# 16-4027

## United States Court of Appeals for the Sixth Circuit

PLANNED PARENTHOOD OF GREATER OHIO,
PLANNED PARENTHOOD SOUTHWEST OHIO REGION,

*Plaintiffs-Appellees,*

v.

RICHARD HODGES, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH,

*Defendant-Appellant.*

On appeal from the United States District Court
for the Southern District of Ohio

**BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW MEXICO, OREGON, VERMONT, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE**

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# TABLE OF CONTENTS

**PAGE**

## TABLE OF AUTHORITIES

**CASES** **PAGE**

## TABLE OF AUTHORITIES (cont'd)

**CASES (cont'd)** **PAGE**

## TABLE OF AUTHORITIES (cont'd)

**CASES (cont'd)** **PAGE**



**UNITED STATE CONSTITUTION**



**FEDERAL STATUTES**



**STATE STATUTES**

## TABLE OF AUTHORITIES (cont'd)

**PAGE**

### STATE STATUTES (cont'd)



### MISCELLANEOUS

## QUESTIONS PRESENTED

1. Whether Ohio's defunding law imposes an unconstitutional condition on public funds in violation of the First Amendment, because it penalizes plaintiffs for engaging in protected speech outside the scope of the funded programs.

2. Whether Ohio's defunding law imposes an unconstitutional condition on public funds in violation of the Due Process Clause, because it penalizes plaintiffs for making constitutionally protected abortion services available outside the scope of the funded programs.

## INTEREST OF AMICI CURIAE

Amici are the States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Vermont, Virginia, Washington, and the District of Columbia. Amici seek to ensure the availability of safe abortion services from accessible providers within each of the States, as well as the ability of providers of such services to engage in related First Amendment activities, such as the promotion of safe and lawful abortion services. The Ohio law at issue, Ohio Revised Statute § 3701.034, seeks to coerce providers to refrain from providing abortion services or engaging in such First Amendment activities in order to obtain public funds for other, unrelated health services. And statutes like this, and state executive actions that similarly seek to defund Planned Parenthood and other providers of abortion services, are proliferating.

Although amici also have an interest in preserving protections for governmental speech—including the right to refrain from conveying a message with which the government disagrees—that interest is not implicated here. When government contractors or grantees engage in protected speech outside the scope of a publicly funded program, there is

little risk that a governmental policy being advanced by the program will be distorted by the contractors' or grantees' message, or that any such message will be imputed to the State. This appeal therefore does not implicate the principle that contractors and grantees may be prohibited from espousing their own message within the scope of a governmental program in order to protect the government's message from being garbled or distorted. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995); *Rust v. Sullivan,* 500 U.S. 173, 193-94 (1991). Nor does it implicate the related principle that, even if a governmental program espouses no message of its own, the State has the right to refrain from allowing its program to be used to convey a message with which it disagrees.

Amici States thus seek to ensure that the government-speech doctrine is not misused to infringe upon the First Amendment rights of abortion providers to speak on matters unrelated to a governmental program. A State's interest in protecting its own government speech does not justify interfering with the constitutional rights of contractors and grantees to convey their own messages outside a government-funded program.

## STATEMENT OF THE CASE

The Ohio law at issue here is not unique. Numerous States have passed laws or taken executive actions to prohibit family-planning and other public-health funds from being awarded to Planned Parenthood affiliates and other providers of abortion services, even when those funds are specifically directed to support services that have nothing to do with abortion. Since 2009 alone, over fifteen States[1] have adopted such defunding measures.

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[1]Alabama: By executive action, State terminated the Medicaid agreement with Planned Parenthood affiliate. See *Planned Parenthood Southeast, Inc. v. Bentley*, 141 F. Supp.3d 1207 (M.D. Ala. 2015) (preliminarily enjoining executive action).

Arkansas: By executive action, State terminated Medicaid agreements with Planned Parenthood affiliates. *See Planned Parenthood of Arkansas v. Gillespie*, Case No. 15-cv-00566 (E.D. Ark. Sept. 29, 2016) (ECF No. 127) (preliminarily enjoining executive action).

Arizona: Arizona Rev. Statute § 35-196.05(B) barred Medicaid recipients from obtaining family planning services from providers who perform abortion services. *See Planned Parenthood Arizona, Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013) (invalidating statute).

Arizona Rev. Statute § 36-2930.05(B)(6) excludes from participation in Arizona's Medicaid program any individual or entity that "failed to segregate taxpayer dollars from abortions, including the use of taxpayer dollars for any overhead expenses attributable to abortions."

Florida: Florida Statutes § 390.0111(15) barred state agencies and local entities from paying funds to or contracting with an organization that provides abortion services or affiliates with such a provider. *See Planned Parenthood of S.W. & Cent. Florida v. Philip*, 194 F. Supp.3d 1213 (N.D. Fl. 2015) (preliminarily enjoining statute).

Indiana: Indiana Code § 5-22-17-5.5(b) bars state and state-administered federal funds from being provided to any entity that provides abortion services. *See Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana Dep't of Health*, 699 F.3d 962 (7th Cir. 2012) (upholding law).

Kansas: By appropriation measure, State limited Title X family planning funds to specified categories of providers that excluded private family planning clinics. *See Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814 (10th Cir. 2014) (upholding law).

Kansas: By executive action, State terminated Planned Parenthood affiliate's Medicaid provider agreement. *See Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 16-2284, 2016 U.S. Dist. LEXIS 86948 (D. Kan. 2016) (preliminarily enjoining termination).

Kentucky: S.B. 8 generally bars public agency funds from being directly or indirectly used, granted, paid, or distributed to any nonpublic entity or organization that provides only family planning services, but does not provide "all basic health services." *See* S.B. 8, 2017 Leg., Reg. Sess. (Ky. 2017).

Louisiana: By executive action, State terminated Planned Parenthood affiliate's Medicaid provider agreement. *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, 837 F.3d 477 (5th Cir. 2016) (preliminarily enjoining termination).

Mississippi: Mississippi Code § 43-13-117.4 disqualified from the state Medicaid program providers that offer non-therapeutic abortion services or affiliate with entities that offer such services. *See Planned Parenthood Southeast, Inc. v. Dzielak*, No. 16-cv-454 (S.D. Mi. Oct. 20, 2016) (ECF No. 25) (invalidating statute).

Missouri: Missouri Code 10.715 bars state family planning funds from being awarded to abortion providers. *See Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458 (8th Cir. 1999) (upholding statute).

North Carolina: Through budget appropriation, State prohibited granting of funds to Planned Parenthood and its affiliated organizations. *See Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp.2d 482 (M.D.N.C. 2011) (preliminarily enjoining appropriation provision).

Oklahoma: By executive action, the Commissioner of Health did not renew contract to grant funds to Planned Parenthood's affiliate for the purpose of providing Women, Infants, and Children services to the community. *See Planned Parenthood v. Cline*, 910 F. Supp.2d 1300 (W.D. Okla. 2012) (declining to preliminarily enjoin contract termination).

Tennessee: By executive action, State revoked state-administered federal public health grants to Planned Parenthood affiliate. *See Planned Parenthood Greater Memphis Region v. Dreyzehner*, 853 F. Supp.2d 724 (M.D. Tn. 2012) (preliminarily enjoining executive action).

Texas: By regulation, State prohibited state women's health program funding from being provided to organizations that provide or promote abortion services or affiliates of such organizations. *See Planned Parenthood Assn. of Hidalgo County Texas v. Suehs*, 692 F.3d 343 (5th Cir. 2012) (reversing preliminary injunction).

Utah: By executive action, State prohibited state administered federal funds from being awarded to Planned Parenthood affiliate. *See Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245 (10th Cir. 2016) (preliminarily enjoining executive action).

Wisconsin: Wisconsin Statute § 253.075(5)(b)(1) prohibits public funds from being distributed to public or private entities that provide abortion services or affiliate with entities that do so.

Congress has similarly sought to defund providers of abortion services. Congress recently proposed legislation that would eliminate federal funding to Planned Parenthood affiliates nationwide. *See* H.R. 354 (115th Congress) (introduced Jan. 6, 2017); S.241 (115th Congress) (introduced Jan. 30, 2017). As part of its proposal to repeal the Affordable Care Act, Congress proposed to eliminate state-administered federal funds to certain abortion providers, defined in a way to include only Planned Parenthood affiliates. *See* H.R. 1628, § 103 ("American Health Care Act of 2017") (115th Congress) (introduced March 20, 2017). While this measure is on hold for now, Congress has also passed a resolution that encourages States to pass defunding laws—it would repeal a rule of the Department of Health and Human Services that prohibits States from denying federally funded family-planning grants for reasons unrelated to the entity's ability to provide family-planning services. *See* House Joint Resolution 43 (115th Congress) (passed House Feb. 16, 2017; agreed to by Senate March 30, 2017). If signed by the President, the resolution would remove an administrative impediment to state defunding measures, though such measures would remain subject to judicial review for, among other things, constitutionality.

Some of these defunding measures have already been judicially invalidated. For example, attempts to eliminate Medicaid funding to Planned Parenthood affiliates or other abortion providers have largely been struck down by federal courts, on the ground that they violated a provision of the Medicaid law that ensures Medicaid recipients the right to obtain services from the qualified provider of their choice. *See, e.g., Planned Parenthood Arizona, Inc. v. Betlach*, 727 F.3d 960; *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 837 F.3d 477. Other defunding measures have been struck down because they imposed unconstitutional conditions on the receipt of public funds or violated the Equal Protection Clause. *See, e.g., Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245 (unconstitutional condition); *Planned Parenthood of S.W. & Cent. Florida v. Philip*, 194 F. Supp. 3d 1213 (unconstitutional condition); *Planned Parenthood Greater Memphis Region v. Dreyzehner*, 853 F. Supp. 2d 724 (unconstitutional condition and equal protection violation); *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482 (same). *But see Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana Dep't of Health*, 699 F.3d 962 (reasoning that if State can permissibly ban public funding for abortion, then State does not indirectly violate due

process by refusing to fund other public-health services offered by abortion providers); *Planned Parenthood Ass'n of Hidalgo County Texas v. Suehs*, 692 F.3d 343 (5th Cir. 2012) (upholding a regulation that limited funding for family-planning services to organizations that did not promote abortion).

In its effort to defund providers of abortion services, Ohio enacted the statute at issue here in 2016. Ohio Revised Code § 3701.034 regulates Ohio's use and distribution of federal funds and materials for six specified public-health programs; the state statute requires Ohio to ensure that those funds are not used, among other things, to "[c]ontract with any entity that performs or promotes nontherapeutic abortions." *Id.* § 3701.034(B)-(G). "Promote" means "to advocate for, assist with, encourage, or popularize through advertising or publicity." *Id.* § 3701.034(A)(8). While this language has not yet been interpreted by the Ohio courts, on its face it appears to include publicizing the fact that an entity makes such abortions available, fundraising to assure an entity's ability to do so, and more generally advocating for safe and lawful abortions. A "nontherapeutic abortion" is narrowly defined as "an abortion that is performed or induced when the life of the mother would

not be endangered if the fetus were carried to term or when the pregnancy of the mother was not the result of rape or incest reported to a law enforcement agency." *Id.* § 9.04 (incorporated by reference in *id.* § 3701.034(A)(7)).[2]

The six public-health programs covered by the statute make federal funds or materials available to health-care providers under (1) the Violence Against Women Act, 42 U.S.C. § 13295 et seq., (2) the Breast and Cervical Cancer Mortality Prevention Act, 42 U.S.C. §§ 300k through 300n-5, (3) an infertility prevention project providing testing and treatment for sexually transmitted diseases, (4) the minority HIV/AIDS initiative, (5) infant-mortality reduction and infant-vitality initiatives, and (6) an education program about personal responsibility, all programs administered by the Ohio Department of Health and unrelated to the provision or promotion of abortion services.[3]

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[2] As plaintiffs note (Pls. Br. 8 n.2), a "nontherapeutic abortion" thus includes an abortion that is necessary to avoid harms that, while not life-threatening, are nonetheless serious.

[3] For simplicity, this brief refers to the six programs as "funding programs," and Ohio Rev. Code § 3701.034 as Ohio's "defunding law." The recipients of the funds or materials provided by these programs are referred to as "grantees." And defendant Director of the Ohio Department of Health is referred to as "Ohio."

Additionally, for one of the funded programs—the infertility prevention project—Ohio's law prohibits project materials from being distributed to an entity that *affiliates* with those who perform or promote nontherapeutic abortions. Ohio Revised Code § 3701.034(D).

Plaintiffs Planned Parenthood of Greater Ohio and Planned Parenthood Southwest Ohio Region sued to prevent implementation of Ohio's defunding law, arguing it violated their rights under the First Amendment and the Due Process and Equal Protection Clauses. Before its effective date, the district court granted a temporary restraining order prohibiting the statute's enforcement. (Op., R.19, PageID#327.) After discovery, briefing and oral argument, the district court granted judgment to plaintiffs permanently enjoining the statute's enforcement. (Op., R.60, PageID#2144.) The court concluded that the statute imposed an unconstitutional condition that violated plaintiffs' First Amendment and due process rights. (Op., R.60, PageID#2144.) And because the court held that those violations in themselves warranted an injunction, it did not reach plaintiffs' equal protection claim.

This appeal followed.

## SUMMARY OF ARGUMENT

The Ohio defunding law is invalid under both the First Amendment and the Due Process Clause because it conditions public funds on the agreement of grantees to refrain from activities protected by those constitutional provisions.[4]

The unconstitutional-conditions doctrine prohibits a State from denying a benefit on a basis that infringes the would-be recipient's constitutionally protected interests, including the interest in free speech. *See Perry v. Sindermann,* 408 U.S. 593, 597 (1972). Where funds are leveraged to regulate speech, the Supreme Court has distinguished between permissible regulations that restrict speech within the scope of the funded program in order to define the limits of that program, and impermissible regulations that restrict speech outside the contours of the funded program and thereby regulate the recipient itself. *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013); *Rust v. Sullivan*, 500 U.S. 173. The Ohio defunding law imposes an

[4] While we agree with plaintiffs that Ohio's defunding law is also invalid under the Equal Protection Clause, we do not address that argument here.

unconstitutional condition on state grants that infringes grantees' right to free speech, because it prohibits the State from contracting for services unrelated to abortion with entities that promote abortion services outside the contours of the funded programs, and thereby penalizes such entities for their protected speech.

Ohio's condition on state funding cannot be justified by Ohio's interest in its own governmental speech. The defunding law is not necessary to prevent any garbling of an anti-abortion message because none of the funded programs seek to convey an anti-abortion message. Nor is Ohio being compelled to convey a message with which it disagrees. When plaintiffs advocate for safe and legal abortion outside the contours of the funded programs, any message they convey is not reasonably imputed to Ohio merely because Ohio awards a grant to plaintiffs to provide other, unrelated public health services.

For like reason, Ohio's defunding law imposes an unconstitutional condition on funding in violation of plaintiffs' right to ensure that their clients have adequate access to abortion services. The law seeks to leverage public funds to pressure grantees to refrain from providing access to constitutionally protected abortion services outside the contours

of the funded programs. Moreover, the law would impose an undue burden on women's right to access those services if plaintiffs succumbed to the pressure. The law therefore violates the Due Process Clause. That plaintiffs have said they will not succumb to that pressure does not eliminate the unconstitutional condition. A constitutionally cognizable injury occurs when benefits are withheld on the basis that the entity engages in constitutionally protected activity, regardless of whether the entity ultimately accedes to the unconstitutional condition.

## ARGUMENT

## POINT I

### OHIO'S DEFUNDING LAW IMPOSES AN UNCONSTITUTIONAL CONDITION ON GOVERNMENT FUNDING THAT INFRINGES PLAINTIFFS' RIGHT TO FREE SPEECH, AND THE LAW IS NOT NECESSARY TO PROTECT GOVERNMENT SPEECH

Ohio's defunding law violates plaintiffs' First Amendment rights. Although plaintiffs have no right to participate in the six programs targeted by the defunding law, plaintiffs cannot be denied the opportunity to participate for an unconstitutional reason. Because the defunding law would require plaintiffs to cease engaging in constitutionally protected speech outside the scope of those programs in order to participate in those programs, the law imposes an

unconstitutional condition on funding that infringes plaintiff's freedom of speech.

Moreover, the condition imposed by Ohio cannot be justified by Ohio's interest in protecting its governmental speech rights. None of the funded programs convey an anti-abortion message that might be garbled by plaintiffs' promotion of abortion services outside the scope of the funded programs. And, although a State has the right not to be compelled to speak, granting funds to entities that provide abortion services so that those entities may provide other, unrelated health services does not compel the State to convey a message with which it disagrees.

### A. Ohio's Law Seeks to Leverage Public Funding to Regulate Speech Outside the Funded Programs.

It is well settled that "the government may not deny a benefit to a person because he exercises a constitutional right," including the right to free speech. *Koontz v. St. Johns River Water Mgt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (internal quotation and citation omitted); *Agency for Int'l Dev.*, 133 S. Ct. at 2328. The unconstitutional-conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 133 S. Ct.

at 2594. Not all funding conditions that restrict speech are impermissible, however. To determine whether the regulation of speech is permissible, the "relevant distinction . . . is between conditions that define the limits of the government spending program—those that specify the activities [the government] wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *Agency for Int'l Dev.*, 133 S. Ct. at 2328.

For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court held that the government could restrict speech within the confines of the Title X family-planning program; program participants could be prohibited from advocating for abortion within the confines of the family-planning program. *Id.* at 192. The Court reasoned that "when the government appropriates public funds to establish a program, it is entitled to define the limits of that program." *Id.* at 194. At the same time, however, the Title X regulations did not force Title X providers to give up abortion-related speech altogether; they could advocate for abortion outside the confines of the Title X program. *Id.* at 196. The Court concluded that the regulations did not impose an unconstitutional condition on speech because they involved restrictions on the particular

program, not the recipient. *Id.* at 197; *see also id.* at 196 ("Title X expressly distinguishes between a Title X *grantee* and a Title X *project*.") (emphasis in original).

In contrast, the condition imposed on service providers in *Agency for International Development*, 133 S. Ct. 2321, fell "on the unconstitutional side of the line" because it "affect[ed] 'protected conduct outside the scope of the federally funded program.'" *Id.* at 2330 (quoting *Rust*, 500 U.S. at 197). As a condition of receiving HIV/AIDS funding, the grantees were required to have a policy explicitly opposing prostitution and sex trafficking. *Id.* at 2324. The Court found this condition impermissible because it affected protected speech outside the scope of the government-funded program. *Id.* at 2330. Although the subject condition would have required the grantees to adopt a specific message, rather than prohibiting them from expressing a viewpoint, the Court's analysis did not turn on that distinction. Instead, the Court's analysis turned on the fact that the challenged condition sought to regulate speech outside the contours of the funded program. *See id.* ("By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the

recipient."). As the Court explained, the condition thus necessarily affected the grantee's ability to espouse a contrary or neutral view "on its own time and dime." *Id.*

Like the policy requirement in *Agency for International Development*, Ohio's defunding law falls on the unconstitutional side of the line. The law does not simply, as in *Rust,* restrict speech within the confines of the funded program, though it does that too. *See, e.g.*, Ohio Rev. Code § 3701.034(B)(2) (prohibiting program funds or materials from being used to promote abortion services). It regulates speech outside the funded program. Under Ohio's defunding law, the State cannot contract with any *entity* that promotes nontherapeutic abortions, regardless of the context in which any such promotion takes place. *See, e.g.*, *id.* § 3702.034(B)(3). Such entities are thus penalized on the basis of speech unrelated to the funded program. In this way, the law regulates the recipient rather than the program, going beyond the funded program itself and impermissibly restricting the speech of grantees when they are speaking on their "own time and dime." *See Agency for Int'l Dev.*, 133 S. Ct. 2330. The district court thus correctly concluded that Ohio's

defunding law places an unconstitutional condition on public funding that infringes grantees' freedom of speech.

### B. Ohio's Defunding Law Does Not Implicate Government Speech.

Ohio (Def. Br. 52-55) and the amici States who support its position (Michigan Br. 14-18) are mistaken in asserting that the funding condition challenged here is necessary to protect Ohio's speech.

It is simply not true that Ohio's anti-abortion message would be "garbled" (Def. Br. 54) if it were required to fund, for other, unrelated health services, an entity that provides abortion services. Ohio does not—and cannot—contend that it is using the six funded programs at issue here to convey any such message. In separate provisions that plaintiffs do not challenge, Ohio's defunding law separately provides that the funds and materials for the six specified programs may not be used to provide or promote nontherapeutic abortions. *See*, *e.g.*, Ohio Rev. Code § 3701.034(B)(1), (2). And as plaintiffs demonstrate (Pls. Br. 29-30 (citing record)), none of the funded programs has a message disfavoring abortion. Indeed, three of the programs have no state message at all (i.e., the minority HIV/AIDS initiative, the program to prevent sexually

transmitted diseases, and the breast and cervical cancer-screening program). The others (the Violence Against Women Act program, the personal responsibility education program, and the infant-mortality program) are educational in nature, and thus potentially convey messages. However, they have fixed curricula that provide no opportunity to discuss the issue of abortion on either side of the debate. None of the programs thus convey an anti-abortion message that could be garbled by plaintiffs' participation. *Cf. Rosenberger*, 515 U.S. at 833 ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.").

It is also not true, as Ohio suggests (Def. Br. 54) that merely by funding a provider that conveys a message outside the scope of the funded program, Ohio will necessarily be understood to endorse the provider's message. The government, of course, has an interest in not being compelled to convey a message with which it disagrees. When the government speaks, the government is entitled to choose any message it wishes to convey. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467-

68 (2009); *Rosenberger*, 515 U.S. 819; *Rust*, 500 U.S. at 194. And the government's right to choose its message necessarily includes the concomitant right to decline to convey a message. *See Rosenberger*, 515 U.S. at 833 (when government speaks, it may "regulate the content of what is or is not expressed").

But the government's right to decline to convey a message is not implicated here. A government entity is forced to convey a message when it is required to accommodate another's message in its own funded program. *Cf. Hurley v. Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557, 572-73 (1995) (parade organizer could not be compelled to accommodate another's message in its own parade). Here, however, any message that plaintiffs convey when they engage in abortion-related First Amendment activities, such as advocating for safe and lawful abortion services, necessarily occurs outside the confines of the government-funded programs. And any message thereby conveyed is not reasonably imputed to Ohio merely because Ohio awards a grant to plaintiffs to provide other, unrelated public health services. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) (law school's associational speech rights were not implicated by law that

required school to host military recruiters because hosting recruiters did not require school to associate with them). Ohio is thus not forced to accommodate any message plaintiffs convey when they speak about abortion outside the funded programs.

By arguing that the defunding law seeks to protect government speech, Ohio seeks to extend the government-speech doctrine beyond the channels of government communication, at the expense of the free-speech rights of its contractors and grantees. Ohio seeks to shield a general state policy disfavoring abortion from the impact of private speech that is unrelated to, and occurs outside of, any public program. The government-speech doctrine should not be misused to impinge upon the First Amendment rights of contractors and grantees to speak on matters unrelated to any publicly funded program. A State's interest in protecting its own speech does not justify interfering with the constitutional rights of contractors and grantees to convey their own messages outside a government-funded program.

The district court thus correctly held that Ohio Rev. Code § 3701.034 violates the First Amendment because it imposes an

unconstitutional condition on public funding that infringes plaintiffs' free speech outside the contours of the funded program.

## POINT II

### OHIO'S DEFUNDING LAW ALSO IMPOSES AN UNCONSTITUTIONAL CONDITION ON GOVERNMENT FUNDING THAT INFRINGES PLAINTIFFS' RIGHT TO PROVIDE ACCESS TO ABORTION SERVICES, AND THEIR CLIENTS' RIGHT TO RECEIVE SUCH SERVICES

For essentially the same reasons that the defunding law imposes an unconstitutional condition on funding that penalizes plaintiffs' speech, it imposes an unconstitutional condition that penalizes plaintiffs for ensuring their clients' due process right to access abortion services.[5] As a condition to obtaining funding for any of the six specified programs, Ohio's defunding law requires grantees to refrain from providing access

[5] It is well settled that health-service providers have standing to enforce the due process rights of their clients to access abortion services. *See Planned Parenthood of S.E. Pa. v. Casey,* 595 U.S. 833, 884, 887 (1992) (plurality opinion). That principle effectively gives providers the right to ensure that their clients have adequate access to abortion services. And some cases suggest that providers themselves have a due process right to offer abortion services. *See, e.g., Planned Parenthood of Mid-Mo. & E. Kan. v. Dempsey*, 167 F.3d 458, 464; *Planned Parenthood of Cent. & N. Arizona v. Arizona*, 718 F.2d 938, 944 (9th Cir. 1983).

to abortion services—activity protected by the Due Process Clause—even though the subject programs are wholly unrelated to the provision of abortion services. Because the law seeks to leverage public funds to pressure plaintiffs to refrain from providing access to constitutionally protected abortion services, and would impose an undue burden on women's right to access those services if plaintiffs succumbed to the pressure, it violates the Due Process Clause.[6]

The unconstitutional-conditions doctrine is not limited to cases implicating the First Amendment, but rather applies in a variety of contexts, including cases implicating due process. *See Koontz*, 133 S. Ct. at 2594 (applying doctrine to Fifth Amendment takings case): *see also*

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[6] As plaintiffs demonstrate (Pls. Br. 23 n.6), the words in Ohio's defunding law that withhold funds from any entity that promotes abortions cannot be severed from the remainder of the statute. Accordingly, because the statute violates the First Amendment rights of grantees, the entire statute is invalid, and it is unnecessary to reach the question whether it also violates their due process rights. But while either constitutional flaw would be sufficient to invalidate the statute, Ohio and its supporting amici are wrong to argue (Def. Br. 28-31; Michigan Br. 11-14) that rejecting either constitutional claim is sufficient to sustain the statute. Even if there were no due process defect, it still would be necessary to determine whether there is nonetheless a fatal First Amendment flaw. A non-severable statute that comports with due process must also comport with the First Amendment, and may not chill the exercise of First Amendment rights.

*R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 434 (6th Cir. 2005) (holding that doctrine is applicable to due process challenge). And a law that impinges on a grantee's due process rights exercised outside the contours of the government program violates the unconstitutional-conditions doctrine. Applying this rule, courts have held that the government may not condition an entity's receipt of funds for programs unrelated to the provision of abortion services on the entity's agreement to refrain from providing abortion services. *See, e.g.*, *Planned Parenthood Assoc. of Utah,* 828 F.3d 1245; *Planned Parenthood of S.W. & Cent. Florida*, 194 F. Supp. 3d 1213; *Planned Parenthood Greater Memphis Region*, 853 F. Supp. 2d 724; *Planned Parenthood of Cent. N.C.*, 804 F. Supp. 2d 482. The same result should obtain here.

Ohio does not dispute that access to abortion services would be unduly burdened if plaintiffs acceded to the funding conditions. Nor could it. Plaintiffs have demonstrated (Pls. Br. 44 (citing record evidence)) that if they were to forego providing nontherapeutic abortion services, women's access to abortion services in Ohio would be severely curtailed, and Ohio has not even attempted to justify such a loss in services with any state interest. A state law that burdens access to abortion services

without adequate benefit to the State "places a 'substantial obstacle in the path of a woman's choice'" and thus unduly burdens that right. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2312 (2016) (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion)).

Ohio (Def. Br. 37) and the amici States that support its position (Michigan Br. 9-10) nonetheless argue that Ohio's defunding law will not impose an undue burden on the right to access abortion services, because plaintiffs have stated that they will continue to provide such services, notwithstanding that law. This argument misapprehends the unconstitutional-conditions doctrine.

The Supreme Court has never required that a funding grantee accept the funds and subject itself to an unconstitutional condition in order to prevail on an unconstitutional-conditions claim. Indeed, the Court rejected this very argument in *Koontz*. The Court there explained that "regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who

exercise them." 133 S. Ct. at 2595. The plaintiff in *Koontz* was in fact effectively denied the land-use permit he sought precisely because he would not cede to the government's conditions. The Court nonetheless found that the government's denial of the permit was impermissible, and that the denial produced "a constitutionally cognizable injury." *Id.* at 2596. Similarly here, notwithstanding plaintiffs' intention not to succumb to the unconstitutional pressure to refrain from providing abortion services, the leveraging of public health funds and materials in order to pressure them to do so is unconstitutional.

Ohio's defunding law therefore violates the Due Process Clause because it imposes an unconstitutional condition on funding that penalizes plaintiffs for ensuring their clients' due process right to access abortion services.

## CONCLUSION

The judgment of the district court enjoining enforcement of the Ohio defunding law should be affirmed.

Dated: Albany, NY
April 5, 2017

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this *Brief for the States of New York et al.* complies with the type-volume requirements for an amicus brief and contains 5,579 words. *See* Fed. R. App. P. 29(A)(5); *id*. 32(a)(7)(B)(i).

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## DESIGNATION OF DISTRICT COURT RECORD

Amici State of New York et al., pursuant to Sixth Circuit Rule 30(g), designates the following filings from the district court's electronic records:

***Planned Parenthood of Greater Ohio, et al., v. Hodges,* 1:16-cv-539**

| Date Filed | R. No.; Page ID# | Document Description |
|---|---|---|
| 5/23/16 | 19; 327 | TRO Op. |
| 8/12/16 | 60; 2144 | Permanent Injunction Op. |

## CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April 2017, this *Brief for the State of New York et al.* was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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