



Senate Bill 2206: Defunding Planned Parenthood Through Senator Vitter's *Title X Family Planning Act*

Introduction

The Title X Family Planning Act (S.2206)¹ proposed by Senator Vitter would prevent any group that performs elective abortions (i.e. those that are not necessary to save a woman's life or to avoid a serious illness) from receiving Title X funds. This bill addresses a longstanding controversy over the public funding of organizations like Planned Parenthood that perform elective abortions. At the same time that Planned Parenthood performs over one hundred thousand abortions every year, it receives hundreds of millions of taxpayer dollars from all levels of government. As one pro-life group has explained: "By far, the single largest revenue source for Planned Parenthood has been the American taxpayer. Efforts to cut funding for this advocacy group have been largely unsuccessful due to court decisions and a large, powerful lobby."² Although public funds cannot typically be used to perform abortions, millions of Americans are

¹ The main provision of S.2206, 109th Cong, 2d Sess (Jan. 27, 2006), states:

(a) In General—None of the funds appropriated under this title shall be distributed to grantees who perform abortions or whose subgrantees perform abortions, except where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed. The preceding sentence shall not apply to a grantee or subgrantee that is a hospital, so long as such hospital does not subgrant to a non-hospital entity that performs abortions.

² Michael Schwartz & Douglas R. Scott, *Understanding the Plague of Title X*, 2 SPECIAL REP., No. 3 (Summer 1999), at 3, available at <http://fightpp.org/downloads/pubs/1999summer%2Epdf> (last visited Sept. 29, 2006).

still upset that their tax dollars fund Planned Parenthood and similar organizations. S.2206 is a sensible way to keep conscientious taxpayers from having to support abortion providers.

Section I of this memorandum briefly describes the Planned Parenthood organization and the various sources of its funding. Section II focuses on Planned Parenthood's funding under Title X, the subject of S.2206. Section III of the memo discusses previous attempts by conservatives to limit the use of Title X funds with regard to abortion. Section IV explains why any legal challenge to S.2206 would likely fail, while Section V discusses the policy arguments that will likely surface both for and against the passage of S.2206.

I. An Overview of Planned Parenthood and Its Funding

Planned Parenthood consists of one national organization and numerous other local organizations. As the www.plannedparenthood.org website explains:

The Planned Parenthood community is made up of 121 independent organizations operating under the Planned Parenthood name. Planned Parenthood Federation of America, Inc., (PPFA) is the nation's largest and most trusted voluntary reproductive health care organization. In addition to PPFA, there are 120 affiliated Planned Parenthood organizations dedicated to providing comprehensive reproductive and complementary health care services to nearly five million women, men and teenagers every year.³

The Planned Parenthood Federation of America and its affiliates are commonly referred to collectively as "Planned Parenthood." The Alan Guttmacher Institute is a public policy and research arm of Planned Parenthood. It originated as a division of Planned Parenthood Federation of America and is now an independent "special affiliate" of the organization.⁴

Planned Parenthood's funding comes from a variety of sources, including government programs administered at the federal, state, and local levels. Governments at all levels spend a

³ Planned Parenthood Federation of America, *Who Makes Up the Planned Parenthood Community?*, at <http://www.plannedparenthood.org/About-This-Site.htm> (last visited Sept. 29, 2006).

⁴ The Alan Guttmacher Institute, *The History of the Guttmacher Institute*, at <http://www.guttmacher.org/about/history.html> (last visited Sept. 29, 2006).

staggering amount of money on family planning and contraceptive services each year, and Planned Parenthood has taken advantage of these programs. For example, the Alan Guttmacher Institute reported that, in 1994, “[t]ogether the federal and state governments spent \$715 million on contraceptive services and supplies through a range of programs.”⁵ Given that spending in many federal and state programs has almost doubled since 1994, it is safe to assume that the federal and state governments now spend over \$1 billion annually on family planning services. In fact, a subsequent Guttmacher report states that “federal and state governments spend \$1.26 billion on family planning services and supplies in FY 2001.”⁶ Furthermore, the Heritage Foundation estimates that federal and state governments spent approximately \$1.73 billion in 2002 on various “contraceptive promotion” and “pregnancy prevention” programs.⁷

Planned Parenthood’s *2003-2004 Annual Report* stated that almost a third of the organization’s \$810 million in total revenue—\$265.2 million—came from “Government Grants and Contracts.”⁸ The two other predominant sources of Planned Parenthood’s income in 2003-2004 were “Clinic Income” (\$306.2 million) and “Private Contributions and Bequests” (\$191 million).⁹ Planned Parenthood’s national office received \$68.1 million overall that year, with only \$500,000 coming from government funding. However, the affiliate offices brought in \$752.2 million, with \$264.7 million coming from government grants and contracts. These figures are consistent with those of the previous year, where \$254.4 million of Planned Parenthood’s

⁵ The Alan Guttmacher Institute, *Fulfilling the Promise: Public Policy and U.S. Family Planning Clinics*, 2000, at 16, available at <http://www.guttmacher.org/pubs/fulfill.pdf> (last visited Sept. 29, 2006).

⁶ The Alan Guttmacher Institute, *Facts in Brief: Contraceptive Services*, 2005, at 1, available at http://www.alanguttmacherinstitute.org/pubs/fb_contr_serv.html (last visited Oct. 5, 2006).

⁷ Melissa G. Pardu et al., *Government Spends \$12 on Safe Sex and Contraceptives for Every \$1 Spent on Abstinence*, THE HERITAGE FOUNDATION BACKGROUNDER #1718, (January 14, 2004), at 1, available at <http://www.heritage.org/Research/Family/bg1718.cfm#pgfId-1071595>.

⁸ Planned Parenthood Federation of America, *Stand Up for Women’s Lives: Annual Report 2003-2004*, at 24-25, available at <http://www.plannedparenthoodrx.com/annualreport/report-04.pdf> (last visited Sept. 29, 2006).

⁹ *Id.*

\$766.6 million in revenues came from government aid.¹⁰ During the seven-year span of the 1997-2003 fiscal years, Planned Parenthood received a total of \$1.492 billion in government grants and contracts, which comprised 31.2 percent of their \$4.7838 billion in total revenues.¹¹

Not surprisingly, the federal government is a major source of the public funding received by Planned Parenthood and other family planning entities. Exact figures are not available for some fiscal years, but it is safe to assume that *roughly two-thirds* of the government money Planned Parenthood receives comes from the federal government. For example, the United States General Accounting Office has determined that, during the five-year period from fiscal year 1997 to fiscal year 2001, the Planned Parenthood Federation of America and its affiliates received \$661.5 million in federal funding for “reproductive health activities.”¹² During that

¹⁰ Planned Parenthood Federation of America, *Annual Report 2002-2003*.

¹¹ Center for Reclaiming America for Christ, *Planned Parenthood Federation of America: Financial Overview – Fiscal Years 1997/ 1998 – 2003/ 2004*, at <http://www.reclaimamerica.org/pages/campaigns/PPH/PPHFinancialOverview.pdf> (last visited Sept. 29, 2006). The statistics from this summary are confirmed as accurate by the following sources: Life Issues Institute, Inc., <http://www.lifeissues.org/pp/index.html> (last visited Oct. 9, 2006); Taxpayer Money to Planned Parenthood 1987 – June 2002, STOPP, 2003, http://www.all.org/stopp/tax87_02.pdf; Planned Parenthood Federation of America, *Annual Report 2004-2005*, at 22-23, available at <http://www.plannedparenthood.org/files/PPFA/report-05.pdf> (last visited Oct. 9, 2006); Planned Parenthood Federation of America, *Stand Up for Women’s Lives: Annual Report 2003-2004*, at 24-25, available at <http://www.plannedparenthoodrx.com/annualreport/report-04.pdf> (last visited Oct. 9, 2006); Jeff Johnson, *Abortion Leader Could Increase Income by ‘Reducing’ Abortions*, CNSNEWS.COM, Dec. 23, 2003 available at <http://www.cnsnews.com/ViewNation.asp?Page=%5CNation%5Carchive%5C200312%5CNAT20031223a.html>; Government Funding and Abortion Income Help Planned Parenthood Make a Killing, According to Organization’s Annual Report, U.S. NEWSWIRE, Dec. 17, 2003, <http://releases.usnewswire.com/GetRelease.asp?id=24521>; 2002-2003 Planned Parenthood Report, PHYSICIANS FOR LIFE, (2/04), <http://www.physiciansforlife.org/content/view/586/2/>; The STOPP Report, Dec. 28, 2002, <http://www.all.org/stopp/rr021228.htm>; Randall K. O’Bannon, *Planned Parenthood 2001-02 Annual Report Released*, http://www.nrlc.org/news/2003/NRL05/planned_parenthood_2001.htm (last visited Oct. 9, 2006); Planned Parenthood Reaps Huge Profits Amid Taxpayer “Rip Off,” REPUBLICAN NATIONAL COALITION FOR LIFE, Feb. 25, 2000, <http://www.rnclife.org/faxnotes/2000/feb00/00-02-25.html>; The Truth About Planned Parenthood, NATIONAL VALUES COALITION, http://www.traditionalvalues.org/pdf_files/TVCSpecialRptPlannedParenthood.pdf (last visited Oct. 9, 2006); Randall K. O’Bannon, *Planned Parenthood’s 1998-99 Annual Report: More Deeply Enmeshed Than Ever In the Killing*, <http://www.nrlc.org/news/2000/NRL06/ppfa.html>, (last visited Oct. 9, 2006); Randall K. O’Bannon & Dave Andrusko, *Details from Planned Parenthood’s Latest Annual Report: Telling Stories about Abortion*, <http://www.nrlc.org/news/2001/NRL04/randy.html> (last visited Oct. 9, 2006); Randall K. O’Bannon, *Another Abortion Record at Planned Parenthood*, <http://www.nrlc.org/news/2002/NRL03/randy.html> (last visited Oct. 9, 2006).

¹² United States General Accounting Office, *Federal Funds: Fiscal Year 2001 Expenditures by Selected Organizations Involved in Health-Related Activities*, GAO-03-527R, at 3, May 16, 2003, available at <http://www.gao.gov/new.items/d03527r.pdf> [hereinafter May 2003 Report] (responding to request of Representatives Christopher Smith and Joseph Pitts); United States General Accounting Office, *Reproductive Health: Federal Funds That Supported Four Nonprofit Organizations*, GAO-02-81R, at 2-3, Nov. 13, 2001,

time, the total amount of government grants and contracts from all sources that Planned Parenthood received was \$972.4 million.¹³ The overall percentage of government funds that Planned Parenthood received from the federal government during this period was 68 percent, with individual years ranging from 67.2 percent to 70.2 percent.¹⁴

II. Planned Parenthood's Funding Under Title X

The predominant source of federal funding for most family planning organizations—including Planned Parenthood—is Title X of the Public Health Service Act,¹⁵ the subject of Senator Vitter's proposed legislation. The two other main sources of federal funding are Title XIX (Medicaid) and Title XX (Social Services Block Grants).¹⁶ The Alan Guttmacher Institute has estimated that, “[i]n 1998, clinics with any Title X funding received about one-quarter of their revenues from the program.”¹⁷

In 1970, Congress added Title X to the Public Health Service Act of 1944 through the passage of the Family Planning Services and Population Research Act of 1970. The main Title X provision provides:

The Secretary [of Health and Human Services] is authorized to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents). To the extent practical, entities which receive grants or

available at <http://www.gao.gov/new.items/d0281r.pdf> [hereinafter Nov. 2001 Report] (same); United States General Accounting Office, *Reproductive Health: Federal Funds Provided to Four Nonprofit Organizations*, GAO/HEHS-00-147 R, July 18, 2000, at 2, available at <http://www.gao.gov/new.items/he00147r.pdf> [hereinafter July 2000 Report] (responding to request of Senator Phil Gramm and Representative Christopher Smith).

¹³ Center for Reclaiming America for Christ, *supra* note 11. See also Taxpayer Money to Planned Parenthood 1987 – June 2003, STOPP, 2004, <http://www.all.org/stopp/04gtax.pdf>.

¹⁴ See *id.*; May 2003 Report; Nov. 2001 Report; July 2000 Report. During that time, the Population Council, the International Planned Parenthood Federation and associations, and the Alan Guttmacher Institute also received a total of \$289.9 million in federal funding related to reproductive health services.

¹⁵ Family Planning Services and Population Research Act of 1970, 42 U.S.C. § 300 *et seq.*, Pub. L. No. 91-572.

¹⁶ See May 2003 Report at 6; Nov. 2001 Report at 5-7; July 2000 Report at 4-5.

¹⁷ The Alan Guttmacher Institute, *supra* note 5, at 26.

contracts under this subsection shall encourage family participation in projects assisted under this subsection.¹⁸

Another important provision states: “None of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning.”¹⁹ “Title X grants are administered through state health departments or regional agencies that subcontract with local clinics.”²⁰ Women living below the federal poverty line are not charged for Title X services, while those living above the line are charged on a sliding fee scale, and those living above 250 percent of the poverty line pay full fees for services. Over one quarter of the women using Title X-funded clinics are 19 years old or younger. “[C]linics supported by Title X funds have traditionally served adolescents on a confidential basis.”²¹

The United States Department of Health and Human Services oversees the distribution of Title X funds. The Office of Family Planning is directly responsible for the administration of Title X funding. It is part of the Office of Population Affairs, which falls within the Department’s Office of Public Health and Science. Title X funds are used to provide a variety of services. “In addition to contraceptive services and related counseling, Title X supported clinics also provide a number of preventive health services such as: patient education and counseling; breast and pelvic examinations; cervical cancer, STD and HIV screenings; and pregnancy diagnosis and counseling.”²² Importantly, *no Title X funds may be used to pay for abortions.*

According to the Office of Family Planning, the following amounts (in millions of U.S. dollars) have been appropriated under Title X since its creation:

¹⁸ 42 U.S.C. § 300(a).

¹⁹ 42 U.S.C. § 300a-6.

²⁰ Planned Parenthood Federation of America, *America’s Family Planning Program: Title X*, at <http://www.plannedparenthood.org/files/PPFA/vox-020801-6-advocacy.pdf> (last visited Sept. 29, 2006).

²¹ *Id.*

²² Office of Population Affairs, *Office of Family Planning*, at <http://opa.osophs.dhhs.gov/titlex/ofp.html> (last visited Sept. 29, 2006).

1971	6	1983	124.1	1995	193.3
1972	61.8	1984	140	1996	192.6
1973	100.6	1985	142.5	1997	198.5
1974	100.6	1986	136.4	1998	203.5
1975	100.6	1987	142.5	1999	215
1976	100.6	1988	139.7	2000	238.9
1977	113	1989	138.3	2001	253.9
1978	135	1990	139.1	2002	265
1979	135	1991	144.3	2003	273.3
1980	162	1992	149.6	2004	278.3
1981	161.7	1993	173.4	2005	285.9 ²³
1982	124.2	1994	180.9		

These figures add up to a total of \$5.65 billion in Title X funds distributed from 1971 to 2005. A total of \$1.35 billion has been spent during the past five fiscal years (2001-2005), and \$2.36 billion has been spent during the past ten (1996-2005).

Although it is impossible to gauge the exact amount of funding that Planned Parenthood has received under Title X since 1971 because accurate, publicly available data only exists for certain years, the figure is almost certainly *between \$1 billion and \$1.5 billion*. In response to several inquiries from members of Congress, the United States General Accounting Office determined the amount of federal funding that Planned Parenthood Federation of America and its affiliates received for “reproductive health activities” from 1994 to 2001 (fiscal years). Planned Parenthood received *\$1.0254 billion in overall federal funding* for reproductive health during that span.²⁴ Planned Parenthood received the following amounts of federal funding in each fiscal year (millions of U.S. dollars):

²³ Office of Family Planning, *Funding History: FY 1971 – 2005*, at <http://opa.osophs.dhhs.gov/titlex/ofp-funding-history.html> (last visited Sept. 29, 2006).

²⁴ See May 2003 Report; Nov. 2001 Report; July 2000 Report; United States General Accounting Office, *Family Planning: Federal Funds Provided to Planned Parenthood Organizations*, GAO/HEHS-98-171R, May 22, 1998, available at <http://archive.gao.gov/paprpdf2/160525.pdf> [hereinafter May 1998 Report] (responding to request of Representatives Christopher Smith and Joseph Pitts).

1994	120.8	1998	120.6 ²⁵
1995	120.0	1999	125.8
1996	123.1 ²⁶	2000	137.3 ²⁷
1997	115.8	2001	162.0 ²⁸

The three major sources of federal funding for Planned Parenthood, in decreasing order of amount, were Title X (Family Planning), Title XIX (Medicaid), and Title XX (Social Services Block Grants). Almost 40 percent of Planned Parenthood's federal funding from 1994-2001 came from Title X funds, for a total amount of \$394.1 million. The amount of Title X funds that Planned Parenthood received each year was: \$41.7 million, \$43.6 million, \$46.0 million, \$46.3 million, \$52.1 million, \$51.1 million, \$54.6 million, and \$58.7 million, respectively.²⁹ During the 1994-2001 fiscal years, the overall amount of Title X funds distributed was \$1.6766 billion.³⁰ Planned Parenthood's \$394.1 million in Title X funds represented 23.5 percent of the total amount distributed during that time. During each fiscal year, Planned Parenthood received between 22.6 and 25.6 percent of all Title X funding.³¹ In light of these figures, it is no surprise that, of the 4.8 million women that received health services from clinics that receive Title X funds in 2004, one-third attended Planned Parenthood facilities.³²

Projecting the total amount of Title X funding that Planned Parenthood has received during the past few decades produces amazing results. For example, if Planned Parenthood received 23.5 percent of the \$1.108 billion in Title X funds distributed during the past four fiscal

²⁵ July 2000 Report at 2.

²⁶ May 1998 Report at 1.

²⁷ Nov. 2001 Report at 2.

²⁸ May 2003 Report at 3.

²⁹ See May 2003 Report at 6; Nov. 2001 Report at 5-7; July 2000 Report at 4-5; May 1998 Report at 4-5.

³⁰ See Office of Family Planning, *supra* note 23.

³¹ The percentages in each year were: 1994 – 23.1 percent (\$41.7 million out of \$180.9 million); 1995 – 22.6 percent (\$43.6 million out of \$193.3 million); 1996 – 23.9 percent (\$46.0 million out of \$192.6 million); 1997 – 23.3 percent (\$46.3 million out of \$198.5 million); 1998 – 25.6 percent (\$52.1 million out of \$203.5 million); 1999 – 23.8 percent (\$51.1 million out of \$215 million); 2000 – 22.9 percent (\$54.6 million out of \$238.9 million); and 2001 – 23.1 percent (\$58.7 million out of \$253.9 million).

³² Planned Parenthood Federation of America, *supra* note 20.

years (2002-2005), it would have received a total of \$260.4 million during that span. This would include receiving roughly \$67.7 million of the \$288 million distributed in 2005. Even using a much more conservative estimate (20 percent) would place Planned Parenthood's Title X total over the past four years at \$221.6 million. If Planned Parenthood received 23.5 percent of the \$2.41 billion in Title X funds that have been distributed over the past ten fiscal years (1996-2005), it would have received a total of \$566.4 million. Even receiving just 20 percent of the Title X funds would place Planned Parenthood's total over the past ten years at \$482 million.

While it is difficult to estimate exactly how much of the \$5.656 billion in Title X funds that Planned Parenthood has received over the past thirty-five years, a good guess (using the 23.5 percent figure) *would be roughly \$1.33 billion*. A more conservative estimate (20 percent) would be \$1.13 billion. In light of the available 1994-2001 government data, Planned Parenthood has received at least \$1 billion in Title X aid so long as it received at least 15.2% of the total pre-1994 and post-2001 Title X money. Regardless of the exact amount of Title X funds Planned Parenthood has already received, the total continues to increase every year by \$50-70 million due to the ever increasing amounts of Title X funds being distributed to all recipients.

III. The History of the Controversy Over Title X Funding

Senator Vitter's proposal to cut Title X funding from groups that perform elective abortions is the latest in a long line of attempts by conservatives to restrict the use of Title X funds. For example, President Reagan's administration enacted a policy requiring Title X recipients to notify parents before giving birth control to minors. Abortion advocates quickly challenged this "squeal rule" in court and it was struck down as being contrary to the intent of Congress.³³

³³ *Planned Parenthood Federation of America v. Heckler*, 712 F.2d 650 (D.C. Cir. 1983); *State of New York v. Heckler*, 719 F.2d 1191 (2d Cir. 1983).

One provision that caused a court battle is Title X's statement that "[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning."³⁴ The original interpretation of this provision was that, while the text of Title X "specifies that Title X funds may not be used for the performance of abortions, [it] places no restrictions on the ability of clinics that receive Title X funds to provide abortion counseling and referrals or to perform abortions using non-Title X funds."³⁵ In February 1988, however, the Department of Health and Human Services under President Reagan enacted regulations which prevented those receiving Title X funds from engaging in abortion counseling or referrals.³⁶ In the Department's view, "Congress intended Title X funds to be used only to support *preventive* family planning services."³⁷ This regulation was dubbed the "Gag Rule" by abortion advocates and was challenged in court.

The federal First and Tenth Circuit Courts struck down the regulation, but the Second Circuit upheld it. The Supreme Court resolved the split by upholding the regulation by a 5-4 vote in *Rust v. Sullivan*. The Court held that the regulation was a reasonable interpretation of the statute given its ambiguous language.³⁸ The Court also rejected the abortion groups' argument that "the regulations violate the First Amendment by impermissibly discriminating based on viewpoint."³⁹ In the Court's view, "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."⁴⁰ The Court also rejected the claim that the regulation impermissibly conditioned

³⁴ 42 U.S.C. § 300a-6.

³⁵ See *The Title X "Gag Rule"*, 58 Fed. Reg. 7455 (Jan. 22, 1993).

³⁶ *Id.*

³⁷ *Rust v. Sullivan*, 500 U.S. 173, 179 (1991).

³⁸ *Id.* at 187, 191.

³⁹ *Id.* at 192.

⁴⁰ *Id.* at 193.

the receipt of a public benefit on the relinquishment of a constitutional right (i.e. the right to have an abortion) or violated women's abortion rights.⁴¹

Shortly after *Rust v. Sullivan*, Congress approved legislation that would have overturned the Gag Rule, but it was vetoed by the first President Bush. However, just two days after being inaugurated in January 1993, President Clinton ordered the Secretary of Health and Human Services to lift the Gag Rule from Title X funding.⁴² The order stated:

The Gag Rule endangers women's lives and health by preventing them from receiving complete and accurate medical information and interferes with the doctor-patient relationship by prohibiting information that medical professionals are otherwise ethically and legally required to provide to their patients. Furthermore, the Gag Rule contravenes the clear intent of a majority of the members of both the United States Senate and House of Representatives, which twice passed legislation to block the Gag Rule's enforcement but failed to override Presidential vetoes.⁴³

During the mid to late 1990s, members of Congress unsuccessfully sought to add a parental consent requirement to Title X. In 1995, Rep. Ernest Istook sought to amend Title X to require parental consent before minors may be given birth control, but his proposal was rejected by the House. A similar attempt in 1997 led to the passage of reporting requirements regarding rape and other crimes against children, but there is still no general parental consent provision.

IV. Potential Legal Challenges to Senator Vitter's Bill

Although Planned Parenthood and other abortion providers would certainly bring a legal challenge to S.2206 the moment it becomes law, such a challenge would be without merit. This Section discusses each of the legal arguments that opponents of S.2206 would likely make if the bill is passed as well as the applicable case law supporting the bill's constitutionality. This Section's conclusion is supported by the Supreme Court's statement that "the Government may

⁴¹ *Id.* at 196, 201.

⁴² 58 Fed. Reg. 7455.

⁴³ *Id.*

allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities.”⁴⁴

A. *The Establishment Clause*

Planned Parenthood’s main argument would be that S.2206 violates the Establishment Clause because it is consistent with the widely-held religious belief that abortion is immoral, and some of its supporters may be motivated by their own religious views. Even if one ignores the fact that many members of Congress would support the bill simply because their taxpaying constituents want it to be enacted, an Establishment Clause challenge would be without merit.

Under *Lemon v. Kurtzman*, the basic Establishment Clause test is: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”⁴⁵ The Supreme Court has already addressed the issue of whether statutes that seemingly “incorporate[] into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences” violate the Establishment Clause.⁴⁶ The Court concluded in *Harris v. McRae* that a law which removed public funding from those seeking elective abortions did not violate the Establishment Clause.

Although neither a State nor the Federal Government can constitutionally “pass laws which aid one religion, aid all religions, or prefer one religion over another,” it does not follow that a statute violates the Establishment Clause because it “happens to coincide or harmonize with the tenets of some or all religions.”⁴⁷

The fact that some religions teach principles that are subsequently adopted by a government statute does not, without more, create a constitutional crisis. If the government seeks

⁴⁴ *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998).

⁴⁵ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citations omitted).

⁴⁶ *Harris v. McRae*, 448 U.S. 297, 319 (1980).

⁴⁷ *Id.* (citations omitted).

to prefer child birth over abortion, it is not precluded from doing so merely because this happens to coincide with some religions' preference for child birth over abortion. "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."⁴⁸ S.2206 merely expresses the government's coincidental agreement with religion on this particular issue. The law's purpose and effect is to promote child birth, minimize abortion, and relieve a serious moral burden from millions of American taxpayers. The law would neither advance nor inhibit religious belief or practice, and no "excessive government entanglement with religion" would occur as a result of the statute.

B. The Free Exercise Clause

The Supreme Court has not directly considered whether the refusal to fund abortions could result in the violation of the Free Exercise Clause. The appellees in *Harris* brought a Free Exercise claim, stating that "a woman's decision to seek a medically necessary abortion may be a product of her religious beliefs under certain Protestant and Jewish tenets."⁴⁹ However, the Court did not discuss the merits of the argument "because the appellees lack[ed] standing to raise a free exercise challenge." To successfully bring a Free Exercise claim against S.2206, challengers would have to have overcome a similar standing hurdle.

Even if a court were to reach the issue of Free Exercise, it would likely reject the claim. A court would likely apply *Employment Division v. Smith*, where the Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"⁵⁰ S.2206 is certainly a "neutral law of

⁴⁸ *Van Orden v. Perry*, 125 S. Ct. 2854, 2863 (2005) (Rehnquist, C.J., plurality opinion).

⁴⁹ *Harris*, 448 U.S. at 319.

⁵⁰ *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment)).

general applicability” because it applies the same restriction to all potential Title X recipients. That “a woman’s decision to seek a medically necessary abortion may be a product of her religious beliefs” is irrelevant because S.2206 does not “proscribe” abortion; it merely ensures that those who perform elective abortions are not subsidized by American taxpayers.

A similar challenge brought under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, would also fail because there is simply no “substantial[] burden” imposed upon anyone’s free exercise of religion by the government. The government’s refusal to subsidize a particular activity that is required by one’s religion does not constitute a government-imposed substantial burden because there is no “right” to have the government subsidize the exercise of constitutional rights. Assuming that some women actually do feel compelled by their religious beliefs to have an abortion, they do not have a free exercise right to indirectly receive financial support from those who feel compelled by their religious beliefs to oppose abortion.

C. Fifth Amendment Due Process (Abortion Rights)

The Supreme Court has held that denying public funding to certain organizations based on their participation in constitutionally protected activity does not violate their underlying constitutional rights. In *Harris v. McRae*, the Court found that:

regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in [*Roe v.*] *Wade*, [410 U.S. 113 (1973),] it simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.⁵¹

The Court has held that the government’s refusal to use public money to fund elective abortions is not a violation of a woman’s right to have an abortion. “Missouri’s refusal to allow public

⁵¹ *Harris*, 448 U.S. at 316.

employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all.”⁵²

In *Rust v. Sullivan*, the Court made it clear that not only may the government refuse to fund the exercise of a constitutional right, but the government may also show a preference for one right over another by selectively funding only the preferred right. The Court explained:

The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion and “implement that judgment by the allocation of public funds” for medical services relating to childbirth but not to those relating to abortion.⁵³

The Court also rejected the claim that the regulation’s restrictions on the doctor-patient relationship violated “a woman’s Fifth Amendment right to medical self-determination and to make informed medical decisions free of government-imposed harm.”⁵⁴ The Court held that the regulation did not violate the Fifth Amendment because “a doctor’s ability to provide, and a woman’s right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remain[ed] unfettered.”⁵⁵ The Court has consistently held that the question of whether the “freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.”⁵⁶

D. Equal Protection

Under the Supreme Court’s current jurisprudence, a statute does not violate the Equal Protection Clause unless it encroaches upon a constitutionally protected right, deals with a “suspect” class, or is not rationally related to any legitimate government interest.

⁵² *Webster v. Reproductive Health Services*, 492 U.S. 490, 509 (1989).

⁵³ *Rust*, 500 U.S. at 201 (citation omitted).

⁵⁴ *Id.* at 202.

⁵⁵ *Id.* at 203.

⁵⁶ *Harris*, 448 U.S. at 318.

It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless “the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective.” This presumption of constitutional validity, however, disappears if a statutory classification is predicated on criteria that are, in a constitutional sense, “suspect,” the principal example of which is a classification based on race.⁵⁷

The Supreme Court has held that legislation similar to S.2206 did not “impinge upon a right or liberty protected by the Constitution.” In *Maher v. Roe*, the Court determined that Connecticut regulations preventing public funds from being used to subsidize elective abortions did not violate a woman’s constitutional right to an abortion.

The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe*.⁵⁸

The Court came to the same conclusion in *Rust v. Sullivan* when considering federal regulations that forbade public funding of abortion related services.

Petitioners contend, however, that most Title X clients are effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services. But once again, even these Title X clients are in no worse position than if Congress had never enacted Title X. “The financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortion, but rather of her indigency.”⁵⁹

S. 2206 clearly does not implicate a “suspect” class. In *Maher*, the Court found that the state regulations at issue did not discriminate against a suspect class. “An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who

⁵⁷ *Id.* at 322 (citations omitted).

⁵⁸ *Maher v. Roe*, 432 U.S. 464 (1977).

⁵⁹ *Rust*, 500 U.S. at 203 (quoting *Harris*, 448 U.S. at 316).

cannot pay lead to a different conclusion.”⁶⁰ The Court echoed this sentiment in a later case, again finding that regulations restricting the use of public funds with regard to abortion were “not predicated on a constitutionally suspect classification.”⁶¹

Moreover, S.2206 certainly is rationally related to a legitimate governmental interest. In *Maier*, the Court stated:

The question remains whether Connecticut’s regulation can be sustained under the less demanding test of rationality that applies in the absence of a suspect classification or the impingement of a fundamental right. This test requires that the distinction drawn between childbirth and nontherapeutic abortion by the regulation be “rationally related” to a “constitutionally permissible” purpose. *We hold that the Connecticut funding scheme satisfies this standard.*⁶²

The Court also held in *Harris*: “It is the Government’s position that the Hyde Amendment bears a rational relationship to its legitimate interest in protecting the potential life of the fetus. We agree.”⁶³ An Equal Protection claim brought against S.2206 would clearly fail.

E. The Free Speech Clause

Potential challengers to S.2206 may argue that the government’s decision to indicate its preference for child birth over abortion through the funding of certain areas of health care violates their free speech rights. Like the challengers in *Rust*, they may “assert that while the Government may place certain conditions on the receipt of federal subsidies, it may not ‘discriminate invidiously in its subsidies in such a way as to ‘aim at the suppression of dangerous ideas.’”⁶⁴ The Supreme Court found this argument unpersuasive in the abortion funding context:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated

⁶⁰ *Maier*, 432 U.S. at 470-71.

⁶¹ *Harris*, 448 U.S. at 322.

⁶² *Maier*, 432 U.S. at 478 (citations omitted) (emphasis added).

⁶³ *Harris*, 448 U.S. at 324.

⁶⁴ *Rust*, 500 U.S. at 192 (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983)).

on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.⁶⁵

The Court rejected a similar argument with regard to the doctor-patient relationship in the Title X context:

It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government. We need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor-patient relationship.⁶⁶

The Court recently addressed the effect of government subsidies on free speech outside the framework of abortion rights. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006), the Court considered whether a federal regulation known as the Solomon Amendment violated the free speech rights of schools by conditioning the receipt of certain government funds on schools permitting military recruiters equal access to their campuses. The Court found that:

In this case, accommodating the military's message does not affect the law schools' speech because the schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.⁶⁷

The Court "rejected the [schools'] view that conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. . . . Instead, [the Court has] extended *First Amendment* protection only to conduct that is inherently expressive."⁶⁸ Having an abortion is not inherently expressive, and S.2206 would not violate the Free Speech Clause.

⁶⁵ *Id.* at 193.

⁶⁶ *Id.* at 200.

⁶⁷ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1309-10 (2006).

⁶⁸ *Id.* at 1310 (internal citations omitted).

F. Conditions on Public Funding

In *Keyishian v. Board of Regents*, the Supreme Court struck down a state regulation that punished public employees for being members of the Communist party. The Court found that the statute was unconstitutional because it “proscribe[d] mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party.”⁶⁹ The Court stated: “It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of condition upon a benefit or privilege.”⁷⁰ The basic holding of *Keyishian* is that the government cannot typically require a person to forgo the exercise of one of his constitutional rights in order to receive a public benefit such as employment. S.2206 does not implicate the Court’s concerns in *Keyishian* because the bill does not prohibit any person from participating in constitutionally protected activities in order to receive a benefit. Women who have had an abortion in the past, or believe that they may have one in the future, are still eligible to receive health care from Title X-funded clinics under S.2206. Moreover, any doctor or organization that wishes to provide elective abortions may continue to do so under S.2206 as long as they do so through an independent organization that does not receive Title X funds.

G. Vagueness

Vagueness arguments are often raised but are rarely successful. “Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards.”⁷¹ In *NEA v. Finley*, the Court addressed a vagueness challenge to the National Endowment for the Arts criteria for selecting which works would receive federal funding. The Court held that the criteria used were “undeniably opaque, and if they appeared in a criminal

⁶⁹ *Keyishian v. Board of Regents*, 385 U.S. 589, 609-10 (1967).

⁷⁰ *Id.* at 606 (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

⁷¹ *Finley*, 524 U.S. at 588.

statute or regulatory scheme, they could raise substantial vagueness concerns. It is unlikely, however, that speakers will be compelled to steer too far clear of any ‘forbidden area’ in the context of grants of this nature.” While *Finley*’s vagueness standards are applicable to S.2206, it is abundantly clear what the bill requires of potential Title X recipients: only clinics that do not perform elective abortions will be eligible to receive Title X funds under S.2206.

V. Policy Arguments Regarding the Effort to Cut Title X Funding

The fight over Title X funding will primarily be one of policy rather than of constitutional law. While Senator Vitter’s bill would likely survive any legal challenges if it were enacted into law, the real difficulty will lie in the rigors of the legislative process. It may be difficult to garner enough support for the bill because many within Congress and the general public are susceptible to believing Planned Parenthood’s line of reasoning. Also, some will find the fact that no Title X funds are directly responsible for abortions to be significant.

A. *The Conservative Argument Against Continued Title X Funding*

Taxpayer funding of groups that perform abortions has become a hot-button issue for many social conservatives. The American Life League has been at the forefront of the drive to defund Planned Parenthood, creating *STOPP International* in 1994 whose purpose is “to cause such discontent with Planned Parenthood programs that it will have no choice but to close its doors and get out of town!”⁷² The American Life League has also launched a website, www.stopplannedparenthoodtaxfunding.com, which allows concerned citizens to sign a petition to stop all taxpayer funding of Planned Parenthood. The Center for Reclaiming America for Christ has launched a Petition to Defund Planned Parenthood, noting that “Planned Parenthood

⁷² STOPP International, *Our Mission*, at <http://www.all.org/stopp/mission.htm#mission> (last visited Sept. 29, 2006).

now performs 180 abortions for every one referral to an adoption agency.”⁷³ Life Decisions International runs a website, www.fightpp.org, which encourages a boycott of companies, actors, and musicians that have financially or publicly supported Planned Parenthood. The Family Research Council supports the passage of Senator Vitter’s bill.⁷⁴ The funding of Planned Parenthood has sparked budget debates from Rockland, New York⁷⁵ to Wisconsin⁷⁶ to Lincoln, Nebraska⁷⁷ to Texas⁷⁸ to Idaho.⁷⁹

One specific argument for cutting Planned Parenthood’s Title X funding is that Planned Parenthood’s health clinic programs and youth “education” efforts help to encourage teenage sexual activity and pregnancy by emphasizing “safe sex” instead of abstinence, increasing the availability of birth control to minors, and undermining parental involvement. A more general argument against continuing to fund Planned Parenthood is the simple fact that it is America’s largest abortion provider. Millions of Americans believe that abortion is the taking of an innocent human life and do not want their tax dollars going to an abortion provider through government programs. The fact that Title X funds cannot directly be used for abortion is irrelevant because Planned Parenthood’s overall budget is increased by millions of tax dollars every year, enabling the organization to spend its resources on many other objectionable activities such as controversial pro-choice advertising and “educational” efforts targeting teens.

⁷³ Center for Reclaiming America for Christ, *Petition to Defund Planned Parenthood*, available at <http://www.reclaimamerica.org/pages/Petitions.aspx?ptid=10> (last visited Sept. 29, 2006).

⁷⁴ Family Research Council, *De-Funding Planned Parenthood*, at <http://www.frc.org/get.cfm?i=LG05A05&f=PK05A01> (last visited May 3, 2006).

⁷⁵ Sarah Netter, *Speakers Critical of Rockland’s Planned Parenthood Funding*, THE JOURNAL NEWS, Nov. 16, 2005, available at www.thejournalnews.com (last visited May 3, 2006).

⁷⁶ David Callender, *Funding Shift Aimed at Planned Parenthood (WI)*, at <http://www.freerepublic.com/focus/f-news/1419686/posts> (last visited Sept. 29, 2006).

⁷⁷ Associated Press, *Planned Parenthood Funding Denied*, available at <http://www.kolnkgin.com/home/headlines/904342.html> (last visited Sept. 29, 2006).

⁷⁸ Randy Hall, *New Planned Parenthood Head Faces Home State Clinic Cuts*, Jan. 20, 2006, at <http://www.cnsnews.com/ViewCulture.asp?Page=\Culture\archive\200601\CUL20060120b.html> (last visited Sept. 29, 2006).

⁷⁹ Feminist Daily News Wire, *Idaho Planned Parenthood Pulls Out of Title X Funding for Family Planning*, Oct. 2, 2003, at <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=8077> (last visited Sept. 29, 2006).

A 1999 Life Decisions International critique of Title X funding for Planned Parenthood effectively summarizes the conservative argument regarding Title X's effect on teen pregnancy. The article explained that "[a]bout one-third of the clients at Title X-funded facilities are teenagers. Title X is the major source of birth control for unmarried teenagers."⁸⁰ The argument that Planned Parenthood programs encourage teen sexual activity and pregnancy is as follows:

"Family planning" programs that target teenagers increase the pregnancy rate among that age group because they lead to higher levels of sexual activity. Such programs represent official, government-approved "permission" to engage in premarital sex. Furthermore, the prevalence of birth control use among sexually active teenagers has no significant relationship to the overall pregnancy rate among unmarried teenagers. *The only variable significantly related to the pregnancy rate is the percentage of teenagers who are sexually active.*⁸¹

Rather than seeking to minimize the chance that teen sexual activity will lead to pregnancy, the conservative approach is to try to minimize teen sexual activity itself. This approach recognizes that abstinence is the only guaranteed way to prevent unwanted pregnancies and also that teen sexual activity often has many harmful physical and emotional effects besides pregnancy.

As for Planned Parenthood's response to this argument, the article noted:

The number of teenagers pregnant outside of wedlock has increased just as steadily as funding of Title X. . . . The response from Title X apologists was to blame cultural factors such as rock music, along with an alleged lack of sex education and birth control, for pushing teen pregnancy rates up. Those rates would have been even higher, [Planned Parenthood] argued, if it were not for the "good work" of Title X grantees.⁸²

The article also noted:

[Planned Parenthood's] theory was disproved in 1981 and 1982 when budget cuts led to a decrease in the number of teenagers enrolled in "family planning" programs (down to 1,300,000 in 1981 and then to 1,250,000 in 1982). Editorials .

⁸⁰ Schwartz & Scott, *supra* note 2, at 2; see also Department of Health and Human Services, *A National Strategy to End Teen Pregnancy, Annual Report, 1999-2000*, at <http://aspe.hhs.gov/hsp/teenp/ann-rpt00/> (last visited Oct. 12, 2006) ("[A]pproximately 30 percent of those receiving [Title X National Family Planning Program] services are under 20 years of age.").

⁸¹ *Id.* at 4 (emphasis added)

⁸² *Id.* at 3.

. . . predicted an enormous increase in teen pregnancy. In reality, the number of unmarried teenagers who became pregnant in those two years fell by about two percent each year to 672,000 in 1982. These were the [first] years in recorded history when the number of premarital teen pregnancies declined.⁸³

The conservative position is that Planned Parenthood’s “family planning” efforts make the problem of teen pregnancy worse by helping teenagers to avoid parental involvement and giving them the illusion that sexual activity has no real consequences. Planned Parenthood’s stated position on the question of whether teenagers should be sexually active is that “[t]here are no right or wrong answers.”⁸⁴ As one commentator has noted, “[p]romoting condom use as the means to ‘safe sex’ in the midst of a culture of promiscuity not only is misleading and irresponsible, it also is potentially fatal.”⁸⁵ Cutting Planned Parenthood’s Title X funding would help to reduce teen sexual behavior (and teen pregnancy in turn) by reinforcing parental instruction and making it more difficult for teenagers to obtain free, confidential birth control.

On the general issue of funding Planned Parenthood with tax dollars, there are plenty of Planned Parenthood activities that conservative taxpayers wholeheartedly object to. The Planned Parenthood Federation of America is the nation’s largest abortion provider.⁸⁶ The number of abortions that Planned Parenthood provides every year has been steadily rising, from 134,277 (1993) to 167,928 (1998) to 213,026 (2001) to 227,385 (2002) to 244,628 (2003).⁸⁷ Planned

⁸³ *Id.*

⁸⁴ Elisa Klein, *Losing It: All About Virginity*, at <http://www.teenwire.com/infocus/2004/if-20040413p282-virginity.php> (last visited, Sept. 29, 2006).

⁸⁵ Ken Connor, *Funding the Hand That Bites You*, Mar. 1, 2003, at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=31308 (last visited Sept. 29, 2006).

⁸⁶ Jonathan D. Rockoff, *RU-486 Ruled Out in Death Linked to Abortion Pill*, THE BALTIMORE SUN, 6A, Apr. 11, 2006.

⁸⁷ Randy Hall, *Planned Parenthood: More Abortions, Fewer Clinics*, Jan. 18, 2005, at <http://www.cnsnews.com/SpecialReports/archive/200501/SPE20050118a.html> (last visited Sept. 29, 2006); Susan Jones, *Abortions and Profits Up at Planned Parenthood*, Dec. 12, 2003, at <http://www.cnsnews.com/Nation/Archive/200312/NAT20031212a.html> (last visited Sept. 29, 2006); United States Conference of Catholic Bishops, *Fact Sheet: Planned Parenthood Federation of America*, at <http://www.nccbuscc.org/prolife/issues/abortion/factsheet.htm> (last visited Sept. 29, 2006); National Right to Life, *Planned Parenthood: Abortion Provider*, at <http://www.nrlc.org/abortion/ppprov.html> (last visited Sept. 29, 2006).

Parenthood facilities have performed over 3 million abortions since 1970, and that figure does not include the unknown number of abortion referrals to non-Planned Parenthood facilities.⁸⁸

In addition to actually performing abortions, Planned Parenthood is involved in other activities that many parents find morally reprehensible. For example, www.teenwire.com is a website that is part of Planned Parenthood's teen "education" efforts. The website explains:

We are committed to giving you the facts about sex so that you can use this information to make your own responsible choices. We provide honest and nonjudgmental information about sexuality in language you can understand with the hope that you will use this knowledge to reduce your risk of unintended pregnancy and sexually transmitted infections.

We know that sex—whether you're sexually active or not—is a part of every teen's life and our sexuality is a big part of who we are. We also know that sexual health isn't only about avoiding pregnancy and preventing sexually transmitted infections.⁸⁹

Teenwire.com has a whole host of discussions and animations that many parents would find objectionable for their teenagers (and younger children). Animations on the website include "How to Use a Condom" and "Your Birth Control Choices."

Teenwire.com's "Ask the Experts" feature allows teens to anonymously submit sexually detailed questions for a response from a Planned Parenthood "expert" on topics ranging from sex and birth control to pregnancy and homosexuality.⁹⁰ Teenwire.com's "nonjudgmental" approach to teen sexuality includes "advice" such as:

Clearly, the definition of virginity leaves lots of room for interpretation! . . . Deciding whether or not to remain a virgin is a highly personal decision that can be influenced by a variety of factors. . . . There are no right or wrong answers to these questions.⁹¹

Of course, millions of American parents have a much different view of the importance of virginity until marriage. There are also numerous graphic explanations of what kind of sexual

⁸⁸ Susan Jones, *supra* note 87.

⁸⁹ *What is teenwire.com?*, at <http://www.teenwire.com/about/> (last visited Sept. 29, 2006).

⁹⁰ *Ask the Experts*, at <http://www.teenwire.com/ask/> (last visited May 3, 2006).

⁹¹ Klein, *supra* note 84.

behaviors are “normal” for teenagers. The website also allows teenagers to “find your local Planned Parenthood health center” by zip code. Teenwire.com’s cavalier attitude toward teenage sexual activity is representative of the kind of sex education Planned Parenthood promotes, and often directly teaches, in America’s public schools.

Many American taxpayers also object to indirectly supporting the ability of Planned Parenthood and its affiliates to devise creative ways to focus their educational efforts on teens and younger children. In 2001, Planned Parenthood of Stark County, Ohio ran a controversial series of advertisements featuring the animated “Reality Girl”:

Four teen-age girls at a slumber party are talking about an upcoming school dance. Three of them are going to the dance, but one says she doesn’t know if she’ll get there because she plans to be with her boyfriend—wink, wink. Looks like a job for Reality Girl.

Dressed in bright red pants, a neon-green top with an “RG” logo and red open-toed heels, the purple-haired Reality Girl appears and hears the teen say that her boyfriend, Jim, “has protection.” Flash to Jim, who says he always thought the female took care of that. “You need a dose of reality,” Reality Girl tells the teens. “Get real. Get a plan. Don’t trust amateurs.”

That’s the story line of a new television commercial being aired by Planned Parenthood of Stark County, which is introducing Reality Girl as a recurring character in a campaign to promote the agency’s message about avoiding unwanted pregnancies and to recruit clients. . . .

In addition to commercials, the advertising campaign includes billboards featuring Reality Girl that will be used throughout the county and a life-sized cutout of her holding agency literature that can be placed in the lobbies of buildings. . . .

The idea was to create a character and a campaign modeled after superheroes and other elements of popular culture that will capture the attention of young females, said Bob Isenberg, the [advertising] agency’s creative director.⁹²

Planned Parenthood also ran a “‘Three Rivers Condom’ ad which featured a picture of the implosion of Pittsburgh’s Three Rivers Stadium and the subheading: ‘It Contains The

⁹² Mark Niquette, *Two Views on Teen Sex Superhero Ads Give Frank Talk of Consequences*, AKRON BEACON JOURNAL, at A1, Dec. 7, 2000.

Explosion.”⁹³

One of Planned Parenthood’s most well-known campaigns targeting children was the appearance of “Joe Sperm” in Oregon. As one pro-life group has explained:

Planned Parenthood launched its “Joe Sperm” ad campaign in Eugene, Oregon, by having Joe Sperm march in the Eugene Celebration Parade [in September 2000]. Children watching the parade were exposed to the smiling sperm cartoon with sunglasses and the giant condoms and birth control pills that accompanied him. Also in this disgusting display were a bevy of humans impersonating sperm who were chasing others dressed as eggs. The slogan for this prize-winning entry was “Want to say no to Joe?” This shocking parade performance has now been followed by Joe Sperm ads on the sides of city buses

“We’ve already had parents tell us that when their children saw the Joe Sperm character, they started asking questions that gave them a perfect opportunity to discuss sexuality issues with them,” Sheppard said. “That’s exactly what we hoped would happen.”⁹⁴

Many American Christians are deeply offended when Planned Parenthood sends out its “Choice on Earth” Christmas cards which use a play on Luke 2:14’s “peace on earth” as a fundraiser.⁹⁵ In January 2006, Planned Parenthood began to sell “a line of ‘condom key chains’ that include a takeoff on Michaelangelo’s famous Sistine Chapel image in which the hand of God gives a condom to Adam.”⁹⁶ The most shocking campaign to date was an animated video that appeared in August 2005 on the website of Planned Parenthood Golden Gate:

An online animated video sponsored by Planned Parenthood’s San Francisco-area branch features a superhero character drowning an abstinence promoter in a trash can and blasting into oblivion several pro-life picketers protesting in front of one of the organization’s facilities. The eight-minute “A Superhero for Choice,” posted on the Planned Parenthood Golden Gate website, has a bespectacled black woman in San Francisco morphing into a red-suited flying enforcer, bent on making the world safe for the organization’s values. . . .

⁹³ John Rossomando, *Abortion Opponents Demand Feds Pull the Plug on Planned Parenthood*, Dec. 6, 2001, available at <http://www.cnsnews.com/Culture/Archive/200112/CUL20011206a.html> (last visited Sept. 29, 2006).

⁹⁴ *Planned Parenthood Using Cartoon Character to Sell Sex to Kids*, THE STOPP REPORT, Dec. 2000, available at <http://www.all.org/stopp/rr0012.htm> (last visited Sept. 29, 2006).

⁹⁵ Steven Ertelt, *Planned Parenthood Brings Back Pro-Abortion “Choice on Earth” Christmas Cards*, Dec. 8, 2005, available at <http://www.lifenews.com/nat1889.html> (last visited Sept. 29, 2006).

⁹⁶ *God, Adam on ‘Condom Key Chain’: Planned Parenthood Accused of Blaspheming Almighty*, Jan. 12, 2006, at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=48315 (last visited Sept. 29, 2006).

The superhero arrives in time to fill a trash can with water and dump the pro-abstinence character into it, slamming the cover down. After the man's muffled voice eventually dies off, the superhero tosses the teens a "safe sex kit," reminding the kids: "Safe is sexy!"

The "Superhero for Choice," dubbed Dianisis, next confronts a group of protesters in front of a Planned Parenthood facility. . . . The superhero character uses a "condom gun" that catches each protester in a prophylactic bubble, which subsequently explodes. . . .⁹⁷

Planned Parenthood Golden Gate quickly pulled the video from its website in response to an outcry from pro-life and Christian organizations throughout the country.⁹⁸ Ironically, the video aired at the same time that NARAL Pro-Choice America released a commercial which suggested that then Supreme Court nominee John Roberts supported violence against abortion providers.⁹⁹ Planned Parenthood Golden Gate has even recently started to offer free iPods and movie tickets to clients in an attempt to recruit more teens.¹⁰⁰ Conservative groups often refer to this kind of outrageous advertising when seeking to gain support for the defunding of Planned Parenthood, especially given the fact that 53% of Planned Parenthood Golden Gate's 2004 funding came from government fees and contracts.¹⁰¹

Planned Parenthood is also actively involved in the political arena, opposing pro-life political candidates, judicial nominees, and legislation at the state and federal level. For example, the Planned Parenthood Action Fund officially endorsed John Kerry in the 2004 Presidential

⁹⁷ Ron Strom, *Planned Parenthood Superhero Terminates Christian Protesters: Character Also Drowns Promoter of Abstinence in Animated Video Pushing "Safe is Sexy" Message*, available at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=45664 (last visited Sept. 29, 2006).

⁹⁸ Steven Ertelt, *Planned Parenthood Removes Cartoon Advocating Abortion Violence*, Aug. 10, 2005, at <http://www.lifenews.com/nat1524.html> (last visited May 3, 2006).

⁹⁹ Associated Press, *NARAL Withdraws Anti-Roberts Ad*, Aug. 12, 2005, available at <http://www.foxnews.com/story/0,2933,165472,00.html> (last visited May 3, 2006).

¹⁰⁰ Steven Ertelt, *Planned Parenthood Abortion Centers Lure Teens With iPods, Movie Tickets*, Mar. 30, 2006, at <http://www.lifenews.com/nat2175.html> (last visited May 3, 2006).

¹⁰¹ Planned Parenthood Golden Gate, *PPGG Annual Report: 2004*, at 4, available at http://www.ppgg.org/atf/cf/{03718487-F21A-48AC-B9F3-325EF8640F5C}/AR_2004.pdf (last visited May 3, 2006).

race, citing a need to “stop the Bush administration’s war on choice.”¹⁰² “In 2000, Planned Parenthood’s Action Fund and its related political action committee spent more than \$10 million in TV and radio ads, direct mail and campaign contributions to defeat mostly Republican pro-life candidates.”¹⁰³ Planned Parenthood operates www.saveroe.com, a website that monitors proposed legislation in various states that deal with restrictions on abortion. It has webpages dedicated to keeping pro-life judges off of the Supreme Court, repealing the “Global Gag Rule” (preventing abortion providers from receiving public population assistance funds), and fighting South Dakota’s ban on virtually all abortions. The website also promotes *Vox: Voices for Planned Parenthood*, “a nationwide program to energize and mobilize the new generation of pro-choice Americans.” Planned Parenthood also created www.fillmypillsnow.com, a website designed to pressure pharmacies into requiring all pharmacists to immediately dispense the morning-after pill and similar drugs upon request, even those employees with moral or religious objections. Many Americans believe these kinds of political activities should not be indirectly funded by their taxpayer dollars.

B. Planned Parenthood’s Argument In Favor of Title X Funding

Planned Parenthood has aggressively disputed conservative arguments by stating that Title X saves taxpayers money and has helped to prevent many unwanted pregnancies and abortions. The basic argument is that teenagers will have sex regardless of what schools and parents say, so everyone is better off if they are given access to birth control, “comprehensive sex education,” and “contraceptive counseling.” Of course, this argument ignores conservatives’ claim that Planned Parenthood’s approach helps to increase the overall rate of teenage sexual

¹⁰² *Planned Parenthood Action Fund Announces Historic Endorsement of Sen. John Kerry: John Kerry, Gloria Feldt Energize Thousands at Pro-Choice Rally*, at <http://www.ppaction.org/ppvotes/KerryRelease.html> (last visited May 3, 2006).

¹⁰³ Connor, *supra* note 85.

activity by removing the stigma attached to teenage sexual behavior, encouraging teenagers to make sexual decisions without parental involvement, and assuring teenagers that unwanted pregnancies can be taken care of. Planned Parenthood's argument is only credible if one assumes that there is a fixed rate of teenage sexual activity that cannot be raised or lowered by changing the content of sex education, the amount of communication between parents and teens, or the ability to access free or low cost birth control without parental knowledge.

Planned Parenthood's *2003-2004 Annual Report* specifically mentioned the preservation of Title X funding as an important goal:

Preserving Title X

Despite anti-family planning efforts to cripple the program, PPFA helped achieve a funding increase of \$10 million, for a total of \$273 million, for Title X, America's family planning program. By subsidizing contraceptive services, basic ob/gyn care, screening for sexually transmitted infections, and pregnancy testing and referrals for millions of low-income women and teenagers, *Title X prevents hundreds of thousands of unintended pregnancies and saves millions of tax dollars each year.*¹⁰⁴

Unfortunately, the federal Office of Family Planning has adopted Planned Parenthood's logic by claiming that Title X-funded "contraceptive counseling and services" actually save the government money and prevent millions of unwanted pregnancies:

The contraceptive counseling and services available in Title X-funded clinic settings help couples space births and plan intended pregnancies, an important element in ensuring positive birth outcomes and a healthy start for infants. Each year, publicly subsidized family planning services help women avoid an estimated 1.3 million unintended pregnancies. Estimates also show that every public dollar spent for contraceptive services saves an average of \$3 in Medicaid costs for pregnancy-related health care and for medical care of newborns.¹⁰⁵

The claim that over one million unintended pregnancies are prevented annually through Title X programs is based upon the faulty assumption that the presence or absence of Title X programs has no effect on the overall rate of sexual activity. While the behavior of *some* teenagers (and

¹⁰⁴ Planned Parenthood Federation of America, *supra* note 8, at 10 (emphasis added).

¹⁰⁵ Office of Population Affairs, *supra* note 22.

adults) will not be effected by a decrease in the availability of free, confidential birth control and “counseling,” many others will be much more cautious about their sexual practices given the chance that their actions will have real consequences. Moreover, many Americans would be willing to have additional tax dollars going toward “Medicaid costs for pregnancy-related health care and for medical care of newborns” if it means that children will be born rather than aborted.

The Alan Guttmacher Institute has made a similar argument about Title X funding:

Clinics receiving Title X funds have been at the forefront of the effort to reduce rates of unintended pregnancy and abortion, and their impact has been enormous. Over the last two decades, women attending these clinics have avoided almost 20 million pregnancies, nine million of which would have ended in abortion

The program has also played a major role in reducing pregnancies among teenagers. By helping to prevent 5.5 million adolescent pregnancies, Title X-supported clinics have helped young women avoid more than two million births and a similar number of abortions over the last two decades. Without Title X, the number of teenage pregnancies would have been 20% higher than it was for this period.¹⁰⁶

The Institute added:

Despite the resonance of this issue in some political circles, charges that clinics or even the availability of contraceptives promotes sexual activity among teenagers are unfounded. While confidential clinic services allow adolescents who feel unable to talk to their parents about their sexual activity to protect themselves against unintended pregnancy and STDs, the average teenager does not visit a family planning provider until 14 months after she has become sexually active. *This finding not only provides clear evidence that clinics do not encourage teenagers to become sexually active, but points up the need for clinics to reach out to adolescents in order to serve them earlier.*¹⁰⁷

Planned Parenthood states that it is helping the vast majority of teenagers “who feel unable to talk to their parents about their sexual activity,” yet virtually no mention is made of the devastating emotional and physical repercussions that often follow casual teenage sexual behavior. Title X helps Planned Parenthood to undermine parental involvement by encouraging

¹⁰⁶ The Alan Guttmacher Institute, *supra* note 5, at 26.

¹⁰⁷ *Id.* at 28 (emphasis added).

teenagers to defy their parents wishes. Again, Planned Parenthood’s solution is for “clinics to reach out to adolescents in order to serve them earlier” rather than to encourage parents to become more aware of their children’s behavior and more receptive to having forthright discussions. Planned Parenthood clearly views parental objections to teenage sexuality as hurdles to be sidestepped rather than legitimate concerns to be taken seriously.

The absurdity of the Institute’s approach can be seen in the following passage:

Each year, three million pregnancies—half of all pregnancies in this country—are unintended, and half of unintended pregnancies end in abortion In addition, while the pregnancy rate among U.S. teenagers declined by 17% from its peak in 1990 to 1996, it is still one of the highest among industrialized nations. . . . Ultimately, addressing these remaining problems will involve a two-pronged approach: *closing the remaining gaps in access to care and improving contraceptive use among women.*¹⁰⁸

Planned Parenthood’s solution for decreasing teen pregnancy rates does not emphasize, or even mention, the importance of abstinence education. Planned Parenthood amazingly argues that instructing children at a young age about the details of various birth control methods while also de-emphasizing abstinence will decrease the rate of unintended pregnancies without also increasing the percentage of teenagers that engage in sexual activity.

The claim that cutting off Planned Parenthood’s Title X funding will endanger women’s health is unfounded. Planned Parenthood and its affiliates will simply have to rely more on private funding sources, re-evaluate their budgets, and spend less money on advertising that targets children and ridicules pro-life Christians. For example, a majority of Planned Parenthood of Greater Cleveland’s clinics have decided to forgo receiving Title X funds to avoid having to comply with funding restrictions. As the organization’s *2004-05 Annual Report* explained:

As our 2004-05 fiscal year came to a close, we’d maintained our high quality of services despite the loss of a main source of funding

¹⁰⁸ *Id.* at 37 (emphasis added).

One monumental change we experienced in the past year had to do with funding. In a dramatic shift from the way PPGC has been doing business for thirty years, four of our five health centers are now operating without federal Title X (“Title Ten”) funding.

The decision to forego Title X at these sites was made after a federal review at which PPGC was told to change the way it was using Title X funding. After much discussion and debate, we concluded that PPGC is less constrained and can better deliver our health care services to people of all economic means without the mandates that come with accepting federal money.

To make up for this loss in funding, PPGC will fundamentally change the way we do business by transitioning from a financial model of significant government support to one of self-sustaining health centers—without compromising the range and quality of services we provide to our clients. This will be accomplished by gradually adjusting our fees for products and services, improving our efficiency, increasing our contracts with private insurers, increasing private support, and creating a Patient Assistance Fund to subsidize client care.¹⁰⁹

Despite the loss of Title X funds, Planned Parenthood of Greater Cleveland reported that it received \$372,510 from the federal government, comprising 9% of its over \$3.9 million budget.¹¹⁰ Most or all Planned Parenthood clinics would continue to operate even after the loss of Title X funding, although non-essential activities such as political lobbying and targeted advertising may have to be downsized.

Conclusion

Senator Vitter’s Title X Family Planning Act is a sensible solution to the problem of taxpayers having to support abortion providers. Planned Parenthood and other abortion providers receive much of their funding from the federal, state, and local governments, and the Act would force them to choose between no longer providing abortions and losing a large source of their income (Title X funding). The Act is supported by strong policy interests and should withstand any court challenges.

¹⁰⁹ Planned Parenthood of Greater Cleveland, *2004-05 Annual Report*, at 3, available at http://www.plannedparenthood.org/pp2/clvld/files/clvld/PP_AR_2005_final_web.pdf (last visited May 3, 2006) (emphasis in original).

¹¹⁰ *Id.* at 13.