(b)(A)(i));
- Permission for states to prohibit coverage for any abortions by all private plans in their state-based exchange (ACA Section 1303(a)(1));
- Permission for private plans in a state exchange to offer abortion coverage beyond that permitted under federal law so long as—
  - No federal subsidies (for premiums or cost sharing) are used to purchase such coverage, i.e., only private dollars are used to purchase abortion coverage (ACA Section 1303(b)(2)(A)); and
  - The plan collects two separate premium payments from all enrollees—one payment for the value of the abortion benefit and one payment for all other covered services (ACA Section 1303(b)(2)(B));
- Prohibition of discrimination by exchange-participating plans against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortion (ACA Section 1303 (b)(4)); and
- Requirement that at least one multi-state plan within a state exchange not cover abortion services beyond those permitted under federal law (in cases of rape, incest and to save the life of the woman) (ACA Section 1334(a)(6)).

In addition to these provisions, ACA allows for the following roles for states in addressing abortion coverage:

- ACA has no effect on state laws regarding coverage, funding, or procedural requirements on abortion (such as parental notification or consent laws) (ACA Section 1303 (c)(1)); and
- States can use state-only funds to pay for medically necessary abortions beyond those permitted under federal law

[1] ACA is comprised of two public laws, P.L. 111–148 and P.L. 111–152.

[2] See, *e.g.,* P.L. 111–148, Sections 1001 and 4101 (relating to preventive health care); Section 1201 (relating to insurance coverage for women); and Section 1302 (relating to maternity benefits).

[3] P.L. 111–148, Section 1303 and Section 1334(a)(6).

under Medicaid or to pay for abortion coverage in plans offered in an exchange.

The language also makes clear that Senator Nelson's provisions have no effect on federal laws regarding—

- Conscience protection; willingness or refusal to provide abortion; and discrimination on the basis of the willingness or refusal to provide, pay for, cover or refer for abortion or to provide or participate in training to provide abortion (ACA Section 1303 (c)(2));
- Rights and obligations of employers and employees under Title VII of the 1964 Civil Rights Act (ACA Section 1303 (c)(3)); or
- The obligation of health care providers to provide emergency services as required under either state or federal law, including the *Emergency Medical Treatment and Active Labor Act* (popularly known as "EMTALA")[4] (ACA Section 1303 (d)).

Shortly after the enactment of ACA, President Obama signed Executive Order 13535 to ensure the enforcement and implementation of the abortion restrictions included in ACA.[5] The Order reinforces the prohibition on the use of federal funds for abortion services under ACA; clarifies that such prohibition applies to community health centers receiving funds under ACA;[6] and directs the Office of Management and Budget (OMB) to develop a model set of guidelines for state health insurance commissioners to use in determining whether state exchange plans are complying with ACA's public/private dollar segregation requirements. OMB published such pre-regulatory guidelines on September 20, 2010.[7]

COMPARISON BETWEEN 2009 STUPAK AMENDMENT AND H.R. 358

Since its introduction, sponsors and supporters of H.R. 358 have argued that the legislation closely resembles the amendment offered by former Congressman Bart Stupak (D–MI)[8] and passed by the House during the 2009–2010 health reform debate.[9] At best, this is an unintentional misreading of the Stupak amendment; at worse, it is an attempt to mislead Members into believing that a vote in support of H.R. 358 is a virtual instant replay of the debate and vote on the 2009 Stupak amendment. As the plain language of H.R. 358 makes clear, this is simply not the case.

The differences between the two pieces of legislation on a number of key issues are stark and meaningful and were confirmed by Committee counsel during the full Committee markup:

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[4] Social Security Act, Section 1867 (42 U.S.C. 1395dd).

[5] Exec. Order 13535, 75 Fed. Reg. 15599 (Mar. 20, 2010).

[6] The community health centers (CHC) program is authorized under section 330 of the Public Health Service Act. Under ACA, the CHC program is to receive mandatory funding support (in addition to discretionary spending support) over the next five years.

[7] Office of Management and Budget, *Pre-Regulatory Model Guidelines Under Section 1303 of the Affordable Care Act (PL–111–148): Issued Pursuant to Executive Order 13535* (Mar. 24, 2010) (online at http://www.whitehouse.gov/sites/default/files/omb/assets/financial_pdf/segregation_2010-09-20.pdf).

[8] See, *e.g.*, Internal Memorandum from Committee Staff to Members of House Committee on Energy and Commerce, *Full Committee Markup on February 15, 2011*, in which Committee staff state: "The proposed legislation closely mirrors the Stupak-Pitts amendment that was adopted during the 111th Congress."

[9] For the text of the Stupak amendment, see Congressional Record, H12921 (Nov. 7, 2009).

The Stupak amendment limited its reach only to qualified health plans and had no effect on completely private plans [10]

• The ACA distinguishes between "qualified health plans" and all other health plans. "Qualified health plans" are those that are part of state insurance exchanges through which people who received federal subsidies may purchase insurance. Other plans are outside the exchanges, are completely private, and do not cover individuals with a federal subsidy. H.R. 358 applies its restrictions on coverage of abortion services to "any health plan" not just to "qualified health plans".

The Stupak amendment limited its reach only to federal funding and insurance coverage of abortion [11]

• Proponents of H.R. 358 contend that its central focus is the prohibition of federal funding for abortion under ACA.[12] Yet, H.R. 358 goes beyond this goal, including among its restrictions on abortion, "access to" abortion services. This is an undefined term in the legislation that leaves open the possibility of a very broad and sweeping interpretation that could include a wide variety of activities, ranging from the provision of factually accurate information about the availability of or limitations on insurance coverage for abortion services, the location of available abortion services, and procedural requirements applicable to such coverage or services, to the provision of transportation services.

The Stupak amendment limited its reach only to state conscience protection laws that deal with abortion [13]

• H.R. 358 expands protection of state conscience protection laws to include those that cover health and medical services other than abortion, going beyond the scope of both ACA Section 1303 and the bill's stated purpose to address abortion coverage under the Act.[14]

The Stupak amendment protected all state laws that address insurance coverage for abortion services—both those that may restrict such coverage and those that may require it [15]

• H.R. 358 protects only state laws that limit insurance coverage for abortion. Indeed, it specifically takes away ACA's state preemp-

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[10] House Committee on Energy and Commerce, Markup of H.R. 358, *Protect Life Act*, *et al,* 112th Cong., p. 50 (Feb. 15, 2011) (transcript of the proceeding).

[11] *Id.,* pp. 66–67.

[12] See, *e.g.,* the opening statements of Rep. Pitts and Rep. Gingrey during the markups of H.R. 358 in which they identify the federal funding question as the primary issue to be addressed by the legislation.

• Rep. Pitts: ". . . the Protect Life Act, which, in short, would amend the [ACA] to continue the historical practice of prohibiting Federal funds from being used on abortion services." (Subcommittee on Health, House Committee on Energy and Commerce, Markup of H.R. 358, *Protect Life Act, et al,* 112th Cong., p. 3 (Feb. 11, 2011) (transcript of the proceeding).

• Rep. Gingrey: "The Protect Life Act is a piece of legislation that seeks to set right what the last Congress got wrong: ensure that abortions are not funded by taxpayer dollars. . . . And that is the simple crux of the issue here today." (House Committee on Energy and Commerce, Markup of H.R. 358, *Protect Life Act, et al*, 112th Cong., p. 24 (Feb. 15, 2011) (transcript of the proceeding).

[13] House Committee on Energy and Commerce, Markup of H.R. 358, *Protect Life Act, et al*, 112th 1 Cong., pp. 79–80 (Feb. 15, 2011) (transcript of the proceeding).

[14] As introduced, the purpose of H.R. 358 is "to amend [ACA] to modify special rules relating to coverage of abortion services under such Act."

[15] House Committee on Energy and Commerce, Markup of H.R. 358, *Protect Life Act, et al*, 112th Cong., pp. 50–51 (Feb. 15, 2011) (transcript of the proceeding).

tion protection for state laws that require such coverage, undoing the law's neutral approach to state abortion law.

The Stupak amendment did not contain anv private right of action[16]

• H.R. 358 creates a new federal private cause of action for health care providers to assert a conscience objection to abortion. The new private right of action would empower federal courts to reach "actual" and "threatened" violations—both undefined terms—of a new conscience clause that is also created in the legislation.[17] Moreover, H.R. 358 does not extend similar enforcement rights to health care providers that allege discrimination because they provide abortion services.

The Stupak amendment did not create any exception to the obligation of hospitals to comply with EMTALA; instead, it left that obligation intact[18]

• H.R. 358 creates an exception to the ACA statement that nothing in ACA's provisions on abortion are to be construed to relieve any health care provider from the provisions of EMTALA, requiring appropriate treatment and referral for emergency patients, including pregnant women.

ANALYSIS AND IMPACT OF H.R. 358

As noted above, ACA's abortion provisions reflect both an excruciatingly difficult and delicately balanced compromise that was reached during the 2009–2010 health reform debate. Clearly, it was no member's first choice. But, in the spirit of conciliation and in the broader interest of keeping health reform basically intact and on track, we have been willing to stand by the law as enacted.

H.R. 358 would undo this compromise. The overall impact of the legislation—to erode the right of choice that is protected by the Constitution—is far more expansive than the disruption of health reform. In our view, H.R. 358 is part of a larger, broad-ranging effort to restrict women's access to reproductive health services.[19] While we are prepared at this time to continue to support health reform's abortion provisions, we are not prepared to further restrict women's access to this legal medical service. Nor are we prepared, in the guise of a debate over federal funding of abortion, to allow for limitations on the availability of other health services—especially contraception and other reproductive health services. H.R. 358 is designed to achieve both of these goals. As such, we believe

[16] *Id.,* p. 52.

[17] The Congressional Budget Office (CBO) also recognized this extension of non-discrimination policy in its cost estimate letter to the Committee: "The bill would . . . expand nondiscrimination rules for health care providers that decline to engage in abortion-related activities." Letter from Douglas W. Elmendorf, Director, CBO to Chairman Fred Upton (Feb. 28, 2011).

[18] House Committee on Energy and Commerce, Markup of H.R. 358, *Protect Life Act*, *et al,* 112th Cong., pp. 53–54 (Feb. 15, 2011) (transcript of proceeding).

[19] See H.R. 3, *No Taxpayer Funding for Abortion Act;* H.R. 217, *Title X [Family Planning] Abortion Provider Prohibition Act;* Amendment No. 11 to H.R. 1, *Full-Year Continuing Appropriations Act, 2011* (Congressional Record, H776 (Feb. 14, 2011)) (regarding Planned Parenthood); and Amendment No. 182 to H.R. 1, *Full-Year Continuing Appropriations Act, 2011* (Congressional Record, H786 (Feb. 14, 2011)) (regarding the papillomavirus vaccine) for additional examples of legislative efforts to curtail women's access to reproductive health services.

the legislation makes significant and overreaching changes in at least the following three ways:

H.R. 358 Would effectively shut down the private insurance market for abortion coverage

H.R. 358 prohibits the use of any funds authorized or appropriated under ACA to pay for abortion or to cover any part of the costs of any health plan in an exchange that includes abortion coverage—unless the pregnancy is the result of an act of rape or incest or is necessary to save the life of the woman. Such funds are defined to include both tax credits applied toward ACA qualified health plans and ACA cost-sharing reductions. This is a wholly new approach to the treatment of private health insurance under federal law.

In effect, these restrictions would preclude any plan offering abortion coverage from accepting any customer who receives any level of ACA subsidization. This would represent the vast majority of the population purchasing private insurance through exchanges.[20]

The legislation does permit insurance companies participating in an exchange to offer a qualified health plan for unsubsidized individuals that includes abortion coverage, but only under very restrictive conditions. Significant administrative requirements must be met and a company offering a comprehensive plan must also provide an identical plan that excludes abortion coverage. Neither the Health Subcommittee hearings nor the legislation has given any attention to the complex problems of adverse selection and actuarial soundness that such parallel plan requirements pose.

Similarly, H.R. 358 allows individuals and state and local governments to purchase separate abortion coverage—a so-called "rider" policy—so long as this coverage is not purchased using ACA authorized or appropriated funds (including ACA tax credits and cost-sharing reductions). But as the data clearly illustrate, these policies—in the very few states where they are even offered—simply do not work.[21] This point is underscored by the testimony of Mr. Douglas Johnson of the National Right to Life Committee, who stated at the Health Subcommittee hearings: "Now, there is nothing . . . to stop any private individual from going out and purchasing abortion coverage with their own resources on the private market if they choose to do so. *I suspect from the data we have seen that very few people do that* [emphasis supplied]."[22] Again, neither the hearings nor the legislation has given any attention to the practical insurance problems that rider plans raise.

Taken together, then, these provisions establish numerous disincentives for companies to provide abortion coverage as part of their basic plan—they are administratively burdensome, unworkable, and unreasonable. Over and above their practical problems, they put private companies at great risk for exposure both to se-

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[20] CBO estimates that approximately 63% of all individuals participating in state exchanges will receive some level of subsidized support. (Letter from Douglas W. Elmendorf, Director, CBO to Speaker Nancy Pelosi (Mar. 20, 2010)) (on line at http://www.cbo.gov/ftpdocs/113xx/doc11379/AmendReconProp.pdf).

[21] *Insurers Report on Use of Abortion Riders,* Washington Post (Mar. 14, 2010).

[22] Subcommittee on Health, Committee on Energy and Commerce, *Hearing on H.R. ____, Protect Life Act,* 112th Cong., p. 50 (Feb. 9, 2011) (transcript of the proceeding).

vere penalties in the case of a violation and to organized boycotts by organizations opposed to abortion. And, by requiring that abortion coverage stand separate and alone from the comprehensive package of services companies currently and routinely offer to their customers,[23] H.R. 358 effectively places a stigma—a bull's eye in fact—on a health service which remains legal in this country and is regarded as medically appropriate by numerous national medical organizations.[24]

Despite the protestations of H.R. 358's supporters,[25] we believe the net effect of these provisions is, for all practical purposes, to shut down the private insurance market for abortion coverage. Indeed, as Professor Sara Rosenbaum testified at the Health Subcommittee hearing on H.R. 358, ". . . health plans could be expected to exit this optional coverage market *entirely* [emphasis supplied]."[26] Such a result would mean the end of abortion coverage for millions of women and their families who already have this insurance benefit and for millions of others who would commonly expect it to be part of a comprehensive health insurance policy. In turn, families who may experience the unanticipated event of abortion could face significant out-of-pocket expenses.

H.R. 358 Would undercut the purpose of ACA's essential benefits package

H.R. 358 safeguards state "conscience-protection" laws (also known as "refusal-protection" laws) that speak to health and medical services other than abortion—a broad extension of ACA's state "non-preemption" language. Such laws often refer to specific services that are covered; others are much wider in scope, allowing for great leeway in how they may be carried out.[27]

This far-reaching expansion of current law has enormous implications for the ACA essential benefits package, the contents of

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[23] "The best available evidence—based on studies conducted by the Guttmacher Institute and the Kaiser Family Foundation—suggests that most Americans with employer-based insurance currently have coverage for abortion." (Guttmacher Institute, *Memo on Private Insurance Coverage of Abortion* (Jan. 19, 2011)).

[24] See, *e.g.,* statements of the American College of Gynecologists and Obstetricians (*ACOG Statement of Policy: Abortion Policy*); the American Medical Association (*Statement on Abortion Policy*) (on line at https://ss13.ama-assn.org/apps/ecomm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fama1%2fpub%2fupload%2fmm%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-5.995.HTM); and the American Academy of Family Physicians (*Statement on Reproductive Decisions*) (on line at http://www.aafp.org/online/en/home/policy/policies/r/reproductdecisions.html).

[25] At the Health Subcommittee markup, Rep. Waxman offered an amendment to set the effective date for H.R. 358 at the time (before January 1, 2014, the effective date of health reform) that the Secretary of Health and Human Services certifies that the availability of abortion coverage in private health plans for individuals who will not receive ACA subsidies will not be affected. Members in opposition of the amendment argued against its adoption on that grounds that ". . . we see no plausible connection between the availability of abortion coverage in the private insurance market and this pending legislation." (Subcommittee on Health, House Committee on Energy and Commerce, Markup on H.R. 358, *Protect Life Act, et al.,* 112th Cong., p. 87 (Feb. 11, 2011) (transcript of the proceeding)). Supporters of the bill cannot have it both ways—if the legislation does not impact the availability of abortion coverage in the private market, they should be comfortable supporting an amendment requiring the certification of such coverage. Their rejection of the Waxman amendment suggests that those in opposition are at least skeptical of their own assertions about the impact of the legislation on the availability of abortion coverage.

[26] Subcommittee on Health, House Committee on Energy and Commerce, *Hearing on H.R. ___, Protect Life Act,* 112th Cong., p. 37 (Feb. 9, 2011) (transcript of the proceeding).

[27] See, *e.g.,* the state conscience protection law for Illinois (745 ILCS 70/3 and 70/11.2) which provides for refusal rights in the case of family planning (and other) health services, and for Mississippi (Miss. Code Ann. Sections 41–107–3 and 41–107–09) and Pennsylvania (40 P.S. Section 991–2171) which allow health care providers, including health insurers, to refuse to provide or pay for any health service as a matter of conscience.

which serve as a floor for the coverage that must be provided in any qualified plan offered by an insurance company in a state exchange.[28] For example, under ACA, the essential benefits package may include coverage of contraception services as a minimum standard of insurance. Under H.R. 358, however, an insurance company located in a state with a sweeping refusal-protection statute in place (or one that targets family planning services specifically) could try to drop contraceptive coverage from the essential benefits package under the protection of that state law. Additionally, a state could pass a new law to take advantage of this loophole.

It is unclear whether or not a company would be successful in this kind of effort to chip away at the essential benefits package. What is clear, however, is that—at best—the state conscience protection provisions in H.R. 358 pose a potential conflict with ACA's requirements regarding the essential benefits package and, at worse, they provide a mechanism through which insurance companies could circumvent ACA law. In either case, we believe the result is an upending of one of most important and fundamental features of ACA—coverage of and access to a core set of health care services.

It bears repeated mention that this is clearly *not* a provision related to abortion. The ACA already prohibits making abortion services part of the minimum benefits package and protects state laws regarding abortion coverage. Despite the bill's misleading title, the legislation is a direct mechanism for allowing state laws to trump benefits decisions in areas *other than abortion*.[29]

H.R. 358 Would undermine EMTALA's protections for women with life threatening conditions

EMTALA establishes three basic obligations for all hospitals that participate in Medicare: (1) to screen an individual who comes to the emergency department to determine whether the individual has an emergency medical condition; (2) to stabilize any emergency medical condition in individuals in the hospital; and (3) to provide an appropriate transfer to another health care facility in some cases. EMTALA does not recognize any exceptions to these requirements.[30]

H.R. 358 breaks with this structure and inserts language that appears to allow a construction that would place "conscience-clause"/"refusal protection" concerns above those of the emergency stabilization and treatment requirements of EMTALA. The effect of this language is, at best, ambiguous. During the markups on the legislation, Committee staff responded to questions from members about this language and repeatedly noted that it does not amend the underlying provisions of EMTALA.[31] One interpretation of this response is that the basic EMTALA guarantees remain intact and

[28] ACA Section 1311(3).

[29] House Committee on Energy and Commerce, Markup on H.R. 358, *Protect Life Act, et al.,* 112 Cong., pp. 76–80 (Feb. 15, 2011) (transcript of the proceeding).

[30] Social Security Act, Section 1867 (U.S.C. 1395dd).

[31] House Committee on Energy and Commerce, Markup on H.R. 358, *Protect Life Act, et al.,* 112th Cong., pp. 53–54 (Feb. 15, 2011) (transcript of the proceeding); Subcommittee on Health, House Committee on Energy and Commerce, Markup on H.R. 358, *Protect Life Act, et al.,* 112th Cong., pp. 76–79 (Feb. 11, 2011) (transcript of the proceeding).

the new language in H.R. 358 is cosmetic only and should result in no change in policy.

Another possible interpretation is that this language actually makes "conscience-clause"/"refusal protection" objections predominate over the emergency needs of a patient.[32] If this is the case, H.R. 358 would allow a hospital to assert an objection to abortion and turn away (without referral or appropriate transfer) a pregnant woman whose emergency medical condition requires pregnancy termination.

Sponsors of H.R. 358 claim that this poses no problem since EMTALA already recognizes the needs for emergency examination and treatment of the woman's "unborn child." This constitutes a deliberate misreading of the statute. The effect of the reference to "unborn child" in the definition of "emergency medical condition" is that a pregnant woman will be considered to have an "emergency medical condition" if her health or the health of her fetus is in serious jeopardy. The only other references to "unborn child" in the statute address the safety of a transfer for a woman in labor.

But certainly EMTALA recognizes special needs during pregnancy and appropriately so. The practice of turning a patient away from a hospital without providing appropriate care (commonly known as "patient dumping") is as repugnant when it endangers a fetus or a newborn just as it is repugnant when it endangers an adult. But there are, in fact, medical conditions that occur during pregnancy in which termination of the pregnancy is one of or, indeed, the only response that will save the life of the woman.[33] It is unfortunately true that the medical needs of the woman and her fetus are not always parallel or consistent.

Indeed, religious organizations, seeking to provide guidance to their adherents, have struggled with these issues. A recent and well-publicized case of a pregnant woman with pulmonary hypertension dramatizes the ongoing nature of the problem.[34] Theological debates continue about such topics as "intended" termination of pregnancy, about the "direct purpose" of a procedure or of a "proportionately serious" condition.[35]

But the appropriate venue for such debates is theological circles and ethics committees, not an ambulance or an emergency room. Under current law, if a hospital does not have the facilities or per-

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[32] Subcommittee on Health, House Committee on Energy and Commerce, Markup on H.R. 358, *Protect Life Act, et al.,* 112th Cong., p. 80 (Feb. 11, 2011) (transcript of the proceeding).

[33] Examples of medical conditions that pose a major threat to maternal health:

• *Pre-eclampsia*. According to a standard textbook on obstetrics, women with severe pre-eclampsia with a pregnancy of a gestational age of under 23 weeks should be offered the option to terminate the pregnancy. (Steven Gabbe, *Obstetrics: Normal and Problem Pregnancies,* Fifth Edition, 2007)

• *Pulmonary hypertension*. The American College of Cardiology and the American Health Association expert consensus guidelines "recommend that pregnancy be avoided or terminated early in women with PAH [pulmonary arterial hypertension]." (*ACCF/AHA 2009 Expert Consensus Document on Pulmonary Hypertension: A Report of the American College of Cardiology Foundation Task Force on Expert Consensus Documents and the American Heart Association Developed in Collaboration with the American College of Chest Physicians; American Thoracic Society, Inc.; and the Pulmonary Hypertension Association* (Mar. 30, 2009)) (on line at http://content.onlinejacc.org/cgi/content/ful1/53/17/1573).

[34] *Hospital Nun Rebuked for Allowing Abortion in Phoenix,* USA Today (May 18, 2010) (on line at http://www.usatoday.com/news/religion/2010-05-18-nun-abortion__N.htm?loc=interstitialskip).

[35] See U.S. Conf. of Catholic Bishops: Committee on Doctrine, *The Distinction Between Direct Abortion and Legitimate Medical Procedures,* (June 23, 2010) (on line at http://www.usccb.org/doctrine/direct-abortion-statement2010-06-23pdf).

sonnel to provide appropriate treatment to a patient, the hospital may nonetheless undertake an appropriate transfer with appropriate informed consent. What is forbidden is abandoning the patient—for any reason.

We believe that one interpretation of the bill's amendment to the rule of construction of EMTALA would allow exactly that result—abandonment of the patient. It would allow a hospital to assert a religious objection to the medically necessary termination of a pregnancy and leave her without rights of transfer or referral.

We want to be clear: No one has identified a problem that this provision of the bill is supposed to solve. Indeed, the Catholic Health Association has told the Congress that it has worked successfully within the current requirements of EMTALA for years and that they do not support this change.[36] Since these hospitals, which have clear objections to abortion services, are living within the terms of the law now, we would expect Catholic hospitals to continue to do so—regardless of whether H.R. 358 gives them the unrequested legal permission to abandon patients. But as Members of Congress who also have a conscience and moral principles, we cannot agree that such permission to abandon patients should be granted in the law.

FAILURE TO ARTICULATE CONSTITUTIONAL BASIS FOR H.R. 358

In addition to our objections to the substance of the legislation, we must also protest the manner in which Republican members of the Committee have flouted their own newly adopted rules of the House regarding statements of constitutional authority. This is the first piece of health legislation considered in the new Congress after the adoption of the new rules. Yet the sponsor did not meet requirements set forth in the new House rule requiring the filing of a statement stating the specific constitutional authority for the bill.

If this were a routine bill, we would probably be inclined simply to note the hypocrisy of enacting a rule one month and violating it the next. But this is not a routine bill. As noted above, this is a piece of legislation that reaches fundamental constitutional protections and unduly burdens them with substantial obstacles.

The new addition to the House Rules is found in clause 7 of rule XII. It provides: "A bill or joint resolution may not be introduced unless the sponsor submits for printing in the Congressional Record a statement citing as specifically as practicable the power or powers granted in the Constitution to enact the bill or joint resolution."

The guidance supplied by the House Rules Committee on how a member is to comply with this new rule provides a number of illustrative examples, each of which makes very specific reference to a provision of the Constitution or to one of the amendments to the Constitution. They include the following examples:

• "The constitutional authority on which this bill rests is the power of the Congress to make rules for the government and regu-

[36] Letter from Sr. Carol Keehan, DC, President and CEO, Catholic Health Association of the United States to Rep. Joseph R. Pitts (Feb. 9, 2011).

lation of the land and naval forces, as enumerated in Article I, Section 8, Clause 14 of the United States Constitution.

• "This bill is enacted pursuant to Section 2 of Amendment XV of the United States Constitution.

• "This bill is enacted pursuant to the power granted to Congress under Article I, Section 8, Clause 3 of the United States Constitution.

• "The Congress enacts this bill pursuant to Clause 1 of Section 8 of Article I of the United States Constitution and Amendment XVI of the United States Constitution.

• "This bill makes specific changes in existing law in a manner that returns power to the States and to the people in accordance with Amendment X of the United States Constitution."

The guidance of the House Rules Committee on Compliance with the rule states that "the adequacy and accuracy of the citation of constitutional authority is [a] [sic] matter for debate in the committee and in the House."

Moreover, the Frequently Asked Questions guidance provided by the House Rules Committee provides:

"Q: So why have this Rule at all?

"A: Just as a cost estimate from the Congressional Budget Office informs the debate on a proposed bill, a statement outlining the power under the Constitution that Congress has to enact the proposed bill will inform and provide the basis for debate. It also demonstrates to the American people that we in Congress understand that we have an obligation under our founding documents to stay within the role established therein for the legislative branch."

So the requirements of the new rule are clear: make reference to the Constitution as specifically as practicable. The examples are clear: they cite articles, sections, clauses and amendments directly and by number. And the rationale is clear: this is to inform the debate on a bill and to show the American people that we understand our role. Over and above that, the venue for debate on this statement is clear: the committee and the House.

Thus, it came as some surprise that the statement of constitutional authority for H.R. 358 cites no provision of the Constitution or any amendment to the Constitution.[37] None. And, while a debate on the "adequacy and accuracy" of the statement was attempted in the both Health Subcommittee and full Committee markup, Republicans shut off debate and ruled it out of order. Therefore, the statement did not "inform and provide the basis for debate." Most significantly, it did not demonstrate "to the American people that we in Congress understand that we have an obligation under our founding documents to stay within the role established therein for the legislative branch."

This should matter to all members, regardless of their views of this particular legislation. If we believe the new rule helps the process of legislation, guides our decisions, and demonstrates responsibility to all Americans, then the statement accompanying

[37] The statement on the constitutional authority for H.R. 358 reads: "Congress has the power to enact this legislation pursuant to the following: The *Protect Life Act* would overturn an unconstitutional mandate regarding abortion in the *Patient Protection and Affordable Care Act*." (Statement of Rep. Pitts, Congressional Record, H396 (Jan. 20, 2011)).

this bill and the process used to discuss it make a mockery of the rule.

This is especially important because, with this legislation, the Congress is stepping far beyond its "obligation under our founding documents to stay within the role established therein for the legislative branch." As discussed above, this legislation intrudes into the realms of personal privacy that the Supreme Court has said are protected by the Constitution. The legislation places an undue burden on this fundamental right to privacy, and it erects barriers to abortion services that are far beyond any previous laws, that will have a severe impact, and that are without justification.

This is exactly the situation in which the new rule would have proven truly useful. The statement of constitutional authority submitted by the author of the bill would have had to ignore or distinguish a long list of Supreme Court opinions about the limits on legislation in this area. Instead, the statement actually filed is factually incorrect, vague, and tautological. The Republicans have failed entirely to address the fundamental concern that Congress does not have the constitutional authority to enact H.R. 358.

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